A SPACE FOR CITIES IN TRADE AGREEMENTS

Prepared by:

The Estey Centre for Law and Economics
in International Trade
Saskatoon, Canada

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Prepared for:

The Cities of Estevan, Humboldt, Lloydminster, Melfort, Melville, Moose Jaw, North Battleford, Prince Albert, Saskatoon, Swift Current, Weyburn and Yorkton
Saskatchewan, Canada

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Theresa Dust Q.C., BA LLB, City Solicitor, City of Saskatoon, acted as project coordinator
Chris Dekker, BComm (Hons) APR, Manager, Public & Intergovernmental Affairs, City of Saskatoon, coordinated the out-of-province businesses survey
Fast Consulting, Saskatoon, Saskatchewan, conducted the out-of-province businesses survey

The views expressed in this report do not necessarily represent the views of the cities who commissioned the report or the Estey Centre for Law and Economics in International Trade

Preface

On April 25, 2007, the Province of Saskatchewan, as part of a wider consultation process, released a series of reports which it had commissioned[1] regarding the impact of the Province of Saskatchewan joining the BC-Alberta Trade, Investment and Labour Mobility Agreement ("TILMA"). Each of these reports indicated that joining TILMA would potentially impact municipal legislation and programs. No specifics of such impact were given, as this was not within the mandate of the commissioned reports. Further investigation indicated that no other studies existed on the specific impact of TILMA on municipalities.

As a result, at a meeting of the Saskatchewan City Mayors and Managers held in North Battleford, Saskatchewan on May 9 & 10, 2007, the twelve Saskatchewan cities present[2] agreed to proceed with an in-depth impact study of the potential effect of TILMA on Saskatchewan cities. The study was to also include an analysis of whether inclusion of cities in TILMA is the only option for dealing with internal trade issues at the municipal level, or whether a possible alternative would be to exclude cities from TILMA, while implementing internal trade agreement goals through amendments to *The Cities Act*. (Please note that while the study was undertaken by Saskatchewan cities for Saskatchewan cities, it was always intended that it would be shared with Saskatchewan towns, villages and rural municipalities for their use in dealing with their similar internal trade agreement issues.)

Subsequently, a contract was entered into with the Estey Centre for Law and Economics in International Trade to participate as trade experts in the study. The Estey team is led by Dr. William Kerr, Senior Associate of the Centre and editor of *The Estey Centre Journal of International Law and Trade Policy*. The team includes May Yeung, M.B.A., Research Associate and Desarée Larsen, Research Assistant. A contract was also entered into with Merrilee Rasmussen, Q.C. to participate as the legislative drafting and *Cities Act* expert.

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[1]
- A report by the Conference Board of Canada dated December 22, 2006 entitled "Assessing the Impact of Saskatchewan Joining the BC-Alberta Trade, Investment and Labour Mobility Agreement";
- A report by Professor Eric Howe of the Department of Economics, University of Saskatchewan dated January 2007 entitled "The Economic Impact of the Trade, Investment and Labour Mobility Agreement (TILMA) on Saskatchewan"; and
- A report by John F. Helliwell, Professor, University of British Columbia entitled "Review of Conference Board of Canada's Report - Assessing the Impact of Saskatchewan Joining the BC-Alberta Trade, Investment and Labour Mobility Agreement"

[2] Cities of Estevan, Humboldt, Lloydminster, Melfort, Melville, Moose Jaw, North Battleford, Prince Albert, Saskatoon, Swift Current, Weyburn, Yorkton

The first phase of the study was to analyze the impact of TILMA on Saskatchewan cities. That analysis, prepared by the Estey team and entitled "*A Space for Cities in Trade Agreements: A Cities' Perspective on the Trade, Investment and Labour Mobility Agreement*" forms Part I of this study.

The second phase of the study was to determine what it is that cities do, which affects internal trade agreement goals. This is essential information in determining whether implementing internal trade agreement goals through *Cities Act* amendments is a possible alternative.

The information for this phase of the study was collected in two ways. Firstly, the cities themselves collected information on their own policies, bylaws and programs which might affect internal trade agreement goals. The results of this review are set out in the document entitled "*What Cities Do*" which is Appendix B to the Part I Estey Centre report. The "Specific Issues" section of that document contains the information collected.

Secondly, a survey was undertaken which consisted of 31 high-level interviews with companies from across Canada which had conducted business with, or considered conducting business with, one or more of the participating Saskatchewan cities, sometime in the last three years. The survey was developed by Chris Dekker, Manager, Public and Intergovernmental Affairs, City of Saskatoon, in consultation with the Estey team. The survey was carried out by Fast Consulting of Saskatoon, Saskatchewan.

The Estey team analyzed the survey results, together with the information from "*What Cities Do*", and prepared a report which identified the specific areas where cities affect internal trade agreement goals. The analysis and report of the Estey team entitled "*Analysis of Saskatchewan Cities' Barriers to Out-of-Province Businesses*", together with the Survey Summary from Fast Consulting, form Part II of this study.

The third phase of the study consisted of Merrilee Rasmussen, Q.C. analyzing how the specific areas identified in Part II might be dealt with, outside of TILMA, using *Cities Act* amendments and/or existing municipal law remedies. Ms. Rasmussen's report entitled "*Legislative Avenues to Ensure Compliance with the Principles of Trade Agreements*" forms Part III of this study.

The study was finalized in January 2008 for presentation to the City Councils of the participating cities and subsequent transmittal to The Honourable Bill Boyd, Minister Responsible for Intergovernmental Affairs for the Province of Saskatchewan.

Theresa Dust, Q.C.
City Solicitor, Saskatoon
Project Coordinator

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LIST OF ACRONYMS

AGP	Agreement on Government Procurement
AIT	Agreement on Internal Trade
ASCM	Agreement on Subsidies and Countervail Measures
DFAIT	Department of Foreign Affairs and International Trade
EU	European Union
FCM	Federation of Canadian Municipalities
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Dispute Rules
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NTB	non-tariff barrier
SPS	Sanitary and Phytosanitary Agreement
TBT	Agreement on Technical Barriers to Trade
TILMA	Trade, Investment and Labour Mobility Agreement
UNCITRAL	United Nations Commission on International Trade Law Rules
WTO	World Trade Organization

APPENDICES

The views and opinions expressed in this study do not necessarily represent the views of the cities that commissioned the study, or the Estey Centre for Law and Economics in International Trade.

A SPACE FOR CITIES IN TRADE AGREEMENTS: A Cities' Perspective on the Trade, Investment and Labour Mobility Agreement

EXECUTIVE SUMMARY

On April 28, 2006 the governments of British Columbia and Alberta signed a bilateral internal trade agreement – the Alberta-British Columbia Trade Investment and Labour Mobility Agreement (TILMA). Other provinces have been invited to join the TILMA and there has been both interest and debate in Saskatchewan regarding the province's participation. One provision of the TILMA explicitly extends its commitments to the activities of cities. How the needs of cities should be included in trade agreements has not received a great deal of attention. This study examines how '*space* for cities' can be made in the provisions of trade agreements.

Why Do Cities Need *Space* in Trade Agreements?

Cities have a special role in promoting economic development in the era of globalization. An increasing level of urbanization is a global phenomenon – from China to Brazil to Nigeria to Spain to Canada – and an ever increasing proportion of economic activity is located in cities. Beyond the economic activity that naturally arises from an expanding population, the contribution of cities to future economic growth is forecast to increase dramatically as a result of the ongoing transition to a knowledge economy. The knowledge economy is expected to generate the majority of future economic growth in modern market economies.

Knowledge economy activities overwhelmingly take place in cities, and may in fact require the connectivity, amenities and infrastructure that cities provide. While not fully understood, the development and commercialization of new intellectual property – which is the basis of the knowledge economy – requires a creative environment in which people can both work and play. The creativity that provides the economic output in a knowledge economy is very different from the economic output arising from manufacturing, the exploitation of resources or service activities in that it is likely just as dependent on the non-work environment as the workplace. Creativity on the job may be as dependent on how an individual spends his or her non-working hours as it is on what occurs at work. Given that the creative people in the knowledge economy are individuals, they will relax in different ways. Only cities provide the diversity necessary to accommodate a wide range of recreation activities. Of course, each individual also relaxes in a number of ways – a hockey game one night, an evening in a restaurant the next, etc. Many of these activities are social which requires a relatively close geographic proximity so that groups can form and disperse easily.

Beyond the contribution city-based recreation makes to productivity in the knowledge economy, the creative portion of the knowledge economy also requires a great diversity of support services to ensure new knowledge can be created and, once created, becomes economically useful knowledge – technical support for computers, elevator maintenance services, lawyers, accountants, marketers, banks and a host of others. Cities provide the proximity for the use of these services to be shared, lowering costs for their users.

For all these reasons, the majority of knowledge economy activities will take place in cities. Essentially, in the globalized economy, it is cities that compete, not countries. Economic success will be determined by how well Toronto competes with Shanghai, Calgary competes with Barcelona, Saskatoon competes with Zurich and Humboldt competes with Cranbrook.

The question of what makes a city competitive is complex. One thing is clear, however, each city is unique in its geography, culture, values and perspective. Thus, it is vitally important that city governments be allowed *space* in trade agreements to foster those aspects of their uniqueness that enhance their competitiveness. Given that the broader city environment – both workplace and non-workplace – is important for effective participation in the knowledge economy, this *space* must include exceptions in trade agreements for the things that cities can do to foster and enhance their unique environment. If cities are to be the engines of future economic growth, then creating that *space* will be central to the successful competitiveness of cities and, as a result, the prosperity of countries (and provinces). Cities do different things than other levels of government and provisions of trade agreements that are appropriate for countries and provinces may not leave cities with sufficient *space* to foster their unique competitiveness.

Why are there Trade Agreements?

The primary purpose of international (and internal) trade agreements is to reduce the risks faced by firms wishing to engage in international transactions – specifically the risks posed by the activities of foreign governments. The "worst nightmare" of, for example, a firm that expands its factory to take advantage of a foreign opportunity is that after its investment is made the foreign government unpredictably changes the rules (for instance, puts a tariff on products the firm is sending to the foreign market) – its profitable exporting activity is lost and its investment wasted. Foreign governments may wish to extend protection to its own firms that are facing stiff competition from foreign firms. Trade agreements provide mutually agreed transparent rules that specify under which circumstances governments can intervene in markets in ways that inhibit international transactions – and sometimes are extended to include investment activities and the movement of people that takes place between political jurisdictions. Over time, trade agreements have expanded their scope to include many activities that traditionally were considered solely the responsibility of domestic governments – and the degree to which international disciplines are desirable has been at the heart of recent controversies surrounding trade agreements.

As with any agreed set of rules, there may be differences in how the agreed rules are to be interpreted. Hence, trade agreements normally contain a mechanism for settling disputes. Typically, the dispute resolution mechanisms may use courts or arbitration as their operational model.

Trade agreements can be of two types, *positive list* and *negative* list. Most agreements (e.g. WTO, NAFTA, Canada's Agreement on Internal Trade (AIT)) use a *positive* list approach. A *positive* list sets out a list of economic activities to which the agreed rules apply – if the activity is not on the list, the rules of the agreement do not apply and governments are free to intervene as they wish. In a *negative* list agreement (such as the TILMA) the agreed rules apply to all activities of governments unless they are specifically excluded. In effect, this prevents governments from intervening in future activities that may not have existed or deemed worthy of intervention when the list of exemptions was agreed – for example, a *negative* list agreement signed in the 1970s would not have included the regulation of cell phone towers as an exemption.

Trade agreements are based on a number of principles, central among them non-discrimination and transparency. Non-discrimination means that foreign firms should not be treated differently than domestic firms by governments – e.g. for municipal governments this would mean not giving preferences to locally based firms in awarding contracts or taxing non-local firms at a higher rate than locally based firms. Transparency supports non-discrimination by ensuring that foreign firms are aware of opportunities and can be assured that government decisions are made in a non-discriminatory fashion.

Investment Provisions of Trade Agreements and What Cities *Do*

There is little that municipal governments do that affects trade in goods or labour mobility; on the other hand a number of things that municipal governments do can affect investment. These activities relate both to the factors that determine whether an investment takes place as well as an investment's profitability after it has been made. In many cases, these actions of cities are at the heart of creating or preserving those attributes that make a city unique and foster its ability to maximise its attractiveness as a competitive location. A significant portion of what cities do is guide what businesses do in their community in accordance with their unique set of civic values and preferences. Existing provincial legislation in Saskatchewan pertaining to cities recognises the advantages of such local policy making. TILMA-style negative list agreements may not explicitly exempt these types of municipal practices. As a result, the activities of cities sanctioned in provincial legislation could be challenged directly in the trade agreement's dispute settlement system, or the existing provincial legislation could be challenged and, if found not be in compliance with the trade agreement, have to be changed – restricting the *space* cities have to make policy.

Cities provide tax incentives to encourage the re-vitalization of certain neighbourhoods, they restrict the height of buildings to preserve aesthetically appealing views, they limit the location of some forms of business activities to certain areas of the city (e.g. big box stores, casinos), they preserve certain areas such as riverfronts as recreation areas, they limit the density of certain forms of businesses (e.g. nightclubs, pawnshops), and they subsidise

infrastructure to encourage firms to locate in certain areas (e.g. access roads, sewer connections) to name a few. All of these could be challenged as "obstacles" to investment.

Cities are dynamic entities meaning that they must have the flexibility to adjust to new opportunities. At times, this flexibility may mean that existing investors may suffer a reduction in their expected returns. For example, in order to enhance the local environment, a city may wish to change a parking lane on a major road into a bike lane and in the process reduce the returns to a business headquartered in another province that relied on their customers having nearby parking. A central objective of trade agreements is to prevent governments changing the rules after investments have been made. Cities also use business licences to ensure that firms comply with municipal ordinances – ordinances they wish to change from time to time. If the firm is found to be in violation of the new ordinance, it may have its licence removed. This would nullify its projected returns on investment and could open the city up to a challenge in the trade agreement's disputes system.

Important Considerations for Cities

Given that the dispute settlement system in trade agreements are typically new, their operation is not transparent and they are not bound by precedent. Hence, it is not possible to know how municipal activities that affect investment would be treated. Further, unlike international trade agreements where there is no super-national legal system, there is no need for an internal trade agreement to have a separate dispute settlement system – Canada has a well-functioning legal system.

The question of "standing" in disputes is particularly vexing. In international trade agreements, the ability to bring a suite to the dispute system is normally restricted to the parties to the agreement. In the TILMA, for example, standing is also extended to individuals and firms – but not to cities. Hence, an out of province firm could initiate a case based on an activity of a city that it felt negatively impacted its investment opportunities or returns and the city would not have standing to defend itself – the city must rely upon the province to mount a defence. Even if cities were granted standing, there could be a large number of cases initiated by private firms pertaining to investment that would impost heavy defence costs on cities. In some cases, smaller cities could be at a resource disadvantage relative to a large firm that initiated a dispute. As the "burden of proof" is not specified in the TILMA, defence costs could be very high for cities if it was necessary for them to prove that their policy was not an "obstacle" to investment (compared to the firm having to prove it suffered an "obstacle").

Providing Cities with *Space*

Cities certainly need to conduct their activities in transparent ways that do not discriminate against firms from other provinces. Cities, however, require *space* in trade agreements to achieve their full potential as "engines of growth" in the knowledge economy. For example, the TILMA has aspects that could unduly restrict the *space* of cities to pursue policies that enhance their competitive advantage should the Province of Saskatchewan join the TILMA. It is not necessary, however, for trade agreements to have a single set of provisions (e.g. the NAFTA is three separate agreements). If Saskatchewan wishes to join the TILMA it should insist that its agreements with BC and Alberta (and any other provinces that eventually join) should ensure that cities have the *space* they require within the agreements.

The signatory Provinces to the TILMA have unequivocally stated that it is not their intention or the TILMA's to control cities or purposely interfere with their abilities to manage their jurisdictions. These statements provide some reassurance to cities that TILMA is in fact not intended to disrupt their abilities to manage their affairs. However, verbal guarantees tend to be as enduring as the current government's term in power. In the end, it is always the written agreement that matters.

Thus cities are advised to analyse their needs and activities, then assess the impact of TILMA or any other future internal trade agreement upon them. Cities must then determine the best means to maintain their ability to meet their citizen's needs.

Essentially, cities should ensure as much as possible that the *space* they require to operate effectively is guaranteed in trade agreements. It appears that in the negotiation of international trade agreements, considerable care has been taken to provide *space* for cities to undertake the activities that will allow them to develop their unique character and foster economic growth. Cities need not be particularly concerned that existing international trade obligations restrict their policy *space*.

This is not true for internal trade (including labour and investment) agreements, particularly for a negative list structured agreements. Therefore, cities must ensure their *space* is guaranteed in writing. The best, most effective means of ensuring that *space* exists is to exclude cities from such agreements entirely. Excluding cities from specific articles or areas of activity under an agreement is less effective and, hence, less attractive alternative to obtain that essential *space*.

A SPACE FOR CITIES IN TRADE AGREEMENTS: A Cities' Perspective on the Trade, Investment and Labour Mobility Agreement

CITIES AS ENGINES OF FUTURE ECONOMIC GROWTH

An increasing level of urbanization is a global phenomenon – from China to Brazil to Nigeria to Spain to Canada. As a result, an ever increasing proportion of economic activity is located in cities. Beyond the economic activity that naturally arises from an expanding population, the contribution cities in modern market economies will make to future economic growth is expected to increase dramatically as a result of the transition to a knowledge economy[1]. The knowledge economy is forecast to generate the majority of future economic growth and facilitating its potential is reflected in the industrial policies of most developed country governments.

Knowledge economy activities overwhelmingly take place in cities, and may in fact require the connectivity, amenities and infrastructure that cities provide. While not fully understood, the development and commercialization of new intellectual property – which is the basis of the knowledge economy – requires a creative environment in which people can both work and play. The creativity that provides the economic output in a knowledge economy is very different from the economic output arising from manufacturing, the exploitation of resources or service activities in that it is likely just as dependent on the non-work environment as the environment in the workplace. Creativity on the job may be as dependent on how an individual spends his or her non-working hours as it is on what goes on in the workplace. Given that the creative people in the knowledge economy are individuals, they will relax in different ways. Only cities provide the diversity necessary to accommodate a wide range of recreation activities. Of course, each individual also relaxes

[1]The initial foundation for the Knowledge Economy was first introduced in 1966 in a book by Peter Drucker. The knowledge economy refers either to an economy of knowledge focused on the production and management of knowledge, or more commonly, a knowledge-based economy. A key concept is that knowledge and education (often referred to as "human capital") can be treated as either a business product or a productive asset. According to the Effective Executive, the difference between a manual worker and a knowledge worker is the former works with their hands and produces "stuff" while the latter works with their head not hands, and produces ideas, knowledge, and information. An example of the change to a knowledge economy is in automobiles. A car 30 years ago and a car today have many things in common, four wheels, a steering wheal seats etc. What sets today's car apart from the one produced 30 years ago is the high degree of computerisation in today's cars – and this is what gives them added value. The computer parts in the car cost almost nothing to manufacture, it is intellectual property that is embedded in the systems that have been designed that make computer technology useful in a car that adds the value. This is the output that arises from a knowledge economy.

in a number of ways – a hockey game one night, an evening in a restaurant the next, etc. Many of these activities are social which requires a relatively close geographic proximity so that groups can form and disperse easily.

Beyond the contribution city-based recreation makes to productivity in the knowledge economy, the creative portion of the knowledge economy also requires a great diversity of support services to ensure new knowledge can be created and, once created, becomes economically useful knowledge – technical support for computers, elevator maintenance services, lawyers, accountants, marketers, banks and a host of others. Cities provide the proximity for the use of these services to be shared, lowering costs for their users. While the internet has reduced the need for geographic proximity for some knowledge economy support services, this is not the case for many others. Direct knowledge creation activities may also benefit from the synergies that are created by the clustering of their activities á la Silicon Valley.

For all these reasons, the majority of knowledge economy activities will take place in cities. In essence, in the globalized economy, it is cities that compete, not countries. Economic success will be determined by how well Toronto competes with Shanghai, Vancouver competes with Memphis, Saskatoon competes with Calgary and Swift Current competes with Medicine Hat. While some cities may not become centres of knowledge creation and will do well in their traditional roles as manufacturing, resource extraction and service centres, no city should be excluded from participating in the knowledge economy.[2]

The question of what makes a competitive city is complex. One thing is clear, however, each city is unique. There is no *cookie cutter* model for creating a competitive city. Each city has a unique geography, culture, values and perspective. Thus, it is vitally important that city governments be allowed *space* in trade agreements to foster those aspects of their uniqueness that enhance their competitiveness. Given that the broader city environment – both workplace and non-workplace – is important for effective participation in the knowledge economy, this *space* must include exceptions in trade agreements for the things that cities can do to foster and enhance their unique environment. If cities are to be the engines of future economic growth, then creating that *space* will be central to the successful competitiveness of cities and, as a result, the prosperity of countries (and provinces).

I. INTRODUCTION

On April 28, 2006 the governments of British Columbia and Alberta signed a bilateral internal trade agreement – the Alberta-British Columbia Trade Investment and Labour Mobility Agreement (TILMA) – which came into effect on April 1, 2007. Other provinces have been invited to join the TILMA. In Saskatchewan, there has been some interest expressed in joining the TILMA and, as a result, the agreement has sparked considerable

[2] For a current study on the competitiveness of Canadian cities, please see Conference Board of Canada's Report 'City Magnets: Benchmarking the Attractiveness of Canada's CMAs', December 2007.

debate. One facet of the Alberta-BC agreement is that its provisions are to apply to municipal governments. The relationship between municipal governments and trade agreements, however, has not been much studied. This report examines the place of cities in trade agreements in the era of globalization. It attempts to answer the questions: How are cities affected by trade agreements? And; in what ways could trade agreements accommodate cities' unique needs?

What is the Role of a Trade Agreement?

Why are there trade agreements? The primary role of trade agreements is to provide transparency for firms that can identify a profitable business opportunity in a foreign market and are faced with making an investment that will allow it to take advantage of that opportunity. The transparency relates to what the firm can expect from the foreign government. An example will illustrate why there is the need for transparency. Suppose a firm operating in one country sees an opportunity to profitably export to a foreign country. The firm, however, must make an investment in expanding its factory to act on the export opportunity. The *worst nightmare* for this firm is that after its investment is made, the foreign government decides to levy a tax (a tariff) on imports of its product. Its export market, and its investment, will be lost. In many cases the firm will choose not to make the investment and the export opportunity, and the additional economic activity it would bring, will be foregone. Unfettered, governments often act to protect the interests of their constituents when faced with strong foreign competition – after all a profitable export opportunity likely means there is a less efficient local competitor in the importing market.

Trade agreements are negotiated among governments to establish rules under which governments can engage in protectionist activities – trade agreements protect firms from capricious acts by foreign governments. Trade agreements seldom attempt to totally remove the ability of governments to impose trade barriers, but rather seek to limit their use of protectionist measures. Firms that identify an opportunity in a foreign country will know under what circumstances the foreign government has agreed to limit its ability to act – increasing transparency. For example, in the World Trade Organization (WTO) tariff levels are *bound*, meaning they cannot be raised above their pre-agreed levels. While trade agreements are generally thought of as being arrangements between countries, they can apply in any situation where government jurisdictions differ and, hence, governments may wish to provide protection to their own political constituents against foreign competition – for example, provinces.

While tariffs (taxes on goods crossing borders) are the classic means of providing protection there are a host of means by which governments can alter the competitive environment – subsidies that favour domestic firms over foreign firms, regulations that reduce the competitiveness of foreign firms, technical standards that make it difficult to sell foreign goods, health regulations that limit market access for foreign products, laws that limit the ability of foreign firms wishing to make direct investments, government recognized professional certification bodies that restrict the opportunities of foreign trained individuals. Despite often having legitimate domestic applications, these measures can also have a secondary effect of being trade barriers. Over time, trade agreements have been

expanded to encompass all of these activities of governments – and many more. The primary objective is to reduce the risk for foreign firms of entering into international transactions. The TILMA is clearly in this tradition as it lays out rules relating to government regulation of trade in goods and services between British Columbia and Alberta, rules pertaining to subsidization, to the regulation of investment activities and to the ability of individuals to work as a qualified professional or tradesperson.

Trade agreements may also have objectives relating to reducing barriers to trade and other aspects of international commerce over time, but these are clearly secondary to the objective of providing rules for the circumstances under which governments can intervene to provide protection. In both countries that are party to a trade agreement, society is expected to benefit from the increased investments firms will make in internationally (or inter-provincially) based activities as a result of the reduced risk of protectionist policies. No government is likely to completely give up its rights to intervene in their economies and, hence, trade agreements are about managing trade, not free trade no matter what their formal titles suggests.

The management of trade is specified in the agreements negotiated. Trade agreements operate under a set of principles[3], central among them the principle of non-discrimination. Non-discrimination means that foreign firms will be treated no differently than domestic firms – they will receive *national treatment*. In essence, this means that governments can make any regulation that they wish so long as they apply equally to foreign and domestic firms. While accepting the principle of non-discrimination, all trade agreements allow for exceptions to their principles. Normally, trade agreements specify those aspects of international commerce to which its principles will apply, with exceptions applying in all other sectors – this is known as a *positive list* approach. The TILMA, on the other hand, takes a less common *negative list* approach whereby the agreement's principles apply to all aspects of inter-provincial commerce unless they are specified in the exceptions included

[3] The key principles acting as foundations of Trade Agreements are:

Non-Discrimination
- Most-Favoured-Nation treatment (MFN) is one of the core obligations found in trade and investment agreements. It is a broadly used concept through trade in goods, services, investment and intellectual property rights. It essentially means that a country must treat products and services of one foreign country as it treats "like" products and services from any other foreign country. In other words, investors and service providers from a trading partner must be treated no less favourably than investors or service providers from another.
- National Treatment is another core obligation. In the context of the trade in goods, this obligation essentially means that a country must treat imported and locally-produced goods and services equally, provided they are alike. Similarly, a government must treat foreign businesses no less favourably than it treats local businesses.

Fairness
- Transparency provisions exist in most trade agreements, which call upon governments to make information concerning domestic laws, regulations, programs and administrative procedures readily available to domestic and foreign businesses.
-Fair and equitable treatment is also a requirement found in various trade agreements as part of the guarantee to provide a minimum standard of treatment to foreign investors. This principle includes the duty to grant due process to foreign investors, ensuring that the treatment of an investment cannot fall below treatment considered as fair and equitable under generally accepted standards of customary international law.

in the agreement. If nothing else, this approach suggests that the signatories to the agreement have a high degree of confidence in their ability to predict the future – the signatory provinces cannot envision a situation in the future where they would like to create a new exception.

As with any agreement, there may be differences in how the parties interpret it. As there is no international commercial legal system, trade agreements between countries often contain a means for settling disputes between the parties. There are two common models, a legal model and an arbitration model. For example, the European Union uses a legal model whereby a super-national court (the European Court) has been established whereas the NAFTA uses arbitration *panels* based on international commercial arbitration institutions. The TILMA specifies an arbitration system. A dispute system need not have been included in the TILMA because Canada has a well-functioning system of national courts. Trade agreements normally restrict *standing* – the ability to bring cases – to the contracting governments. The TILMA extends standing to individuals which greatly increases the complexity (and likely the cost) of settling disputes.

