

# PUBLIC WATER FOR SALE: HOW CANADA WILL PRIVATIZE OUR PUBLIC WATER SYSTEMS

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*A report to provincial, territorial and municipal governments regarding the  
Canada-European Union Comprehensive Economic and Trade Agreement*

*December 2010*



## **ABOUT THIS REPORT**

This report has been prepared by the Canadian Union of Public Employees and the Council of Canadians as part of their joint work on water and trade policy. The report is being distributed to federal, provincial and territorial decision makers, trade negotiators, municipal councillors, Members of the European Parliament, the media and the public in advance of a sixth round of Canada-European Union Comprehensive Economic and Trade Agreement (CETA) negotiations, scheduled for Brussels in January 2011. The report cautions provincial and territorial governments in particular about the effect of proposed services, investment and procurement commitments in CETA on public water systems and water management in Canada. It explains the benefits of public ownership and management of water utilities and the importance of public finance for urgently needed municipal and First Nations water system upgrades. Finally, it makes several recommendations on how to protect public water systems from proposed policy restrictions in CETA that would encourage privatization.

## **ABOUT THE COUNCIL OF CANADIANS**

Founded in 1985, the Council of Canadians is Canada's largest citizens' organization, with members and chapters across the country. We work locally, provincially, federally and internationally to promote progressive policies on fair trade, clean water, energy security, public health care, and other issues of social and economic concern to Canadians. The Council does not accept money from corporations or governments, and is sustained entirely by the volunteer energy and financial assistance of its members.

## **ABOUT THE CANADIAN UNION OF PUBLIC EMPLOYEES**

The Canadian Union of Public Employees (CUPE), Canada's largest union, represents more than 605,000 women and men working in municipalities, health care, education, libraries, universities, social services, public utilities, transportation, emergency services and airlines. CUPE members are proud to deliver the majority of Canada's community drinking water and wastewater services.

## **ACKNOWLEDGEMENTS**

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## **EXECUTIVE SUMMARY**

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The federal, provincial and territorial governments in Canada are currently negotiating a Comprehensive Economic and Trade Agreement (CETA) with the European Union that presents a serious threat to Canada's public water systems. At the request of Europe's large private water companies, the provinces and territories are considering including drinking water and wastewater services in their CETA commitments. EU negotiators are also asking that Canada's municipalities and their water utilities be included in a chapter on public procurement. Initial provincial-territorial offers in services, procurement and investment will be sent to the European Commission early in January 2011.

If CETA is negotiated on these terms, it would be the first time that Canada has allowed our drinking water to be fully covered under a trade treaty and the first instance that a trade agreement has covered municipal procurement of water services. The services and procurement commitments proposed in CETA would be protected by strong investor rights. The effect of these rights as they relate to the services and procurement provisions would be to lock in existing private water contracts, restrict how local governments regulate the activity and investment of private water companies, and to encourage more private sector involvement in a number of public service sectors, including water.

The federal, provincial and territorial governments are being asked to make these commitments to the EU during what has been described as an infrastructure crisis in Canada. Municipalities and First Nations communities are under pressure to upgrade aging water facilities, and to meet new environmental and safety legislation without access to proper financial resources. At least \$31 billion is needed to cover the cost of the facility upgrades, and the estimated cost of the new sanitation regulations is \$20 billion. Not surprisingly, the private water industry sees leaky pipes as an opportunity to increase its role in water delivery and treatment. Existing government programs, including the Building Canada Plan, and funding initiatives under Public Private Partnerships Canada (PPP Canada Inc.), encourage privatization as a condition of receiving federal money for municipal infrastructure projects.

Experiments with privatization have failed all over the world, and a growing trend in Europe, the United States and Latin America is toward remunicipalization (or de-privatization) of private and P3 water projects. Time and again, partial or full privatization of water systems has been a disaster; accountability disappears, water rates go up, workers are laid off, service levels decline. Once public revenues are transformed into private profits remunicipalization will become next to impossible under the services, investment and procurement rules set out in CETA. There are no economic or social gains from agreeing to the EU requests as they relate to water services. There are only unnecessary and costly risks to Canada's municipalities and First Nations.

