AIT MISBEHAVIN'
Trade and Labour Mobility Issues for Ontario Municipalities

By Tom Melville

Canadian federal and provincial trade agreements have for some time addressed topics of interest to municipalities, such as local procurement preference policies or local ability to regulate occupations. More recently, there has been significant change to some of those agreements, new Ontario trade legislation, and reporting of ongoing Canada-European Union trade negotiations that mention government and municipal procurement. All these factors suggest that trade issues are of increasing importance to the local sector.

This article will outline the scope of the Canadian domestic trade liberalization arrangements known as the Agreement on Internal Trade, the related subject of Ontario's labour mobility legislation, and discuss how some of the domestic trade rules and issues may impact Ontario municipalities.[1]

What is AIT?

The "Agreement on Internal Trade (1995)"[2] (AIT) is a Canadian domestic trade agreement. The federal government of Canada and the governments of each of the Canadian provinces and territories are parties. Municipalities are not signatories to the AIT.

The primary objective of the AIT is "…to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market."[3] The kinds of barriers contemplated by the AIT are non-tariff barriers. Municipal measures, such as procurement rules with local preferences (or other "buy local" policies), or local residency requirements for employment, have potential to be the kinds of barriers the AIT is aimed at.

It can be important to look beyond the main AIT (which is itself lengthy at over 200 pages), as there are a significant number of supplementary and related agreements. Among other things, they may expand the open trade impact of the AIT.

The AIT, first in force July 1, 1995, has been amended by at least ten protocols of agreement.[4] The AIT also contemplates supplementary or "trade enhancement arrangements,"[5] and some parties have entered them: for example, the September 11, 2009 Trade and Cooperation Agreement Between Ontario and Quebec (discussed further in this article). There are conflict clauses found in various agreements that make up the AIT. Many,[6] but not all,[7] have wording to the effect that the agreement provision that is more conducive to trade prevails, which does seem generally consistent with the trade barrier reduction purpose of the AIT.

Each party is responsible for compliance with the agreement. That includes, where it is provided for, responsibility for compliance by each party's forms of municipal government.[8] As examples, the AIT states parties are specifically responsible, in relation to their municipalities, for labour mobility[9] and transportation.[10]

Generally, because in Canada provinces have constitutional responsibility for municipalities,[11] the AIT leaves the provinces with options concerning AIT enforcement and municipalities. These options could include, broadly, legislation or regulations, policies, or the use of financial incentives. In this connection, the government of Ontario elected to bring forward legislation concerning the matters in the labour mobility chapter of the AIT. The legislature of Ontario has now passed the *Ontario Labour Mobility Act, 2009*.[12] That statute is discussed later in the article.

Structure and Scope

Part III of the AIT sets out the general rules for open trade. These general principles are often repeated, or restated with a degree of variation, in the other, more specific, chapters and annexes of the AIT.[13] That prominent mention makes the general principles important in understanding the AIT. A few key examples include: The "reciprocal non-discrimination" principle,[14] which provides, generally, that a party shall accord to goods, persons, services and investments of any other party treatment no less favourable than the best treatment it accords to its own. The "right of entry and exit"[15] provides, generally, for the unrestricted movement of goods, services, persons and investments across provincial boundaries. The "no obstacles" principle[16] states that measures (such as legislation or other rules[17]) shall not obstruct internal trade. Finally, the "transparency" principle[18] provides that parties are to make their legislation, regulations, procedures, guidelines, and administrative rulings readily accessible.

There are "legitimate objectives" provisions in the AIT.[19] These establish that measures, if put in place for certain purposes, could be inconsistent with the principles of reciprocal non-discrimination, right of entry and exit, and no obstacles. In other words, rules that have a purpose, for example, of public safety and security, environmental protection, consumer protection, or health might justifiably be inconsistent with the open trade principles of the AIT.[20]

There are other exceptions, including, potentially, for economic development.[21] The AIT also states it does not to apply to some subjects, including to municipal procurement of goods for resale to the public,[22] and certain investments.[23] The exceptions are not wide open. For example, having a purpose that is a legitimate objective might not justify a measure, if the measure is a disguised trade restriction,[24] or if the measure is more restrictive than necessary.[25]

Besides its general principles, the AIT has chapters with rules for specific subject matters. These are found in Part IV, and include chapters for procurement, investment (which includes rules to limit local presence and residency requirements for investors,[26] and to regulate incentives for enterprises[27]), labour mobility, transportation and environmental protection, among

others. A number of the specific chapters, including those for procurement,[28] labour mobility,[29] and transportation,[30] mention municipalities.