Cities have governments that face pressures to provide protection to their constituents just as national (and provincial) governments do – and they have powers that can be used for protectionist purposes. Thus, their activities can pose a threat to non-local firms. Historically, trade agreements have not included detailed provisions dealing with cities, likely because the economic impact of city governments was considered to be relatively small. Globalization has brought changes that suggest the role of cities needs to be considered explicitly in trade agreements. These changes relate to: (1) the central role cities are expected to take as engines of future economic growth and; (2) the increasing requirement for trade agreements to move deep into regulatory territory that until now has been seen as the exclusive domain of domestic governments. As a result, it is necessary to create *space* in trade agreements for city governments to provide an environment conducive to maximizing cities' contribution to future economic growth and prosperity while at the same time providing sufficient transparency in their activities to induce non-local (*foreign* to the city) firms to make investments in activities that will impact on cities.

Trade Agreements Reaching Deep into Domestic Competencies

One of the major complaints of those who dislike the activities of institutions such as the World Trade Organization (WTO) or the North American Free Trade Agreement (NAFTA) is that they appear to interfere in what has always been perceived as the exclusive policy-making domain of domestic governments – loss of local control. From this perspective, trade agreements should deal exclusively with border policies such as tariffs; and not regulatory policy. The modern era of trade agreements began at the end of the Second World War. In the Great Depression of the 1930s countries had increased tariffs to very high levels in desperate (and unsuccessful) attempts to save domestic jobs by excluding foreign competitors from their markets. Of course, one country's imports are another county's exports so that any job savings that arose from raising tariffs on imports were quickly offset by loss of jobs in export industries as trading partners raised their own

tariffs in retaliation. At the end of the Second World War the high, depression era tariffs were still in place in most countries.

The General Agreement on Tariffs and Trade (GATT) was negotiated to reduce those high tariffs and came into force in 1947. It has taken over fifty years of successive GATT negotiations to substantially reduce most of those depression era tariffs. In the long era of high tariffs, governments were able to put in place a large number of policies that could inhibit trade, but did not, because their economies were relatively isolated due to those very high tariffs. For example, if there was a 75 percent tariff in place to exclude imports, then a government could provide a subsidy to expand the protected industry without any complaints from foreign firms that were already excluded from the market. The GATT, over time, was successful in reducing and removing tariffs. This success, however, had two effects. First, as tariffs came down firms that wished to export gained market access only to run into domestic subsidies and regulations that continued to limit their opportunities in importer's markets. Further, governments agreed at the GATT that no new tariffs would be allowed and that remaining tariffs would be *bound* at existing rates – meaning that they could not subsequently be raised. Governments, however, found that they were still asked for protection by domestic firms facing stiff foreign competition and, at times, wished to provide the requested protection – but they had agreed not to use tariffs.

They looked for other means, which eventually became known as non-tariff barriers (NTB). For example, setting up a strict inspection system for imported cars could be as effective in excluding competitive imports as raising a tariff. Foreign firms, fearing these types of activities from governments in importing countries, were deterred from making investments in trade related activities due to the risk of non-tariff protectionist policies being put in place by governments. To reduce these risks and encourage investment, trade agreements began to include provisions on the use of subsidies (including tax exemptions), the form of sanitary and phytosanitary (SPS) (i.e. those pertaining to human, animal and plant health) regulations, the constitution of technical standards (such as car inspections and labelling regulations), etc. Trade agreements moved far beyond their original focus on tariffs. Given that most NTB's have legitimate domestic purposes (for instance, ensuring that all cars, domestic or imported, are safe) this greater reach of trade agreements has been controversial.

The original trade agreements dealt almost exclusively with trade in goods. In the latter few decades on the 20th century services became the most rapidly growing sector in most economies but there were no rules relating to trade in services. As a result, foreign firms faced a high degree of risk related to government policy making when contemplating investments in transborder service activities. During the Uruguay Round (1986-1994) of GATT negotiations a new General Agreement on Trade in Services (GATS) was negotiated and the WTO formed to administer both the GATT (dealing with trade in goods) and the GATS. Rules for investment come under the GATS but it has been particularly difficult for countries to agree on provisions relating to investment – because governments feel it is important to be able to intervene both to limit foreign investment and to provide investment incentives. A stronger investment section was, however, included in the NAFTA – Chapter 11, but it is relatively unique. The TILMA includes strong

provisions dealing with investment. International trade agreements seldom deal with issues of labour mobility – these are left to immigration policy. One major exception is the European Union (EU) which has limited many government activities that could inhibit the movement of labour in the EU. The TILMA includes provisions pertaining to labour mobility.

Hence, over time, governments have expanded the mandate of trade agreements to include not only border measures, but a range of activities of governments that put at risk investments in transboundary activities being contemplated by foreign firms. In trade agreements, lower levels of government (municipal, provincial/state) are expected to conform to what has been negotiated by the national government. The restrictions acceptable to national (provincial) governments may not, however, recognise the policy *space* required by city governments to foster their competitiveness. Given the increasing role of cities in the creation of economic growth, the policy needs of city governments should be explicitly recognized in trade agreements.

Intergovernmental relationships

The government of Canada pursues and is party to international trade agreements for the fundamental purpose of ensuring economic prosperity. With a relatively small population base, Canada must look to international markets and global consumers as a means of economic growth. Ensuring access to these markets through the predictable and stable business environment provided by the system of enforceable rules and commitments that comprise trade agreements reduces the risks associated with investing in foreign market activities.

The benefits of participating in trade agreements include a clear and stable framework to conduct business, secure access to markets for Canadian exporters, protection for Canadian investors abroad, access to greater choices and better prices for Canadian consumers, and increased productivity and efficiency for the Canadian economy. These all contribute to a higher standard of living in Canada as well as those of trade and investment partners. There is a mutual benefit that encourages the ongoing commitment of all partied to an agreement.

When the federal government becomes party to an international trade agreement, it undertakes an agreed upon set of obligations and expectations. Provincial and municipal levels of government are *ipso facto*, also party to the obligations and expectations of the agreement. Most trade agreements have a 'federal clause' or a 'best effort' clause (in the NAFTA, Article 105 and in the WTO, Article 24.12) that obligates the federal government to make a best effort to ensure the other levels of government comply with the agreement's commitments. In order to achieve this, the federal government actively consults with the provinces when undertaking trade negotiations[4]. All levels of government can expect to accrue benefits resulting from trade agreements.

[4] The federal government actively consults with provincial representatives with the intention that the provinces then consult with municipalities. The Federation of Canadian Municipalities appears to have taken a role in interacting directly with the federal government in consultations.

Cities benefit from trade agreements as they help support their economic and social foundations. The majority of Canadian businesses are small and medium sized enterprises that are also citizens and tax payers of cities. Trade gives these Canadian businesses access to larger markets for their products and services and more varied sources for cost-effective inputs, technology and investment. This, in turn, delivers increased efficiency, productivity and competitiveness, all of which translate into jobs and higher incomes for cities' citizens.

The onus is upon cities to ensure their activities and policies are compliant with commitments made in international trade agreements. Cities are not always subject to all requirements of those agreements, enjoying exemptions, exceptions and reservations to exclude many municipal measures. These include and are not limited to government procurement, measures taken in the exercise of governmental authority, and certain measures relating to social services and minority or aboriginal affairs. For example, procurement activities of cities and provinces are exempt from the GATS and the NAFTA.

Taken as a whole, it appears that in the negotiation of international trade agreements, considerable care has been taken to provide *space* for cities to undertake the activities that will allow them to develop their unique character and foster economic growth. Broad provisions of trade agreements pertaining to non-discrimination apply but even here exceptions are allowed. Of course, as with any legal agreement there may be differences over interpretation and the regulations and measures of cities are open to dispute and subject to dispute resolution – and the associated costs – even if cities do not have *standing* at dispute resolution institutions. On balance, however, cities need not be particularly concerned that existing international trade obligations restrict their policy *space*.

II. INTERNAL TRADE AGREEMENTS IN CANADA

Within Canada, efforts to improve trade and investment between the provinces resulted in the Agreement on Internal Trade (AIT) in 1995, applicable to all the provinces and territories and the Trade, Investment and Labour Mobility Agreement (TILMA) between Alberta and British Columbia in 2006. Similar to Canada's international trade agreements, these internal trade agreements are founded on the principles of non-discrimination and transparency. Their core principles are summarized in Table 1.

Table 1. Core Principles of AIT and TILMA

AIT (All Canadian Provinces)	TILMA (BC and Alberta)
Non-discrimination – Equal treatment for all Canadian persons, goods, services and investments	Non-discrimination – treatment no less favourable than the best treatment given in like circumstances to goods, services, persons or investments of any one else.
Transparency – ensuring information is accessible to interested parties	Transparency – ensuring information regarding measures affected by TILMA is accessible
No Obstacles – the parties ensure that any measure it adopts or maintains does not operate to create an obstacle to internal trade.	No Obstacles – the parties shall ensure its measures do not operate to restrict or impair trade, labour mobility or investment between or through the parties
Legitimate Objectives – ensuring non-trade objectives have a minimal adverse impact on trade	Legitimate Objectives – ensuring government measures are legitimate, are the least trade/investment/labour mobility restricting as possible and are not a barrier in disguise.
Reconciliation (standards and regulations) – the basis for eliminating trade barriers caused by differences in standards and regulations	Standards and Regulations – mutual recognition or reconciliation of existing standards and regulations that currently restrict or impair trade, investment or labour mobility
Right of entry and exit - Prohibiting measures that restrict the movement of persons, goods, services or investments across provincial/territorial boundaries	Mutual recognition of worker certifications, with exceptions and further requirements to achieve certifications
Dispute Resolution	Dispute Resolution

Table 1 illustrates that both agreements have similar objectives and on the surface, appear to be similar instruments. However, their vastly different structures have broad implications for cities.

The AIT is what is known as a *positive list* agreement whereby the terms of the agreement are applicable only to the measures listed. In other words, the agreement lists what it applies to. During the negotiations phase, parties will negotiate what is to be included in a *positive list* agreement. This is the most common structure of trade agreements. The AIT encompasses eleven economic sectors where its provisions are applicable. Within each of these sectors, the agreement further lists what specific areas it will apply to. These include:

- Procurement
- Investment
- Labour mobility
- Consumer related measures and standards
- Agricultural and food products
- Alcoholic beverages
- Natural resources processing
- Energy
- Communications
- Transportation
- Environmental protection

Conversely, the TILMA uses a *negative list* structure whereby the terms of the agreement are exhaustively applicable to goods, services, and investment, including unknown future goods, services, investment and measures***, unless*** it is listed as an exception in the agreement. In other words, the parties will negotiate what will be left out of a *negative list* agreement which will then list the exceptions where it does not apply. The TILMA includes provisions in the areas of:

- Investment
- Business subsidies
- Labour mobility
- Procurement
- Energy
- Transportation

Many of the provisions in both the TILMA and AIT are not relevant for cities, as the majority focus on areas of provincial jurisdiction. However, because of its inclusive structure, the TILMA, and any other potential *negative list* internal trade agreement has a larger potential impact on the activities of cities. It is vitally important to note that a *negative list* agreement precludes the making of regulations that might inhibit trade or investment in the future. If an exception is not included at the time of signing, regulations cannot subsequently be made. New economic activities that have not yet even been contemplated may well arise in the future – activities that governments may want to regulate. For example, if a *negative list* agreement had been signed in 1980, it would not be possible to regulate the location of, for example, cell phone towers today. *Negative list* agreements mean that governments that sign them have great confidence in their visions of the future. Agreements using a *negative list* approach are not common. The only way a *negative list* agreement can be changed is if all parties to the agreement agree to its re-negotiation.

In trying to ensure compliance, Canadian cities treating businesses in their communities with transparency and non-discrimination reduce the likelihood of violating some provisions of internal trade agreements.

III. PROVISIONS OF INTERNAL TRADE AGREEMENTS AND WHAT CITIES *DO*[5]

Given the essential activities undertaken by cities, an analysis of how such conduct may be potentially affected by internal trade agreements is necessary. Although cities are usually exempt from most provisions in international trade agreements, there are international requirements that cities must meet. These are discussed in Appendix C. As cities have fewer exemptions under internal trade agreements than international ones, these agreements will have a greater impact on cities' policies. Although this discussion focuses upon cities in Saskatchewan, the concepts and analysis are germane to cities in other provinces.

[5] Please see Appendix B for the complete document "What Cities Do"

This document is not intended to provide legal advice. The applicability of any trade, investment and labour mobility provisions of a TILMA-style or any other trade and/or labour and/or investment agreement, and the related exemptions, exceptions and reservations to municipal measures will need to be assessed on a case-by-case basis. Cities should seek legal advice, as appropriate.

PROVISIONS OF INTERNAL TRADE AGREEMENTS[6]

There are currently two internal trade agreements within Canada. Both address a broad breadth of policy issues beyond trade, including investment and labour mobility. Thus, although they are called internal trade agreements, both encompass much more. The AIT is a *positive list* agreement, with less potential impact on cities as its provisions are applicable only as listed in the agreement itself, as negotiated by the parties. The TILMA being a *negative list* agreement has larger implications for cities merely because of its structure. Negative list agreements will be the focus of this discussion.

ESSENTIAL JURISDICTION - THE CITIES ACT, THE PLANNING AND DEVELOPMENT ACT 2007 AND THE MUNICIPAL EXPROPRIATION ACT

City activities considered as 'Essential Jurisdiction' are potentially faced with greater challenges in a *negative list* type internal trade agreement, than a *positive list* agreement. As the negative list agreement encompasses all matters, including unpredicted future issues***, unless*** it is specifically exempted, the broad and general powers undertaken as part of Essential Jurisdiction are more likely to contravene provisions of a TILMA-style agreement.

For example, in Saskatchewan, *The Cities Act* empowers cities to pass any bylaws for city purposes that it considers expedient in relation to:

(a) the peace, order and good government of the city;
(b) the safety, health and welfare of people and the protection of people and property;
(c) people, activities and things in, on or near a public place or place that is open to the public;
(d) nuisances, including property, activities or things that affect the amenity of the neighbourhood;
(e) businesses, business activities and persons engaged in business.

Similarly, the Saskatchewan *Planning and Development Act 2007* enables local governments to undertake urban and rural land use planning and development. Such planning and development is unique to specific communities and specific circumstances. Decisions can reflect the natural features of a city (e.g. whether the city has a river and, if so, whether and how its banks are reserved for public use) or the particular objectives of a city (e.g. how much or little to protect the downtown by allowing or not allowing big box stores, stadium theatres, etc.).

[6] It should be noted that common economic lexicon refers to trade agreements (both internal and international) as usually including trade, labour and investment provisions but are generally called simply 'trade agreements'.

The purpose of the Saskatchewan *Municipal Expropriation Act* is to allow a city council to expropriate land "for any purpose authorized by the appropriate municipal Act ..." [Section 3]. Such purposes would be primarily the "city purposes" set out in Section 4(2) of *The Cities Act*. *The Municipal Expropriation Act* provides a process for determining compensation for the owner of the land.

As these three Acts accord broad general powers to Saskatchewan cities, conflicts with a negative list agreement's provisions and concepts are more probable.

Cities treating all businesses in their communities with transparency, non-discrimination and fairness reduce the general likelihood of violating either internal or international trade agreements (both of which usually include labour and investment provisions). So long as local and non-local businesses are treated equally, with no less favourable treatment for either, a city is less likely to violate specific trade related provisions, of either internal or international agreements. Internal agreements will usually include labour mobility provisions which have little impact on cities as labour regulations tend to be of provincial jurisdiction.

While cities have little jurisdiction over trade in goods and labour mobility, the investment related provisions of a TILMA-style agreement have the potential to impact the activities of cities to a considerable degree. A significant portion of what cities do is to manage what businesses do in their community in accordance with their unique set of values and preferences. Given the ambiguous definition of 'restrict or impair' as discussed below, and the provided definition of 'investment', much of this municipal activity could be considered restricting or impairing of investment, particularly if cities in other provinces do not share similar regulations, standards or bylaws. The impact of TILMA-style trade agreements is discussed in the following section. For reference, the TILMA is attached to this document as Appendix A.

As legislation is defined as a "measure" of a Party, provincial legislation, such as *The Cities Act*, *The Planning and Development Act* or *The Municipal Expropriation Act*, that permits a city to act by resolution or bylaw in areas of its Essential Jurisdiction is subject to possible challenge (Rasmussen, 2007) through the following TILMA Articles:

1) **No Obstacles (e.g. Article 3 in TILMA)**

> *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.*

The No Obstacles provision, if insufficiently defined, can enable the potential challenge to any municipal activities possibly affecting trade or investment undertaken pursuant to the *Cities Act, the Planning and Development Act 2007*, and the *Municipal Expropriation Act*. For instance, under TILMA Article 3 , particularly the portion '*its measures* ***do not operate***

to restrict or impair *trade… investment or labour mobility between the Parties'* is ambiguous, broad and all-encompassing as it lacks further definition of:

a) what measures are considered to 'restrict or impair'
b) how 'restrict or impair' is defined or measured

In this current form, No Obstacles could be used to challenge any municipal policy, bylaw or activity as being an obstacle to trade or investment and could be used as a 'catch-all' for any challenge to municipal activities, and could potentially become the source for nuisance challenges.

2) Article 5[7] – Standards and Regulations

Article 5 illustrates how investment related provisions of a negative-style trade (including labour and investment) agreement, such as the TILMA, can significantly affect cities' ability to govern themselves.

a. Article 5.3

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

The term "standard" is defined in TILMA as a "specification approved by a Party or a recognized body setting out rules, guidelines or characteristics" for goods, services, occupations, or sanitary/phytosanitary measures. The term, "regulation" is defined as a standard adopted into law. In relation to the activities of cities and how they function, it would appear that the term "standard" captures specifications adopted by resolution of a city council and the term "regulation" captures specifications adopted by bylaw (Rasmussen, 2007).[8]

Particularly in relation to investment, Article 5.3 may prove especially problematic for cities. It states: *Parties shall not establish new standards or regulations that operate to restrict or* ***impair*** *trade,* ***investment*** *or labour mobility.*
Investment is further defined as:

a) an enterprise
b) financial assets, including money, shares, bonds, debentures, partnership rights, receivables, inventories, capital assets, options and goodwill;
c) the acquisition of financial assets; or
d) the establishment, acquisition or expansion of an enterprise.

[7] Article 4 – Non-discrimination was found to be a non-issue for Saskatchewan municipalities as none of the cities reported a local preference policy for goods or services as part of their "Essential Jurisdiction". However, Article 4 has some relevance for the following section addressing Specific Issues.

[8] However the reference to "approved by a Party or by a recognized body" contained in the definition of "standard" is unclear. Since a Party is the province, whether this means that a specification is only a standard if it is explicitly approved by the province, as opposed to approved by the city, or by for example the Canadian Standards Association is uncertain. Whether the fact that the provincial legislation allows a city to approve a specification amounts to approval by the province is also ambiguous (Rasmussen, 2007).

Since there is no clear definition of what constitutes impairment of investment, many of the things that cities do could be construed as having that effect. For example, if a city limits the number of pawn shops to a ratio of one per five city blocks, it may be argued that this restricts or impairs investment by prohibiting the establishment of an enterprise. Or, if a city reserves a large tract of prime development land for mixed income and mixed density housing projects, it is arguable that this restricts or impairs investment by preventing a business specializing in high-end luxury single homes in prime real estate areas from locating in the city and using the land in that manner (Rasmussen, 2007).

Finally, Article 5.3 is broad based and non-specific regarding:

i. what standards or regulations are considered to 'restrict or impair' trade
ii. how 'restrict or impair' is defined or measured

These broad-based, non-specific components of Article 5.3 leave open to challenge any resolutions or bylaws that fall within the definition of standards or regulations under TILMA and that a city may adopt in relation to its Essential Jurisdiction under *The Cities Act*, the *Planning and Development Act,* or the *Municipal Expropriation Act* (Rasmussen, 2007). These could include, for example, bylaws regulating what a business can put into the sanitary sewer system without pre-treatment or filtering, and bylaws setting minimum property maintenance standards for rental properties.

b. Article 5.5
Parties shall cooperate to minimize differences in standards or regulations adopted or maintained to achieve legitimate objectives.

Article 5.5 may unintentionally remove the ability of cities to 'be themselves'. The resolutions and bylaws adopted by a city reflect its character, geography, values and features, and these characteristics contribute to each city's unique competitive advantage. Complete harmonization of regulations and standards removes their unique features – those that can be used to create a competitive advantage. To some extent, each province's *Cities Act* (or equivalent) already standardizes regulations and regulations but not to the micro-economic level suggested by Article 5.5 (or similar).

Minimizing the differences as required by Article 5.5 may restrict a city's ability to express its unique preferences. An example pertains to the regulation of rental accommodation. Some cities have higher property maintenance standards than others, and some cities enforce them more rigorously. Some cities have compulsory licensing requirements for rental properties with minimum standards requirements attached to the issuance of the license. These differences in regulation and enforcement reflect the different priorities which different cities place on safe, stable housing and its importance to an overall safe city (which is a feature city's will want to have as part of their competitiveness).

Additionally, in preserving their unique characteristics and features by not minimizing these differences, cities could also be accused of restricting or impairing investment as discussed under Article 5.3

The exact definition of regulation or standard can determine cities' abilities to act in these areas. In the TILMA for example, it appears that Article 5.3, which prevents the Parties from establishing new standards and regulations, or Article 5.5, which requires the Parties to work to eliminate differences in standards and regulations, would not prevent cities from enacting bylaws, or require cities to harmonize differences between bylaws, relating to building heights, location of certain businesses, or uses on commercial property in certain areas. Since none of these things is a specification setting out a rule, guideline or characteristic of goods, services, occupations or sanitary/phytosanitary measures, they are therefore not caught within the definition of "standard" and the related definition of "regulation" under the TILMA (Rasmussen, 2007).

Even if these things were standards or regulations, Article 5.5 would not apply to require harmonization among cities with different standards; it applies to require harmonization between standards and regulations of the Parties. Thus, the trigger to harmonize would be differences between the provinces about how they permit cities to function that results in differences between cities from province to province (Rasmussen, 2007).

3) Article 6 – Legitimate Objectives

Article 6 permits the violation of Article 3 (No Obstacles), Article 4 (Non-discrimination) or Article 5 (Standards and Regulations) or Part IIC (Special Provisions) if the violating 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.*

Legitimate Objectives are further defined as:

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;*

Thus if a city's activities are undertaken to reflect the aesthetic choices of its citizenry, and not for the purpose of achieving legitimate objectives – as defined above – they are open

to challenge under a negative list agreement. For example, if the residents of a city vote in a plebiscite to reject casinos, that democratic choice may not be considered to be a legitimate objective, and could be deemed as restricting investment. Similarly, a city's choice to impose a height limit on commercial buildings to preserve a unique city view may not qualify as a legitimate objective, even if applied equally to all building owners whether resident or not (Rasmussen, 2007).

The current definitions of Legitimate Objectives does not encompass many of the activities or goals cities pursue in meeting the needs or demands of its residents, preserving its unique character or accomplishing its socio-community goals.

Important Considerations for Cities – Essential Jurisdiction

In *negative list* agreements, including the TILMA, exemptions, exclusions and reservations must be specifically included as part of the agreement. Unless it is specifically exempted, excluded or reserved in the agreement, the agreement's provisions will apply, even to future, currently unknown issues. Thus any provisions important to cities that they wish to exclude from the agreement must be negotiated into the agreement itself as a clause or addendum. Essentially, for *negative list* agreements, cities must ensure they negotiate and include what they want left out of the agreement, recognizing that everything else is subject to the agreement.

The above discussion highlights the impact a *negative list* agreement may have upon cities' Essential Jurisdiction, to the detriment of cities' abilities to manage themselves as mandated by provincial legislation. **The most effective means to completely protect cities' Essential Jurisdiction is to negotiate the complete exclusion of cities from a negative-list style internal trade agreement.** In order to be eligible for such a complete exclusion, cities must, in turn, seek alternative remedies to address trade, labour or investment restricting concerns.

If this is not possible, and cities are to be included in the negative-list style internal agreement, then a **clause that completely exempts cities' Essential Jurisdiction activities from the agreement's provisions would be a less desirable alternative**. This would contribute to preserving the mandate given to cities' under the Saskatchewan *Cities Act*, the Saskatchewan *Planning and Development Act 2007* and the Saskatchewan *Municipal Expropriation Act*.

Once cities are included in a negative-list style agreement, they are subject to challenge on what is and what is not included in the specific exemptions. For example, even were a city's essential jurisdiction exempted, the city would be subject to challenge on every bylaw or policy as to whether it was or was not included in "essential jurisdiction". Also, if in the future a Province wishes to change or expand a city's essential jurisdiction, as the role of cities change, that different essential jurisdiction would not be exempt from TILMA.

If an entire clause encompassing exemptions for Essential Jurisdiction is not possible, piece-meal remedies are plausible, but will be less effective overall in providing complete protection of Essential Jurisdiction. These could be sought either on the basis of an exemption from the entire article itself, via area of activity, or from within the article.

For example, should resort to piece-meal exemptions to Articles be the only alternative, cities' best course of action would be to be exempted completely from Articles pertaining to Legitimate Objectives or No Obstacles (Articles 6 and 3 respectively in TILMA).

If area of activity is to be used to guide piece-meal exemptions, then investment related provisions of a negative list agreement, including TILMA are more problematic to the Essential Jurisdiction of cities. Much of what cities do potentially affects investment, either purposefully or indirectly, both of which could result in a challenge to the city. To reduce TILMA and similar agreements' impact on their mandated activities, cities could ask that investment be excluded completely, or at the least, from the articles concerning no obstacles, standards and regulations and legitimate objectives. In TILMA's case, these are Articles 3, 5 and 6.

As a last resort, cities could also negotiate and include exemptions for themselves within particular portions of articles of an agreement (rather than being exempt from the entire article). For example, cities could include a clause in TILMA Article 3 (No Obstacles) exempting any activities they undertake as mandated by *the Cities Act, the Planning and Development Act 2007 and the Municipal Expropriation Act*. Similarly, cities could negotiate a clause in TILMA Article 5 (Standards and Regulations) that exempts any standards and regulations that enable the city to maintain, develop or create the 'unique character and individuality' of that city.

Other minor changes that may assist in protecting cities' interests include requesting less ambiguous definitions or more inclusive definitions of terms used in the agreement. Specifically in the TILMA, a more definitive description of 'restrict or impair' in Articles 3 and 5 would improve clarity and reduce uncertainty. Similarly, TILMA Article 6 (Legitimate Objectives) could have a specific clause for cities that defines a wider list of legitimate objectives that better reflects municipal goals (i.e. the unique character/democracy/socio-community clause). While many activities of cities might well be upheld if a challenge were made in the disputes system, the ambiguity leaves open the opportunity for a challenge and, hence, the cost and effort of mounting a defence.