Provincial, territorial and municipal governments must take immediate action to protect Canada's public water systems from decay and privatization. As one of the wealthiest countries in the world, solving the infrastructure crisis in municipalities and First Nations communities is a matter of political will, not adequate funding. First, government procurement and trade-in-services commitments related to water systems must be rejected in CETA. Provincial and territorial governments must work with municipalities and the federal government to develop a public funding plan to upgrade Canada's neglected water infrastructure. Finally, all levels of government must be transparent with Canadians about the effect that CETA will have on the provision of public services and development of social policy. They should seek informed consent from Canadians on what provisions a trade agreement with the EU should and should not include.

# **PUBLIC WATER FOR SALE: HOW CANADA WILL PRIVATIZE OUR PUBLIC WATER SYSTEMS**

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## **INTRODUCTION**

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Canada and the European Union are currently negotiating a broad free trade agreement that threatens Canada's already challenged public water systems. At the request of Europe's large private water multinationals, the provinces and territories are considering including drinking water and wastewater services in their services commitments under the proposed Canada-EU Comprehensive Economic and Trade Agreement (CETA). EU negotiators are also asking that Canada's municipalities and their water utilities be included in a chapter on public procurement. If CETA is negotiated on these terms, it would be the first time that Canada has allowed our drinking water to be fully covered under a trade treaty and the first instance that a trade agreement has covered municipal procurement of water services.<sup>1</sup> The goal is clearly to encourage and facilitate the privatization of Canada's public municipal water systems.

The majority of our water and sanitation services in Canada are publicly owned, operated and delivered. Water and other essential services such as health care, public transit, postal services and energy act as important inputs into all economic activities, which reinforces the need for their delivery to be accountable to the public. Our public services provide stability and ensure a decent quality of life for all Canadians. They further act as equalizers in our increasingly unequal society by providing support to the most disadvantaged members of our communities. Our governments oversee our public services in the public interest and must not consider handing control over to corporations whose interest is profit. The inclusion of water and wastewater services, utilities and municipalities in CETA would undermine public control and accountability of this vital sector while offering no real gains to domestic or industrial water users. Canada's drinking and sewage systems are important community assets. Public drinking water and sanitation services are a human right and the lifeblood of well-functioning communities.

Unfortunately, today these systems that were built by generations before us are under enormous stress. Municipalities and First Nations communities across the country require critical water facility upgrades to meet present and future needs. According to the Federation of Canadian Municipalities (FCM), at least \$31 billion is needed for water facility upgrades alone. Proposed new federal water sanitation standards would add \$20 billion<sup>2</sup> to that figure. Providing safe drinking water to First Nations communities will raise the price tag even further. Not surprisingly, Canada's municipalities have been lobbying the federal government for long term funding in order to meet these critical needs. Though these numbers may seem high they are not out of reach. Canada is one of the wealthiest countries in the world. The problem is a matter of priorities and political will – not financial capacity.

Instead of preserving and improving our public water systems, the current federal and some provincial governments seem to have other priorities. They are encouraging municipalities to look elsewhere, to the private sector, for water infrastructure financing. Meanwhile, the federal, provincial and territorial governments are negotiating a free trade agreement with the European Union (EU) that would lock in

existing contacts with foreign corporations, restrict how local governments regulate the activity of private water companies, and encourage more private sector involvement in a number of public service sectors, including water.<sup>3</sup>

According to an August draft of an EU Sustainability Impact Assessment (SIA) of the proposed agreement, this is entirely the point of including water services in CETA:

*Canada-EU trade could allow deeper penetration of EU-based water utilities in Canada. This could lead to changes in water management and water consumption... Increased liberalisation in this sector could provide benefits to EU environmental service providers as they are able to capitalise from greater market access to Canada's water management system.<sup>4</sup>*

