

March 4, 2009

Mr. Darryl Walker  
President  
B.C. Government and Service  
Employees' Union  
4911 Canada Way  
Burnaby, B.C.  
V5G 3W3

Dear Mr. Walker:

**Re: British Columbia - Municipal Food Procurement Policies**

Several groups have been encouraging municipalities in British Columbia to adopt sustainable food procurement policies. These policies would require local governments and other public bodies to favour local food suppliers and, where appropriate, pay a premium for their produce. Local food procurement policies, which are promoted to achieve public policy goals such as greenhouse gas emission reduction, food security and improved public health, have now been adopted by some municipalities in other jurisdictions.

However, at least some public officials have raised a concern that local food procurement is prohibited under both international and domestic trade agreements that generally preclude local preferences.

For the reasons set out below, in our view, local food procurement policies are entirely consistent with both international and domestic procurement rules. For the most part, these regimes simply do not apply to most local food procurement. Even where domestic procurement rules do apply, buy-local food policies would, if properly crafted, be compliant with these obligations. However, even were this not found to be the case, local food procurement policies would certainly be exempt under domestic trade regimes because they relate to legitimate objectives including environmental protection, public health promotion and food security.

In simple terms, neither international nor domestic procurement regimes impose constraints that would prevent a municipality or other local body, such as school board, from adopting and implementing a local food procurement policy.



## THE FACTS

It is our understanding that various B.C. groups have proposed municipal procurement policies to support local and sustainable food production. These proposals have yet to be formulated as a specific proposal, but are likely to reflect the approach adopted by the City of Toronto last year. Toronto's "Local Food Procurement Policy" was explicitly adopted to "reduce greenhouse gas and smog causing emissions generated by the import of food from outside of Ontario."

That policy commits Toronto City Council "to progressively increase the percentage of food being served at City-owned facilities or purchased for City operations from local sources". "Local" is defined as "food that is grown in the Greater Toronto Area, the Greenbelt of Ontario and other regions of Ontario."

City Council in turn directed the Toronto Environment Office to report on the ongoing progress with the plan and on mechanisms available and/or required for achieving a 50 percent local food purchasing target as soon as possible, with annual measurements to gauge progress.

In formulating its approach to local food procurement, Toronto had the benefit of a staff report that provided a detailed and thorough review of the benefits, costs and challenges of adopting a local and sustainable food procurement policy. It addressed issues which included those concerning the environmental benefits that such a policy would achieve.

In describing the benefits of such a policy, the staff report quoted from a discussion paper published by the Metcalf Foundation, "Food Connects Us All: Sustainable Local Food in Southern Ontario", which outlines the major economic, environmental and health factors of concern (<http://www.metcalffoundation.com>). These include:

- climate change and greenhouse gas emissions associated with food transportation and production;
- harmful effects of agricultural chemicals, in particular pesticides and fertilizers;
- the long term effects of large scale monocultures; and
- increased reliance on imported food and food security issues related to breaks in the food chain due to emergencies or natural disasters.

We are advised by the City Councillor who played a key role in supporting the initiative that at no time either before or after the adoption of the local food procurement policy were any concerns raised about the compatibility of such a policy with Canada's obligations under international or domestic trade rules concerning public procurement.

For the purposes of this assessment we consider the potential consequences of BC municipalities proceeding on the same basis as has the City of Toronto with one important modification, which would be to include out-of-province suppliers that can meet the proximity

requirements of the policy. This is because there is no apparent environmental reason for a local food procurement policy to exclude Alberta or even US producers located near BC border communities. Thus, local food suppliers under the policy would be defined in terms of geographic proximity, not province or country of origin.

For this purpose, “local” could be defined as “food that is grown within a hundred mile radius of the municipality, or in as close proximity to the municipality as is reasonably practical.”

The question then is whether policies that favour such local food producers offend procurement rules that generally preclude local preferences. These procurement rules are set out in both international and domestic trade agreements and are considered below.

## **THE LAW**

Public purchasing policies are subject to various international trade rules and agreements. Of these, the most important are in the procurement provisions of the North American Free Trade Agreement (NAFTA) and the Agreement on Procurement under the World Trade Organization (WTO). If these rules were to apply to municipal procurement, they would generally prohibit the local preferences.<sup>1</sup> Fortunately, while the application of these international rules to municipal governments is contemplated by these regimes, the federal government has yet to make any such commitments.<sup>2</sup> For this reason, international procurement rules simply do not apply to municipal governments or other local public entities.

### **The Agreement on Internal Trade**

While Canada has steered clear of compromising the procurement options of provincial and local governments under international trade agreements, the provinces themselves have made such commitments under The Agreement on Internal Trade (the AIT).<sup>3</sup> Chapter 5 of that Agreement sets out detailed rules and procedures for provincial governments to follow in purchasing goods and services.

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<sup>1</sup> For example, the obligation to provide National Treatment to foreign suppliers would preclude policies that favour those from Canada. See, for example, NAFTA procurement rules which are set out in Chapter 10 of that Treaty. Article 1003: National Treatment and Non-Discrimination provides in part:

With respect to measures covered by this Chapter, each Party shall accord to goods of another Party, to the suppliers of such goods and to service suppliers of another Party, treatment no less favorable than the most favorable treatment that the Party accords to:

1. its own goods and suppliers; and
2. goods and suppliers of another Party.