Conversely, if the agreement has a *positive list* structure, the jurisdiction of cities has less potential exposure to challenge as the agreement's provisions are only applicable to the situations/issues/concepts listed in the agreement itself. Cities should then ensure through the negotiating period that only what they wish to be affected is included as part of the agreement. In other words, for *positive list* agreements, cities must negotiate what they want included in the agreement and leave out what they want excluded.

As best practice, cities can reduce trade-related challenges from an internal (or international) agreement by ensuring they practice non-discrimination, transparency and

fairness in their activities as discussed previously. So long as non-local businesses are treated no less favourably than local ones by a city, the risk of violating the agreement's trade provisions are reduced.

Beyond essential jurisdiction, cities are responsible for specific issues that may be affected by an internal trade agreement, particularly one of a *negative list* structure such as the TILMA. If cities are unable to exclude themselves completely from internal trade agreements, these activities could potentially be affected by the agreement.

SPECIFIC MUNICIPAL JURISDICTIONAL ISSUES

1. Cities' Purchasing

All cities have purchasing policies which, for economically significant monetary thresholds usually require public competitive bidding. The thresholds vary between cities. All cities have standard procedures for advertising tenders. Some contracts below specified amounts may be awarded without advertising or public tender. Cities' purchasing also includes the hiring of consultants through request for proposals.

Although most cities have standard purchasing procedures, not all purchasing activity is advertised. Public tendering can create disputes which are settled through the Courts. The Courts have mechanisms to deal with frivolous or nuisance claims.

As an example of how a negative list agreement can affect cities' purchasing, TILMA's Article 14 states:

Further to Articles 3(No obstacles) and 4 (Non-discrimination), Parties will provide open and non-discriminatory access to procurements of their government entities where the procurement value is:

1) *$10,000 or greater for goods*
2) *$75,000 or greater for services*
3) *$100,000 or greater for construction*

The low threshold values for Article 14 expose cities to potential procurement challenges for purchases that are less economically significant but highly costly. The low thresholds add a significant burden to cities' procurement activities. More contracts that are worth less must be publicly tendered. Doing so requires cities to expend significant resources, which can easily outweigh the value of the goods or services being procured. Such activities also are a larger relative burden for smaller centres that have fewer resources to expend. Consider that Saskatoon requires publicly advertised tenders for contracts over $100,000. This is a significantly higher threshold than the $10,000 listed in the TILMA.

Article 14 also includes a dispute settlement mechanism. Currently, cities rely upon the judicial system to resolve any procurement disputes. The relationship between TILMA's dispute settlement mechanism and the judicial system is unclear. Should a party be dissatisfied with the dispute settlement mechanism, it is unknown whether recourse to the

judicial system is allowed under TILMA. Furthermore, cities do not have *standing* to represent themselves under TILMA's dispute settlement mechanism.

The TILMA dispute settlement mechanism is discussed in detail later in this report.

Essential Considerations for Cities – Purchasing

The ability to procure supplies and services are essential to the proper functioning of cities. So long as cities pursue their purchasing in a fair, non-discriminatory, transparent and open manner, such activities should not be subject to challenges. Cities must ensure that their ability to undertake procurement is fully protected from challenges under a negative list style agreement such as the TILMA.

Specifically pertaining to the logistics of municipal procurement within the context of a TILMA-style agreement, in order to reduce the economic burden placed upon cities when undertaking their purchasing, the thresholds which trigger the necessity of public tender should be economically significant, either in absolute or relative terms. The threshold could be an absolute value for all cities, regardless of size or purchasing activity, for example, all purchases over $100,000 must be publicly tendered. An alternative would be to value thresholds in relative terms, where larger cities whose greater frequency and value of purchasing would have a higher threshold (i.e. $100,000) while smaller centres that make smaller purchases could be assigned a lower threshold (i.e. $30,000). While a smaller value, such an amount would still be economically significant for a smaller centre.

In terms of the dispute settlement mechanism, cities have several options. Firstly, cities could negotiate to exempt themselves completely from the agreement's dispute settlement mechanism, and continue to use the Canadian judicial system to settle issues arising from their procurement activity.

Secondly, cities could maintain the option of using the agreement's dispute settlement mechanism, but must ensure certain conditions are met: a) that the agreement accords *standing* to represent themselves in the case of a dispute. Currently, cities cannot directly represent themselves at a TILMA dispute settlement procedure and must rely upon provincial representation in a dispute; b) that the agreement clarifies the relationship between the judicial system and its dispute settlement mechanism should the disputants wish to resort to the former following an unsatisfactory finding by the latter.

2. Business Subsidies

Cities' subsidizing abilities can be subject to constraints in internal trade agreements, such as the TILMA where Article 12 states:

Parties shall not directly or indirectly provide business subsidies that:

a) *provide an advantage to an enterprise that results in material injury to a competing enterprise of the other party*
b) *entice or assist the relocation of an enterprise from the other party; or*
c) *otherwise distort investment decisions*

unless such subsidy is to offset a subsidy being offered by a non-party or a government entity not subject to this Article.

The TILMA further defines 'business subsidy' as:

Where a business subsidy means a financial contribution by a party, namely:

a) *cash grants, loans, debt guarantees or an equity injection, made on preferential terms;*
b) *a reduction in taxation and other forms of revenue generation, including royalties and mark-ups, or government levies otherwise payable, but does not include a reduction resulting from a provision of general application of a tax law, royalties or other forms of a Party's revenue generation; or*
c) *any form of income or price support that results directly or indirectly in a draw on the public purse*

that confers a benefit on a specific non-government entity…. But does not include generally available infrastructure, assistance to provide generally available infrastructure, or subsidies defined as non-actionable under Article 8 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM).

Article 12 targets the economic development subsidies practiced by virtually all levels of government to attract new or expansion of industrial or manufacturing businesses to or within the jurisdiction. Competing jurisdictions will often enter into bidding wars to increase their attractiveness to a business. These types of subsidies contravene Article 12. These incentive packages are costly to the jurisdictions involved, particularly if a bidding war occurs.

There is also the question of how the subsidy activities of individual cities will be monitored, reported and verified. There must be confidence that all cities are 'toeing the line' by not offering subsidies; this confidence is based upon a credible monitoring and verification system and fits generally within the transparency principle.

Cities also all provide a very different type of economic incentive which is tied to the accomplishment of a specific goal of the city. These goals could be called socio-economic in nature, usually contributing to the character or vitality of the community. Examples of

these socio-economic goals for which incentives are commonly provided include the following:

- incentives to build affordable housing;
- incentives to create housing in the downtown (e.g. converting warehouses to lofts);
- incentives to locate businesses within a certain area of the city (usually an older neighbourhood in need of revitalization);
- incentives for a business which moves into a commercial or industrial building which has been vacant for a certain period of time;
- incentives to develop a certain type of business which is needed in a certain location (e.g. a grocery store in a neighbourhood which has none);
- incentives to developers to promote new residential growth (this is especially so in smaller cities); and
- incentives to move industrial uses out of older neighbourhoods (at one time, it was acceptable to have industry within or next to residential neighbourhoods. Now cities try to encourage those existing businesses to move out of the neighbourhood and into an industrial area).

Directly of concern to cities, according to Article 12.c, *Parties shall not directly or indirectly provide business subsidies that* ***otherwise distort investment decisions.*** The purpose of cities' socio-economic incentives is exactly to distort investment in order to achieve municipal goals. Hence, cities providing subsidies in order to achieve a socio-economic goal will violate Article 12.c.

There are, however, two exemptions available to cities in order to preserve their use of socio-economic incentives provided certain conditions are met. The TILMA definition of 'business subsidy' states:

> *....But does not include generally available infrastructure, assistance to provide generally available infrastructure, or* ***subsidies defined as non-actionable under Article 8 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (ASCM)****.*

Under the WTO ASCM, if an incentive or subsidy meets the definition of a subsidy[9] then:

1) If the incentive is non-specific[10], it is non-actionable. A non-specific subsidy is one that is not directed at certain businesses or groups of businesses. It must be automatically granted to any enterprise that meets the set objective conditions or criteria. The essential

[9] Article 1.1 - in this case financial contribution from "government" in the form of tax relief from a city being a public body of a government

[10] Article 2.1 – A non-specific subsidy is one where the granting authority or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification. A specific subsidy is one where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises and is actionable (in TILMA's case, subject to fines).

concept is non-specificity, where the subsidy is not limited to a certain enterprise or industry or group of enterprises or industries.

2) ASCM Article 2.2 deems a subsidy as specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. This is relevant for cities with socio-economic subsidies as they tend to focus on designated geographic areas such as revitalization zones, business cores, industrial areas, etc.

If the incentive is deemed specific under ASCM Article 2.2 (because it is limited to certain enterprises within a geographical region), it still may be permitted under ASCM Article 8 (non-actionable subsidies) in two instances:

a) Article 8.1.a (non-specific subsidies) - Under Article 2.2, a subsidy is only specific if it is limited to certain enterprises within a region. As long as tax relief is *generally provided* within the region, the tax relief should not qualify as "specific" and is non-actionable by virtue of Article 8.1.a.

b) Article 8.1.b (permitted specific subsidies) – If a subsidy is specific (because it is limited to certain enterprises located within a designated geographical region) and therefore Article 2.2 applies, then it will be non-actionable as a permitted specific subsidy (by virtue of Article 8.1.b) provided it meets the criteria set out in Article 8.2. Article 8.2 allows specific subsidies for research activities (8.2.a), disadvantaged regions within the jurisdiction (8.2.b), and assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms (8.2.c).

Hence, a city's socio-economic business subsidies that are non-specific and have objective conditions are likely exempt from TILMA's Article 12. An example of this could potentially involve building affordable housing where ***all*** businesses that build/create 1 unit of affordable housing for every 2 regular housing units throughout the city will have their sewage levies reduced by 10%.

Socio-economic subsidies targeted at certain areas within a city could qualify as either a non-specific subsidy (ASCM Article 8.1.a) or a permitted specific subsidy (ASCM Article 8.1.b) for disadvantaged areas (ASCM Article 8.2.b) and also be exempt from TILMA's Article 12.

An example of a non-specific subsidy (ASCM Article 8.1.a) which is generally applied to all businesses within a certain area could be: ***all*** businesses that move their offices to, create employment in, build or create housing in or otherwise bring sustained economic activity to the downtown core and sustain such activity for a minimum of 3 years will receive a 15% reduction in their property taxes for a period of 5 years.

Permitted specific subsidies (ASCM Article 8.1.b) are allowed for disadvantaged areas (ASCM Article 8.2.b); thus a city could have a policy focusing on subsidizing certain areas

to create housing (e.g. converting warehouses to lofts downtown), locating businesses within a certain area of the city (usually an older neighbourhood in need of revitalization), or promote new residential growth, and not violate TILMA's Article 12 so long as the area in question is disadvantaged according to the ASCM definition.

Subsidies to help develop a certain type of business which is needed in a certain location (e.g. a grocery store in a neighbourhood which has none) may or may not qualify for Article 8.2.b, and requires further analysis on a case-by-case basis.

ASCM Article 8.2.c allows subsidies that assist in promoting the adaptation of existing facilities to new environmental requirements imposed by law and/or regulations. Depending on the circumstances, a subsidy provided to a business which moves into a commercial or industrial building which has been vacant for a certain period of time may or may not be exempt from TILMA's Article 12 by virtue of ASCM Article 8.2.c. The same could be true for subsidies to move industrial uses out of older neighbourhoods. At one time, it was acceptable to have industry in close proximity to or within residential areas. Cities currently tend to encourage those existing businesses to move out of residential neighbourhoods into an industrial area. These situations also require a case-by-case analysis to ascertain the applicability of ASCM Article 8.2.c.

A city's socio-economic business subsidies could also face potential challenges under TILMA's Article 3 – No Obstacles, Article 5 – Standards and Regulations or Article 6 – Legitimate Objectives. Although this is possible, it is unlikely as these Articles state that measures should not ***operate to restrict or impair*** *trade,* ***investment*** *or labour mobility.* Socio-economic business subsidies do not restrict or impair trade or investment from other cities or provinces *per se*.

Essential Considerations for Cities – Business Subsidies

Cities need to ensure that their subsidies used to achieve socio-economic goals, both existing and future, are fully protected from potential challenges under a negative list agreement, such as the TILMA. At the very least, cities must ensure that for all internal agreements, whether *positive list* or *negative list*, reference to WTO ASCM Article 8 is included as part of their non-actionable list of subsidies. Including ASCM Article 8 ensures some level of protection for socio-economic subsidies.

3. Business Licensing

All cities have some form of business license system. The business license is used to verify businesses are locating in appropriate land use zones, and to identify premises which must meet fire and building requirements. The third use of business licenses is as an enforcement and regulatory tool. Examples include regulating the number, safety and cleanliness of taxicabs through their business license. Cities may use business licenses to limit the number of certain types of businesses in an area or the distance between them. Conditions attached to business licenses may be used to enforce health and safety standards. Withdrawal or cancellation of business licenses can also be used to close

businesses which are a danger to the public. For example, a drinking establishment which repeatedly blocks exits, or has more people than the allowed maximum on the premises, may have its business license suspended or revoked, and therefore have to close its doors. Increasingly, business licenses are used as an enforcement tool for that small percentage of businesses which cause harm to the public and/or to the neighbourhood. The use of business licenses as an enforcement tool may by definition, preclude the standardization of business licenses among cities.

Business licenses are also required for businesses which are doing business in the city but do not have physical premises in the city. The most common would be transient traders, out-of-town contractors working in the city, and mobile food vendors. The business license is used to identify that the business is operating in the city and to ensure that it also meets minimum health and safety standards.

Cities sometimes charge a higher license fee for businesses which do not have a physical presence in the city. This has traditionally been done to recognize that such businesses do not pay property tax (and therefore pay no tax to the city) while using all of the same city services as those who pay property tax.

These licensing activities could be challenged under internal trade agreements as illustrated by several provisions of TILMA:

1) Article 3 – No Obstacles and Article 5 – Standards and Regulations; the use of business licenses as a regulatory and enforcement tool could conceivably be challenged as restricting or impairing investment as discussed in Essential Jurisdiction above.
2) Article 6 – Legitimate Objectives; the use of business licenses as a regulatory and enforcement tool could be challenged as not achieving a legitimate objective as discussed in Essential Jurisdiction.
3) Article 4 – Non-discrimination; the charging of differential business license fees for non-residents contravenes non-discrimination. However, there may be exceptions which permit a city to charge a higher licence fee to a non-resident should it be considered as taxation, other revenue generation, or rates established for the public good or public interest. A licence fee being used as a tax equalizing mechanism could potentially require a city to prove that the extra fee was equivalent to the taxes paid by local firms.

In TILMA's General Exceptions, 1.c exempts *taxation and associated compliance mechanisms* while 1.e exempts *regulated rates established for the public good or public interest*. This is confirmed by Article 8.1, which states that measures listed in Part V (Exceptions to the Agreement) are not subject to Part II (Provisions, which includes Article 4) except as stated in Part V.

General Exception 1.d states: *Subject to Articles 4* (non-discrimination) *and 12* (business subsidies)*, other revenue generation, including royalties and mark-ups, and associated compliance mechanisms* (are exceptions to the agreement). The specific reference to "subject to Article 4 (non-discrimination)" which suggests that the other provisions (1.c

and 1.e particularly) are not subject to Article 4, as it is not clear how else that difference in wording can be interpreted (Rasmussen, 2007). In other words, Exceptions 1.c. and 1.e. ***can*** violate Article 4, but it appears that 1.d. cannot. Hence it can be concluded that differential licensing could qualify under Exceptions 1.c. (taxation) and 1.e. (regulated rates) (Rasmussen, 2007).

Differential rates will only be permitted if they qualify under the particular exemptions and it is cities' responsibility in determining this.

4. Utilities and Competition with Private Sector

All cities are responsible for providing treated water to individual premises, for sewage treatment, garbage collection and landfill (although a few may use a regional landfill) and storm water. In Saskatchewan, water treatment and sewage treatment are regulated by the Province. All cities regulate what is put into the sewer systems, and landfill, and set rates for the utilities provided. Some cities own their own electrical utilities which buy bulk power and distribute it to their customers within a specific franchise area within the city.

Internal trade agreements make specific exemptions for certain activities. For instance, the TILMA exempts "*Water and services and investments pertaining to water*" under General Exception 1.b., hence cities' activities in providing treated water are exempt from the agreement. Cities must clarify whether sewage treatment is considered a 'service or investment pertaining to water' in order to determine if such service qualifies under Exception 1.b.

Under TILMA's General Exceptions, the Environment is exempted from the Agreement's provisions whereby "*measures adopted or maintained relating to the management and disposal of hazardous and waste materials*". Sewage treatment could easily be considered an exemption under the Environment. Again, cities should seek legal clarification.

Article 11.4. states: "*Nothing in this agreement shall be construed to prevent a party from maintaining, designating or regulating a monopoly for the provision of goods or services within its own territory*". The monopoly provision of key services such as sewage and electricity could qualify for exemption from TILMA under Article 11.4.

Article 11.4 may potentially apply to the case of Saskatoon's Land Bank where the City of Saskatoon is a major land developer. It develops approximately 60% of the residential properties in the city, as well as most of the industrial and commercial land. In this context, develop means to subdivide and install services so that the land is ready for someone to build on it. The private sector develops the remainder. In most cities, the private sector develops virtually all of the land.

In this case, the Land Bank is not a monopoly. Whether this has an impact on the applicability of Article 11.4 should be clarified by the City of Saskatoon and others with similar programs. Saskatoon's Land Bank provides services to business (by undertaking the subdivision and provision of service) that would otherwise have to be completed by the businesses themselves. It is not likely that a business planning to develop land in Saskatoon would bring a challenge given that they benefit from these activities.

However, the Land Bank could potentially be construed as a form of business subsidy that under Article 12, particularly 12.1.b where '*parties shall not directly or indirectly provide subsidies that entice or assist the relocation of an enterprise from another party*', and 12.1.c (or) '*otherwise distort investment decisions*'. Saskatoon's Land Bank provides a service to developers that no other city in Saskatchewan does. It is unknown whether cities in other provinces undertake a similar activity.

Given that the Land Bank program supports a large number of small builders who can purchase lots from the city, but who would not normally be able to purchase lots from a private developer and that the profits of the Land Bank are reinvested in revitalizing the older areas of the city, Saskatoon and other cities with a similar program must clarify the applicability of Article 11.4.

In other situations where cities are in direct competition with the private sector, a case-by case analysis assessing the impact of TILMA or any other internal trade agreement is required. It would be reasonable to expect that such activity could be challenged under the auspices of no obstacles, business subsidies or investment, particularly under a negative list structured agreement.

Overall, cities need to ensure that their activities undertaken to achieve socio-economic goals, both existing and future, that could or do compete with the private sector, are fully protected from potential challenges under a negative list agreement, such as the TILMA.

5. Assessment, Taxation and Revenue Collection

Cities raise the bulk of their revenue from property tax. Assessment is done pursuant to Provincial legislation and regulations. Cities have some discretion in establishing different tax rates for different types of property. Cities are also responsible for tax enforcement, which is done pursuant to Provincial legislation.

The assessment, taxation and revenue collection activities of cities are exempt from TILMA, and usually in other agreements. The applicable TILMA General Exceptions are:

1.c. – *Subject to Article 12 (business subsidies), taxation and associated compliance mechanisms*
1.d. – *Subject to Articles 4 (non-discrimination) and 12 (business subsidies), other revenue generation, including royalties and mark-ups, and associated compliance mechanisms*
1.e. - *Regulated rates established for the public good or public interest*

Cities are advised to clarify the categories and definitions of '*other revenue generation', 'associated compliance mechanisms'* and '*rates established for the public good or public interest'* to ensure which of their policies will qualify for the above General Exceptions.

6. Transportation

Saskatchewan cities have jurisdiction to pass bylaws regarding vehicles within the city, subject to *The Traffic Safety Act* of Saskatchewan. As a result, the city's jurisdiction is somewhat limited, as many vehicle issues are dealt with by Provincial legislation. Cities do set truck weights, including for highways passing through their boundaries. Cities also set size restrictions for trucks on certain routes and establish dangerous goods truck routes through the city.

Internal trade agreements may include transportation. For example, TILMA's Article 16 addresses transportation issues and states essentially that further negotiations are required. It would appear that such negotiations may prove to be an opportunity to review the proper roles for the Province and cities in the area of transportation. Cities may wish to have the Province set certain interprovincial truck weights, including within cities, but have the cities establish the route which those trucks must use through the city. Moving regulations to the Province when standardization is necessary may be effective, but cities must be allowed to deal with unique local issues on an individual basis.

ADMINISTRATIVE ISSUES

Dispute Settlement

International trade agreements often incorporate dispute settlement mechanisms. As with any legal document agreed by two (or more) parties, there may be disagreements regarding interpretation of the document and over whether a party (or parties) is complying with what was agreed. Having dispute settlement mechanisms directly incorporated in international agreements is necessary because there is no international legal system. Sovereign countries are not subject to a higher law unless they voluntarily agree to do so. International dispute mechanisms mean that governments temporarily cede their sovereignty over some aspects of their activities. Sovereignty is not ceded lightly, even temporarily, and governments have limited the powers of international dispute mechanisms. The European Union and NAFTA were some of the first trade agreements to have a dispute settlement system where countries agreed to accept adverse consequences if they did not comply with dispute panel rulings. In the pre-WTO GATT, for example, the accused country could simply refuse to accept Panel rulings. In 1995 the WTO was endowed with a strong dispute settlement system based on the NAFTA model. Hence, binding dispute settlement systems are a relatively new phenomenon in international trade.

In a typical trade agreement, countries cannot be forced to comply with a dispute panel. If it refuses to comply it must either provide compensation or accept retaliation from those countries that brought the complaint. For example, the European Union lost a case with

Canada regarding its beef importation regime but refused to comply with the ruling. Canada was allowed to retaliate by putting 100 percent tariffs on some products imported from the European Union.

Typically, only the countries that are parties to the agreement can bring a complaint to the dispute panels. Individuals and firms that may feel that they have a complaint have no *standing* in disputes. They must convince their governments to bring forth complaints on their behalf. One major exception is investment treaties, or, for example, NAFTA's Chapter 11 which deals with investment. Firms can bring cases against government activities and fines can be levied against governments. Chapter 11 has proved extremely controversial for this reason.

Dispute mechanisms in trade agreements typically take one of two forms: a court system modeled on domestic legal systems or; an arbitration system modeled on private sector international commercial arbitration. For example, the European Union has established a European Court while the WTO and NAFTA use an arbitration-style system. Each system has merits and weaknesses. Court systems are based on due process which provides considerable protection for all parties but are also considered slow and costly. Arbitration on the other hand is more practical, less costly and fast – both the WTO and the NAFTA have timetables specified for their dispute systems – but provide less surety of process for disputing parties. Lists of arbitrators, which may or may not have formal legal training, are drawn up by the parties to the agreement and a mechanism is put in place for the selection of arbitrators for each dispute which attempts to reduce the potential for bias in adjudication; e.g. parties can reject an arbitrator it feels might be biased. Both systems appear to function well in international trade agreements.

Dispute mechanisms can sometimes specify other aspects of dispute settlement such as where the burden of proof lies. For example, a city having to prove that it did not discriminate against a non-local firm in its awarding of contracts is vastly different from a *foreign* firm having to prove that it was discriminated against by a city awarding contracts. As suggested above, from a city's perspective the former will be much more resource intensive than the latter.

The TILMA specifies an arbitration model for dispute settlement. As the TILMA is an agreement among sub-national governments (provinces), unlike international trade agreements, there is no need for it to have its own dispute settlement system. Canada has a well-functioning and legally binding justice and court system. It may be that British Columbia and Alberta felt that the Canadian judicial system was too slow and costly for their purposes. The TILMA panels are new so that their operation lacks the transparency of the legal precedent system of established courts. It will take time to determine the basis upon which TILMA panellists will decide cases.

Standing at TILMA panels is an extremely important issue for cities. As currently constituted, only individuals, firms and the contracting provinces will have *standing* with TILMA panels. This is particularly important in the area of investment. This means that a firm could bring a case forward against a city if it felt a city's policy inhibited its

investment opportunities, but the accused city could not directly defend itself. It would have to rely on a provincial government to defend its interests. If the case went against the city it is not clear whether the city could be fined directly or whether the province would be fined (and have to seek recourse from the city). Given that the views or priorities of city and provincial governments may not always coincide, as suggested above this is a major area of concern with the TILMA disputes system.

Even if cities were given *standing* so that they could defend themselves directly, given the *negative list* approach taken in TILMA, there may be numerous cases in the investment area until the panels have a record upon which some precedents can be established. These cases can be costly to defend against and may represent a large burden on the taxpayers of smaller cities. The *negative list* approach combined with a failure to directly deal with the appropriate exemptions for cities in the TILMA means that panels are not obliged to take account of the need of cities to have policy *space* to foster their global competitiveness.

For these reasons, cities are advised to seek a complete exemption from dispute settlement mechanisms of internal trade agreements, such as the TILMA. They should continue to rely upon the Canadian judicial system as they have in the past to resolve disputes. Cities have found this to be an effective, transparent and fair process.

CONCLUSIONS

The signatory Provinces to the TILMA have unequivocally stated that it is not their intention or the TILMA's to control cities or purposely interfere with their abilities to manage their jurisdictions. The governments of Alberta and British Columbia have stated:

> *TILMA does not restrict the ability of local governments to make bylaws that are in the best interests of their citizens, such as zoning bylaws, height restrictions or rules applying to signage. Nor does it require changes to land use decisions applying to areas like sign bylaws, building height restrictions, zoning, agricultural land reserves or parks. If these types of provisions are challenged, the Provinces retain the right to issue a joint interpretation of the Agreement to make our intentions clear.*[11]

These statements provide some reassurance to cities that TILMA is in fact not intended to disrupt their abilities to manage their affairs. However, verbal guarantees tend to be as enduring as the current government's term in power. Those verbal reassurances may not be honoured by a subsequent government, post-election. 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.

Thus cities are advised to analyse their needs and activities, then assess the impact of TILMA or any other future internal trade agreement upon them. Cities must then determine the best means to maintain their ability to meet their citizen's needs.

[11] From the BC-Alberta Trade, Investment and Labour Mobility Agreement, a joint communiqué published by the AB International and Intergovernmental Relations and BC Ministry of Economic Development

Essentially, cities should ensure as much as possible that the *space* they require to operate effectively is guaranteed in trade agreements. It appears that in the negotiation of international trade agreements, considerable care has been taken to provide *space* for cities to undertake the activities that will allow them to develop their unique character and foster economic growth. Cities need not be particularly concerned that existing international trade obligations restrict their policy *space*.

This is not true for internal trade (including labour and investment) agreements, particularly for a negative list structured agreements. Therefore, cities must ensure their *space* is guaranteed in writing. The best means of ensuring that *space* exists is to exclude cities from such agreements entirely. Excluding cities from specific articles or areas of activity under an agreement is a less effective but potential means to obtain that essential *space*.

The governments of British Columbia and Alberta have suggested that other provinces join the TILMA; but on a "take it all" basis. This is the model used when new countries accede to the EU. It is not, however, the only available model. For example, the NAFTA is actually three separate agreements – Canada-US, Canada Mexico and Mexico-US which reflect the specific needs of the bilateral parties in each case. Given the concerns with negative list style agreements, including TILMA, raised in this report, at the very least cities should suggest that their provincial government not approach the TILMA on a "take it all" basis and, rather, enter into negotiations to improve upon the agreement in ways that better suit Saskatchewan's interests and create *space* for cities in the province to grow and prosper.