For years, international development and public interest groups have warned that the European Commission uses trade negotiations to push for trade rules that encourage and lock in water privatization. The public has always fought back against these trade agreements on the grounds that they would impede the ability of governments to provide for the vital drinking water and sanitation needs of their residents. Numerous examples from around the world show that experiments with the privatization of water and sanitation services have led to rate hikes and cut-offs to lower income households, poor environmental stewardship and lack of transparency and public accountability among many other shortcomings. This has led to a growing anti-privatization movement calling for water and sanitation services to be declared a human right that must be accessible and affordable to all. While EU and US-based water firms have made global inroads in private water delivery and treatment, the growing trend in Europe, the US and Latin America is now remunicipalization – the bringing back into public hands of failed privatizations. CETA would be taking Canada down a well trodden but ultimately rejected path.

Public pressure is now essential to convince the Canadian provinces and territories, which are at the negotiating table for the first time, to reject including drinking and wastewater services and utilities in their commitments in CETA. Notwithstanding the need for sanitation and infrastructure upgrades, the high quality of public water management in Canada and the proven failures of water privatization around the world means there can be few if any efficiency gains from water services liberalization. The agenda of EU negotiators is clearly to pry open Canada's largely public water systems to private involvement and then to enforce a regime that facilitates privatization and commercialization through the terms of the CETA investment, services and procurement provisions.

This paper will first look at the internal pressures on Canadian municipalities to privatize public water systems which has created fertile ground for CETA's privatization agenda. It will then explore the EU trade agenda pertaining to services liberalization before examining the key provisions of the CETA text as they relate to water services.<sup>5</sup>

While provincial and territorial governments must fully exclude water from all government procurement and trade-in-services commitments in CETA, investment protections in the text could still pose a significant threat to public water delivery and treatment systems. We include several recommendations on how to safeguard public water systems from Canada's future trade commitments, and on the need to maintain and upgrade Canada's suffering municipal water systems by keeping them public.

## CANADA'S VULNERABILITY – A PUBLIC WATER SYSTEM IN CRISIS

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In 2010, with few exceptions, Canadian water and wastewater systems remain in public hands. While the majority of Canadian municipalities own, operate and manage our drinking water and sanitation facilities, and despite strong public support for the public provision of water, there is cause for concern that this situation may change.

In May 2010, the City of Winnipeg approved a 30-year deal to potentially hand over the design, construction and partial operations of its wastewater treatment facility upgrades to the French multinational corporation Veolia Environment. The total cost of these upgrades is expected to exceed \$660 million. At this time, it is no secret that Canadian municipalities are being underfunded and experiencing what is widely understood to be an infrastructure crisis. In search of capital, municipalities are being persuaded to consider the private sector.

The Federation of Canadian Municipalities (FCM) has calculated that an investment of at least \$31 billion is needed to maintain and repair water infrastructure across Canada. This shortfall exists in the context of an overall infrastructure deficit of over \$123 billion. Receiving only eight cents for every tax dollar collected in Canada, our municipalities are being stretched to the limit.

A large number of Canadian water and wastewater systems are in desperate need of upgrades. Water supply, wastewater and storm water systems are approaching the end of their service life. Many older cities have infrastructure that is over 100 years old and facing serious deterioration. Montreal currently loses 40% of its municipal water through leaky pipes, while 34% of Canadian municipal water pipes will meet their service life by 2020.<sup>6</sup> The situation in our First Nations communities is even worse. According to Health Canada, as of October 31, 2010 there were 116 First Nations communities under drinking water advisories, while 49 First Nations water systems were classified as “high risk” in March 2010.<sup>7</sup>

There has been significant investment in infrastructure in recent years. The problem is that it has not been sufficient to meet the infrastructure needs of municipalities and First Nations communities.<sup>8</sup> A related issue of concern is the fact that these federal funding initiatives directly and indirectly support a broad privatization agenda to the detriment of our communities.

### A Federal Privatization Agenda

In 2007, the Federal government rolled all infrastructure investments into the Building Canada Plan. This was to be a \$33 billion investment in infrastructure over seven years. The plan had many components but two important features were the Building Canada Fund (BCF) and the Public Private Partnership (P3) Fund.

