

Municipalities and the Comprehensive Economic and Trade Agreement (CETA)

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The Canada-EU Comprehensive Economic and Trade Agreement (CETA): A threat to local government powers

A legal opinion commissioned by the Centre for Civic Governance raises troubling questions about the local governance implications of the proposed Canada-European Union Comprehensive Economic and Trade Agreement, or 'CETA'.¹

According to the legal opinion, CETA negotiations may be bargaining away the ability of local governments to include local and Canadian content requirements in procurement processes, and may also open the door to privatization of municipal water services.

Background

A municipality's ability to 'buy local' or 'buy Canadian' can be an important tool for stimulating the local and national economy, and can also be used to protect the environment and foster innovation. Although Canada has signed on to several international trade agreements since the 1980s, the ability to use buy-local and buy-Canadian policies remained largely intact until this year.²

But in February 2010, the Canadian government signed a deal with the US (the Canada-US Procurement Agreement, or 'CUSPA') that includes measures

preventing local governments in Canada from giving Canadian or local contractors preference in many municipal construction projects until the fall of 2011.

The current CETA negotiations between Canada and the EU seem to be going even further. Legal analysis of a leaked draft of the EU's negotiating document concludes that if the deal is signed, "local governments will no longer legally be able to give preference to local or Canadian suppliers," and "would bear significant administrative costs and litigation risks" related to potential legal challenges from European companies.³ If the deal is signed, it would extremely difficult for Canada to cancel or renegotiate the agreement.

Undermining Local Decision Making

According to the legal opinion, proposed CETA procurement rules would:

- Prohibit municipalities from restricting tender calls to local or Canadian companies or requiring that bidders use some proportion of local or Canadian goods, services or labour. This would essentially end the ability of municipalities to use procurement as a local economic or social development tool;
- Prohibit municipalities from using procurement for strategic purposes, such as creating or sup-

Canadian communities and public services targeted in CETA

CETA has implications for all Canadian municipalities, but leaked European Union negotiating documents specifically name many Canadian communities, and public services as targets, including:

Airports

Toronto, Vancouver, Montréal, Calgary, Edmonton, Winnipeg, St John, Regina, Saskatoon, Charlottetown, Québec City, Prince George, Kelowna, Victoria, London, Ottawa, Thunder Bay, St John's, Gander, Halifax, Charlottetown, Fredericton, Moncton, Yellowknife, Iqaluit, Whitehorse.

Public Transit

Toronto Transit, Metrolinx (Ontario), Ontario Transit, Société des Transports de Montréal (STM), Agence Métropolitaine des Transports (Québec), Translink Vancouver, OC Transpo (Ottawa), Edmonton Transit System (ETS), Calgary Transit, Winnipeg Transit, Halifax Transit, Saskatoon Transit, Regina Transit, Société de Transport de Laval, Réseau de Transport de Longueuil, Via Rail, GO Transit.

Energy Utilities

Ontario Power Generation, BC Hydro, EPCOR (Edmonton), Hydro Ottawa, Hydro Quebec, Newfoundland and Labrador Hydro, Hydro One (formerly Ontario Hydro), Manitoba Hydro-Electric Board, Toronto Hydro, Saskpower, Veridian, Aurora Hydro Connections Ltd., Hamilton Hydro, New Brunswick Power Corporation, Manitoba Hydro-Electric Board, Saskatchewan

Public procurement of goods and services

Ottawa, Toronto, Hamilton, London, Richmond Hill, Kitchener, Vaughan, Brantford, Windsor, Markham, Greater Sudbury, Burlington, Oakville, Oshawa, St. Catherine's-Niagara, Sherbrooke, Thunder bay, Kingston, Barrie, Guelph, Montréal (and/or Ville de Montréal ex-CUM), Québec, Longueuil, Gatineau, Trois Rivières, Laval, Chicoutimi-Jonquière, Calgary, Edmonton, Vancouver, Richmond, Coquitlam, Burnaby, Abbotsford, Victoria, Kelowna, Winnipeg, Regina, Saskatoon, Halifax, St John's (Newfoundland).



CETA could open the door to privatization of municipal water services in Canada by European multinationals. Privatized municipal water systems operated by EU companies have led to poor service, high water prices and corruption scandals. In the past decade, a growing number of French municipalities, are taking their water systems back under public control.⁵

porting a market for innovative goods and services, including green technologies if the effect would favour Canadian producers or attract investment to Canada;

- Prohibit municipalities from using procurement for sustainable development purposes such as promoting food security by adopting “buy local” food practices.