APPENDIX A

The TILMA

Trade, Investment and Labour Mobility Agreement

Between

British Columbia and Alberta

April 2006

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PART I

OPERATING PRINCIPLES

The Governments of British Columbia and Alberta, RESOLVED to:

ESTABLISH a comprehensive agreement on trade, investment and labour mobility that applies to all sectors of the economy;

ELIMINATE barriers that restrict or impair trade, investment or labour mobility;

ENHANCE competitiveness, economic growth and stability in Alberta and British Columbia;

INCREASE opportunities and choice for workers, investors, consumers and businesses;

REDUCE costs for consumers, businesses and governments;

PROVIDE access to information and programs to facilitate labour mobility and business establishment;

PROMOTE sustainable and environmentally sound development, and high levels of consumer protection, health and labour standards;

COOPERATE on matters related to trade, investment and labour mobility;

MINIMIZE the impacts of other measures that may adversely affect trade, investment or labour mobility;

RESOLVE disputes in an effective, inexpensive and timely manner;

SUPPORT ongoing trade and investment liberalization both nationally and internationally; and

DEMONSTRATE the benefits of freer trade within Canada by simplifying and expanding upon the scope and coverage of the Agreement on Internal Trade;

HEREBY AGREE as follows:

PART II

A. EXTENT OF OBLIGATIONS

Article 1: Relationship to the Agreement on Internal Trade

1. This Agreement is established pursuant to Article 1800 (Trade Enhancement Arrangements) of the *Agreement on Internal Trade*, which permits the Parties to enter into additional arrangements to liberalize trade, investment and labour mobility beyond the level required by that Agreement.

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.

Article 2: Scope and Coverage

1. This Agreement applies to measures of the Parties and their government entities that relate to trade, investment and labour mobility.

2. Each Party is responsible for compliance with this Agreement by its government entities.

3. The benefits of this Agreement accrue only to the Parties and their persons.

B. GENERAL RULES

Article 3: No Obstacles

1. 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 4: Non-Discrimination

1. Each Party shall accord to:
    a) like, directly competitive or substitutable goods;
    b) persons;
    c) services; and
    d) investors or investments

of the other Party treatment no less favourable than the best treatment it accords, in like circumstances, to its own or those of any non-Party.

2. Each Party shall ensure that any charges it applies to persons, goods, services, investments or investors of the other Party are the same as those charged to its own, in like circumstances, except to the extent that any difference can be justified by an actual cost-of-service differential.

Article 5: Standards and Regulations

1. Parties shall mutually recognize or otherwise reconcile their existing standards and regulations that operate to restrict or impair trade, investment or labour mobility.

2. Parties shall, where appropriate and to the extent practicable, specify standards and regulations in terms of results, performance or competence.

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

4. Parties shall continue to work toward the enhancement of sustainable development, consumer and environmental protection, and health, safety and labour standards and the effectiveness of measures relating thereto.

5. Parties shall cooperate to minimize differences in standards or regulations adopted or maintained to achieve legitimate objectives.

Article 6: Legitimate Objectives

1. 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.

2. Subject to paragraph 1, Parties may establish the level of protection necessary to achieve a legitimate objective.

3. No Party shall prohibit or restrict an investment or the import of any good or service from the other Party or the export of any good or service to the other Party for a legitimate objective unless the restriction on investment or the import of the like good or service from all non-Parties or the export of the like good or services to all non-Parties is similarly prohibited or restricted.

Article 7: Transparency

1. Each Party shall ensure that its measures covered by this Agreement are made readily accessible.

2. A Party proposing to adopt or amend a measure that may materially affect the operation of this Agreement shall, to the extent practicable:
   a) notify the other Party of its intention;
   b) provide a copy of the proposed measure to the other Party on request; and
   c) provide the other Party with an opportunity to comment on the measure, and take such comments into consideration.

3. Each Party shall ensure that documents requested by the other Party or interested persons of a Party are supplied in a non-discriminatory manner and that any fees charged therefor are reasonable.

4. Nothing in this Agreement shall be construed to require a Party to provide or allow access to information the disclosure of which would:
   a) be contrary to its freedom of information or privacy legislation;
   b) impede law enforcement;
   c) prejudice the legitimate commercial interests of particular enterprises;
   d) involve a waiver of privilege; or
   e) otherwise be contrary to the public interest.

5. This Article applies notwithstanding any other provision of this Agreement.

Article 8: Rules Relating to Exceptions to the Agreement

1. With the exception of this Article, measures listed in Part V are not subject to Parts II and IV, except as otherwise provided in Part V.

2. Additional measures may be added to Part V only by mutual consent of the Parties.

3. A Party may, of its own accord, remove any of its measures listed in Part V.

Article 9: Rules Relating to Transitional Measures

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.

2. 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.

3. Further to Article 17, during the transitional period the Ministerial Committee shall oversee consultations and negotiations and approve any amendments resulting therefrom.

4. During the transitional period, Parties shall:
    a) ensure that no measure listed in Part VI is amended or renewed in a manner that would decrease its consistency with this Agreement; and
    b) seek to minimize any adverse effects on the other Party or its persons of measures listed in Part VI.

5. A Party may, of its own accord, remove any of its measures listed in Part VI.

6. Subject to Article 13(4) and 13(5), additional measures may be added to Part VI only by mutual consent of the Parties.

C. SPECIAL PROVISIONS

Article 10: Purpose:

1. The special provisions in this Part II(C) augment and further elaborate upon the general rules in Part II(B).

2. Except for Article 6, where a provision in this Part II(C) is inconsistent with a provision in Part II(B), the provision in this Part shall prevail to the extent of the inconsistency.

Article 11: Investment

1. Parties shall reconcile their business registration and reporting requirements so that an enterprise meeting such requirements of one Party shall be deemed to have met those of the other Party.

2. No Party shall require an enterprise of the other Party to establish or maintain a representative office or enterprise, or to be resident, in its territory as a condition for carrying on business activities.

3. A requirement by a Party that an enterprise has an agent located within its territory for service of notices of proceedings or other judicial documents is deemed not to be a requirement to establish or maintain a local presence or to be resident in its territory. Parties shall further consider options for eliminating measures requiring the designation or maintenance of agents for service.

4. Nothing in this Agreement shall be construed to prevent a Party from maintaining, designating, or regulating a monopoly for the provision of goods or services within its own territory.

Article 12: Business Subsidies

1. Parties shall not directly or indirectly provide business subsidies that:
   a) provide an advantage to an enterprise that results in material injury to a competing enterprise of the other Party;
   b) entice or assist the relocation of an enterprise from the other Party; or
   c) otherwise distort investment decisions

   unless such subsidy is to offset a subsidy being offered by a non-Party or a government entity not subject to this Article.

2. Parties shall jointly encourage non-Parties to eliminate subsidies to business and refrain from bidding wars.

Article 13: Labour Mobility

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 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.

Article 14: Procurement

1. Further to Articles 3 and 4, Parties will provide open and non-discriminatory access to procurements of their government entities where the procurement value is:
   a) $10,000 or greater for goods;
   b) $75,000 or greater for services; or
   c) $100,000 or greater for construction.

2. Articles 3 and 4 do not apply to any procurement under the thresholds specified in paragraph 1.

3. Parties shall ensure that procuring government entities post tender notices for all covered procurement through an electronic tendering system or systems provided by the Party. Additional means of providing notices may be used.

4. Parties shall consider options to improve the dispute settlement process as it relates to procurement, including the development of an effective bid protest mechanism. Until such time, the monetary award provisions of Articles 29, 30 and 31 do not apply to any disputes relating to procurement measures or specific procurements by covered government entities.

Article 15: Energy

1. Parties shall ensure that their standards-related electricity measures are not incompatible with generally accepted and applicable North American standards or standards of the Western Interconnection Region, including those relating to energy system security and reliability.

2. Parties shall work toward improving existing arrangements and promote enhanced inter-jurisdictional trade in energy.

Article 16: Transportation

1. Parties shall require all vehicles owned by a person of a Party to be licensed and registered in the Party where the person is ordinarily resident.

2. Each Party shall provide full and free registration reciprocity for temporary inter- and intra-provincial vehicle operations as provided for by the *Canadian Agreement on Vehicle Registration* (CAVR) without exceptions or additional registration fees for those Category B vehicles described in paragraph 1(a)(i) of CAVR. For the purposes of this Agreement, temporary intra-provincial operation as referenced in paragraph 4 of CAVR means operation for a period of up to 90 days in a calendar year. A Party may require carriers operating such vehicles in its territory in excess of 90 days in any calendar year to obtain a prorated license or temporary operating permit.

3. Upon request, a Party shall identify to the other its carriers having a National Safety Code number for any vehicle with a licensed gross vehicle weight of less than 11,794 kg.

4. Parties shall continue to work toward the enhancement of public safety and preservation of highway infrastructure through measures relating to cargo securement, and vehicle configurations, weights and dimensions.

PART III

ADMINISTRATIVE PROVISIONS

Article 17: Ministerial Committee

1. Each Party shall appoint a Minister to a Ministerial Committee to:
   a) ensure the implementation of and ongoing adherence to this Agreement;
   b) review annually the exceptions listed in Part V with a view to reducing their scope;
   c) oversee consultations and negotiations to address the transitional measures listed in Part VI;
   d) consider reports of any working groups formed under this Agreement;
   e) approve any amendments to the Agreement; and
   f) consider any other matter that may affect the operation of this Agreement.

Article 18: Ministerial Committee Structure and Procedures

1. The Ministerial Committee shall be composed of cabinet-level representatives authorized to act on behalf of their respective governments in matters pertaining to this Agreement.

2. The Ministerial Committee shall be convened upon the request of either Party.

3. The Ministerial Committee may establish its own practices and procedures.

4. All decisions and recommendations of the Ministerial Committee shall be taken by consensus.

Article 19: Administrative Facilities

1. Parties shall either establish a Secretariat or appoint one or more administrators prior to the entry into force of this Agreement.

2. Each Party shall maintain a contact point for the other Party or interested persons of a Party to answer or refer reasonable enquiries and to provide information in a timely manner pertaining to its existing and proposed measures and other matters covered by this Agreement. The contact points will be published on both Parties' websites.

3. The contact points shall publish the contact details for the administrator for the purposes of Part IV.

Article 20: Accession and Withdrawal

1. Further to Article 1800 (Trade Enhancement Agreements) of the *Agreement on Internal Trade*, any Canadian province, territory or the Federal Government may accede to this Agreement upon acceptance of its terms.

2. A Party may withdraw from this Agreement on 12 months written notice to the other Party.

Article 21: Further Negotiations

1. The Parties may enter into negotiations to amend this Agreement.

2. The Parties may establish such working groups as they consider necessary to ensure that the obligations of this Agreement are met.

Article 22: Further Co-operation

1. Parties shall cooperate to promote their mutual interests nationally and internationally.

2. Parties shall continue to jointly advocate for the removal of any Federal Government measures that operate to restrict, impair or distort trade, investment and labour mobility between the Parties.

Article 23 Entry Into Force

1. This Agreement shall enter into force on April 1, 2007.

2. 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.

PART IV

DISPUTE RESOLUTION PROCEDURES

Article 24: Application

1. This Part applies to the avoidance and resolution of disputes between Parties, or between persons and Parties, regarding the interpretation or application of this Agreement.

2. Where a dispute falls within the jurisdiction of a regulatory body listed in Appendix 1 of this Agreement, the dispute resolution processes established by that regulatory body shall first be used.

3. Where a Party or person believes that a measure is inconsistent with both the *Agreement on Internal Trade* and this Agreement, they must choose which agreement's dispute resolution process to use and, once chosen, will have no recourse to the other process regarding that same measure.

Article 25: Consultations

1. A Party may request in writing to the contact person of the responding Party that the responding Party engage in consultations to resolve any matter regarding the interpretation or application of this Agreement.

2. Where a person of a Party has first exhausted all other reasonable means to resolve any matter regarding the interpretation or application of this Agreement, that person may request in writing that a Party initiate consultations with the responding Party on its behalf.

3. Following the delivery of a request made under paragraph 2, a requested Party must determine within 21 days whether to proceed with consultations on the person's behalf. If the Party accedes to the request, it shall request consultations with the responding Party within 7 days.

4. If the requested Party declines the request under paragraph 2, it must provide written notice to the person, setting out the reasons for its decision, within 21 days from delivery of the written request. Failure to provide notice to the person within the 21-day period shall be deemed to be a rejection of the request.

5. Following the rejection of its request under paragraph 4, the person may, within six months, request in writing to the contact point of the responding Party that the responding Party enter into consultations with that person to resolve the matter.

6. In its request for consultations under paragraph 1 or 5, the Party or person requesting consultations shall:
    a) provide the factual basis for the matter at issue, including the existing or proposed measure at issue;
    b) list those provisions of this Agreement it considers to apply to the matter;
    c) describe in detail the alleged inconsistency; and
    d) provide an address for service.

    Should the matter proceed to panel under Article 26, the consultation request shall establish the basis of the complaint.

7. The consulting parties shall exchange all reasonable information pertaining to the matter.

8. Consulting parties may include relevant sectoral and trade officials in the consultations and, by mutual consent, may use mediation or other cooperative means to resolve the matter.

9. Consultations shall be without prejudice to the rights of the consulting parties in any further proceedings.

10. Consultations shall be completed within 30 days from delivery to the responding Party of the written request for consultations under paragraph 1 or 5.

Article 26: Establishment of a Panel

1. Prior to the entry into force, each Party will establish and maintain a list of at least five individuals to act as panellists. If a Party fails to establish or maintain a list, the other Party's roster of panellists shall be exclusively used.

2. If, following consultations under Article 25, the consulting parties have failed to resolve the matter, either of them may request the establishment of a panel to consider the matter. Such request shall be made in writing to the other consulting party. A copy of the request shall be delivered to the administrator and the Ministerial Committee.

3. In order to access the panel process established under this Article, a person must acknowledge, in writing, its consent thereto and such consent shall be included with the request made under paragraph 2.

4. If more than one administrator has been designated, the administrator located within the territory of the responding Party will administer the dispute.

5. Once the request has been delivered under paragraph 2, each disputant shall select a panellist within 15 days. If the disputants are Parties, they each shall select a panellist from the other Party's list. If one of the disputants is a person, that person

shall select a panellist from the responding Party's list and the responding Party shall select a panellist from the other Party's list. If a disputant fails to select a panellist within 15 days, the chosen panellist shall select the second panellist by lot from the applicable list of the disputant which has failed to choose a panellist.

6. Within 10 days of their appointment, the two panellists shall choose, by consensus, a panellist from the lists of their Parties to chair the proceedings. If the two panellists are unable to agree, they shall choose a chair by lot from the lists of the Parties.

7. As an alternative to the panel selection process under paragraphs 5 and 6, the disputants may, by mutual consent and within 15 days of the commencement of the selection process under paragraph 5, choose a single panellist to consider the matter.

8. All panellists selected must be independent and impartial in the matter under dispute.

Article 27: Panel Proceedings

1. Except as otherwise specifically provided in this Part, the panel shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules.

2. Within 7 days of the panel being established, the complainant will provide to the administrator a copy of the request for consultations issued under Article 25(6) and, if one of the disputants is a person, that person will provide to the administrator and the other disputant a copy of the notice, if any, issued under Article 25(4).

3. Subject to the requirements of this Part, the panel shall determine the manner in which it intends to proceed and, through the administrator, shall so notify the disputants.

4. In a dispute where one of the disputants is a person, the non-disputing Party may make oral and written submissions to the panel regarding the interpretation of this Agreement.

5. Without prejudice to a panel's authority to address other objections as preliminary questions, a panel shall address and decide as a preliminary question any objection by the responding Party that the matter under dispute is not one for which an award in favour of the complainant may be made under this Agreement.

6. Subject to Article 7(4) and any concerns relating to confidential information, panel hearings shall be open to the public, and the panel shall determine, in consultation with the disputants, the appropriate logistical arrangements therefor.

7. The hearing of the matter shall take place within 45 days of the establishment of the panel under Article 26 and shall take place at a location within the territory of the responding Party, as determined by the panel.

8. On agreement of the disputants, the panel process may be terminated at any time prior to the issuance of the panel's final report.

9. The panel shall, within 45 days of hearing the dispute, issue a report to the disputants that contains:
    a) findings of fact;
    b) rulings on any applicable interpretations and whether the measure at issue is or would be inconsistent with this Agreement;
    c) any findings as to the possible economic effect of the measure;
    d) recommendations, if any, to resolve the dispute; and
    e) specification of a reasonable period of time for implementation of the panel's recommendations, which shall be no longer than one year from the issuance of the report.

10. Within 10 days of the delivery of the panel report to the disputants, either disputant, with notice to the other disputant, may request in writing to the administrator that the panel clarify or reconsider any part of the panel report. If no such request is received by the administrator within that 10-day period, the panel's report will be considered to be final.

11. Within 5 days of delivery of a request to the administrator under paragraph 10, the other disputant may provide a response thereto to the administrator. The panel shall, within 15 days of delivery of the initial request to the administrator, provide the requested clarification or rule on the requested reconsideration. Thereafter, the panel's report, including any clarification or reconsideration thereof issued by the panel, will be considered to be final.

12. The final report of the panel is binding on the disputants and, subject to Article 7(4) and any concerns relating to confidential information, shall be made public.

Article 28: Implementation of Final Report

1. Disputants shall, within 30 days of delivery of the final panel report, agree on the resolution of the dispute. Absent any other agreement between the disputants, resolution of the dispute will require compliance with the determinations and recommendations of the Panel.

Article 29: Non-Implementation

1. If a disputant believes the panel's final report or the agreement reached between the disputants under Article 28 has not been complied with, that disputant may request

that a panel be convened to determine whether there has been compliance. Such request shall be made in writing to the administrator and to the other disputant. A copy of the request shall be delivered to the Ministerial Committee.

2. The panel established to determine if there has been compliance shall be composed of the original panellists unless otherwise agreed to by the disputants. Any new panellist, or any panellist that is unwilling or unable to participate, shall be replaced using the process established under Article 26(5), (6) and (7).

3. The panel shall convene within 30 days after the date of delivery of the request to the administrator. The panel shall determine the manner in which it intends to proceed and, through the administrator, shall so notify the disputants.

4. Subject to Article 7(4) and any concerns relating to confidential information, panel hearings shall be open to the public and the panel shall determine, in consultation with the disputants, the appropriate logistical arrangements therefor.

5. In a dispute where one of the disputants is a person, the non-disputing Party may make oral and written submissions to the panel regarding compliance with the panel's final report.

6. The panel shall, within 30 days of being convened, determine whether the final report or the agreement reached between the disputants has been complied with and issue a compliance report.

7. Subject to Article 14(4), if the panel determines that there has not been compliance, it shall:

    a) if the disputants are both Parties, issue a monetary award determined in accordance with Article 30 or authorize retaliatory measures of equivalent economic effect, or both; or

    b) if one of the disputants is a person, issue a monetary award determined in accordance with Article 30.

8. Subject to any judicial review initiated under Article 31, any remedy determined under paragraph 7 shall be effective at a time of the panel's discretion.

Article 30: Determination of Monetary Awards

1. In determining the amount of any monetary award under Article 29(7), the panel shall take into account:
   a) the efforts made by the responding Party to conform with the recommendations of the panel in its final report or the agreement between the disputants under Article 28;
   b) the nature and extent to which the measure has caused economic injury to the complainant and the extent to which that injury would continue should the responding Party continue to be non-compliant; and
   c) any other factor the panel considers relevant in the circumstances.

2. In no circumstances shall a monetary award exceed $5 million with respect to any one matter under consideration.

Article 31: Judicial Review

1. A disputant may, within 15 days after the delivery to the disputants of any compliance report that has awarded a monetary award under Article 29(7), request judicial review of that report under:
   a) section 30 of the *Commercial Arbitration Act* (RSBC 1996 c. 55) if the responding Party is British Columbia; and
   b) paragraphs 45(1)(c) and (f) through (i), and subsection 45(8) of the *Arbitration Act* (RSA 2000, c. A-43) if the responding Party is Alberta

   and solely for the purpose of this Article, the Parties agree that this Part constitutes an "arbitration agreement" and any compliance report constitutes an "award" as those terms are defined in the applicable statute.

2. The effective time of any award as determined by the panel under Article 29(7) shall be suspended during the period of any judicial review under this Article.

Article 32: Costs and Remuneration

1. The panel may apportion costs at its discretion. For greater certainty, if the disputants agree to terminate the panel proceedings prior to the issuance of the panel's final report under Article 27(8), the panel retains the power to apportion any costs incurred up to such termination.

2. Each Party shall provide under its laws that any monetary award issued under Article 29(7), or any award of costs under paragraph 1, shall be enforceable in the same manner as an order issued by that Party's superior court.

3. Parties shall, prior to the entry into force of this Agreement, and thereafter every five years, establish the amounts of remuneration and expenses that will be paid to administrators, panellists, or any experts that they may engage.

Article 33: Abridgement or Extension of Time Periods

1. Consulting parties or disputants may, by mutual agreement, abridge or extend any time period specified in this Part.

Article 34: Other Provisions

1. A person may not initiate proceedings under this Part if more than two years have elapsed from the date on which the person first acquired, or should have first acquired, knowledge of the alleged inconsistency.

2. A person may not initiate any proceedings under this Part regarding any measure that is already the subject of proceedings under this Part until such time as those ongoing proceedings have been completed.

3. Parties shall establish a code of conduct governing panellists prior to entry into force of the Agreement.

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.

PART V

EXCEPTIONS TO THE AGREEMENT

BOTH PARTIES

General Exceptions

1. Measures adopted or maintained relating to:

    a) Aboriginal peoples;

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

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

    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.

Business Subsidies

1. Measures adopted or maintained to provide:

    a) Compensation to persons for losses resulting from calamities such as diseases or disasters;

    b) Assistance for book and magazine publishers, sound recordings, and film development, production and distribution;

    c) Assistance for recreation;

    d) Assistance for academic research; or

    e) Assistance to non-profit organizations.

Government Procurement

1. Articles 3, 4 and 14 do not apply in the circumstances listed below in paragraph 2 provided that procurement procedures are not used by the procuring Party to avoid competition, discriminate between suppliers, or protect its suppliers.

2. Procurements:

    a) from philanthropic institutions, prison labour or persons with disabilities;

    b) from a public body or a non-profit organization;

    c) of goods purchased for representational or promotional purposes, and services or construction purchased for representational or promotional purposes outside the territory of a Party;

    d) of health services and social services;

    e) on behalf of an entity not covered by Article 14;

    f) by entities which operate sporting or convention facilities, in order to respect a commercial agreement containing provisions incompatible with Article 3, 4 or 14;

    g) where it can be demonstrated that only one supplier is able to meet the requirements of a procurement;

    h) where an unforeseeable situation of urgency exists and the goods, services or construction could not be obtained in time by means of open procurement procedures;

    i) when the acquisition is of a confidential or privileged nature and disclosure through an open bidding process could reasonably be expected to compromise government confidentiality, cause economic disruption or be contrary to the public interest;

    j) of services provided by lawyers and notaries;

    k) of goods intended for resale to the public; or

    l) in the absence of a receipt of any bids in response to a call for tenders.

Energy and Minerals

1. Subject to Article 4, measures adopted or maintained relating to:

    a) the licensing, certification, registration, leasing or other disposition of rights to energy or mineral resources;

    b) exploration and development of energy or mineral resources; or

    c) management or conservation of energy or mineral resources.

2. Measures adopted or maintained to promote renewable and alternative energy.

Transportation

1. Measures relating to the licensing of a motor vehicle operated by or on behalf of a person who may charge or collect compensation for the transportation of passengers in that vehicle.

Regional Economic Development

1. Regional economic development measures, provided that such measures:
    a) are only adopted or maintained under exceptional circumstances;
    b) are not more trade restrictive than necessary to achieve their specific objective;
    c) do not operate to unduly harm the economic interests of persons, goods, services or investments of the other Party;
    d) minimize the discriminatory effects and impacts on trade, investment and labour mobility; and
    e) are consistent with Article 12.

Forests, Fish and Wildlife

1. Measures adopted or maintained relating to:
    a) the licensing, certification, registration, leasing or other disposition of rights to the harvesting of forest or fish resources;
    b) the management or conservation of forests, fish and wildlife; or
    c) requirements that timber be used or manufactured within the territory of a Party.

Environment

1. Measures adopted or maintained relating to the management and disposal of hazardous and waste materials.

ALBERTA

Investment

1. *Fair Trading Act – Collections and Debt Repayment Regulation* and *Public Auctions Regulation*, requiring that funds be maintained in an Alberta-based account.

2. *Fisheries (Alberta) Act* requires residency for:
   a) Commercial Bait Fish Licence; and
   b) Commercial Fish Licence.

3. *Wildlife Act* requires residency for:
   a) Registered Fur Management;
   b) Registered Fur Management Partner; and
   c) Resident Fur Management.

Energy

1. *Power Purchase Arrangements Regulation*, Section 3 that restricts access to and ownership of Power Purchase Arrangements.

Agriculture

1. Measures adopted or maintained relating to regulated marketing and supply management which restrict trade, or the right to invest in the production of, or to produce poultry, dairy and eggs.

BRITISH COLUMBIA

Energy

1. Measures adopted or maintained relating to the use of dams, reservoirs and generation facilities provided that such measures are not used for the purpose of preventing access to electricity transmission facilities.

2. Measures to ensure domestic load is served as provided for in the British Columbia Transmission Corporation's Open Access Transmission Tariff, where filed with, and approved by, the British Columbia Utilities Commission.

3. *Provisions of the BC Hydro Public Power Legacy and Heritage Contract Act,* S.B.C.2003, c. 86, and any regulations or special directions pursuant thereto. Without limiting the foregoing, the Act prohibits BC Hydro from selling, or otherwise disposing of, protected (heritage) assets, and *Heritage Special Direction No. HC2 to the British Columbia Utilities Commission* that ensures domestic customers of BC Hydro receive the benefit of the utility's low-cost resources on an embedded cost basis for a minimum of ten years, beginning April 1, 2004.

Transportation

1. Measures to ensure adequate insurance coverage for commercial vehicles.

Agriculture

1. Existing regulatory measures adopted pursuant to the *Natural Products Marketing (BC) Act* which restrict trade or investment in agricultural products or production regulated thereunder.

PART VI

TRANSITIONAL MEASURES

BOTH PARTIES

Standards and Regulations

1. Existing standards and regulations that operate to restrict or impair trade, investment or labour mobility not otherwise expressly addressed in this Agreement.

Investment

1. Measures relating to business registration and reporting.

Business Subsidies

1. Measures adopted or maintained relating to financial support and assistance provided to the agriculture and agri-food sectors.