The AIT has its own dispute resolution procedures.[31] There are separate provisions for government-to-government[32] and person-to-government complaints.[33] Conciliation, mediation, and similar informal steps are stressed at the initial stage.[34] There are a number of formal stages, including consultations[35] and proceedings by various panels (including summary, compliance or appellate panels[36]). Consequences at the final stages may include a finding of inconsistency with the AIT, retaliatory action by a party, or a costs award against a party.[37] Because of the overall complexity and number of steps, it does appear the process could be a long one.

Municipalities and AIT

AIT procurement and municipalities. The AIT extends coverage of its open procurement principles to municipalities and other local or publicly-funded entities, and to corporations owned or controlled by them.[38] Because procurement is a common activity for municipalities, the municipal procurement annex[39] is likely one of the more important AIT components for them. The annex contains rules about non-discrimination,[40] transparency,[41] and about legitimate objectives,[42] and other exceptions.[43] That provides one example of how the general trade enhancement principles in Part III of the AIT are also found or restated in specific parts of the AIT. As would be expected with a trade liberalization agreement, a part of the annex includes statements about fair, open and competitive procurement principles. As examples: municipal procurements would generally be subject to a tendering process,[44] and there is to be a fair acquisition process with high degree of competition.[45] The use of an electronic tendering system is promoted,[46] and municipal tender notices are to be posted on the system.[47] However, it is part of the AIT responsibility for the parties to designate the electronic tendering system.[48]

There are some exceptions in the annex. One of the more important is that these rules do not apply to procurements below certain values – the thresholds for the application of the annex are municipal procurements with a value of $100,000 or greater for goods and services, and $250,000 or greater for construction.[49]

AIT labour mobility and municipalities. The stated purpose of the AIT labour mobility chapter is "…to eliminate or reduce measures adopted or maintained by the Parties that restrict or impair labour mobility in Canada and, in particular, to enable any worker certified for an occupation by a regulatory authority of one Party to be recognized as qualified for that occupation by all other Parties."[50] These provisions were recently revised (amendments came into in effect August 2009[51]), with an apparent political goal of creating full labour mobility across Canada.[52] The requirements of the chapter apply to measures that are (a) residency requirements for workers; (b) certification requirements for workers to practice an occupation or use a particular occupational title, and (c) occupational standards.[53] In particular: parties are not to require workers to be residents, as a condition of employment eligibility or certification for occupation;[54] and occupational certifications of one province are to be accepted by other provinces.[55] Each party is to ensure compliance by its municipalities.[56]

2009 Ontario Quebec agreement and municipalities. The "Trade and Cooperation Agreement Between Ontario and Quebec" (TCAOQ) is a recent AIT development, as the provinces of Ontario and Quebec signed it in September 2009.[57] Its objectives include reducing and eliminating "… barriers to the movement of persons, goods and services and to investments and investors between the Parties to a higher degree than that achieved by the Agreement on Internal Trade."[58] The TCAOQ incorporates much of the AIT wording for procurement for municipalities;[59] however, there are some differences. The threshold for municipal construction procurements is $100,000 in TCAOQ, and $250,000 in the AIT procurement annex for municipalities.[60] The TCAOQ dispute resolution provisions expressly provide for written complaints to be registered with the procuring entity (municipality),[61] and state that the procuring entity is to act quickly to resolve complaints.[62] Such express wording is absent from the AIT annex for municipalities. The AIT contemplates additional agreements, such as the TCAOQ, that "enhance trade and mobility."[63] The TCAOQ shows how there can be differences between them. These differences may or may not be important to a particular issue, but they do demonstrate the importance of checking the wording of the numerous AIT supplementary and other agreements[64] with the AIT itself.

