



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

#431a.

November 14, 2002

To: Joint meeting of Policy & Finance and Works Committees
City Councillors

From: Michelle Swenarchuk
Canadian Environmental Law Association

CELA has reviewed the Staff Report by Anna Kinastowski, City Solicitor of October 18, to the Joint meeting of Policy and Finance and Works Committees and the attached opinion of by John Terry of Torys LLP regarding the "Proposed Implementation of Water and Wastewater Municipal Service Board."

In our opinion, Ms Kinastowski and Mr. Terry have underestimated the possibility that the WTO General Agreement on Services (GATS) applies to municipal services including water and wastewater services. Further, we consider that this proposed change in governance of water services would increase the likelihood that GATS applies. It therefore would reduce the flexibility of the City regarding future planning for water and wastewater management.

1. Torys LLP stated:

The GATS Only Applies to Service Sectors Listed by a WTO Member State in Its List of Commitments. ...The GATS does not apply automatically to all services in all WTO member states. It applies to a particular service sector only if the member state has expressly made a commitment that that services sector will be bound by the GATS rules....(page 3, 2nd paragraph)

CELA comment: In fact, the GATS applies to "measures by Members affecting trade in services," that is, to **all** measures (GATS I). It establishes a hierarchy of obligations, so that some rules apply to all services and some only apply to the service sectors listed in individual countries' schedules.

Specifically, rules applying to all services include:

- most-favoured nation treatment, requiring that all foreign companies receive equal trade advantages(GATS II), and
- requirements of transparency (GATS III).

Rules that apply only to sectors listed in country specific schedules include:

- The obligation of national treatment, requiring treatment of foreign companies equal to treatment received by Canadian companies (GATS XVII),
- market access, prohibiting various conditions on establishment of businesses (XVI) and
- restrictions on domestic regulations (GATS VI).

Regarding monopolies, some rules apply to all sectors and others apply only to listed sectors (GATS VIII).

2. Torys LLP stated three bases for its position that the GATS does not apply to water and wastewater services in Toronto:

- no commitments (by Canada) on water or wastewater services;
- Canada's reservation from national treatment for services provided by the public sector; and
- GATS exemption for services supplied in the exercise of governmental authority.

CELA COMMENT

- **Canadian commitments:**

Contrary to Torys' opinion, echoed in the Staff Report, the Canadian Schedule of Specific Commitments lists numerous commitments pertaining to elements of these services, including:

- **integrated engineering and project management services for water supply and sanitation works turnkey projects** (p.23, Canada Schedule of Specific Commitments);
- **sewage services** (p.51);
- sanitation and similar services (p.51);
- business services (p.31);
- technical testing and analysis services including quality control and inspection (p.31); and
- construction services: general construction work for civil engineering (p.44)

In summary, substantial commitments were made by Canada under GATS for elements of water and wastewater services, including apparent coverage of wastewater as "sewage services."

- **Canada's reservation from national treatment for services provided by the public sector:**

As Torys LLP has stated, Canada's schedule of commitments includes a limitation that "The supply of a service, or its subsidization, within the public sector is not in breach of [the GATS rules respecting national treatment]." (Canada Schedule, p.3)

The meaning of this limitation is unclear. It may mean, as Torys LLP argues, that these services are exempt from national treatment obligations, the obligation to treat foreign

suppliers of the services equally to Canadian suppliers. However, it may also simply mean that the supply of a service in the public sector **in itself** does not give rise to a right of a foreign private sector supplier to provide that service.

In any event, whether or not it exempts these services from national treatment rules, it does not exempt them from many other GATS rules.

- **GATS exemption for services supplied in the exercise of governmental authority:**

To summarize a full examination of the uncertainties of this exemptionⁱ:

Although the GATS contains an exemption for government services, (the exemption) only applies to those services that are “neither supplied on a commercial basis nor in competition with private suppliers.” (GATS I 3(c) The WTO concedes that the meaning of “commercial basis” is unclear,ⁱⁱ noting that services provided on a commercial basis are covered by GATS, whether the owner of the business is a public or private entity. ... Since many municipal services are provided by a mix of public and private operators (i.e waste disposal, day care), it seems unlikely that they could be classified as both non-commercial and non-competitive.

In a comprehensive examination of the uncertainties surrounding this exemption, officials of the Government of British Columbia identified numerous uncertainties regarding its applicationⁱⁱⁱ:

- The exclusion is very narrow, given that both excluding criteria must apply; the service must be supplied on a non-commercial basis **and** not in competition with another supplier;
- Ordinary dictionary definitions of the terms of both criteria are broad;
- A similar exclusion in the European communities treaty has been interpreted very narrowly;
- WTO statements about the GATS coverage are not reassuring; some merely reiterate the text, others use a narrow definition of public services; others suggest that the exclusions are very limited; others (such as the Secretariat paper noted above) confirm the uncertainties.

Given that many municipal services are provided by a mix of public and private suppliers, and fees for service are common (for waste disposal, water, public transit), **it seems unlikely that many municipal governmental services will actually be exempted from GATS.**

In summary, the purported GATS exemption for services provided by government authorities is at best uncertain and unreliable, and given the fee-for-service delivery of water and wastewater services, a WTO dispute panel may well find that the GATS rules apply to these services.