The P3 Fund was the only source of new funding in this plan and is explicit in its promotion of privatization. This \$1.25-billion fund was a massive subsidy to promote the use of P3s in the procurement of public infrastructure by provincial, territorial, municipal and First Nations governments. To administer the fund, a Crown Corporation called *PPP Canada Inc.* was created with a mandate to “develop the Canadian market for public-private partnerships for the supply of public infrastructure in the public interest.” Their interest in municipal infrastructure is not a secret and is certainly cause for concern.

Municipal proposals are actively being solicited for a multitude of infrastructure projects including water and wastewater treatment. Several cities in Canada have applied for funding for their drinking water facilities. And of the 73 proposals PPP Canada Inc. received in its second round of calls that closed in the summer of 2010, 35 involved municipal projects, including seven wastewater projects.<sup>9</sup> The government is particularly interested in gaining access to First Nations communities and in “bundling” several small rural water treatment facilities for private operation.

Under the BCF, cities that applied for funding had to undergo a mandatory P3 screening process for large projects over \$50 million. Municipalities had to go through an elaborate process involving expensive legal fees before they were allowed to exercise their right to keep services public. In 2006, Whistler had to spend over \$1 million dollars in legal fees before giving in to public pressure to maintain a public water system. Although the P3 screen was put on hold for federal stimulus projects since 2009 there is nothing to suggest that the underlying political agenda has changed in any way.

Federal and provincial underfunding has created the conditions for the privatization of public services. Despite their well documented failures all over the world, and a growing trend in Europe, the United States, and Latin America to remunicipalize private and P3 water projects, our federal government and several provinces are promoting P3s as a legitimate solution to address the infrastructure deficit, including our leaky pipes and deteriorating water facilities.

#### *PUBLIC-PRIVATE PARTNERSHIPS: A FAILED MODEL GLOBALLY*

- **London, England:** Metronet was one of two P3s used for maintenance and upgrade of the London Underground system in the UK. In 2007 it collapsed when it ran out of money after overspending by £2 billion (nearly CDN\$4 billion) through a P3 where it awarded its own shareholders overpriced contracts. It also failed to carry out work on time or on budget. A parliamentary report written after its failure stated:

*“Whether or not the Metronet failure was primarily the fault of the particular companies involved, we are inclined to the view that the model itself was flawed and probably inferior to traditional public-sector management. We can be more confident in this conclusion now that the potential for inefficiency and failure in the private sector has been so clearly demonstrated. In comparison, whatever the potential inefficiencies of the public sector, proper public scrutiny and the opportunity of meaningful control is likely to provide superior value for money. Crucially, it also offers protection from catastrophic failure. It is worth remembering that when private companies fail to deliver on large public projects they can walk away—the taxpayer is inevitably forced to pick up the pieces.”<sup>10</sup>*

- **Manila, Philippines:** After passing the Water Crisis Act in 1995 the Philippines signed a \$283 million privatization plan managed partially by multinational firms Suez and Bechtel. It wasn’t long before tariff prices increased, water service and quality worsened, and public opposition skyrocketed. Today, some Filipinos still don’t have water connections, tariffs have increased from 300 to 700 per cent in some regions, and outbreaks of cholera and gastroenteritis have killed six people and severely sickened 725 in Manila’s Tondo district.<sup>11</sup>
- **Frankfurt, Germany:** In 2007 the government in Germany entered into a P3 agreement with Hochtief for several schools. Using conventional public procurement the construction of the educational centre would have been €4million cheaper, according to an audit report. For the next 20 years the contract with Hochtief required €12.1 million annually which amounted to between 17% and 36% of the total budget for school buildings in Frankfurt, leaving the remaining schools with very limited budgets.
- **Montreal, Quebec:** In June 2010, the Quebec Auditor General slammed the Montreal Public Private Partnership project and found the public option would save the province \$10.4 million. For four years in a row, Quebec’s Auditor General has found that the choice to pursue a P3 for upgrades to Montreal’s University Health Centres (MUHC)<sup>12</sup> is based on faulty and inaccurate assumptions and will end up costing taxpayers millions more than if they chose a public model.
- **British Columbia, Canada:** BC’s Sea-to-Sky Highway will cost taxpayers \$220 million more than if it had been financed and operated publicly.