AIT dispute resolution and municipalities. Although the AIT chapter on dispute resolution procedures outlines procedures for parties and other persons in bringing or responding to formal AIT complaints, a particular role for municipalities is not highlighted.[65] Accordingly, it appears from the practical perspective that the formal AIT dispute resolution would primarily be initiated by governments, or by certain other persons (perhaps investors, or persons bidding on contracts). Similarly, it seems governments have a primary role in responding to formal complaints about their measures. If there were to be a formal AIT complaint and an Ontario municipality had an interest in it, one option would be for the municipality to approach the province about working with it to try to resolve the complaint. By contrast, in the area of municipal procurement there are distinct AIT provisions.[66] They list specific expectations for municipalities, such as documenting

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their non-judicial complaint process,[67] or giving out-of-province suppliers an opportunity equal to that given to local suppliers to challenge contract decisions.[68] In an exception to the apparent usual party/provincial primary role in responding to AIT complaints, those distinct provisions may afford municipalities an opportunity to themselves try and resolve bidder complaints.

Labour Mobility Legislation & Municipalities

The Ontario Labour Mobility Act, 2009 (the "Act") was enacted by the Ontario legislature on December 15, 2009, and is now in force.[69] The Act refers directly to the AIT – one of the Act's purposes is "…to support the Government of Ontario in fulfilling its obligations under Chapter Seven of the Agreement on Internal Trade,"[70] with a second purpose of reducing or eliminating the measures of Ontario regulatory authorities that restrict or impair out-of-province occupational certifications.[71] The Act establishes a Labour Mobility Code for Ontario.[72] It contains specific duties and rules for regulatory authorities, which include:

- recognizing certifications of individuals who have been certified out-of-province;[73]
- publishing on a website certification requirements for occupations;[74]
- considering labour mobility when establishing or amending occupational standards;[75] and
- giving notice of proposed new occupational standards or requirements.[76]

Ontario municipalities have business licensing bylaws, some of which may include requirements for certification or occupational requirements or standards (e.g., a bylaw provision requiring examinations for workers such as building renovators). It is possible that some Ontario municipalities are regulatory authorities, which are bodies or individuals authorized by law to certify individuals in an occupation.[77] If so, the bylaws or other measures of those municipalities could be subject to the requirements for regulatory authorities in the Act.

Besides its obligations for regulatory authorities, the Act includes express rules for "municipal governmental regulatory authorities,"[78] including a right of recovery for the government. That right could arise if the government were ordered, by a body established under the AIT, to pay a penalty or costs under the labour mobility provisions the Code, and if the order resulted from the non-compliance of a municipal governmental regulatory authority.[79]

Municipalities might have residency requirements in place for municipal employment. In this connection, it is of interest that another rule in the Act states "no municipal governmental regulatory authority shall require that an individual reside in its area of geographic jurisdiction as a condition of employment…".[80]

The implications for Ontario municipalities include considering: if they are regulatory authorities, and if any requirements in the Act might apply to them; and any possible need to amend any local bylaws that conflict with the Labour Mobility Code, to conform to the Code.

Ongoing Trade Negotiations

On February 12, 2010, representatives of Canada and the United States signed a Canada-U.S. procurement agreement.[81] There had been prior negotiations concerning the U.S. stimulus package. Media reports had indicated that the negotiations sought, from the Canadian perspective, a waiver from that package's "Buy American" policies for Canadian suppliers.[82] Reports had also suggested that access to municipal procurement was part of the discussion.[83] The new procurement agreement gives Canadian businesses access to American state and local public works projects,[84] and also includes temporary access to certain municipal-based construction procurements,[85] apparently those valued at over $8.5 million.[86]

Economic and trade negotiations between Canada and the European Economic Union were announced in July, 2009. Government procurement and trade in goods and services are among the items on the agenda.[87]

The Canada/European Economic Union discussions may lead to agreement. Or, perhaps, the Canada/U.S. agreement will be extended. In either case, the almost certain outcome would be more law or policy (whether in the form of agreement provisions, or provincial or federal policies or statutes) about trade issues and open procurement for Canadian and Ontario municipalities to consider.