<sup>2</sup> For an explanation of the current state of such commitments, see the website of the Department of International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/fo/gp-faqs.aspx?lang=en#4Federal>

<sup>3</sup> Agreement on Internal Trade, Consolidated Version, 2007, [http://www.ic.gc.ca/epic/site/ait-aci.nsf/en/h\\_il00054e.html](http://www.ic.gc.ca/epic/site/ait-aci.nsf/en/h_il00054e.html)

In general terms, AIT procurement rules prohibit governments from discriminating among Canadian service providers, but allow preferences that favour Canadian over foreign service companies.<sup>4</sup>

### **The Trade, Investment and Labour Mobility Agreement**

On April 28, 2006, Alberta and British Columbia entered into a Trade, Investment and Labour Mobility Agreement (“TILMA”), which goes fully into effect on April 1, 2009.

TILMA is based upon, but expands the scope and binding character of the AIT, which it incorporates by reference [Article 1.2]. The key point of departure from the AIT is the TILMA dispute regime, which represents an amalgam of elements taken from the AIT and NAFTA investment rules. The most significant feature of TILMA dispute procedures is borrowed from Chapter Eleven of NAFTA, which entitles companies and private individuals to claim monetary compensation where a TILMA party fails to comply with the requirements of the regime.<sup>5</sup>

TILMA also deals explicitly with procurement under Article 14. But Article 14:4 provides that until such time as an effective bid protest mechanism is established, TILMA dispute panels may not make monetary awards concerning procurement measures. In other words, and at least for the moment, failure to comply with TILMA or AIT procurement rules does not expose provincial governments to the risk of having to pay monetary awards for non-compliance.<sup>6</sup>

### **Do AIT or TILMA Procurement Rules Apply to Local Food Purchasing Policies?**

Under TILMA, “procurement” is defined to mean “the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction ...” The purchase of food by municipalities or other local public bodies, such as a school board,<sup>7</sup> would therefore represent procurement under this definition.

#### *Procurement Thresholds*

However, AIT and TILMA procurement rules only apply to local procurements that exceed certain threshold values. The first question to ask then is whether local food procurements would exceed these threshold levels.

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<sup>4</sup> See AIT Article 504. See AIT Annex 502.1B.

<sup>5</sup> The dispute resolution provisions of TILMA are set out in Part VI, and may be invoked by the Parties, or by a “person of a Party”.

<sup>6</sup> However, in December of last year, the provinces agreed to enhance dispute procedures under the AIT by allowing for monetary awards in province to province disputes. As of this date, their agreement has not been made public.

<sup>7</sup> TILMA applies to all government entities [Article 2] which are broadly defined to include virtually every public body, even at the local level [Art. VII], and explicitly including school boards.

In negotiations with the provinces about the appropriate threshold levels, the UBCM and other municipal associations requested that proposed TILMA procurement thresholds be increased to the levels contained in the AIT. These local governments argued that lowering these thresholds, particularly in respect of goods, would result in minimal trade benefits and create an administrative and unnecessary burden on local government.

In response, the governments of BC and Alberta agreed to raise the thresholds for municipalities and other public sector entities as follows:

for goods, the proposed threshold of 10,000 would be increased to \$75,000;

for construction, the proposed threshold of \$100,000 would be increased to \$200,000;  
and

for services, the proposed threshold of \$75,000 would remain unaltered.

Moreover, these thresholds apply to each procurement, not their cumulative value. Given these thresholds, we expect that most food purchasing by a municipality, or other local entity such as a day care centre, would be well below the threshold of \$75,000. In such cases, neither TILMA nor AIT rules would apply or be of any other concern.

### **Would Local Food Procurement Offend AIT or TILMA Rules Where These Apply?**

In a case where the value of a local food procurement exceeds the \$75,000 threshold, the next question is whether the procurement actually offends AIT/TILMA rules. As noted, we have suggested defining “local” to include out-of-province sources that fall within the geographic parameters of the policy.

Under TILMA Article 14, government entities are obliged to provide “open and non-discriminatory access to procurements.” Insight into the meaning of non-discrimination is provided by AIT Article 504, which under the heading “reciprocal non-discrimination” defines procurement obligations this way:

Each Party shall accord the goods and services of another Party .... Treatment no less favourable than the best treatment it accords to its own goods and services ....

According to our proposed formulation of a local food policy, the best treatment accorded to goods produced in BC, which is to favour goods produced in the local area, is precisely the same treatment accorded to goods from Alberta which are produced in similar proximity to the local community. Therefore, a local food procurement policy that accords a preference, including a price preference, for locally grown foods regardless of whether these are produced in Alberta or B.C. is in fact consistent with TILMA and AIT requirements.

### **Is Local Food Procurement a Legitimate Objective Under the AIT/TILMA?**

Even if we are wrong, and local food procurement is found to discriminate against Alberta

suppliers, in our view such a policy would be exempt under both AIT and TIIMA rules as a measure to achieve a “legitimate objective”. Article 6 defines this exemption this way:

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.

“Legitimate objective” is defined to include the following objectives:

- 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;
- 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 ...

As noted, Toronto’s food policy was adopted to achieve a number of objectives, including to reduce:

- climate change and greenhouse gas emissions associated with food transportation and production;
- harmful effects of agricultural chemicals, in particular pesticides and fertilizers;
- the long term effects of large scale monocultures; and
- increased reliance on imported food and food security issues related to breaks in the food chain due to emergencies or natural disasters.

It is readily apparent that these goals accord closely with those described as legitimate objectives under both the AIT and TIIMA, and therefore would be exempt under these regimes

in the unlikely circumstance that local food procurement was otherwise found to offend TILMA rules.

Further support for such policies can also be found in the preambles to these agreements which, as framed by TILMA, include the need to:

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

## **CONCLUSION**

For the above noted reasons, there is simply no plausible basis for impugning the validity of a local food procurement policy under either international or domestic trade rules. In the exceedingly unlikely event that such a policy was challenged under AIT/TILMA rules, that complaint would certainly fail.

Sincerely,



Steven Shrybman

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