Labour Mobility

1. 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):

Occupation	Additional requirements
Acupuncturist	British Columbia: may require additional examination or training.
Agrologist	Alberta: diploma holders will be reassessed, and may require examination.
Architect	British Columbia: two years in the practice of architecture or employment in the office of a practicing member of the Architectural Institute of B.C. or a practicing architect approved by the Institute's council.
Audiologist, Speech or Language	Alberta: must meet the requirements established for this occupation under the *Health Professions Act.*

Occupation	Additional requirements
Autobody – Prep Technician (AB) and Automotive Refinishing Prep Technician (BC)	Alberta: examination for individuals who have not completed an apprenticeship.
Biologist, Registered Professional	British Columbia: may require additional examination to perform some activities.
Cemetery and Funeral Services Pre-Needs Sales Person	Alberta: additional study and examination.
Chiropractor	Both: examination of practitioners who have not written the National Chiropractic Examination Board exam.
Combined Laboratory and X-Ray Technologist	Alberta: examination or training requirements established under the *Health Professions Act*.
Community/Urban Planner	Alberta: examination or training requirements.
Crane and Hoisting Equipment Operator – Boom Truck (AB) and Boom Truck Operator Class A (BC)	Alberta: examination for individuals who have not completed an apprenticeship.
Crane and Hoisting Equipment Operator – Hydraulic Mobile Crane (AB) and Hydraulic Crane Operator (BC)	Alberta: examination for individuals who have not completed an apprenticeship.
Crane And Hoisting Equipment Operator – Tower Crane (AB) and Tower Crane Operator (BC)	Alberta: examination for individuals who have not completed an apprenticeship.
Dental Assistant	Alberta: must pass the National Dental Assisting Examining Board Exam.

Occupation	Additional requirements
Dental Hygienist	Alberta: must graduate from an accredited dental hygiene program and be certified by the National Dental Hygiene Certification Board.
Dental Technician and Technologist	British Columbia: may require additional training or examination depending on category of registration in Alberta.
Dentist	Alberta: requires dentists registering as a specialist to complete the National Dental Speciality Examination.
Denturist	Alberta: may require additional training.
Dietician, Registered	Both: may require additional training or examination.
Elevator Constructor	Alberta: requires a credential issued by the Canadian Elevator Industry Education Program (CEIEP) or, if necessary, will issue an Alberta document subject to additional training or examination.
Engineer	Alberta: may require additional examination in specialty areas.
Forest Technologist	Both: examination.
Forester	Both: examination.
Funeral Director	Alberta: examination on the *Alberta Funeral Services Act* and associated regulations.
Gasfitter A (BC) and level 1 gasfitter (AB)	Alberta: recognizes as equivalent.
Gasfitter B (BC) and level 2 gasfitter (AB)	Alberta: recognizes Red Seal in plumbing or pipefitting as qualified to work as a level 2 gasfitter.
Gasfitter, Other	Alberta: holders of other certificates will have qualifications reviewed and may be required to take additional examination or training for certification.
Geo-Scientist (for Alberta this category includes Geologists and Geophysicists)	Both: may require examinations in specialty areas.

Occupation	Additional requirements
Hearing Aid Practitioner	Alberta: those who completed their training after July 1, 2002 must demonstrate currency of their competencies.
Home Economist	Alberta: may require additional training or examination to use the professional designation.
Hunting Guide	Both: local presence.
Land Agent	Alberta: may require additional training or examination.
Landscape Architect	British Columbia: may require additional training or examination.
Land Surveyor	Both: additional training or examination.
Lawyer	Both: additional examination.
Massage Therapist	British Columbia: additional training and examination.
Medical Laboratory Technologist	Alberta: certification from the Canadian Society for Medical Laboratory Science or evidence of currency as set out under the *Health Professionals Act*. Additional training or examination may be required.
Medical Radiation and Diagnostic Technologist	Alberta: must demonstrate that practice hour requirements are met.
Mortgage Broker and Mortgage Agent	Alberta: must take the Provincial Qualifying exam and be licensed by the Real Estate Council of Alberta. May require additional coursework.
Motor Vehicle Sales Person	Alberta: must take a course and be licensed by the Alberta Motor Vehicle Industry Council. British Columbia: must be a resident of British Columbia.
Motor Vehicle Dealer	British Columbia: may require additional training or examinations.
Naturopathic Physician	British Columbia: may require additional training or examinations.

Occupation	Additional requirements
Notary Public	Alberta: must be a member of the Law Society of Alberta, or registered as a student-at-law, or be appointed by the Alberta Minister of Justice and Attorney General. To be appointed as a notary public, a person must be a Canadian Citizen or lawfully admitted into Canada for permanent residence and resident in Alberta. British Columbia: quantitative restriction on the number of members under the *Notaries Act*.
Nurse, Licensed Practical	Alberta: must have training in pharmacology, physical assessment, and infusion therapy. A six-month registration is permitted for Licensed Practical Nurses seeking to meet Alberta's registration requirements.
Nurse, Registered	Alberta requires Nurse Practitioners to have their equivalencies assessed.
Nurse Practitioner	Both: assessment of competency.
Occupational Therapist	Alberta: must graduate from a Canadian Association of Occupational Therapists approved program, pass the certification exam and meet currency requirements. Both: may require additional training or examinations.
Optometrist	Alberta: must provide evidence of obtaining Level 3 CPR certification, and pass a jurisprudence exam. Additionally, must provide evidence of 40 hours of clinical practice in prescribing topical pharmaceutical agents to be granted the authority to prescribe.
Paramedic	British Columbia: additional examination requirements. Alberta: Emergency Medical Technician and Emergency Medical Technician-Paramedic applicants must write an exam. Alberta: Emergency Medical Responder applicants are assessed through a substantial equivalency process.
Pesticide Applicator	Alberta: must apply for an Alberta certificate. Additional examination may also be required.
Pharmacist	Alberta: additional examination requirements.
Physical Therapist	Alberta: non-licensed Physical Therapists must

Occupation	Additional requirements
	demonstrate the currency of their competencies.
Power Engineer	British Columbia: Power Engineers from Alberta holding a standardized certificate may obtain a BC Safety Authority certificate of the same class; Power Engineers holding an Alberta certificate may obtain a BC Safety Authority certificate that is one class lower.
Psychologist	Alberta: must pass an oral examination.
Real Estate Agent Real Estate Agent (Realtor) Associate Real Estate Broker Real Estate Broker	Alberta: a Realtor/Broker must take the Provincial Qualifying exam and be licensed by the Real Estate Council of Alberta. Additional coursework may be required.
Real Estate – Appraiser	Alberta: must become an active member in good standing of a professional appraisers' association prior to being licensed.
Respiratory Technologist	Alberta: must participate in the continuing competence program administered by the Canadian Society of Respiratory Therapists and must have completed 720 practice hours.
Social Worker, Licensed	British Columbia: must have a degree in Social Work.
Teacher	British Columbia: Additional training and examination.
Waste Facility Operator	Alberta: additional education and experience may be required to be either conditionally or fully certified.
Waste Water Operator	Alberta: must have an Alberta address and apply for Alberta certification. May require additional training and examination.
Water Well Driller	Alberta: examination for individuals who have not completed an apprenticeship.

Procurement

1. Measures relating to the procurement of professional services provided by architects and engineers.

2. Parties shall further consider technological improvements that will improve access to each other's electronic tendering systems.

Transportation

1. The Recognition of Joint Access to Interprovincial Charter Bus Markets – Memorandum of Agreement – The Governments of British Columbia and Alberta.

2. Measures relating to the implementation of the Canadian Driver Licence Agreement.

Financial Institutions and Financial Services

1. Existing measures relating to financial institutions and financial services.

Crown Corporations, Government-Owned Commercial Enterprises, Municipalities, Municipal Organizations, School Boards, and Publicly-Funded Academic, Health and Social Service Entities

1. Measures of or relating to Crown corporations, government-owned commercial enterprises, municipalities, municipal organizations, school boards, and publicly-funded academic, health and social service entities.

ALBERTA

Investment

1. Provisions of the *Coal Conservation Act*, *Coal Conservation Regulation*, *Oil and Gas Conservation Act*, *Oil and Gas Conservation Regulation*, *Oil Sands Conservation Act*, *Pipeline Act*, and *Pipeline Regulation*, which require enterprises resident outside Alberta to maintain an office in Alberta or appoint an agent in Alberta. With respect to these measures, the Parties agree that "transitional period" means a period of 18 months after the entry into force of this Agreement.

2. The *Wildlife Act* and the *Fisheries (Alberta) Act* require residency for the following licences and permits:
    a) Fish Establishment Licence;
    b) Taxidermy Permit;
    c) Game Bird Farm Permit;
    d) Game Bird Shooting Ground;
    e) Commercial Falconry;
    f) Zoo Permit; and
    g) Class 1 or Class 2 Fur Dealer.

BRITISH COLUMBIA

Investment

1. Section 16(5) of the *Liquor Control and Licensing Act*, which requires residency for individuals and partnerships to obtain a liquor licence. In the case of a corporation, the manager selected by the corporation to carry on its business in the licensed establishment must be a resident of the province.

Government Procurement

1. The British Columbia Ministry of Transportation's Registration, Identification, Selection and Performance Evaluation (RISP) contract system.

PART VII

GENERAL DEFINITIONS

In this Agreement:

administrator means the Secretariat, if established, or a third party contracted to provide secretarial and operational support as provided under Article 19;

business subsidy means a financial contribution by a Party, namely:

a) cash grants, loans, debt guarantees or an equity injection, made on preferential terms;
b) a reduction in taxation and other forms of revenue generation, including royalties and mark-ups, or government levies otherwise payable, but does not include a reduction resulting from a provision of general application of a tax law, royalties, or other forms of a Party's revenue generation; or
c) any form of income or price support that results directly or indirectly in a draw on the public purse

that confers a benefit on a specific non-government entity, whether organized as one legal entity or as a group of legal entities, but does not include generally available infrastructure, assistance to provide generally available infrastructure, or subsidies defined as non-actionable under Article 8 of the World Trade Organization *Agreement on Subsidies and Countervailing Measures*;

carrier means a person that seeks to provide or provides a motor vehicle transportation service;

complainant means the Party or a person that has requested the establishment of a panel under Article 26;

construction means a construction, reconstruction, demolition, repair or renovation of a building, structure or other civil engineering or architectural work and includes site preparation, excavation, drilling, seismic investigation, the supply of products and materials, the supply of equipment and machinery if they are included in and incidental to the construction, and the installation and repair of fixtures of a building, structure or other civil engineering or architectural work, but does not include professional consulting services related to the construction contract unless they are included in the procurement;

consulting parties means the Party or person that has initiated consultations under Article 25, and the responding Party;

disputants means a Party or person that has requested the establishment of a panel under Article 26, and the responding Party;

enterprise means 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;

existing means existing as of the date of the entry into force of this Agreement;

financial service means any service or product of a financial nature that is subject to, or governed by, a measure adopted or maintained by a Party or by a public body that exercises regulatory or supervisory authority delegated by law and includes, but is not limited to:

a) deposit-taking;
b) loan and investment services;
c) insurance;
d) estate, trust and agency services;
e) securities; and
f) all forms of financial or market intermediation including, but not limited to, the distribution of financial products;

financial institution is a person that is subject to, or governed by, a measure adopted or maintained by a Party or by a public body that exercises regulatory or supervisory authority delegated by law, in respect of and by reason of the production or provision of a financial service;

good means a good that is produced, manufactured, grown or obtained in, used for a commercial purpose in, or distributed from, the territory of a Party;

government entity means 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;

investment means:

a) an enterprise;
b) financial assets, including money, shares, bonds, debentures, partnership rights, receivables, inventories, capital assets, options and goodwill;
c) the acquisition of financial assets; or
d) the establishment, acquisition or expansion of an enterprise;

investor means:

a) a Party;
b) a person ordinarily resident in the territory of a Party; or
c) an enterprise carrying on business in the territory of a Party;

that seeks to make, is making, or has made an investment within a Party;

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;

measure includes any legislation, regulation, standard, directive, requirement, guideline, program, policy, administrative practice or other procedure;

non-governmental bodies that exercise authority delegated by law means any organization, institution, corporation or association to whom regulatory or supervisory authority has been delegated by a Party;

Party means either signatory to this Agreement;

person means a natural person or an enterprise of a Party;

procurement means the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include:

a) any form of government assistance such as grants, loans, equity infusion, guarantees or fiscal incentives; or
b) government provision of goods and services to persons or other government organizations;

procurement value means the estimated total financial commitment resulting from a procurement, not taking into account optional renewals when the compulsory part of the contract is of at least one year's duration;

regulation means a standard that has been adopted into law;

regulatory authority means a government entity with authority to certify or regulate an occupation;

responding Party means the Party whose measure is at issue in consultations under Article 25 or a complaint under Article 26;

sanitary and phytosanitary measures means a measure that a Party adopts or maintains to:

a) protect animal or plant life or health in its territory from risks arising from the introduction, establishment or spread of a pest or disease;
b) protect human or animal life or health in its territory from risks arising from the presence of an additive, contaminant, toxin or disease causing organism in a food, beverage or feedstuff;
c) protect human life or health in its territory from risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof; or
d) prevent or limit other damage in its territory arising from the introduction, establishment or spread of a pest;

service means a service supplied or to be supplied, by a person of a Party;

standard means a specification, approved by a Party or by a recognized body, that sets out the rules, guidelines or characteristics for:

a) goods or related processes and production methods,
b) services and service providers or their related operating methods,
c) occupations and occupational qualifications,
d) sanitary/phytosanitary measures;

transitional period means the two-year period commencing as of the entry into force of this Agreement, or as the Parties otherwise agree;

water means surface and ground water in liquid, gaseous, or solid state, but does not include water packaged in containers with a capacity of 20 litres or less.

APPENDIX I

REGULATORY BODIES WITH ESTABLISHED DISPUTE RESOLUTION PROCEDURES

British Columbia Utilities Commission
British Columbia Oil and Gas Commission
Alberta Energy Utilities Board

In Witness Whereof, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Signed at Edmonton,
28th day of April, 2006

The Honourable Gordon Campbell,
Premier of British Columbia

Signed at Edmonton,
28th day of April, 2006

The Honourable Colin Hansen,
Minister of Economic Development,
and Minister Responsible for the Asia-Pacific Initiative and the Olympics,
Government of British Columbia

Signed at Edmonton,
28th day of April, 2006

The Honourable Ralph Klein,
Premier of Alberta

Signed at Edmonton,
28th day of April, 2006

The Honourable Gary Mar,
Minister of International and Intergovernmental Relations, Government of Alberta

APPENDIX B

WHAT CITIES DO

WHAT CITIES DO[12]

In discussions with Saskatchewan cities, a list of essential functions performed by municipal governments that have the potential to be particularly affected by internal trade agreements has been created. These functions enable cities to manage themselves as well as maintain their own individual characteristics. A discussion of each of these functions and how a trade agreement could affect them follows. Although this discussion focuses upon cities in Saskatchewan with reference to Saskatchewan's legislative acts, these concepts and implications are applicable to cities in other provinces.

ESSENTIAL JURISDICTION

There are three major pieces of legislation giving cities the power and jurisdiction to manage their affairs in Saskatchewan: *The Cities Act, The Planning and Development Act 2007*, and *The Municipal Expropriation Act*[13].

The Cities Act

The Cities Act defines a city's role and set the framework of a city's jurisdiction. They are as follows:

(a) to provide good government;
(b) to provide services, facilities and other things that, in the opinion of council, are necessary and desirable for all or a part of the city;
(c) to develop and maintain a safe and viable community;
(d) to foster economic, social and environmental well-being;
(e) to provide wise stewardship of public assets.

A goal of the Province in passing *The Cities Act* in 2003 was to ensure that cities had "... the flexibility to respond to the existing and future needs of their residents in creative and innovative ways" [Section 3(2) (c)]. Cities often deal with emerging issues first, and need to be able to respond without waiting for *The Cities Act* to be amended. To accomplish this, cities were given broad and general powers, rather than a laundry list of specific powers by topic. For example, a city council has the power pursuant to Section 8(1) of *The Cities Act* to pass any bylaws for city purposes that it considers expedient in relation to:

(a) the peace, order and good government of the city;
(b) the safety, health and welfare of people and the protection of people and property;
(c) people, activities and things in, on or near a public place or place that is open to the public;
(d) nuisances, including property, activities or things that affect the amenity of the neighbourhood;
(h) businesses, business activities and persons engaged in business;

[12] This section is based upon *What Cities Do*, Dust, Theresa Q.C., City Solicitor for Saskatoon, in consultation with Saskatchewan's municipal governments.
[13] The other provinces will have similar legislation pertaining to the activities of their municipalities.

Cities only have jurisdiction over matters that have been deemed by the Province to be primarily local in nature or most appropriately dealt with at the local level at the time, and in the manner, best suited to each community.

The Planning and Development Act 2007

The purpose of *The Planning and Development Act 2007* is to provide urban and rural land use planning and development. The intent of the *Act* is that local government will be responsible for land use planning and development within its boundaries, subject to the concept of "approving authority".

The city councils of Saskatchewan cities are deemed by the Province to have sufficient capacity to be their own "approving authority" on virtually all land use and development issues. Smaller cities which have less capacity are not "approving authorities" and must have provincial approval for many of their planning decisions.

It is the nature of land use planning and development that decisions are unique to specific communities and specific circumstances. Decisions can reflect the natural features of a city (e.g. whether the city has a river and, if so, whether and how its banks are reserved for public use) or the particular objectives of a city (e.g. how much or little to protect the downtown by allowing or not allowing big box stores, stadium theatres, etc. outside the downtown). Should a common provincial standard be required, the issue would be removed from a city council's jurisdiction by amending *The Planning and Development Act* or passing provincial regulations pursuant to that *Act*.

Items which can be dealt with include the adoption of an official community plan, passage of a zoning bylaw (including discretionary land uses, height and density requirements, sign regulations, parking and landscaping requirements, architectural controls, etc.) and regulations regarding the subdivision of land including requirements for servicing the land to a specific standard, paying offsite levies towards the cost of trunk sewers, water mains and major roadways which service the land, and the dedication of parkland.

The Municipal Expropriation Act

The purpose of this *Act* is to allow a city council to expropriate land "for any purpose authorized by the appropriate municipal Act ..." [Section 3]. Such purposes would be primarily the "city purposes" set out in Section 4(2) of *The Cities Act*. *The Municipal Expropriation Act* provides a process for determining compensation for the owner of the land. If the parties cannot agree, the Court of Queen's Bench decides the compensation. Its decision may be appealed to the Court of Appeal.

SPECIFIC ISSUES

1. Procurement/Purchasing

All cities have purchasing policies. Purchasing includes utilizing public competitive bidding for purchases or contracts whose monetary thresholds vary somewhat between cities. All cities have standard procedures for advertising tenders. Some cities specify amounts may be awarded without advertising or public tender.

All cities also hire consultants, based on a Request for Proposals which will have some form of rating system to identify the firm most qualified to do the work. Consultant contracts are not awarded based on lowest cost and not all Requests for Proposals will be advertised. All cities will occasionally "sole source" a contract, although this is the exception, not the rule.

Based on the responses to date from City Managers, there is no Saskatchewan city which has a local preference policy. There will be cities which specify a local presence in a few areas. For example, a city may require that their auditor have a local office or that their bank have a local branch. (This is especially so in smaller centers where one cannot assume, for example, that all of the major banks have, or will maintain, a branch in the community.)

Public tendering can create disputes over who should be awarded the contract. Such disputes are settled through the Courts. The Courts have mechanisms to deal with frivolous or nuisance claims.

2. *Business Subsidies*

All cities will have some version of economic development incentive for industrial or manufacturing companies which are new to the city or which expand within the city. Such incentives are almost always tied to the creation of a specified number of new jobs. The most common incentives would be either a reduction in the property taxes owing by the business (anywhere from 20% to 100%) for a maximum of five years provided a certain number of new jobs are created and maintained, or a grant of a specific amount of money for each new job created.

Providing land at less than fair market value, waiving offsite levies (the amount which the company owes towards the cost of the major infrastructure which services the site) or providing a grant towards the construction of special infrastructure (e.g. on-site primary sewage treatment for a hog slaughter operation), would also occur occasionally for a particularly large new plant.

Cities also all provide a very different type of economic incentive which is tied, not to jobs, but to the accomplishment of a specific goal of the city. Such incentives are usually

in the form of property tax forgiveness, or the waiving of various fees or levies which would otherwise be owing. Examples of this type of incentive include the following:

- incentives to build affordable housing;
- incentives to create housing in the downtown (e.g. converting warehouses to lofts);
- incentives to locate businesses within a certain area of the city (usually an older neighbourhood in need of revitalization);
- incentives for a business which moves into a commercial or industrial building which has been vacant for a certain period of time;
- incentives to develop a certain type of business which is needed in a certain location (e.g. a grocery store in a neighbourhood which has none);
- incentives to developers to promote new residential growth (this is especially so in smaller cities); and
- incentives to move industrial uses out of older neighbourhoods (at one time, it was acceptable to have industry located within or next to residential neighbourhoods. Now municipal governments try to encourage those existing businesses to move out of the neighbourhood and into an industrial area).

3. *Business Licensing*

All cities have some form of business license. The most common is a license requirement for any business which is moving into some sort of premises in the city. The business license is used to verify that the business is locating in a land use zone where that type of business is permitted. It is also used to identify premises which must meet fire and building requirements. (For example, if someone was converting a warehouse into a drinking establishment, there would be a number of *National Fire Code* and *Building Code* requirements relating to public safety.)

Business licenses are also required for businesses which are doing business in the city but do not have physical premises in the city. The most common would be transient traders, out-of-town contractors working in the city, and mobile food vendors. The business license is used to identify that the business is operating in the city and to ensure that it also meets minimum health and safety standards.

Cities will normally charge a higher license fee for businesses which do not have a physical presence in the city. For example, a contractor with an office in the City of Saskatoon would pay a $95.00 business license fee. A contractor working in the city but without premises in the city would pay a $400.00 business license fee. This has traditionally been done to recognize that such businesses do not pay property tax (and therefore pay no tax to the city) while using all of the same city services as those who pay property tax.

The third use of business licenses is as an enforcement and regulatory tool. For example, the number, safety and cleanliness of taxicabs are all regulated through their business license. Cities may use business licenses to limit the number of certain types of businesses in an area or the distance between them. This is most commonly done with

pawn shops and drinking establishments. Conditions to business licenses may be used to enforce health and safety standards. For example, some cities may require all landlords or landlords of a certain type of premises (apartment blocks) to obtain a business license for their premises and to pass health and fire inspections before a license is issued. Business licenses can also be used to close businesses which are a danger to the public. For example, a drinking establishment which repeatedly blocks exits, or has more people than the allowed maximum on the premises, may have its business license suspended or revoked, and therefore have to close its doors.

Increasingly, business licenses are used as an enforcement tool for that small percentage of businesses which cause harm to the public and/or to the neighbourhood.

4. *Utilities*

All cities are responsible for providing treated water to individual premises. (Some cities actually treat the water. Others purchase treated water from SaskWater.) All cities are responsible for sewage treatment, garbage collection and landfill (although a few may use a regional landfill) and storm water. Water treatment and sewage treatment are regulated by the Province. All cities regulate what is put into the sewer systems, and landfill, and set rates for the utilities provided.

Saskatoon and Swift Current own their own electrical utilities which buy bulk power (usually from SaskPower) and distribute it to their customers within a specific franchise area within the city.

5. *Assessment, Taxation and Revenue Collection*

Cities raise the bulk of their revenue from property tax. Assessment is done pursuant to Provincial legislation and regulations. Cities have some discretion in establishing different tax rates for different types of property. Cities are also responsible for tax enforcement, which is done pursuant to Provincial legislation.

6. *Transportation*

Cities have jurisdiction to pass bylaws regarding vehicles within the city, subject to *The Traffic Safety Act*. As a result, the city's jurisdiction is somewhat limited, as many vehicle issues are dealt with by Provincial legislation. Cities do set truck weights, including for highways passing through their boundaries. Cities also set size restrictions for trucks on certain routes and establish dangerous goods truck routes through the city.

7. *Dispute Resolution*

Cities expect to be, and are, responsible for all city litigation both as a plaintiff and as a defendant. The Province would only be involved, as an additional party, if there was a specific provincial interest at issue (e.g. the provincial law itself, as well as the city's

actions, was being challenged). The Province does not act in place of a city or pay any awards against a city.

In some cases, especially involving smaller cities, there may be an issue of capacity. A small city's bylaw or resolution may be challenged by a large corporation. In a worst case scenario, the city may have to abandon the case because of lack of funds, even though they would likely be ultimately successful in the legal action.

8. *Competition with Private Sector*

Cities can, on occasion, be in direct competition with the private sector. Saskatoon's Land Bank is a good example. Saskatoon is a major land developer. It develops approximately 60% of the residential properties in the city, as well as most of the industrial and commercial land. (By develop, we mean subdivide and install services so that the land is ready for someone to build on it.) The private sector develops the remainder. In most cities, the private sector develops virtually all of the land.

The Land Bank program has two main effects. It supports a large number of small builders who can purchase lots from the city, but who would not normally be able to purchase lots from a private developer. The profits of the Land Bank are reinvested in revitalizing the older areas of the city.

Cities are not prohibited from undertaking commercial ventures of this nature.

APPENDIX C

INTERNATIONAL TRADE AGREEMENTS AND MUNICIPALITIES

INTERNATIONAL TRADE AGREEMENTS AND MUNICIPALITIES[14]

In pursuing best practice, by ensuring as much as possible that several founding principles of trade agreements are followed, municipalities can generally ensure their activities are compliant with such agreements. In a joint publication, the Department of Foreign and Affairs and the Federation of Canadian Municipalities have published a guide on trade agreements and local governments. The following section is adapted from the guide 'International Trade Agreements and Local Government'[15].

Best Practice for Municipalities

Generally, Canadian municipalities tend to already practice transparency and non-discrimination in their activities. In other words, while international trade obligations create additional considerations that municipal governments must take into account, to the extent that municipalities' regulatory practices are transparent and non-discriminatory the chance of trade issues arising is greatly minimized.

A municipality can pose several questions to determine whether its policy or practice is likely to be compliant with a trade agreement:

1) Are any of its measures discriminatory on the basis of nationality:

   Is a municipal measure treating locally-produced goods, services or businesses more favourably than their foreign counterparts/equivalents?

   or

   Is a municipal measure favouring goods, services or businesses of one trading partner more favourably than those of another trading partner?

2) Should a municipality believe that a measure is discriminatory or unfair, then municipalities should examine whether the various exemptions, exceptions and reservations of the agreement apply as many are pertinent to many measures taken by municipal governments. This includes, for example, government procurement,

[14] Sourced from 'International Trade Agreements and Local Government' published by Department of Foreign Affairs and International Trade and Federation of Canadian Municipalities, found at: http://www.dfait-maeci.gc.ca/tna-nac/fcm/intro2-en.asp#core and 'International Trade Agreements: A Pocket Guide for Canadian Municipalities' published by Federation of Canadian Municipalities, found at http://www.fcm.ca/english/documents/pguide.pdf. For greater detail please refer to these guides.

[15] 'International Trade Agreements and Local Government' published by Department of Foreign Affairs and International Trade and Federation of Canadian Municipalities, found at: http://www.dfait-maeci.gc.ca/tna-nac/fcm/intro2-en.asp#core and 'International Trade Agreements: A Pocket Guide for Canadian Municipalities' published by Federation of Canadian Municipalities, found at http://www.fcm.ca/english/documents/pguide.pdf

measures taken in the exercise of governmental authority, and certain measures relating to social services and minority or aboriginal affairs.