Conclusion

Trade liberalization principles are not confined to procurement. They can apply to an extensive list of topics ranging from labour mobility, residency requirements, economic development and transportation to the transparency of government law making, among others. This article has briefly outlined the scope of the Canadian AIT, as a domestic example of a trade liberalization agreement. The recent AIT amendments and labour mobility legislation, and the ongoing international trade negotiations, may make it timely for Ontario municipalities to consider these issues further.

Notes

1. This paper is not intended to give legal advice. Any views expressed are those of the author, and do not represent the opinions of the Ontario Ministries of the Attorney General or Municipal Affairs and Housing.
2. AIT (1995). This article refers to the 2009 Consolidated Version, which combines the text of the 1995 agreement, together with all protocols of amendment adopted since the signing of that agreement. *See* the AIT website at http://www.ait-aci.ca.
3. *Id.* at Art. 100.
4. *Id.* at foreword.
5. *Id.* at Art. 1800.
6. AIT (1995) examples include Art. 400 (generally, the more specific rules in Part IV prevail over the general rules in Part III) and Section Q of Annex 502.4 (municipal procurement).
7. Trade and Cooperation Agreement Between Quebec and Ontario (2009) at Art. 1.4, paragraph 5 (a provision declaring other agreements, as listed in Annex 1.4, generally prevail over the Ontario Quebec agreement in the event of a conflict).
8. AIT, Art. 102, para.1(b).
9. *Id.* at Art. 703.