Increased costs and legal problems for local governments

The legal opinion also points out that CETA would also allow multinational corporations to put intense pressure on municipalities. Under the proposed agreement, unsuccessful corporate bidders will have the right to challenge a municipality’s decision in awarding a contract. This could mean significant litigation risks and increased administrative costs as local governments are forced to report on and defend procurement choices. There is even a real danger that local governments would have to compensate unsuccessful bidders if a court finds that CETA procedures and rules were not strictly observed.

Administrative costs:

The legal opinion warns that CETA would require municipalities to shoulder administrative costs associated with:

- Providing the federal government with information and statistics about their procurement practices and activities:

- Publishing detailed notices and announcements of intended procurements;
- Issuing tenders in accordance with CETA procedures and technical specifications;
- Accounting to unsuccessful suppliers for their procurement decisions; and
- Defending their actions if challenged, before domestic administrative, judicial and appellate bodies;

Legal Risks

The opinion also found that proposed CETA rules could slow or derail procurement processes by forcing municipalities to:

- Provide unsuccessful EU bidders with sufficient time to appeal their decisions;
- Contend with an order suspending the procurement pending the resolution of such an appeal; or
- Pay damages to an unsuccessful bidder or bidders where [municipalities] fail to comply with CETA rules.

Water at Risk?

Another issue identified in the report is the possibility that multinational companies could gain unprecedented access to municipal water services. While the Canadian government has in the past made efforts to preserve its sovereign control over water when negotiating international trade agreements, the EU has specifically requested that drinking water services be included in CETA. This could open the door to private ownership and operation of municipal water infrastructure by multinational corporations. The world’s two largest multinational private water companies, GDF Suez and Veolia Water, are both based in the EU, and other large multinational water companies are based in EU countries such as Germany and the UK.

According to the legal opinion, “CETA rules would allow a water conglomerate to get its foot in the door whenever a Canadian municipality or covered water utility tenders for any goods (eg. water treatment technology) or services (eg. for engineering, design, construction, or the operational services) relating to water supply systems. That contractual relationship could then provide a platform for the company to expand its interests in the water or waste water systems.” The report further notes that proposed CETA rules could ultimately lead to “the risk of private entities being able to establish a proprietary claim to the water itself.”⁶

EU's own research flags CETA problems

Many concerns identified in Shrybman's legal opinion are reaffirmed by recent research commissioned for the European Parliament.⁷ The EU's social impact assessment flags a number of negative impacts CETA may have on Canadian communities, including:

- Reduced ability of local and provincial governments to make social, economic and environmental policy.
- EU companies will move into Canada's utility sector, but there will be no big improvements for Canadian firms' share of the EU procurement market.
- Negative impacts on fair wage policies and for minority/aboriginal businesses and jobs.
- No improvements in quality of services.
- Significant negative environmental impacts.

Give municipalities a real say on trade deals

Procurement is of crucial importance to municipalities, and it is troubling that the federal government is negotiating CETA behind closed doors without an open, thorough and effective consultation with municipalities and the Canadian public.

Although CETA is currently in the draft stage of development, the Federal Government is on track to finish negotiations early, and the Federal Trade Minister recently suggested that the final deal could be signed well before the end of 2011.⁸

Given the high stakes involved in CETA, the Centre for Civic Governance-commissioned legal opinion recommends that the federal government provide objective information about the costs and benefits for municipalities, give municipalities a meaningful place at the table and allow municipalities time to gain public input on the impacts of these changes.

Resources

Municipal Procurement Implications of the Proposed Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union.

Legal opinion prepared by Steven Shrybman of Sack Goldblatt Mitchell LLP for the Centre for Civic Governance at Columbia Institute, May 28, 2010. Available online from www.civicgovernance.ca

A Leaked Draft of the CETA text, dated January 2010, can be downloaded from the Trade Justice Network website: tradejustice.ca

Negotiating from weakness: Canada-EU trade treaty threatens Canadian purchasing policies and public services, 2010 report by Scott Sinclair for the Canadian Centre for Policy Alternatives:

www.policyalternatives.ca/projects/trade-and-investment-research-project

Out of Equilibrium: The Impact of EU-Canada Free Trade on the Real Economy, October 2010 report for the CCPA by economist Jim Stanford:

www.policyalternatives.ca/publications/reports/out-equilibrium

CETA a threat to local economies

- Canadian municipal governments collectively purchase an estimated \$98 billion per year in goods and services. By opening up this sector to foreign corporations, the CETA would make it harder to keep these dollars circulating in Canada's local, regional and national economies.⁹
- Economist Jim Stanford found that CETA would create a huge trade deficit for Canada, resulting in the loss of up to 150,000 Canadian jobs.¹⁰
- Big European drug corporations may gain extended patent rights, resulting in massive cost increases for Canadian drug plans, including \$1.3-billion per year on taxpayer-funded public drug plans and \$1.5-billion on private drug plans.¹¹
- Hydro Quebec researchers warn that CETA's procurement chapter could limit the ability of government agencies to use public spending to achieve goals such as economic development and regional employment. If CETA had been in place in 2003, Quebec would likely not have been able to insist on 60 per cent provincial content in wind projects. Local content requirements under Ontario's Clean Energy Act could face similar problems under CETA.¹²

Local governments and allies speaking out on CETA

Municipalities and other organizations across Canada are demanding that the Canadian government address their concerns about CETA.