3. GATS and monopolies

In response to CELA's statement of concern on June 11, 2002, concerning the GATS impact on monopolies, the City Solicitor, has argued that "the City of Toronto currently operates its water and wastewater service as a monopoly and will continue to do so whether it continues to be governed through a municipal department or through a municipal service board^{iv}."

We agree that both modes of operation constitute monopolies. GATS VIII requires that monopolies do not "act in a manner inconsistent with (Canada's) obligations under Article II (most-favoured-nation-treatment) and specific commitments." This convoluted wording is also unclear.

In our opinion, a monopoly like the proposed municipal service board is somewhat more vulnerable to claims from foreign companies to rights of market access and national treatment under the GATS, as the monopoly is more likely to be found to have elements of a commercial character. This would further reduce the possibility of protection under the "governmental services" exemption.

4. Possible implications of the GATS for water and wastewater services

As we have discussed elsewhere^v the GATS creates the following potential problems for municipal water/wastewater services:

- The broad coverage of services related to water service delivery in the Canadian schedule gives rights to foreign companies (engineering, construction, including scientific water testing and monitoring firms) to the same degree of involvement in water services and wastewater quality and quantity monitoring as Canadian companies may have. It increases the number and scale of private sector players who may create pressure for more privatization of water services or parts of these services.
- Where municipalities have contracted exclusively with a private company or, in Ontario, with OCWA, other foreign companies may claim that the contracts constitute monopolies, even if a single-source supplier is preferable for public protection, cost, and efficiency. They may then pressure for treatment equal to that given the chosen supplier.
- Measures to promote water efficiency and use reduction, as well as energy reduction related to water services, if they impact private sector projects (entry of new operators or access to the resource) or designs, may be vulnerable to challenge. They are not protected by the limited GATS XIV general exception which does not protect measures taken for resource conservation.
- Since GATS covers subsidies, private water companies may seek access to the subsidies now paid to public water providers.

- The Federation of Canadian Municipalities' call for improved national water quality standards raises the possibility of stronger regulatory controls, which will affect the provision of water services. Foreign companies (through their governments) may argue under GATS VI that such regulations are “more burdensome than necessary.”
- Environmental assessment requirements regarding water facility siting and treatment may be challenged as too burdensome.
- The FCM calls for operator training and provincial standards for training. Such standards are included in Bill 195, the proposed new Ontario Safe Drinking Water Act. These are the types of qualification requirements and licensing standards, that are subject to GATS VI and could be challenged as “too burdensome.”
- The FCM discussions of energy conservation options underlines the need for **flexibility** for municipalities in designing service systems to meet multiple purposes. This flexibility is reduced when, due to high capital costs, corporations gain long-term contracts and procedures for service delivery. The flexibility is further reduced by GATS, which gives foreign firms more strategies to demand access to such long-term service commitments.
- The use of a mix of regulatory tools (sewer use bylaws, permits, policies, user fees and education) to control discharges to sewers implies controls (through sewer use bylaws) on rights of establishment of industries, as well as questions of domestic regulation of water effluents, both vulnerable to GATS oversight.

5. Conclusion

The City Solicitor has concluded that:

Although there can be no absolute guarantee, it is reasonable to conclude that GATS as it exists at the present time, would not apply to the provision of water and wastewater services by a municipal service board. In any event, the implementation of the water and wastewater municipal service board does not create a situation that is any more or less vulnerable to the application of GATS than maintaining the status quo.

We disagree with this conclusion.

We consider that given the extent of the Canadian commitments affecting water and wastewater services and the weakness and uncertainty of the exemption for governmental services, it is likely that the GATS obligations apply to many elements of the provision of water and wastewater services in Toronto.

These obligations will also apply to services in the proposed new structure, with a somewhat increased risk of the range of possible GATS-based challenges detailed above. The increased risk results from an increased separation of the services from direct political control and differentiation from the mode of delivery of other municipal services. These changes increase the likelihood that the governmental exemption will not apply to these services.

Further, any additional changes in governance or decisions which increase the role of the private sector in providing these services increase the possibility of GATS-based claims from foreign service providers.

Thank you for your consideration of these submissions.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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ⁱ Michelle Swenarchuk, From Global to Local: GATS Impacts on Canadian Municipalities, 2002, Canadian Environmental Law Association and the Canadian Centre for Policy Alternatives, see www.cela.ca

ⁱⁱ WTO Council for Trade in Services, Environmental Services, Background Note by the Secretariat, S/C/W/46/6 July 1998 (98-2690), Paragraph 53

ⁱⁱⁱ Ministry of Employment and Investment, Government of British Columbia, “GATS and Public Service Systems,” April 2001, and sources cited in it, originally posted at www.ei.gov.bc.ca/Trade&Export/FTAA-WTO/WTO/governmentalauth.htm, now available at http://members.iinet.net.au/~jenks/GATS_BC2001.html

^{iv} Anna Kinastowski, Staff Report to Joint meeting of Policy & Finance and Works Committee, October 18, 2002, p.2

^v Swenarchuk, Op.Cit.