10. *Id.* at Art. 1404.
11. *Constitution Act, 1867* (*Canada*), s. 92(8).
12. S.O. 2009, c. 24. *See* Ontario's e-laws website at http://www.e-laws.gov.on.ca.
13. AIT (1995) examples include Art. 504 (reciprocal non-discrimination in the procurement chapter), and sections E and F of Annex 502.4 (transparency and legitimate objectives- municipal procurement).
14. *Id.* at Art. 401.
15. *Id.* at Art. 402.
16. *Id.* at Art. 403.
17. *Id.* at Art. 200 (definition of "measure").
18. *Id.* at Art. 406.
19. *Id.* at Art. 200 (definition of "legitimate objectives").
20. *Id.* at Art. 404.
21. *Id.* at Art. 1801, para. 7 (referring to possible regional economic development exceptions, but none are currently scheduled in corresponding Art. 1801.7).
22. *Id.* at Annex 502.4, para.(a) of sec. L.
23. *Id.* at Art. 611 (e.g., measures for privatization of government services or assets).
24. *Id.* at Art. 404, para.(d).
25. *Id.* at Art. 404, para.(c).
26. *Id.* at Art. 604.
27. *Id.* at Art. 608.
28. *Id.* at Art. 502, para. 4 (extending the procurement chapter to municipalities).
29. *Id.* at Art. 703, para. 1(a) (extending labour mobility chapter to municipalities).
30. *Id.* at Art. 1404, para. 2 (extending certain transportation provisions to municipalities).
31. *Id.* at Part V, Arts. 17 and 18. Art. 1707.4 states that reports of the various panels are not subject to judicial review.
32. *Id.* at chap. 17, Part A.
33. *Id.* at chap. 17, Part B.
34. *Id.* at Art. 1700, para. 2.
35. *Id.* at Art. 1702.1.
36. *Id.* at Art. 1702 (Summary Panel), Art. 1707 (Compliance Panel), and Art. 1706.1 (Appellate Panel).
37. A report by a panel may determine that a measure is inconsistent or not compliant with the Agreement (Art. 1706, para. 3(b). Ultimately, a Compliance Panel can order that a monetary penalty be paid by a complaint recipient party to a complaining party (Arts. 1707 and 1707.1). There is provision for retaliatory action by a complaining party (Art. 1709).
38. *Id.* at Art. 502, para. 4.
39. AIT Annex 502.4 Procurement – Provisions for municipalities, municipal organizations, school boards and publicly funded academic, health and social services organizations.
40. *Id.* at Sec. D.
41. *Id.* at Sec. E.
42. *Id.* at Sec. F.
43. *Id.* at Sec. I.
44. *Id.* at Sec. G, para. 1.
45. *Id.* at Sec. G, para. 5.
46. *Id.* at Sec. G, para. 6 and 7.
47. *Id.* at Sec. G, para. 8.
48. *Id.* at Sec. G, para. 7.
49. *Id.* at Sec. C, para. 3. Contrast the $100,000 construction threshold in the Trade and Cooperation Agreement Between Ontario and Quebec (2009), discussed *infra*.
50. AIT (1995), Chap. 7 (Labour Mobility), Art. 701.
51. *Id.* at Foreword, stating the ninth protocol of the amendment (labour mobility) came into force on Aug. 11, 2009.
52. *Backgrounder – Agreement on Internal Trade* (16 January 2009), issued by the Office of the Prime Minister, noting that the provincial and federal leaders signed changes to AIT in January, 2009 with a goal of enhancing labour mobility in Canada.
53. AIT (1995), Chap. 7 (Labour Mobility), Art. 702, para. 1.
54. *Id.* at Art. 705.
55. *Id.* at Art. 706.
56. *Id.* at Art. 703.
57. Trade and Cooperation Agreement Between Ontario and Quebec (2009). *See* the AIT website at http://www.ait-aci.ca.
58. *Id.* at Art. 1.1, para. 1(c).
59. *Id.* at para. 9.4(d) and Art. 9.10. Compare AIT Annex 502.4 generally, and at Section M.
60. *Id.* at Art. 9.3, sec. 4. Compare AIT Annex 502.4 at Section B, para. 3(b).
61. *Id.* at Art. 9.10, sec. 4.
62. *Id.* at Art. 9.10, sec. 14.
63. AIT (1995), Art. 1800, para.1 and 2.
64. TCAOQ references numerous other agreements in Annex 1.4, and contains a perhaps unexpected provision (Art. 1.4, para. 5) to the effect that those other agreements generally prevail in the event of a conflict with the Ontario Quebec Agreement.
65. AIT (1995), Chap. 17 (dispute resolution) refers to disputes being initiated by governments (Parties) and by "persons of a party." Municipalities are not mentioned in particular.
66. AIT Annex 502.4, Procurement – Provisions for municipalities, at Part M.
67. *Id.* at para. 1.
68. *Id.* at para. 2.
69. S.O. 2009, c.24. *See* Ontario's e-laws website at http://www.e-laws.gov.on.ca.
70. *Id.* at s. 1, clause (b).
71. *Id.* at s. 1, clause (a).
72. *Id.* at Part II.
73. *Id.* at s. 9.
74. *Id.* at s. 11.
75. *Id.* at s. 12.
76. *Id.* at s. 13.
77. *Id.* at s. 2 (definitions).
78. Table 1 of the Act provides for "Municipal Governmental Regulatory Authorities – Public Acts" and lists the City of Toronto, and each municipality, as defined in the *Municipal Act, 2001* (except the City of Toronto).
79. *Id.* at s. 21.
80. *Id.* at ss. 8(2).
81. Foreign Affairs and International Trade Canada Backgrounder – *Buy American* (16 Feb. 2010). The Backgrounder states that Canada and the United States signed the Agreement on February 12, 2010. *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca.
82. Canadian Broadcasting Corporation (CBC) News, *Canada, provinces deal for 'Buy American' waiver,* Aug. 21, 2009. This reports that the federal Canadian government trade minister offered "time-limited guaranteed access to an ambitious package of sub-federal procurement." *See* the CBC website at cbc.ca.
83. CBC News, *Buy American exemption deal in the works*, Sept. 29, 2009. This reports that Canada might "…announce that its provincial and municipal doors are now wide open to U.S. companies." *See* the CBC website at cbc.ca.
84. Foreign Affairs and International Trade Canada, *Canada and the United*

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Exculpatory Contracts

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was held unenforceable as against public policy— the use of the term "fault" in the waiver, which stated that visitors assumed all liability without regard to fault and agreed to hold facility harmless for any injuries incurred, made the waiver unenforceable as overly broad and all-inclusive, and did not specify that visitors were releasing the facility for negligent acts; second, it did not provide the signer with adequate notification of the waiver's nature and significance).