3) In addition, when undertaking activities such as zoning, setting standards or providing subsidies, municipalities will also want to ensure that, as appropriate and where applicable, their actions are consistent with obligations regarding issues such as certain specified trade related performance requirements, compensation requirements for expropriation or the creation of unnecessary or disguised barriers to trade. Where these obligations may be applicable to a municipality's activities, the relevant provisions are reviewed in detail in the respective sections of the DFAIT and FCM guide.

Generally, areas of municipal activity that have the potential to be affected by international trade agreements are:

- financial assistance
- government procurement
- public-private partnerships and
- regulation e.g. zoning and environmental regulation

Canada is party to several international agreements which have implications for municipalities. These include several WTO Agreements and the NAFTA. The WTO Agreement on Subsidies and Countervail (ASCM), the Agreement on Technical Barriers to Trade (TBT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the General Agreement on Trade in Services (GATS) all have implications for municipalities. Similarly, the NAFTA has provisions relating to investment, services and agriculture/SPS that can potentially affect municipalities' activities. Municipal activities that could be affected by international agreements are outlined below, followed by the various Agreements and relevant provisions.

Financial Assistance

A. The WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (ASCM)

ASCM disciplines the use of subsidies by WTO Members and regulates the actions countries are permitted to take to counter the effect of subsidies. The types of government actions encompassed by the "financial contribution" element include direct transfer of funds or potential direct transfer of funds or liabilities (e.g. loan guarantees), government revenue otherwise forgone or not collected (e.g. tax credits), and the provision of goods or services or the purchase of goods by a government, including municipalities.

To be contrary to obligations under the ASCM, a subsidy must be actionable or prohibited. An actionable subsidy is a subsidy that is "specific" and causes "adverse affects" to the interests of other Members of the WTO – in effect foreign firms wishing to engage in exporting or other commercial activities in jurisdictions where the subsidy is being provided. A "prohibited" subsidy is one that is either contingent upon export performance

(in law or in fact) or contingent upon the use of domestic over imported goods. The latter means that regulations would force a foreign firm to use local rather than imported inputs in its production to receive the subsidy. A "prohibited subsidy" is deemed to be specific. These subsidies are prohibited since they are considered to have the most trade-distorting effects. For more detail regarding how the ASCM can specifically affect the provision of subsidies by municipalities, please see the Section 'Specific Municipal Jurisdictional Issues, 2. Business Subsidies'

Countries may take action against actionable or prohibited subsidies through the WTO dispute settlement system. Where there are allegations that a domestic industry has been injured by subsidized goods, countervailing duty investigations may also be conducted at the national level. The ASCM sets out the procedures to be followed in such investigations and provides for the application of countervailing duties, on imports from the subsidizing country. The ASCM applies primarily to goods; it may apply to a service if it is "provided" by a government and confers a benefit (advantage) on the recipient of the service. The ASCM does not apply to investment. Further, an exporter whose economic opportunities are negatively impacted by a foreign subsidy can ask its governments to dispute the foreign subsidy at the WTO.

So long as financial assistance is exercised under government authority, municipalities are excluded from the GATS, NAFTA Chapter 11 (investment) and NAFTA Chapter 12 (services).

Government Procurement

Municipalities and provinces (sub-national governments) are exempted from government procurement provisions of the WTO, GATS and NAFTA.

Public-Private Partnerships

A. GATS

GATS Article VIII (Monopolies and Exclusive Service Providers) could apply to municipalities' provision of utilities or for example, in the case of Saskatoon, it's Land Bank. The Article requires that a monopoly supplier of a service must not be allowed to act inconsistently with a Member's MFN obligations or the specific commitments listed in a Member's Schedule of Commitments. In addition, when a monopoly competes in the supply of a service outside the scope of its monopoly rights in a sector listed in a Member's Schedule of Commitments, the Member must ensure that the monopoly supplier does not abuse its monopoly position. These obligations extend to exclusive service providers where a Member formally or in effect authorizes or establishes a small number of service suppliers and substantially prevents competition among them in its territory

Regulation (E.g. zoning and environmental regulation)

A. The Sanitary and Phyto-Sanitary (SPS) Agreement

Sanitary and phytosanitary measures relate to regulations pertaining to human, animal and plant (phyto means pertaining to plants) life or health. SPS Article 13 (Implementation) states that WTO Members are responsible for the observance of all obligations contained in the SPS Agreement, including by "other than central government bodies." Thus, the federal government is accountable in ensuring municipalities meet Canada's SPS obligations. Article 13 also stipulates that Members "shall not take measures which have the effect of, directly or indirectly, requiring or encouraging… regional or non-governmental entities, or local government bodies, to act in a manner inconsistent with the provisions of the Agreement". Therefore, the requirements of the SPS Agreement may apply to any sanitary or phytosanitary measures taken by municipal governments.

Municipal governments must ensure that their animal, plant or health risk related regulations are:

- Non-discriminatory, based on scientific principles and are not maintained without sufficient scientific evidence that are not applied in a manner that constitutes a disguised restriction on trade (Article 2)
- Based on international standards, guidelines or recommendations where they exist, Article 3 (Harmonization) as such international standards are deemed to be necessary and consistent with the Agreement. Members also may apply measures at a higher level or protection than that provided for under international standards if there is a scientific justification or based upon a risk assessment in accordance with Article 5 of the Agreement.
- Taking into account the international risk assessment techniques that international organizations have developed, the relevant scientific evidence and certain economic factors that affect risk, Members shall avoid arbitrary and discriminatory measures and ensure that such measures are least trade restrictive. If scientific evidence is insufficient, Members may provisionally adopt measures based on available information Article 5.

B. The Technical Barriers to Trade (TBT) AGREEMENT

Municipalities are subject to the provisions of the TBT Agreement except for the requirement to notify the WTO of their technical requirements. They are expected to observe common standards in the preparation, adoption and application of technical regulations as detailed in the various articles of the TBT. For greater detail please refer to the DFAIT guide for municipalities.

C. GATS

The GATS Article 1.3 specifically excludes "services supplied in the exercise of governmental authority" from the obligations of the GATS. These services are defined as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." Although many services sectors would fall under the meaning of this Article and are therefore not subject to the GATS, this does not mean that any service provided by the government is excluded, but rather, a service must meet both criteria of being supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Certain obligations contained in the main text of the GATS apply across-the-board for all Members. These obligations of general application include most-favoured nation (MFN) treatment, transparency, the provision of administrative review and appeal procedures and certain disciplines on the operation of monopolies and exclusive suppliers.

GATS does not prevent governments, whether at the federal, provincial/territorial or municipal level, from regulating. This "right to regulate" is officially recognized in the Preamble to the GATS and makes it clear that nothing in the GATS prevents governments, whether at the federal, provincial/territorial or municipal level, from regulating in the interests of their citizens. Governments are thus free to pursue their regulatory objectives and have a wide array of choices for implementing such objectives.

At the same time, the GATS does provide a framework of rules to ensure that services regulations are administered in a reasonable, objective and impartial manner and do not constitute unnecessary barriers to trade.

General exceptions to the GATS that municipalities qualify for includes measures: a) necessary to protect public morals or to maintain public order; b) necessary to protect human, animal or plant life or health; or c) necessary to secure compliance with laws or regulations which are not inconsistent with the Agreement (e.g. privacy laws, safety). Various actions taken pursuant to essential security interests are also excluded from the GATS. Measures affecting air traffic rights and services directly related to the exercise of such rights, with the exception of aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation systems are also exempt from GATS.

Measures taken by municipalities that are not exempted from the GATS by Article 1.3 may be affected by GATS market access and domestic regulation provisions depending upon whether the federal government has undertaken specific commitments. For market access, Canada's Schedule of Specific Commitments includes a number of horizontal and sectoral limitations.

D. NAFTA CHAPTER 7: AGRICULTURE AND SANITARY AND PHYTOSANITARY MEASURES

Canada's commitments to the NAFTA Chapter 7 are similar to that of the SPS Agreement. In other words, Canada, including its municipalities, is obligated to:

- The right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health and to determine what level of protection is appropriate. Measures must be based on scientific principles and a risk assessment must not be discriminatory and must not constitute unnecessary obstacles to or disguised restrictions on trade.
- To use relevant international standards, guidelines or recommendations where possible, without reducing their level of appropriate protection. Measures that conform to such an international standard will be presumed to be consistent with the agreement.
- In assessing risk, utilize relevant techniques and methodologies developed by international standardization organizations; scientific evidence; production and processing methods; inspection, sampling and testing methods; the prevalence of diseases or pests; and environmental conditions. Economic factors to be taken into account are also listed. Parties also are required to minimize negative trade effects and avoid arbitrary or unjustifiable distinctions in such levels that could result in discrimination or disguised restrictions on trade.

E. NAFTA CHAPTER 9: STANDARDS-RELATED MEASURES

Article 902(1) exempts municipalities from the provisions of Chapter 9, although there is a "best efforts" obligation on the federal government to ensure the observance of those obligations by provincial and municipal governments.

F. NAFTA CHAPTER 11: INVESTMENT

Chapter 11 of the NAFTA deals with Parties' commitments with respect to the treatment within their territories of each other's investors and their investments. Chapter 11 has several exemptions for municipalities which effectively removes a wide range of government measures, including at the municipal level, from the coverage of key NAFTA Chapter 11 obligations:

- As per Article 1108(1) (a) (iii), local governments were not required to list measures pertaining to investment that pre-dated the implementation of the NAFTA on January 1, 1994.
- Under Article 1108(3), Canada, Mexico and the United States each established reservations for measures, including at the local government level, relating to selected sectors, sub-sectors or activities. These reservations are listed, by country, in NAFTA Annex II. Of particular interest to municipalities are the following reservations taken by Canada:

- Canada has reserved the right to adopt measures relating to certain social services[16], that otherwise would be inconsistent with the national treatment requirements of Article 1102 or the senior management and board of directors requirements of Article 1107. It is important to note that the reservation does not require a specified means of delivery (for example publicly funded, not-for-profit or on a commercial basis). What the reservation does require is that the service must be established or maintained for a public purpose.
- Similarly for aboriginal and minority affairs Canada has reserved the right to maintain existing, or to adopt new or more restrictive measures providing preferences to aboriginal peoples that otherwise would not be consistent with the national treatment requirements of Article 1102, the Most-Favoured-Nation (MFN) requirements of Article 1103, the performance requirements of Article 1106, or the senior management and board of directors requirements of Article 1107.
- Additionally, government procurement, subsidies or grants, including government-supported loans, guarantees and insurance are exempted from the national treatment provisions of Article 1102, the MFN provisions of Article 1103 and the senior management and board of director provisions of Article 1107. Government procurement is further exempted from provisions relating to performance requirements in Article 1106.

It should be noted, however, that even where these reservations and exceptions apply, Chapter 11 provisions on minimum standard of treatment in Article 1105 and expropriation in Article 1110 are applicable to all levels of government.

Minimum standard of treatment is addressed in Article 1105 which requires each Party to provide to the investments of investors of another Party with fair and equitable treatment and due process within the meaning of customary international law. Municipalities are obligated to meet Article 1105.

Other Articles of Chapter 11 which may apply to municipalities, in addition to the dispute settlement mechanism, include:

- Article 1106 - Where an exception or reservation does not apply, Article 1106 prohibits any Party from imposing certain requirements with respect to the establishment, acquisition, expansion, management, conduct or operation of an investment by an investor of a Party or non-Party in its territory. The prohibited performance requirements include, among other things, export or local content quotas, and technology transfer requirements. It should be noted, however, that Article 1106(4) makes clear that Parties are not prevented from conditioning the receipt of an advantage on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand facilities or carry out research and development in its territory. In addition, Article 1106(6) indicates that Parties are not prevented from adopting or maintaining certain measures,

[16] Public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care.

including for environmental purposes, provided they are not applied in an arbitrary or unjustified manner or do not constitute a disguised restriction on trade or investment. Permitted measures include those necessary to protect human, animal and plant life and health.

- Article 1107 - Unless an exception or reservation applies, Article 1107(1) prohibits a Party from imposing requirements with respect to the nationality of the senior management of an enterprise that is an investment of an investor of another Party. Article 1107(2), however, allows a Party to require that a majority of the board of directors, or any committee thereof, be of a particular nationality or resident in their territory provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.
- Article 1110 - Article 1110 sets out requirements with respect to direct or indirect expropriation. It establishes that "no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment except: a) for a public purpose; b) on a non-discriminatory basis; c) in accordance with due process of law and Article 1105(1); and d) on payment of compensation." Compensation must be equivalent to fair market value plus interest at a commercially reasonable rate.
- Dispute Settlement - Section B of Chapter 11 sets out procedures for the settlement of disputes between a Party to the NAFTA and an investor of another Party within its territory. These procedures provide access to arbitration for alleged breaches of the provisions of Section A of Chapter 11 by a Party that have resulted in loss of or damage to an investment. The arbitration is conducted in accordance with either the International Centre for Settlement of Investment Disputes Rules (ICSID), the ICSID Additional Facility Rules or the United Nations Commission on International Trade Law Rules (UNCITRAL). It is important to note that, contrary to some state-to-state dispute settlement mechanisms, a Chapter 11 investor-state Tribunal may only award monetary damages, costs and interest directly related to a breach of an obligation. A Tribunal cannot order a Party to modify or remove its existing legislation and it cannot award punitive damages. The federal government represents Canada in a Chapter 11 case, but local governments would be consulted closely on any claim relevant to their activities. Hence, municipalities have no *standing* at a dispute where their regulations or measures are being challenged.

G. NAFTA CHAPTER 12: SERVICES

Chapter 12 establishes rules and obligations aimed at facilitating trade in services amongst the NAFTA Parties. Chapter 12 does not apply to the provision of a service in the territory of a Party by an investment, which is covered in Chapter 11, or to services that are specifically excluded from Chapter 12, including financial services and air services. In addition, the kinds of obligations applicable to municipal activities may be further limited by several exceptions to Chapter 12, as well as by reservations that Canada has taken against key provisions contained in the chapter.

There are no provisions in Chapter 12 that undermine the right of governments to regulate. Article 1201(3)(b), Scope and Coverage, states that:

> "Nothing in Chapter 12 shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter".

In addition, the NAFTA Preamble explicitly recognizes the Parties' intent to "preserve their flexibility to safeguard the public welfare."

As with Chapter 11, NAFTA Chapter 12 has several exemptions for municipalities which effectively remove a wide range of government measures, including at the municipal level, from the coverage of key NAFTA Chapter 12 obligations:

- Article 1206(1) states that local governments were not required to list measures pertaining to services that pre-dated the implementation of the NAFTA on January 1, 1994.
- Article 1201(2)(c) and (d) clearly exempts government procurement and subsidies or grants to services or service suppliers as well as subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance from the scope of Chapter 12
- Article 1206 (Reservations) - Chapter 12 is a "top-down" (negative list) application of key disciplines for cross-border trade in services, which means that the chapter applies to all services except where a sector has been excluded or Parties have taken reservations. In this regard, Article 1206 outlines the manner by which NAFTA Parties could take reservations, which are specified in NAFTA Annex I and Annex II. Canada has made reservations for aboriginal and minority affairs as well as social services, similar to its reservations in Chapter 11.
- For aboriginal and minority affairs Canada has reserved the right to maintain existing or adopt new measures that would not otherwise be consistent with the national treatment requirements of Article 1202, the MFN requirements of Article 1203 or the local presence provisions of Article 1204.
- Similarly, regarding certain social services[17] Canada has reserved the right to adopt measures that otherwise would not be consistent with the national treatment requirements or Article 1202, the MFN requirements of Article 1203 or the local presence provisions of Article 1204. It is important to note that the reservation does not require a specified means of delivery (for example publicly funded, not-for-profit or on a commercial basis). What the reservation does require is that the service must be established or maintained for a public purpose.

[17] Public law enforcement and correctional services, and the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care.

The NAFTA, however, does require governments at all levels to act in accordance with certain principles, such as non-discrimination, when implementing regulatory measures affecting cross-border trade in services.

- Article 1202 (National Treatment) - Article 1202 is the national treatment provision in Chapter 12. Unless exceptions apply, it requires each Party to accord to service providers of another Party treatment no less favourable that it accords, in like circumstances, to its own service providers.
- Article 1203 (Most-Favoured-National Treatment) - Article 1203 is the most-favoured-nation (MFN) treatment provision. Unless exceptions apply, it requires a Party to accord to service providers of another Party treatment no less favourable than it accords, in like circumstances, to service providers of any other Party or of a non-Party.
- Article 1205 (Local Presence) - Subject to exceptions that might apply, Article 1205 states that a NAFTA Party may not require service providers a cross-border service, except as required for legitimate regulatory reasons, such as consumer protection.

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ANALYSIS OF SASKATCHEWAN CITIES' BARRIERS TO OUT-OF-PROVINCE BUSINESSES

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ANALYSIS OF SASKATCHEWAN CITIES' BARRIERS TO OUT-OF-PROVINCE BUSINESSES

Introduction

In order to round out Part I of the study 'A Space for Cities in Trade Agreements: A Cities' Perspective on the Trade, Investment and Labour Mobility Agreement', participating Saskatchewan cities provided a detailed list of essential functions that have the potential to be particularly affected by internal trade agreements. These functions enable cities to manage themselves as well as to maintain their own individual characteristics. The resulting document 'What Cities Do' is attached as Appendix B to Part I of the study.

Based upon information provided by 'What Cities Do', each civic function was then analysed according to its ability to inhibit trade or investment. In other words, each civic function was assessed on its ability to become a trade or investment barrier, based upon its adherence to the major founding principles of trade agreements. These are non-discrimination, transparency, and fair and equitable treatment[1].

Municipalities treating all businesses in their communities with transparency, non-discrimination and fairness will reduce the general likelihood of violating either internal or international trade agreements (both of which may include labour and investment provisions). So long as local and non-local businesses are treated equally, with no less favourable treatment for either, a city is

[1] The key principles acting as foundations of Trade Agreements are:

Non-Discrimination
- Most-Favoured-Nation treatment (MFN) is one of the core obligations found in trade and investment agreements. It is a broadly used concept through trade in goods, services, investment and intellectual property rights. It essentially means that a country must treat products and services of one foreign country as it treats "like" products and services from any other foreign country. In other words, investors and service providers from a trading partner must be treated no less favourably than investors or service providers from another.
- National Treatment is another core obligation. In the context of the trade in goods, this obligation essentially means that a country must treat imported and locally-produced goods and services equally, provided they are alike. Similarly, a government must treat foreign businesses no less favourably than it treats local businesses.

Fairness
- Transparency provisions exist in most trade agreements, which call upon governments to make information concerning domestic laws, regulations, programs and administrative procedures readily available to domestic and foreign businesses.
- Fair and equitable treatment is also a requirement found in various trade agreements as part of the guarantee to provide a minimum standard of treatment to foreign investors. This principle includes the duty to grant due process to foreign investors, ensuring that the treatment of an investment cannot fall below treatment considered as fair and equitable under generally accepted standards of customary international law.

less likely to violate specific trade related provisions, of either internal or international agreements. Additionally, cities following these basic principles contribute towards creating a favorable business and investment climate that in turn encourages growth and enhances their competitive advantage.

It was found through the analysis of 'What Cities Do' that cities in general do little that would violate these basic provisions of internal trade agreements that relate to the movement of goods into their jurisdictions. Similarly, what cities do is unlikely to affect labour mobility. It was also found that most participating Saskatchewan cities already practice transparency, fairness and equitable treatment as a matter of policy.

A significant portion of what cities do is to manage what businesses do in their community in accordance with their unique set of values and preferences. Much of this civic activity might be considered potentially restricting or inhibiting of investment within the context of a negative-list style, internal trade, investment, labour mobility agreement such as TILMA. Regardless of their potential to affect investment within such a context, these activities achieve important legitimate civic goals. The implications of these specific examples on cities will be discussed at the conclusion of PART II of this report.

In addition to the document 'What Cities Do', a survey was commissioned amongst out-of-province businesses that recently have begun operations, attempted to undertake operations or have bid on contracts in any of the participating Saskatchewan cities. The survey was conducted in order to confirm whether the functions undertaken by cities as provided in 'What Cities Do' were the only ones that potentially inhibit trade, labour mobility and investment and whether there are other practices undertaken by cities that would treat local and out-of-province businesses differently, thus contravening provisions of internal trade agreements.

The survey was conducted over the telephone with 31 randomly selected companies drawn from lists provided by the participating cities which are: Saskatoon, Prince Albert, Lloydminster, Moose Jaw, Estevan, North Battleford, Yorkton, Swift Current, Humboldt, Melfort, Melville and Weyburn. The survey is not an exhaustive sample.

FINDINGS OF THE SURVEY

The 'Survey of Out-of-Province Businesses to Identify Potential Investment/Business Activity Distorting Practices in Saskatchewan Cities' (Tab IIA) was designed to determine whether cities' practices comply with the principles of trade (including labour mobility and investment) agreements. These principles are transparency, non-discrimination, and fairness and equitable treatment. The survey was intended to firstly determine whether there were civic practices not included in the document 'What Cities Do', and secondly to provide a sampling of the experiences of businesses regarding civic practices in the participating Saskatchewan cities to determine whether out-of-province businesses were treated differently than local ones. The survey confirmed the findings in the study in that, for the most part, the participating Saskatchewan cities did little that would violate the basic provisions of internal trade agreements.

Of all the successful[2] out-of-province businesses undertaking new activity in Saskatchewan cities, 24% indicated that there were civic incentives or disincentives to establishing in Saskatchewan cities. A nearly equal percentage (25%) of out-of-province businesses that were unsuccessful[3] in undertaking new activity in Saskatchewan cities indicated knowledge of civic incentives or disincentives. It is worthy to note that essentially, in total, out of all surveyed out-of-province businesses with any interest at all, whether successful or unsuccessful, in doing business with any of these Saskatchewan cities, roughly only 25% were aware of any civic incentive programs at all.

Tax benefits, particularly property tax relief were the most common incentive. Such benefits when provided equally to *anyone* establishing operations, whether local or out-of-province, are in compliance with the principle of non-discrimination of trade agreements.

There was one participating city that offered a two-part program of property tax relief for developers of new housing. The first part offered a certain reduction in property tax to build new residential housing with the second part offering an additional reduction if the developer purchased the majority of supplies from local businesses. This second part would violate the principle of non-discrimination as it provided an incentive benefiting local suppliers over non-local suppliers. The participating city has amended this policy by removing the second part of the incentive program.

The cited disincentives to establishing in Saskatchewan cities were not of a civic nature but under areas of provincial jurisdiction that are beyond the scope of this discussion.

The great majority of out-of-province businesses surveyed (86% of the successful and 92% of the unsuccessful) believed they were treated no differently than local businesses by the city of interest. These responses indicate that the participating cities have generally been non-discriminatory in their treatment of both local and out-of-province businesses. The small number of businesses (14% of the successful and 8% of the unsuccessful) that believed they were treated differently than a local business in the civic process were unable to suggest any specific action or policy that resulted in this belief. This small percentage of businesses and the lack of specific details suggest that in general, it appears that cities do not overtly discriminate between local and out-of-province businesses. However, there may be subtle variations in the degree of compliance or interpretation of compliance between cities. Businesses cited what 'looks like the old boys network', or 'get the feeling that outsiders are not as warmly welcomed'. More specific details would be required in these situations before it could be assessed whether principles of trade agreements have been violated.

In terms of transparency, the majority of businesses that were both successful (81%) and unsuccessful (66%) in undertaking activity in participating Saskatchewan cities reported that

[2] For this discussion 'successful' is defined as an out-of-province business that was successful in setting up or expanding into new business, or in being awarded a tender contract in one of the participating Saskatchewan cities.
[3] Similarly, 'unsuccessful' is defined as an out-of-province business that attempted to but was not successful in being awarded the tender contract or did not expand or set up new operations in one of the participating Saskatchewan cities.

information about civic regulations, licenses and zoning was readily available. Comments indicate that despite information being occasionally cumbersome to access (by not being fully available online) or disorganized, the information was nonetheless available. It would seem that the Saskatchewan cities were not necessarily withholding information but were not actively assisting companies to access information or providing resources to assist in conducting business in those cities. Essentially, criticisms of the transparency practiced by Saskatchewan cities (by 19% of successful and 17%[4] of unsuccessful businesses) focused on information only being passively available as compared to a proactive, helpful approach on the part of cities to assist out-of-province businesses. Trade agreements are not the vehicle to address the difference between passive availability and proactive assistance. From a trade agreement perspective, the survey indicates that the majority of participating Saskatchewan cities are transparent.

Overall, the comments received from out-of-province businesses that have undertaken or attempted to undertake new business opportunities in the participating Saskatchewan cities are mostly positive in nature, expressing a general satisfaction.

Of the thirty-one completed interviews, four negative comments regarding civic policies were given:

- One that relates to perceptions ('Saskatchewan cities seem different to us. It seems they always need a lot and give little in return') to which the principles of trade agreements have little to offer in terms of a remedy.

- Two comments indicate a possible preference for local companies, which could be considered discriminatory. Further information is required.
    - 'They (the city) seem to be responding to pressure from local companies who might have old product they may be trying to divest…'
    - 'There is an 'old boys' network' in that city and they clearly look like they're treated more favorably than non-local companies in some cases that we know about.'

- Another comment indicates a suspicion on the part of the business that the city invites their tenders only as a means of obtaining new information and pricing. The company has submitted tenders similar to their competitors, but has never won the contract. This comment indicates that there may be a potential issue of business in good faith within that particular city that may or may not be relevant for the principles of trade agreements. Further information would be needed.

The survey indicates that the majority of participating Saskatchewan cities appear to be acting in compliance with the principles of trade agreements. Most were perceived by out-of-province businesses as treating local and out-of-province businesses equally, fulfilling the concept of non-discrimination. The one exception did not directly discriminate between local and out-of-province businesses, but provided an indirect benefit to local suppliers. That city has now amended its policy to ensure that it is fully non-discriminatory. Other concerns require further

[4] An additional 17% of unsuccessful businesses were unsure whether information regarding civic regulations, licenses and zoning was readily available to them.

information in order to determine whether they are trade-related issues. The survey also indicates that most out-of-province businesses believe that the participating Saskatchewan cities act in a transparent manner such that necessary information is available.

RECOMMENDATIONS

Based upon the findings in the study 'A Space for Cities in Trade Agreements: A Cities' Perspective on the Trade, Investment and Labour Mobility Agreement' (Part I) which were confirmed in the 'Analysis of Saskatchewan Cities' Barriers to Out-of-Province Businesses' (Part II), the specific examples of potentially investment distorting activities that may be undertaken by cities which have been identified are:

- Economic development subsidies practiced by virtually all levels of government, including cities, to attract new or expansion of industrial or manufacturing businesses to or within the jurisdiction.
- Incentives to accomplish specific socio-economic goals could be considered as inhibiting investment, depending on the instrument and its use.
- Cities may charge differential business licensing fees based upon residency in the jurisdiction.
- Cities also tend to use licensing fees as an enforcement tool.
- Certain situations where cities compete with the private sector, such as in the case of Saskatoon's Land Bank.
- Although the participating Saskatchewan cities do not have local preference policies, such policies are not currently prohibited.
- Cities currently set size and weight restrictions for all interprovincial trucks passing through the City.