- **The Union of British Columbia Municipalities** (UBCM) convention passed a resolution asking that the provincial government negotiate a clear, permanent exemption for local governments from CETA (see box on right).
- **The Federation of Canadian Municipalities (FCM)** passed a resolution calling on the federal government to respect municipal autonomy in EU trade negotiations.
- **Local councils across Canada**, from Burnaby, BC all the way to Lunenburg, NS have passed resolutions asking that municipalities have a say in CETA .
- **The National Farmers Union** warns that CETA could prevent municipalities from setting local food preference policies and even extinguish farmers' rights to save and re-use seeds. Read more at www.nfu.ca
- **Environmental groups** such as the Sierra Club of Canada and the Indigenous Environmental Network have declared serious concerns about CETA.
- **The Alberta Chambers of Commerce** passed a resolution expressing concern that CETA's extensive demands to open procurement may restrict stimulus spending and "buy local" programs.
- **The BC School Trustees Association** passed a resolution calling on the provincial government negotiate a clear, permanent exemption from CETA for local governments.

UBCM resolution on CETA (passed October 2010)

WHEREAS the Canadian government has entered into negotiations with the European Union for a comprehensive economic trade agreement;

AND WHEREAS European corporations are insisting on full access to procurement by sub national governments - including local governments, school boards, universities, hospitals and other provincial agencies, which could significantly reduce or eliminate the right to specify local priorities when public money is invested in goods, services or capital projects;

THEREFORE BE IT RESOLVED that the UBCM request:

- a briefing from the Province of BC on the scope and content of trade negotiations with the European Union;
- the Federation of Canadian Municipalities to provide sector-by-sector analysis of the potential impacts on municipal functions and powers of the procurement regime that the European Union is seeking;
- the Federation of Canadian Municipalities to urge the government of Canada not to provide the European Union with access to sub national government procurement; and
- that the provincial government negotiate a clear, permanent exemption for local governments from CETA.

Sources and Endnotes

1. Steven Shrybman (Sack Goldblatt Mitchell LLP), *Municipal Procurement Implications of the Proposed Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union*. Legal opinion prepared by the Centre for Civic Governance at Columbia Institute, May 28, 2010. Available online from www.civicgovernance.ca/
2. Local procurement above certain dollar thresholds is already constrained to some extent by the Agreement in Internal Trade (AIT). However, the constraints imposed by CETA go well beyond those of the AIT, which allow municipal procurement to favour Canadian goods and services and which unlike CETA rules, exempt procurement relating to water and water related services.
3. Shrybman, 2010
4. Leaked drafts of the CETA text and related documents can be downloaded from the Trade Justice Network website: tradejustice.ca
5. For more information, see Food and Water Europe, *Paris Reclaims Public Water*, Backgrounder, March 2010. Available online at foodandwaterwatch.org/ParisReclaimsWater.pdf

6. Shrybman, 2010

7. See *EU-Canada SIA draft Final Report: SUMMARY REPORT* (March 2011) at http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147754.pdf

8. Nirmala Menon, "Canada Minister Confident Of EU Trade Pact Before End 2011", *Wall Street Journal Online*, MAY 6, 2010

9. Federation of Canadian Municipalities, "The Benefits of Becoming a Corporate Partner" (2009 brochure). Available online at: www.fcm.ca/cmfiles/FCM%20CP%20Info_App%20En1PBL-1212008-2149.pdf

10. Jim Stanford, *Out of Equilibrium*, (CCPA 2010). www.policyalternatives.ca/publications/reports/out-equilibrium

11. Andre Picard, "EU trade deal could cost Canadian drug plans billions." *The Globe and Mail*, Feb. 7, 2011.

www.theglobeandmail.com/life/health/eu-trade-deal-could-cost-canadian-drug-plans-billions/article1896747/

12. Éric Desrosiers "Libre-échange Canada-Europe - La souveraineté économique du Québec est menacée." *Le Devoir*, Jan. 29, 2011. www.ledevoir.com/economie/actualites-economiques/315712/libre-échange-canada-europe-la-souverainete-economique-du-quebec-est-menacee



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