23. *See Enforceable Exculpatory Agreements: Do They Still Exist?* Wisconsin Lawyer, Vol. 78, No. 8 (Aug. 2005). ML

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States Reach Agreement on Buy American (5 Feb. 2010). *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca.

85. Ontario Ministry of Economic Development and Trade (MEDT) News Release, *Canada and the United States Reach Agreement on Buy American: McGuinty Government Supports Important Breakthough. See* MEDT website at http://www.ontariocanada.com/ontcan/1medt/en/news_2010_02_12_en.jsp.

86. *Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement*, Part B, Market Access, Thresholds. *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca for the text of the agreement.

87. *Federal Canadian government announcement Canada-European Union: Comprehensive Economic and Trade Agreement* (CETA) *Negotiations. See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca. ML

Federal

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transportation, promoting bicycle and pedestrian paths, workforce housing, and other projects that fall under the broad umbrella of "smart growth." The Act appropriates $3.75 billion over three years, starting in 2011, for the program. Areas with population under 200,000 may apply for up to $15 million while large population areas with over 500,000 may be awarded up to $100 million. Some rural states and communities see themselves at a disadvantage with the Act. Senator John Thune (R-SD) has stated that the Act "is a program that's going to overwhelmingly focus on urban areas."[9] Even so, this may very well be a bill that will pass President Obama's desk and it will be worth your local government's time to keep track of S.1619's progress.

Notes

1. Livable Communities Act of 2009, S. 1619, 111th Cong. (2009).
2. Press Release, U.S. Senator Chris Dodd, *Dodd Announces Initiative to Coordinate Housing, Transportation, and Environmental Policies* (Aug. 6, 2009) (on file with author).
3. Livable Communities Act of 2010, H.R. 4690, 111th Cong. (2010).
4. Don Stacom, *Dodd Promises to Promote 'Smart Growth' Housing Plans*, Hartford Courant, March 9, 2010, at http://articles.courant.com/2010-03-09/news/hc-hartford-livable-0309.artmar08_1_smart-growth-plans-housing-authority-directors-sen-christopher-dodd. (last accessed Mar. 15, 2010).
5. Press Release, U.S. Dept. of Housing and Urban Development, HUD *Secretary Donovan Announces New Office of Sustainable Housing and Communities* (Feb. 4, 2010) (on file with author).
6. Press Release, U.S. Dept. of Housing and Urban Development, *HUD and DOT Announce Interagency Partnership to Promote Sustainable Communities* (Mar. 18, 2009) (on file with author).
7. Livable Communities Act of 2009, S. 1619, 111th Cong. § 6 (2009). The Act's Interagency Council would be expanded to include the Administrator of the Environmental Protection Agency and "such representatives from other Federal agencies . . . as the President may prescribe."
8. Livable Communities Act of 2009, S. 1619, 111th Cong. § 7(b) (2009).
9. Elana Schor, *Dodd Vows to Pass Livability Bill Amid Skepticism From Rural Senators*, dc.streetsblog.com, available at http://dc.streetsblog.org/2010/03/09/dodd-vows-to-pass-livability-bill-amid-skepticism-from-rural-senators/. ML

Supreme Court

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the Act was concerned with the *consequences* of the unlawful employment practice. Benna Ruth Solomon, Corporation Counsel for the City of Chicago, argued that the time when the injury occurred or impact was felt was when the tiered list or priority pool was first created. That was the only practice that had adverse impact as contemplated by the statute, and "in this case the defining feature, namely disparate impact, in the sense defined by the statute, required by the statute to limit or classify in a way that denies people employment opportunities based on race — that defining feature was absent within the charging period." Regardless of how many hiring rounds occurred, it "always goes back to the test and the list." Ultimately, what the petitioners were asking the Court to do was to validate new "opportunities to challenge exactly the same thing that they…would have challenged if they had filed a charge promptly." Illustrating the City's dilemma further, she added that, "in a case like this, it – it wasn't possible simply to take the list down. The Court's opinion in *Ricci* makes that quite clear."

The Court's decision is expected by this June. ML