A number of these civic activities accomplish specific goals for cities that may not be possible to achieve otherwise, thus their usefulness and effectiveness can outweigh any adverse investment effects. Many trade agreements recognize this reality by allowing some trade and investment-adverse activities, usually with accompanying conditions of use. As most trade agreements utilize a positive list approach, investment provisions contained within permit the flexibility to accommodate such legitimate goals. *Sui generis* investment agreements also incorporate flexibility in order to allow signatory parties the ability to achieve desirable socio-economic goals.

However, there are several activities listed above that violate the fundamentals of trade agreements and cities should consider discontinuing or prohibiting them.
These include:

- Economic development subsidies to attract new or expansion of industrial or manufacturing businesses to or within the jurisdiction are highly discriminatory, distortionary and contentious.
- Consider not charging differential business licensing fees based upon residency in the jurisdiction as such a practice is discriminatory.
- Although the participating Saskatchewan cities do not have local preference policies, cities should consider officially prohibiting such policies to ensure a non-discriminatory business environment.

- Cities could consider relinquishing to the Province the control of size and weight restrictions for all interprovincial trucks passing through the city on designated urban connector routes. Cities could make this conditional upon the province being responsible for any increased maintenance or replacement costs for urban connectors caused by increased weights, and subject to urban connectors being able to physically handle increased dimensions and weights.

Given that the participating Saskatchewan cities have few policies that would contravene a trade agreement, the need to include them within an internal trade agreement seems less valid. This is particularly so if cities can ensure compliance with the principles of trade agreements through non-trade related legislative avenues as will be discussed in Part III of this paper. If cities can meet such obligations without being party to trade agreements, they can also avoid the loss of their ability to 'be themselves'. They will be compliant with the principles of trade agreements yet still be able to manage themselves according to their particular values and preferences, and can maintain their individual traits that give them their unique competitive advantages.

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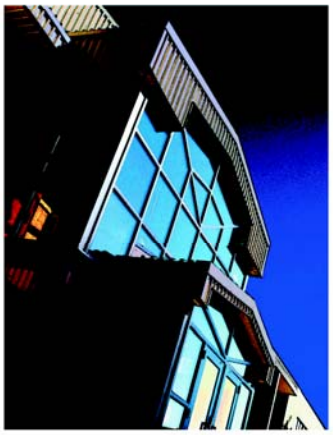

Situation Summary

Survey of Out-of-Province Businesses to Identify Potential Investment/Business Activity Distorting Practices in Saskatchewan Cities

November 2007


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FAST CONSULTING

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1 EXECUTIVE SUMMARY

Fast Consulting recently conducted high level interviews with a sample of 31 companies from across Canada. The objective of these interviews is to evaluate and quantify whether companies think there are any discriminatory practices or barriers to their successfully doing business in 12 Saskatchewan cities that they think local companies might not necessarily encounter.

- All of the companies that participated in the survey indicated that they have conducted business, or considered conducting business in at least one of the Saskatchewan cities listed by the interviewer at some time in the previous three years.

- Almost one half (48%) of the companies we spoke with, indicated that their most recent effort to conduct business with one of these Saskatchewan cities was in response to a city tender call. Approximately one third (36%) suggested their most recent effort was in regard to expanding operations in that city and 16% said it was to set up new operations in that city.

- About one quarter (24%) of those companies that were successful in setting up or expanding new business or in being awarded a tender contract in one of the Saskatchewan cities included in the study indicate that there were either incentives or disincentives to achieving or conducting the new business. So approximately 16% of all companies in the survey sample, associate incentives or disincentives to conducting business with Saskatchewan cities. The most mentioned incentive is tax benefits; typically property tax relief. The most mentioned disincentive is not civic related, but 'regulations associated with working with the provincial government or working in Saskatchewan'.

- Approximately 14% of those companies that were successful in setting up or expanding new business or in being awarded a tender contract in a Saskatchewan city, believe that their was something in the civic process that resulted in their company being treated differently than local businesses (approximately 10% of all companies in the survey sample).

- The large majority (81%) of those companies that were successful in setting up or expanding new business or in being awarded a tender contract in a Saskatchewan cities, appear confident that information regarding civic regulations, licensing, or zoning is readily available to them. However, 19% of these companies do not believe this to be the case (13% of all companies in the random sample).

- A relatively small proportion (25%) of those companies who were NOT successful in being awarded a tender contract, or did not expand their operations or set up new operations in a Saskatchewan city (32% of all companies in sample) suggest that there are incentives or disincentives to conducting business in the cities (8% of all the companies in the overall sample). Most of things mentioned by respondents, however, are issues at the provincial level, not the civic level within the city they are dealing with or exploring.

- Although businesses who were NOT successful in their most recent effort to get work in Saskatchewan cities did not suggest anything specific in the civic process that made them feel that their company was treated differently than a local business, some do feel that is the case (8% of businesses that were not successful, or 3% of all companies in the sample).

- The majority (66%) of companies that were unsuccessful in their most recent effort to conduct business in a Saskatchewan city believe that the various types of information they require on civic regulations, licensing or zoning is readily available. However, about 17% of these companies, or 5% of all companies in the overall sample, suggest that information they need to be successful with their bids, or expand their current operations is not readily available to them. This does not necessarily come out as the city withholding information from them, but more likely as cities in Saskatchewan not taking steps to help all businesses be successful in their bids or their efforts to conduct business here, or not making it easier for companies to access the types of information and resources they need in order to be successful with their efforts to conduct business here.

2 METHODOLOGY

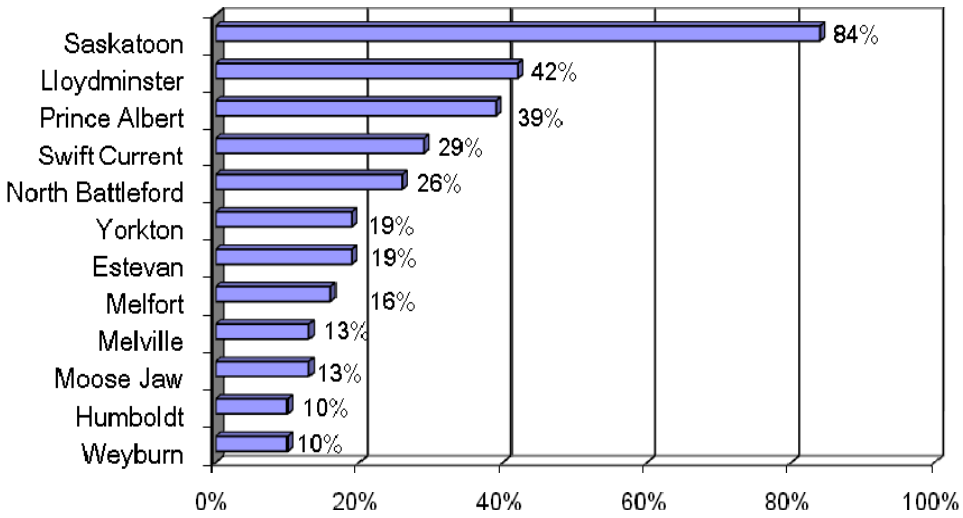
Fast Consulting conducted telephone interviews with a sample of 31 companies from across Canada that have conducted business, or considered conducting business in one or more of the following Saskatchewan cities; Saskatoon, Prince Albert, Lloydminster, Moose Jaw, Estevan, North Battleford, Yorkton, Swift Current, Humboldt, Melfort, Melville and/or Weyburn. Participants for the survey were randomly selected from a list of 150 contacts generated randomly from lists provided by these cites. These contacts are all businesses who either bid on city contracts, and were either awarded the business or were unsuccessful, or businesses who conducted or attempted to conduct other business in these cities by setting up a new business or expanding existing operations.

The objective of the survey interviews is to evaluate and quantify whether companies from outside of these cities think there are any discriminatory practices or barriers to their successfully doing business in these Saskatchewan cities that they think local companies might not necessarily encounter.

Interviews were conducted between October 30th November 7th, 2007 with companies located in Baie d'Urfe, Bon Accord, Calgary, Cambridge, Cochrane, Cold Lake, Didsbury, Don Mills, Edmonton, Ottawa, Richmond, Sherwood Park, Spruce Grove, Stony Plain, Toronto, Vancouver, and Winnipeg. A broad cross-section of companies participated in the survey, including chemical, concrete, construction, electrical, engineering, manufacturers, pharmaceutical, real estate, research, sewer, and sign companies.

3 RESULTS

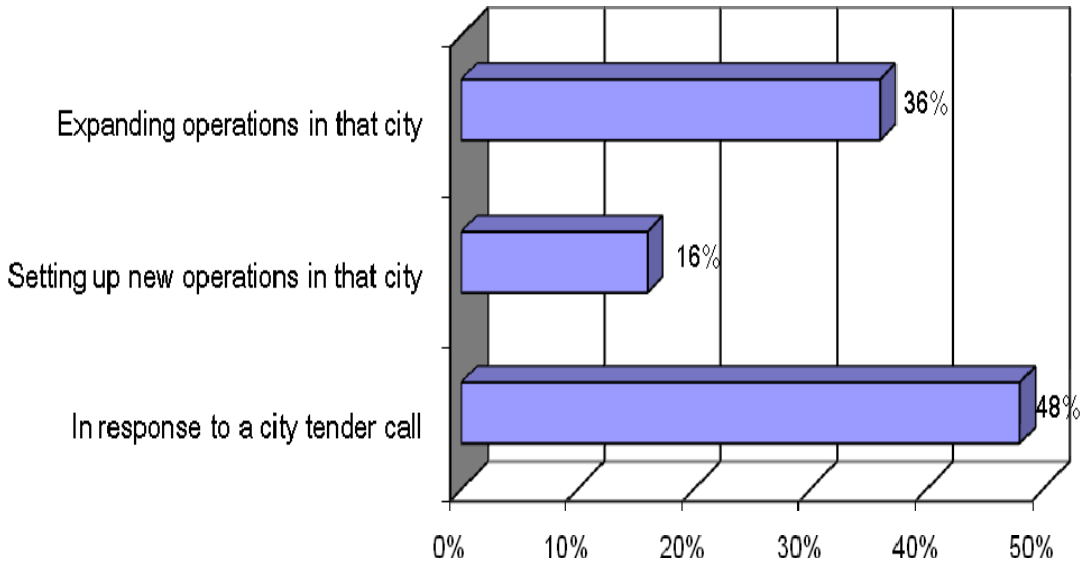
Question In the past three years, has your company conducted business, or considered conducting business, with or in any one of these Saskatchewan's cities (cities listed by the interviewer included Saskatoon, Prince Albert, Lloydminster, Moose Jaw, Estevan, North Battleford, Yorkton, Swift Current, Humboldt, Melfort, Melville and/or Weyburn) ?



- All of the companies that participated in the survey indicated that they have conducted business, or considered conducting business in at least one of the Saskatchewan cities listed by the interviewer at some time in the previous three years.

- The majority (84%) conducted business in Saskatoon, half (42%) in Lloydminster and 39% in Prince Albert. (Regina did not participate in this study.)

Question Thinking about your most recent effort, was this business in response to a city tender call, or was it in regard to setting up new or expanded operations in that city?



- Almost one half (48%) of the companies we spoke with, indicated that their most recent effort to conduct business with one of these Saskatchewan cities was in response to a city tender call. Approximately one third (36%) suggested their most recent effort was in regard to expanding operations in that city and 16% said it was to set up new operations in that city.

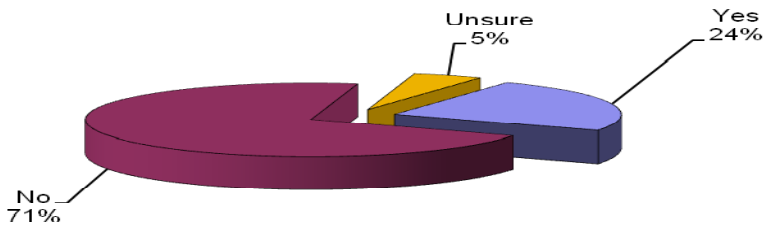
Comments

- *"We are very specialized at what we do and there are never any barriers to doing business in Saskatchewan. But we had to do all the research in that regard. It's something we've always done and although it could be made much easier and much more convenient by helping us with the research we've never experienced any obvious barriers."*

SUCCESSFUL SETTING UP NEW OR EXPANDED BUSINESS

Still discussing their most recent effort, the majority of companies in our random sample of businesses - 68% - indicate that they were successful in being awarded the tender contract, expanding their operations or setting up the new operations in one of the Saskatchewan cities listed in this study.

Question Were there any civic incentives or disincentives to conducting business in (with) the city?



- About one quarter (24%) of those companies that were successful in setting up or expanding new business or in being awarded a tender contract in one of the Saskatchewan cities included in the study indicate that there were either incentives or disincentives to achieving or conducting the new business. So approximately 16% of all companies in the survey sample, associate incentives or disincentives to conducting business with the cities in the study (24% of the 68% of companies that were successful = 16% of all companies in sample).

- The most mentioned incentive is tax benefits; typically property tax relief.

- The most mentioned disincentive is 'regulations associated with working with the provincial government or working in Saskatchewan'. This, despite instructions from the interviewer earlier in the survey interview that we are looking for issues that relate to the cities we listed, and not to provincial or federal policies, regulations or taxes. These provincial disincentives can involve a variety of different things from the viewpoint of respondents, from WCB regulations that vary from province-to-province, to provincial sales tax levies on capital equipment.

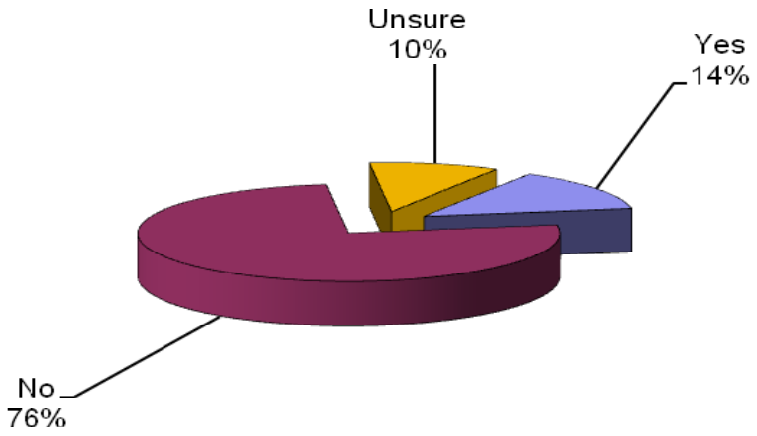
Comments regarding disincentives

- *"The provincial government is a disincentive and we are hoping for better in the future."*
- *"We have to work through a Crown corporation and sometimes there are delays that result in expensive fines for our company when we are unable to get street lights and traffic signals back up In time."*

Comments regarding incentives

- *"Yes, the city has a tax incentive program for companies who use local supply companies from the city and that has worked well for us as an incentive to do business there."*
- *"We received a property tax reduction for one year."*
- *"Yes, we received a property tax discount."*

Question Was there anything in the civic process that made you feel your company was treated differently than a local business from that city?



- Approximately 14% of those companies that were successful in setting up or expanding new business or in being awarded a tender contract in one of the Saskatchewan cities in the survey, believe that their was something in the

civic process that resulted in their company being treated differently than local businesses from that city. So approximately 10% of all companies in the survey sample believe there was something in the civic process that made them think their company was treated differently than a local business from the city they were conducting or trying to conduct business in (68% X 14% = 10%).

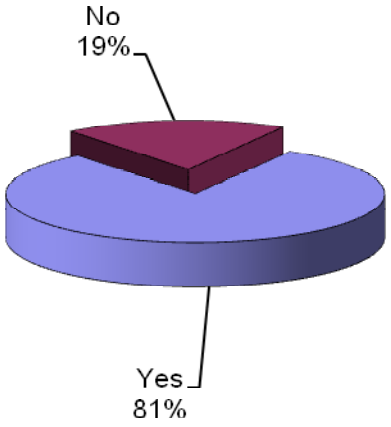
Positive comments

- *"Anyone doing this business would have the same regulations to deal with"*

Negative comments

- *"There is an 'old boys' network in that city and they clearly look like they're treated more favourably than non-local companies in some cases that we know about."*

Question Did you feel that the information on civic regulations, licensing, or zoning was readily available to you?



- The large majority (81%) of those companies that were successful in setting up or expanding new business or in being awarded a tender contract in one of the Saskatchewan cities in the survey, appear confident that information regarding civic regulations, licensing, or zoning is readily available to them. However, 19% of these companies do not believe this to be the case – this translates into approximately 13% of all companies in the random sample (68% X 19% = 13%).

Comments

- *"Yes - We are a distributer of our products and we ship a lot into Saskatchewan cities, but don't really have to deal with those aspects of trade, so we have no difficulties there."*

- *"No - We had to do our own research. When we asked questions we didn't readily get answers. No one seemed to know what or how to get certain information and that made the processes cumbersome and slow."*

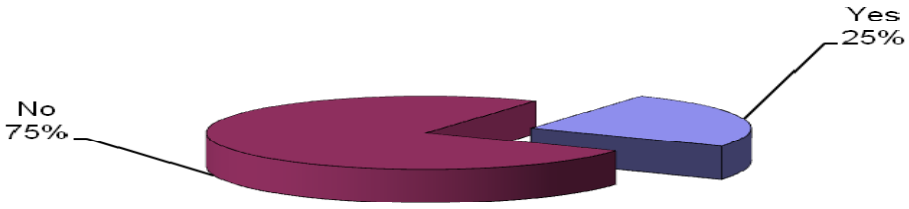
- *"No –We don't find that information is readily available to us. We did get some information online but most of it had to be conducted with inquiries over the telephone as opposed to researching and being able to prepare and complete things online."*

NOT SUCCESSFUL SETTING UP NEW OR EXPANDED BUSINESS

Approximately one third (32%) of the companies in our random sample of businesses were NOT successful in being awarded the tender contract, or did not expand their operations or set up new operations in one of the Saskatchewan cities listed in this study. These companies were asked to comment on;

- **whether they think their company was treated differently than a local business from that city,**
- **if there was anything in their dealings with the city that may have influenced their decision**
- **whether information on civic regulations, licensing, or zoning was readily available to them, or**
- **if any changes in the operating environment would have changed their decision.**

Question Were there any civic incentives or disincentives to conducting business in (with) the city?



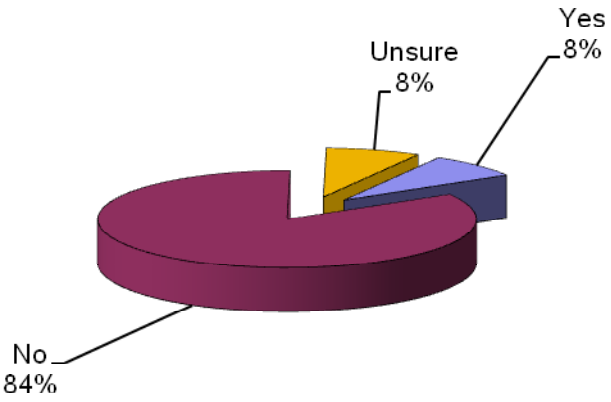
- A relatively small proportion (25%) of those companies who were NOT successful in being awarded a tender contract, or did not expand their operations or set up new operations in one of the Saskatchewan cities listed in this study (32% of all companies in sample) suggest that there are incentives or disincentives to conducting business in the cities. This translates into 8% of all the companies in the overall sample (32% X 25% = 8%).

Most of things mentioned by respondents, however, are issues at the provincial level, not the civic level within the city they are dealing with or exploring.

Comments

- *"Not civic – but Saskatchewan Highways has provision in the tendered contract that any business from a province that does not have a PST must pay 1.6% of their equipment value in order to ratify the contract."*
- *"The provincial government is not proactive in getting business in Saskatchewan. If that were to change we would have a different look at Saskatchewan."*
- *"No it was not civic, but rather the disincentive of having a small subsidiary that didn't work out on a provincial level."*

Question Was there anything in the civic process that made you feel your company was treated differently than a local business from that city?

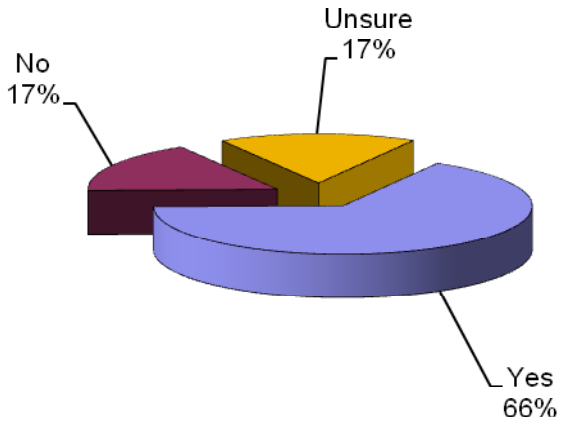


- Although businesses who were NOT successful in their most recent effort to get work in the Saskatchewan cities listed in the study did not suggest anything specific in the civic process that made them feel that their company was treated differently than a local business from that city, some did feel that way (8% of businesses that were not successful, or 3% of all companies in the sample).

Comments

- *"There have been many times when we've tendered in the city I'm referring to, but despite there being no difference in the tenders we never seem to get the contract. We've even brought our equipment there for demonstrations when no one else would do this and we were still unsuccessful. So we suspect they are just using us to get new information and prices and we're probably not going to tender to that city anymore."*

Question Did you feel that the information on civic regulations, licensing, or zoning was readily available to you?



- The majority (66%) of companies that were unsuccessful in their most recent effort to conduct business in a Saskatchewan city believe that the various types of information they require on civic regulations, licensing or zoning is readily available.

- However, about 17% of these companies, or 5% of all the companies in the overall sample, do suggest that information they need to be successful with their bids, or expand their current operations is not readily available to them. This does not necessarily come out as the city withholding information from them, but more likely as cities in Saskatchewan not taking steps to help all businesses be successful in their bids or their efforts to conduct business here, or not making it easier for companies to access the types of information and resources they need in order to be successful with their efforts to conduct business here.

4 OTHER COMMENTS FROM COMPANIES

- *"There is a lot of opportunity here in Saskatchewan and we wouldn't think of going out of province or any where else."*
- *"No, it's pretty much business as usual. We've had to deal with Saskatchewan cities, and there are no problems in doing so."*
- *"I have been in business in Calgary for 25 years and it's expensive and the traffic is terrible at times. I could maintain my operations very well in Calgary but the quality of life that I want for me and my company has led me to a Saskatchewan city where I'm setting up my new operations."*
- *"The city was excellent to deal with; they were helpful, responsive and professional."*
- *"It's been great working with cities in Saskatchewan. I've met with good people and was treated the same everywhere I went."*
- *"If there were additional or new regulations, that might be a problem."*
- *"There is no online resource for licensing through SGI so you must sit on the telephone. This is a change I would recommend."*
- *"I find doing work in Saskatchewan cities to be like anywhere else. In Saskatchewan there is a greater reliance on external, non-public funding whereas in Alberta capital cost funding is more readily available."*

- *"It's been very smooth and very simple for our transition into the Saskatchewan city we went to North Battleford."*

- *"We seem to be doing better in Saskatchewan cities than we did last year and that is always good news."*

- *"We enjoy doing business with cities in Saskatchewan and look forward to doing more."*

- *"We deal with Saskatchewan cities on specs' and sometimes they appear to go back on agreements based on these specs'. They seem to be responding to pressure from local companies who might have old spec product they may be trying to divest of while we will go to new spec product no matter what."*

- *"We enjoy the opportunity to be a part of the business community in the Saskatchewan city we're in. We love the people and the working environment."*

- *"We appreciate the support in Saskatchewan and we will continue to look to Saskatchewan cities and the west for good business. We currently distribute our product to a chain of retail outlets through a company there."*

- *"No concerns. From our company's perspective it looks like Saskatchewan cities are starting to be proactive in looking to business and that is good news."*

- *"Saskatchewan cities seem different to us. It seems they always need a lot and give little in return."*

- *"There is no reason to go 600 kilometers to drum up work and have to deal with Saskatchewan Highways and the way they have written into tendered contracts that any business from a province that doesn't pay PST must pay PST on our equipment to them as part of the tender is discriminating against Alberta as we are the only province without a PST."*

- *“We are hoping for a change in government at the provincial level and if that happens we will market more aggressively to cities in Saskatchewan.”*

- *“Our scaling back in the city in Saskatchewan where we had operations was not policy related but a technical contract that didn't work out.”*
- *“I’m going to be in one of the cities next week to see people about investing more there.”*

5 QUESTIONNAIRE

Hi, my name is _____ from Fast Consulting, a Saskatchewan based market research firm. We're conducting a brief survey regarding the investment and business environment in some Saskatchewan cities. These cities are Saskatoon, Prince Albert, Lloydminster, Moose Jaw, Estevan, North Battleford, Yorkton, Swift Current, Humboldt, Melfort, Melville, and Weyburn.

The survey should only take 10 minutes and all information provided is for statistical use only and is reported anonymously in an aggregated manner. The information will be used by Saskatchewan cities to potentially reduce any real or perceived barriers to investment.

It is important to note that we are looking for issues that relate to the cities and not to any provincial or federal policies, regulations, or taxes.

(If asked how their name was made available . . . Each City provided a list of contacts and your company was chosen at random from this list.)

1. In the past three years, has your company conducted business or considered conducting business with or in any one of these Saskatchewan's cities? **(REPEAT LIST OF CITIES IF REQUIRED)**

    1) yes → Continue
    2) no → End interview
    3) unsure **(PLEASE EXPLAIN)**

2. Thinking about your most recent effort, was this business in response to a city tender call, or was it in regard to setting up new or expanded operations in that city?

    1) in response to a city tender call
    2) setting up new operations in that city
    3) expanding operations in that city

3. Still thinking about this most recent effort, were you successful in setting up the new/expanded business or in being awarded the tender contract?

    1) yes → **(PLEASE EXPLAIN)**
    2) no → Skip to Q4
    3) unsure **(PLEASE EXPLAIN)**

    a) Were there any civic incentives or disincentives to conducting business in (with) the city?

        1) yes → Can you describe what those were?
        2) no
        3) unsure **(PLEASE EXPLAIN)**

    b) Was there anything in the civic process that made you feel your company was treated differently than a local business from that city?

        1) yes → Can you describe what that was?
        2) no
        3) unsure **(PLEASE EXPLAIN)**

    c) Did you feel that the information on civic regulations, licensing, or zoning was readily available to you?

        1) yes
        2) no → Why do you say that?
        3) unsure **(PLEASE EXPLAIN)**

    d) Do you have any other comments or anything you would like to share regarding your experience conducting business, or trying to conduct business, in any of these Saskatchewan cities?

<SKIP TO END>

4. **IF NO FROM Q3**:

    a) Were there any civic incentives or disincentives to conducting business in (with) the city?

        1) yes → Can you describe what those were?
        2) no
        3) unsure **(PLEASE EXPLAIN)**

    b) Was there anything in the civic process that made you feel your company was treated differently than a local business from that city?