To present P3s as a viable funding option is to ignore the reality that P3s cost more over the long term, are highly risky, provide lower service quality, and lock governments into long term contracts with the private sector, effectively undermining local control and democratic, accountable processes. In the water sector in particular, there is no empirical evidence that the private sector can outperform public utilities. Virtually all P3s in Canada have been justified on the basis that they are more efficient and transfer large amounts of risk to the private sector. But Ron Parks, one of British Columbia's most respected forensic accountants, recently calculated that the cost of privatization would add \$116 million to BC's Capital Regional District (CRD) sewage treatment system.<sup>13</sup>

Remunicipalization or de-privatization, also referred to as contracting-in, would become much more complicated once the rights of European water corporations are entrenched in an international trade agreement with a dispute settlement mechanism that is unaccountable to the local public and above domestic law. Even when a private company fails to meet its end of the bargain, breaking a contract could be declared expropriation under international trade law, forcing governments to compensate for millions of dollars in lost profits.

## Environmental Legislation

### WASTEWATER SYSTEMS EFFLUENT REGULATIONS

New regulations proposed by the federal government may render our municipalities particularly vulnerable to the interests and demands of EU water corporations to increase private investment in Canadian water services. A draft set of regulations called the *Wastewater Systems Effluent Regulations* was released in March 2010 with the goal to harmonize regulations across Canada to protect our water sources from wastewater effluent. While the details are still being negotiated, it is possible that these changes to the federal Fisheries Act will require as many as 1000 Canadian wastewater facilities to upgrade their treatment levels to a secondary level of treatment, at a cost of over \$20 billion. This would bring to over \$50 billion the total municipal water deficit.

To date, the federal government has not presented our cities with a realistic plan to cover these costs. The disturbing element here is the use of necessary environmental regulations to download costs onto cash-strapped municipalities, which ought to be borne by all three levels of government. Efforts to set and enforce regulations that ensure our water is clean and safe and that our environment is protected should be supported. But with CETA on the horizon they could become a double-edged sword. The timing of these new regulations could not be better for multinational corporations looking to gain access to municipal water services in Canada.

In Europe and elsewhere in the world, there is a growing concern that such regulations will become a gateway to the privatization of our wastewater facilities. In fact, they have been identified by the industry as an opportunity for private investment. According to a Global Water Intelligence Report in 2006:

Wastewater treatment, which for a long time was perceived as an impediment to economic growth, is becoming – both in central and provincial government policies – a force of economic development itself. This is now true across the region (China) and, in wealthy or fast growing economies; it is becoming the single largest source of business for private water companies.<sup>14</sup>

In Canada, these new regulations will legally require our cities to invest in wastewater facilities despite other pressing needs in the community and regardless of their economic situation or fiscal capacity. Clearly, higher standards for water treatment are a good thing in the long run. But according to the FCM, without proper funding, these regulations could result in the largest property tax increase in Canadian history.

Furthermore, without adequate funding from senior levels of government for municipalities to meet these higher water quality standards, CETA could well become the mechanism that allows multinational water corporations greater access to our public water. Small, rural and First Nations communities whose population and property tax base may not generate sufficient revenue to support the necessary facility upgrades are particularly vulnerable to these privateers lurking in the shadows.