1) yes → Can you describe what that was?
2) no
3) unsure **(PLEASE EXPLAIN)**

c) Was there anything in your dealings with the city that may have influenced your decision?

i) civic licensing/permits
ii) civic residency requirements
iii) civic regulations
iv) additional costs
v) other

d) Did you feel that the information on civic regulations, licensing, or zoning was readily available to you?

1) yes
2) no → Why do you say that?
3) unsure **(PLEASE EXPLAIN)**

e) What changes in the operating environment, if any, would have changed your decision?

f) Any other comments?

Thank respondent and end interview

LEGISLATIVE AVENUES TO ENSURE COMPLIANCE WITH THE PRINCIPLES OF TRADE AGREEMENTS

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LEGISLATIVE AVENUES TO ENSURE COMPLIANCE WITH THE PRINCIPLES OF TRADE AGREEMENTS

I. INTRODUCTION

Saskatchewan cities are governed by *The Cities Act*, a statute enacted by the province in 2002 on the request of and after extensive consultations with cities. The 2002 Act is strikingly different from municipal legislation from the first 100 years of Saskatchewan's history. The old approach was to keep local governments on a short legislative leash; they could only do those specific things that the governing statute allowed, and only strictly in accordance with the statutory conditions and limitations set out in relation to the authority granted to them. Rapid changes in society and technology would thus often leave municipalities behind as they struggled to meet the needs and demands of their populations, wielding legislative authority designed for past events rather than future ones.

The new approach is marked by three key features: 1) cities are given "natural person powers", meaning that, subject to the limitations contained in the legislation, they can do whatever a flesh and blood person can do, thus overcoming the strictures of outdated, specific authorities; 2) the jurisdiction of cities to enact bylaws is described in broad, general terms rather than narrow and specific terms, with the intention of providing cities with a broader power to act; and 3) the ability of cities to exercise authority and jurisdiction is constrained only by the legislative purposes for which cities are established and continued. Thus, cities are provided with the legal room to move they require to respond to the needs and demands of the people who live in them, subject to the supervisory authority of the province only in relation to those matters where the public interest is best served by the retention of an element of provincial control or intervention.

These limitations are incorporated into the legislation in two ways, either as specific limitations in *The Cities Act* on a city's otherwise general power to act or as a general provincial law overriding the authority the city might otherwise have.[1] This report focuses on what would need to be changed in *The Cities Act* to ensure that the actions of cities do not interfere with the province's ability to meet its obligations under trade agreements.

[1] Section 11 of *The Cities Act* states:

> If there is a conflict between a bylaw or resolution and this or any other Act or regulation, the bylaw or resolution is of no effect to the extent of the conflict.

This would be the legal result of conflict even in the absence of such an explicit statement in *The Cities Act*, since in the constitutional hierarchy of power, a provincial law will "trump" a municipal one.

As is pointed out in Part I of this report, trade agreements are based on three key principles:

> 1) non-discrimination — treating those from outside a jurisdiction in the same way as those inside the jurisdiction are treated;
>
> 2) transparency — providing access to laws, regulations, rules, procedures and programs to those from outside the jurisdiction; and
>
> 3) fair and equitable treatment — providing due process to those from outside the jurisdiction

Thus, in general terms, trade agreements attempt to ensure that their objectives are achieved through the taking on of obligations by the governmental parties to those agreements to use their power as governments to make rules or laws that will comply with these principles. Those obligations are monitored and enforced both internally and externally. In Canadian jurisdictions, all provincial and territorial governments have in place internal review processes. These are established to ensure that the government complies with its domestic constitutional authority to make law, and to ensure that the government complies both with the limitations that are placed on its jurisdictional authority internally through the rule of law, human rights and other limiting legislation, and with the limitations that are placed on it externally through obligations that the jurisdiction has taken on in the extra-provincial context. Externally, compliance with obligations assumed by governments through trade agreements is monitored by other jurisdictions and by their citizens and entities who endeavour to trade with or work or invest in the jurisdiction. Internally, compliance is thus provided through the internal political processes at work in the jurisdiction and externally compliance is provided through the reconciliation and dispute resolution mechanisms in the trade agreement itself.

In the case of cities, who are not themselves parties to the trade agreements but who are nevertheless law-making entities within the jurisdiction of the parties, these principles can be achieved in other ways than making the trade agreements apply to them. There are both general and specific changes to the legislation governing cities that will give effect to these principles, and there are also specific differences in the context of actions taken by cities, as compared to provinces, that result in some provisions of trade agreements being unnecessarily applied to cities.

Trade agreements set out obligations that are contractually binding on the parties to the agreements, but which, in the international arena where they were first developed, are difficult to enforce in practical terms because there are no international courts that can compel compliance. Typically, the dispute resolution mechanisms in international trade agreements provide for an elaborate process that is intended to encourage resolution at the lowest possible level, but which can ultimately result in a trade panel making a binding decision to require compliance and in some circumstances awarding monetary payments as damages or penalties (where the complaining party is a person who is aggrieved by the failure of the jurisdiction to meet its obligations under the agreement) or authorizing retaliatory measures (where the complaining party is another signator to the agreement that is not “personally” aggrieved by the lack of compliance, but whose citizens and entities will be). In Canada, any such decision will be subject to judicial review either explicitly, as provided for by the agreement itself, or implicitly, in that courts always retain supervisory

jurisdiction over other tribunals to ensure that they operate only within their jurisdiction or mandate.

The specific dispute resolution processes contained in trade agreements encourages discussion and mediation as a first step before formal litigation, in order to either find a better way to do things or to recognize that some barriers to trade are erected for legitimate objectives. The compliance report issued by the trade panel where the matter cannot be resolved will contain directions to the parties about what they must do in order to achieve compliance. Thus, the "due process" element of trade agreements lies in their access by persons outside the jurisdiction to a mechanism to effectively monitor and enforce the obligations that the parties have assumed.

In the case of actions taken by cities, however, if a complaint were to be taken to a trade panel and it was determined that what a city had done was in contravention of the trade agreement, the trade panel would likely issue a compliance report that would require the province to change its legislative framework for cities to prohibit cities from taking that same action in the future. The reason for this is that cities are not parties to the agreement and have not themselves agreed to adhere to the obligations contained in the trade agreement. However, because cities are established pursuant to legislative authority exercised by provinces, the province has the legal ability to change the legislation governing cities to limit what they can do.

Thus, it is possible to ensure that what cities do does not thwart the province's objectives in entering into a trade agreement by making specific changes to the legislation governing cities, and by doing so without having a complaint or a trade panel.

II. PRINCIPLES OF TRADE AGREEMENTS

Non-Discrimination

The principle of non-discrimination for persons and entities of another jurisdiction is achieved by ensuring that cities cannot discriminate solely on the grounds of residence.[2]

Cities are already prohibited from acting in a discriminatory manner in some circumstances. Courts have found that it is acceptable for cities to discriminate in the sense of benefitting one group at the expense of another, but only when by doing so they are acting in the public interest. However, the issue of discrimination in the context of trade agreements is about discrimination on the basis that a person or entity does not reside in the city. Since the function of the city government is to provide governance to the city, it is arguable that discrimination against persons or entities who do not reside in the city is in the public interest of those who do. For this reason it is necessary to amend the legislation governing cities to prohibit cities from discriminating solely on the basis of the location of a person or business in order to give effect to the non-discrimination principle that is fundamental to trade agreements.

[2] See potential section 11.1 in the attached Appendix A.

Transparency

Cities act in public through their councils and the results of their actions are publicly accessible. Any person may inspect the bylaws and resolutions of a city at any time during regular business hours and obtain copies of them, as well as of a number of other municipal documents.[3] Many cities have their bylaws, council minutes and documents accessible online. In addition, cities are subject to *The Local Authority Freedom of Information and Protection of Privacy Act*. This legislation gives any person a right of access to all records of the city, subject to the exceptions and limitations contained in that Act.[4]

There are, therefore, no provisions of *The Cities Act* that require amendment to provide transparency to what cities do, as transparency already exists even for persons and entities located outside the province.

Fair and Equitable Treatment

The principle of fair and equitable treatment for persons and entities of another jurisdiction is achieved by ensuring that those persons and entities have access to the courts of the province directly, in order to challenge the things that cities do.[5]

At first blush, it may seem odd to suggest that the most appropriate way of ensuring that out of province individuals and entities are provided with due process in relation to the actions of cities is to provide them with access to courts. It is often said that arbitration – or a trade panel as a form of arbitration – is the speedy and cost-efficient alternative to litigation. In many situations, however, this is not true. There are summary processes available to challenge the capacity of a statutory delegate to make decisions, and this includes cities as "creatures of provincial law". These processes are described as judicial review, and they allow a court to review the jurisdiction of the entity purporting to exercise statutory powers to ensure that what they have done is, in this sense, legal. The actions of cities can therefore be challenged in this way on the grounds of "illegality." These grounds can include a failure to comply with statutory conditions or to act outside of statutory authority, bad faith, personal or private interest, patent unreasonableness and bias. In judicial review terms, these issues all go to the question of jurisdiction.

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[3] *The Cities Act*, S.S. 2002, c.C-11.1, s.91. Note that it is "persons" who are entitled to inspect and obtain copies, not just residents of the city.

[4] See *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c.L-27.1. As a "municipality", cities are included in the definition of "local authority" found in clause 2(f) of the Act, as are all of their boards, commissions and other bodies if prescribed in regulations made by the province. Section 5 of the Act provides access to any person to all records. Exceptions to this general rule are contained in Part III of the Act and generally include records obtained in confidence from other governments, records relating to law enforcement and investigation, drafts of bylaws or resolutions, agendas and other meeting documents relating to meetings that are permitted to be held in camera under the Act, documents relating to advice from officials, proprietary information, documents relating to testing or auditing techniques, documents whose disclosure could prejudice the health or safety of a person or persons, and documents protected by solicitor-client privilege. The Act also prohibits disclosure of personal information.

[5] See potential amendments to section 320 of *The Cities Act* to provide standing to all persons to challenge what they do.

Because, as a creature of statute a city can only exercise the authority given to it by statute, a city that goes beyond the power that was thus delegated to it, or fails to comply with statutory conditions precedent, has no jurisdiction to take the action in question and it can be quashed by the court. A city that has jurisdiction, in this sense, may also lose it, by failing to comply with the rules of natural justice[6], acting in bad faith or in pursuance of a private interest,[7] acting patently unreasonably,[8] or by acting in a discriminatory manner[9].

The process, as mentioned, is a summary one. It is commenced by a notice of motion in Court of Queen's Bench chambers, often supported by an affidavit setting out the chain of events that led to the action of the city that is being challenged. The notice sets out the date on which the matter will be raised in chambers and the grounds on which the application will be argued. Chambers sittings occur regularly throughout Saskatchewan, and twice each week in Regina and Saskatoon. The minimum notice required is three clear days, so that a motion in chambers can be brought as early as a week after the action complained of occurs.[10]

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[6] The "rules of natural justice" are requirements that must be met by statutory delegates when exercising the powers granted to them by statute. They are implied standards, imposed by the courts, and do not have to be explicitly set out in the governing statute. The "rules of natural justice" or the "duty of fairness," as the concept is also referred to, includes such elements as the right of a person to receive notice, to be heard, to be fully informed, and to fully participate in a hearing. The courts have held that the specific content of a duty of fairness comprises a sliding scale ranging from mere notice to a court-like hearing, depending on the circumstances of the situation. See, for example, *Robertson* v. *Edmonton (City)*, [1990] A.J. No. 278, in which a court quashed two city bylaws relating to the rezoning of land to be used for a landfill on the basis that the city failed to give an effective hearing to members of the public affected in a situation in which a hearing was statutorily required.

[7] Actions of a city taken within jurisdiction and in good faith are not subject to judicial review. Courts have found bad faith to exist, for example, where land was rezoned to limit is value to permit its acquisition by the city, where land was expropriated to defeat an action by the owner for trespass, and where land was rezoned to prevent the establishment of a tavern. In other words, bad faith occurs where a city attempts to achieve something that it has no authority to do or to circumvent other processes, such as approval by ratepayers, through "the back door". It has been summarized by the courts as being the absence of fairness, openness and impartiality that is required of a municipal government.

[8] Generally, courts have said that a statutory delegate has the "right to be wrong" when acting within jurisdiction. By this they mean that because the legislature has granted to the delegate the right to make the decision in question, it is not up to a court – to which the power to decide the question has NOT been granted by the legislature – to substitute its own view of the situation. The court's power is limited to ensuring that the delegate is truly exercising the jurisdiction granted. However, if a delegate makes a decision that cannot be supported in any rational sense by the evidence before it, that decision is said to be "patently unreasonable" and a court can quash it on the basis that such a decision is actually outside the jurisdiction granted by statute because the legislature would not have granted to the delegate the jurisdiction to act patently unreasonably.

[9] In order for a city's action to be considered "discriminatory," it must be one that does in fact discriminate, but it must also be carried out with an improper motive of favouring or hurting one individual without regard to the public interest. It is this last aspect of the legal limitations on a city's ability to act that is most relevant in the context of trade agreements because of the principle of non-discrimination, as is outlined above.

[10] When calculating time where the time is expressed as "clear" days, neither the day on which the notice is served or the day on which the hearing is set are included in the count. As well, when the number of days provided for is less than one week, holidays and weekends are not included in the count. Thus, in a week in which there is no statutory holiday, a notice of motion to be heard in chambers in either Regina or Saskatoon where regular chamber sittings are held on Tuesdays and Thursdays, can be served as late as the previous Wednesday or Friday, respectively. Regular chambers sittings are less frequent in other centres, so while the notice period is still three clear days before the date set for hearing, there are fewer dates available to which hearings can be set. It should also be noted that frequently counsel

The evidence received in a chambers application is by affidavit. There are no witnesses called to give testimony, although extensive written materials can be put before the court through the use of affidavits.[11] It is not uncommon for a judicial review application to be heard in chambers in a half day or less. Most often the judge will reserve his or her decision and then examine the affidavit materials filed more carefully in light of the arguments made by counsel, and will ultimately provide a decision. There is no legal time requirement within which a decision in chambers must be given, but in practical terms these are usually completed within 30 to 60 days. If the judge agrees that the action of the city in question is beyond the city's jurisdiction, as already discussed, the judge can quash the action taken by the city, rendering it void. Judicial review as a remedy is thus quick and relatively inexpensive, as long as it is available.

One other aspect of judicial review as a remedy, is that the applicant for it must have what is called "standing" to call upon the court to undertake the review. At present, section 320 of *The Cities Act* states that an "elector" may challenge bylaws or resolutions. An amendment to the legislation governing cities to ensure that persons who are aggrieved or affected by a bylaw or resolution, whether or not they are electors, will provide access to this remedy to the persons or entities of a party to a trade agreement with Saskatchewan. This allows a dispute about the actions of a city to be challenged by those affected, wherever they are located, and to be defended directly by the city whose actions are in dispute. The city will thus directly suffer any negative consequences that result from a successful challenge, both in terms of having its actions declared by the court to be invalid as well as having to pay the court costs of the successful challenger.

III. SPECIFIC RECOMMENDATIONS FOR LEGISLATIVE CHANGE

Part II of this report makes specific recommendations for legislative changes affecting cities in relation to their activities in four areas. These include economic development subsidies, differential business licensing fees based on residency, eliminating the possibility of local preference policies in purchasing, and relinquishing control to the province over size and weight restrictions for interprovincial trucks.

Subsection 262(4) of *The Cities Act* allows cities to exempt property from municipal taxation by agreement with the owner for a maximum period of five years. These agreements are used by cities to achieve socio-economic objectives and community objectives, but are also a means by which cities are able to provide subsidies to business. Restricting the purposes for which cities can enter into these agreements will limit their ability to make subsidies to businesses. It is also possible to include in the legislation a "no bonusing" provision, such as the provision that was found in previous legislation affecting cities and other municipalities.[12] However, these changes to *The*

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will agree to adjourn a matter to a date that is more convenient to all participating and that provides a more reasonable time for the respondent, in this case, a city to prepare.

[11] There are some restrictions on affidavit materials that may be filed in relation to a judicial review application, which, as has already been discussed, is restricted to a review of jurisdiction and does not conduct a review of the substantive merits of the matter at issue.

[12] *The Urban Municipality Act*, R.S.S. 1978, c. U-10, s. 278, now repealed.

Cities Act cannot in a practical sense be implemented in isolation. For example, if Saskatchewan cities are to be prohibited from providing business subsidies in competition with cities in Alberta but not Manitoba, a blanket prohibition against providing any such subsidies at all will disadvantage Saskatchewan cities unfairly. It may be premature to address this issue through *The Cities Act*. It may also be possible to deal with it through provincial legislation that, by virtue of section 11 of *The Cities Act*, would constrain the ability of cities to offer tax incentives as a business subsidy but only to the extent that the provincial legislation provided. The provincial legislation would presumably only relate to elimination of subsidies in respect of those jurisdictions that are parties to a trade agreement with it.

Business licensing at the municipal level is completely different from business registration licensing at the provincial level. Provincial registration creates a legal entity. Municipal business licensing provides a means by which the activities of businesses can be regulated and by which city bylaws can be enforced. This report does not recommend any changes to be made to the use of business licensing by cities as a mechanism for ensuring compliance with regulatory requirements.

However, the report does recommend eliminating the ability of cities to charge differential business licensing fees based solely to businesses located outside the city. At present subsection 9(5) of *The Cities Act* allows cities to charge a different and higher business licence fee to businesses that operate in the city but are not resident there. The elimination of this provision would eliminate the city's ability to charge a fee based only on the fact that the business is not located there, but other provisions of the Act would still allow the city to charge a fee that covers only its costs of administration and regulation. It should be noted that it is possible that these costs in relation to a business that is not located in the city may be higher than the same costs in relation to businesses located in the city.

Section 154 of *The Cities Act* requires every city to have a purchasing policy and to follow that policy unless council specifically authorizes a departure from the policy. The section also authorizes the Lieutenant Governor in Council (provincial Cabinet) to make regulations "respecting the required contents of any city purchasing policy". There have been no regulations made to date as authorized pursuant to subsection 154(3). Regulations could be made by the provincial Cabinet to prohibit the adoption of a local preference as part of any city's purchasing policy. A Cabinet Order, or Order in Council, can be promulgated by Cabinet at any time. While there are certain internal processes that are applied to the development of the text of regulations to be adopted by Cabinet, there are no legal impediments to the immediate adoption by Cabinet of regulations to restrict cities from adopting purchasing policies that discriminate in this way. Such a provision would work in conjunction with a prohibition on cities acting in a manner that discriminates solely on the basis of location.[13]

Clauses 8(1)(f) of *The Cities Act* provide direct authority to cities relating to vehicles and their movement through the city, including size and weight restrictions, subject to *The Traffic Safety Act* and, of course, always subject to section 11 of *The Cities Act* and any conflicting provincial statute. A city's interest in controlling these aspects of transportation through its boundaries arises from its obligation to maintain and replace the routes over which larger vehicles travel. Cities recognize the

[13] That is, the non-discrimination provision discussed above and included as section 11.1 in Appendix A.

need to establish sizes and weights that are uniform interprovincially along urban connectors, but cannot be expected to bear the cost of doing so. However, no legislative change to *The Cities Act* is required to give effect to a provincially-authorized size and weight system if either general provincial legislation in this area is enacted or if cities negotiate with the province for the necessary funding to maintain and replace the infrastructure as will be necessitated by larger and heavier vehicles traveling over urban connector routes.

IV. SUMMARY OF LEGISLATIVE CHANGES

Specific potential amendments to *The Cities Act* as outlined in this part are attached as Appendix A.

Part III – Appendix A

POTENTIAL AMENDMENTS TO *THE CITIES ACT* TO IMPLEMENT TRADE AGREEMENT OBJECTIVES

An act to amend *The Cities Act* for the purpose of Implementing Trade Agreement Objectives[14]

POTENTIAL PROVISION	EXISTING PROVISION	EXPLANATION
Short title 1. This Act may be cited as *The Cities Amendment Act*. **S.S. C-11.1 amended** 2. *The Cities Act* is amended in the manner set forth in this Act.		
Section 9 amended 3. Subsection 9(5) is repealed.	(5) Notwithstanding subsection 8(4), licence fees imposed by a bylaw passed pursuant to this section may exceed the cost to the city for administration and regulation of the activity with respect to which the licence relates.	Section 9 authorizes a city to licence persons who carry on business in the city but do not reside or have business premises there. Subsection 9(5) allows a city to charge a licence fee in excess of the cost of administration and regulation of the activity licensed. This is a charge aimed at persons solely on the basis of residency. It is repealed in order to eliminate discrimination based on the location of a business outside a city.

[14] In Saskatchewan, legislation has a "long title" as well as the "short title" contained in section 1 of the statute. This title can be used to make a political statement or to provide some indication of its content. It is suggested that the collection of amendments that would be necessary to *The Cities Act* to give effect to trade agreement objectives would not on their face be obviously connected in any way to trade agreements. Thus, the inclusion of this reference in the long title makes that connection and will assist in the interpretation of the amendments by outlining their purpose.

New section 11.1 4.The following section is added after section 11: "**Non-discrimination** 11.1 A bylaw or resolution whose exclusive purpose is to discriminate against persons on the sole basis that they are non-residents of Saskatchewan is invalid".	None.	This provision implements the objectives of trade agreements by establishing the principle that actions of a city that discriminate on the basis that a person does not reside in Saskatchewan are not valid. This, together with the amendments to section 320 allowing non-residents to challenge bylaws or resolutions will provide non-resident business with access to due process.
Section 320 amended 5. Subsection 320(1) is amended: (a) by adding "or person affected by a bylaw or resolution" after "elector of"; and (b) by striking out "quash a" and substituting "quash the".	Subject to subsections (2) and (3), any elector of a city may apply to the court to quash a bylaw or resolution in whole or in part on the basis that: (a) the bylaw or resolution is illegal due to any lack of substance or form; (b) the proceedings before the passing of the bylaw or resolution do not comply with this or any other Act; or (c) the manner of passing the bylaw or resolution does not comply with this or any other enactment.	The amendment would allow any person affected by a bylaw or resolution to challenge its validity, not just electors.
Coming into force 6. This Act comes into force on a day to be fixed by proclamation.		Having the amendments become effective on a date to be fixed by proclamation permits it to be aligned with the effective date of a trade agreement.

Biographies

William A. Kerr is a Senior Associate of the Estey Centre for Law and Economics in International Trade in Saskatoon and the Van Vliet Professor of International Trade at the University of Saskatchewan. He received his PhD in economics from the University of British Columbia. He was a member of the Economics Department at the University of Calgary from 1980-1999 before taking up his current position at the University of Saskatchewan. He has published widely in the area international trade and international commercial policy. He has over 300 academic publications including more than ten books. Recent titles include: *International Environmental Liability and Barriers to Trade*; *Governing Risk in the 21st Century*; *Economic Analysis for International Trade Negotiations* and *The Economics of International Business*. He was commissioning editor for the reference work *Handbook on International Trade Policy* and is editor of the *Estey Centre Journal of International Law and Trade Policy*.

May T. Yeung is a Research Associate of the Estey Centre for Law and Economics in International Trade in Saskatoon as well the principal in Edoceo Consulting Inc. She earned an MBA from the University of Wales after completing a BA in Economics from the University of Calgary. Working with a broad spectrum of clients, her expertise in economic research, analysis and management focuses on international trade, regulatory and policy analysis, including the application of practical marketing and strategic business development within these contexts. Recent projects include *Geographic Indications and Developing Countries*, *Traceability in Agri-food* and *Models for Smart Regulations*. She is the author of *Regional Trade Agreement in the Global Economy*. In addition to publishing a number of research papers, she teaches trade-related seminars and presents at conferences.

Desaree L. Larsen is a Research Assistant at the Estey Centre for Law and Economics in International Trade in Saskatoon. In addition to contributing to various trade research projects at the Estey Centre, she manages the marketing and technical aspects of the *Estey Centre Journal of International Law and Trade Policy*. She is studying business at the University of Saskatchewan.

Merrilee Rasmussen, Q.C. is a lawyer in private practice, primarily in Saskatchewan. She worked with Saskatchewan City Mayors to assist in the preparation of recommendations for legislation for cities that resulted in the enactment of *The Cities Act* in 2002. Since that time she was worked on similar legislation for other urban and rural municipalities that resulted in the enactment of *The Muncipalities Act* in 2005 and is now working with the provincial government and northen municipalities on a revision of the northern legislation. In 1994, she was Saskatchewan's representative on the drafting team that prepared the legal text of the Agreement on Internal Trade.

Theresa Dust, Q.C. is the City Solicitor for Saskatoon, Saskatchewan. She has been the City Solicitor since 1987. She is the author of *The Impact of Aboriginal Land Claims and Self-Government on Canadian Municipalities*.

In 1999, she became the coordinator of a project by the 13 Saskatchewan cities to write new legislation for themselves. This culminated in the passage of *The Cities Act* in June of 2002. In February of 2003, she was awarded the "Scoop Lewry" Award for outstanding service to urban municipalities by the Saskatchewan Urban Municipalities Association.

Christopher Dekker obtained an Honours Degree in Commerce from the University of Saskatchewan in 1984. Between 1986 and 1995, Chris served in various positions with the provincial government including Executive Assistant to the Minister of Revenue and Financial Services and the Minister of Health, Assistant Press Secretary to the Premier, and Chief of Staff in the Office of the Official Opposition.

In 1996, Chris became the Manager of the Communications Branch for The City of Saskatoon. Chris was appointed to the position of Special Projects Manager in charge of the River Landing redevelopment project in 2005, and maintains his duties as Manager of Public and Intergovernmental Affairs.

He is an Accredited Public Relations Practitioner (APR), past-president of the Saskatoon Chapter of the Canadian Public Relations Society, and a past-director on the National Board of the Canadian Public Relations Society.

Fast Consulting is based in Saskatoon and specializes in focus group discussions, one-on-one high-level executive interviews, strategic planning, survey research and statistical analysis, corporate communications, and branding strategies. They have developed numerous award-winning strategies for local, national, and international clients including Cameco, the University of Saskatchewan, SaskPower, SaskTel, the Royal Canadian Mounted Police, and the Saskatoon Regional Economic Development Authority.

Participating
Saskatchewan City Mayors and City Managers

City of Estevan	Mayor Gary St. Onge City Manager James Puffalt
City of Humboldt	Mayor Malcolm Eaton City Manager Tom Goulden
City of Lloydminster	Mayor Ken Baker City Manager Roger Brekko
City of Melfort	Mayor Kevin Phillips City Manager John Wade
City of Melville	Mayor Walter Streelasky City Manager Michael Hotsko
City of Moose Jaw	Mayor Dale McBain City Manager Garry McKay
City of North Battleford	Mayor Julian Sadlowski City Manager Jim Toye
City of Prince Albert	Mayor Jim Scarrow A/City Manager Chris Cvik
City of Saskatoon	Mayor Don Atchison City Manager Phil Richards
City of Swift Current	Mayor Sandy Larson City Manager Matt Noble
City of Weyburn	Mayor Debra Button City Manager Bob Smith
City of Yorkton	Mayor Chris Wyatt City Manager David Putz

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