#### COMMITTED TO THE ENVIRONMENT YOU SAY...

The city of Brussels terminated a contract with Veolia in 2010 after Aquiris, a consortium created in 2001 by Veolia Environment to support a BOT (build own operate transfer) in the city, deliberately dumped the wastewater from 1.1 million people into the river Zenne for 10 days. The chief executive of the regional water authority described this action as equal to “releasing an atomic bomb” into the river.<sup>15</sup> Aquiris took this action while in a dispute with public authorities. One official noted that “whatever the rights and wrongs in the dispute it is hard to imagine that a publicly owned and operated company would have stopped the pumps like this.”<sup>16</sup>

- » **RECOMMENDATION 1:** *The federal government should establish a National Public Water Fund to finance water and wastewater upgrades to be cost-shared with provincial and municipal governments.*

*An immediate injection of \$3.7 billion in the 2011 federal budget should go into this fund with at least \$1 billion earmarked for the cost of meeting the new sanitation standards. These will be cost-shared with provincial and municipal governments. Municipal water transfers could then reach a yearly target of \$3.1 billion between 2012 and 2022 to pay down the infrastructure deficit in 10 years.*

*An additional \$150 million per year should cover training, certification and testing with funding restricted to publicly-operated facilities.*

#### SAFE DRINKING WATER FOR FIRST NATIONS ACT

Bill S-11 titled “Safe Drinking Water for First Nations Act” was tabled in Parliament on May 26, 2010. The stated objective of ensuring First Nations have access to safe drinking water was swiftly called into question when the federal government did not make clear how these regulations would be implemented. On June 9, 2010 the National Chief issued a national bulletin on the issue stating that

*Bill S-11, does not guarantee that First Nations will have access to safe drinking water. Without funding for infrastructure/facilities, skills, resources, training and support, safe drinking water for First Nations will not be guaranteed. ... the AFN is calling on the federal government to engage in real action to address the capacity gap as well as working towards a regulatory regime that reflects our rights, jurisdiction and delivers equitable and guaranteed access to safe drinking water.<sup>17</sup>*

Among the many concerns regarding Bill S-11 are the fact that First Nations communities were never consulted, and the fact that Canada will have the authority to force First Nations into agreements with third parties to operate First Nation water systems. The private sector will have the ability to enter First Nations as owners and operators of water and wastewater facilities due to a lack of infrastructure, resources and training within First Nations. Private operation of public facilities can lead to higher costs of service and user fees downloaded to First Nations resulting in further inequality. An added problem is that set-asides

for First Nations companies, an important means for provincial-territorial governments to encourage economic development, may be lost to the CETA procurement chapter.

- » **RECOMMENDATION 2:** *The federal government should respect the right of First Nations communities to prior informed consent, and must consult and include them in any negotiations having to do with the water and wastewater facilities on First Nations reserves. Direct financial support will also be required to improve water and wastewater facilities on First Nations reserves and communities beyond 2012 when funding for the First Nations Water and Wastewater Action Plan (FNWWAP) expires.*

## In the Interest of the EU

Given this context, it is no surprise that Europe's largest and most notorious private service providers, including the world's largest water companies, Veolia Environment and Suez, have signed a joint business declaration "in Support of a Canada-EU Trade and Investment Agreement."<sup>18</sup> In the absence of proper funding, new water regulations render our municipal and territorial drinking and sanitation facilities increasingly vulnerable under this trade and investment agreement. Requirements to consider private-public partnerships and incentives for municipalities further entrench opportunities for private water companies.

Allowing these corporations to gain even a foot in the door of our water facilities is problematic when we consider what is at risk. To enter into operating agreements with a private water corporation effectively amounts to signing away the public's right to control its water. Once our water services are privatized, generally through multi-decade contracts, it will be very difficult to bring them back under public control no matter the consequences in terms of poor service or higher rates.

### LABOUR MOBILITY AND REGULATORY HARMONIZATION

A significant issue in CETA, although not as critical as the services, procurement, and investment issues discussed in more detail below, is how EU companies may gain rights in the agreement to export skilled workers and so-called expertise to Canada in the form of management services in private water plants. Provisions in CETA on Temporary Entry seek to ease the flow of European services managers and skilled water operators into Canada.

Under the new sanitation regulations proposed by the federal government, changes to current monitoring and reporting systems and the requirement to be operating at a minimum secondary level of wastewater treatment will be a challenge for municipal utilities. Our water and sanitation facilities are already reporting difficulty hiring for all facility positions and up to 50% of the estimated workforce in our water facilities is expected to retire in the next 5-10 years.<sup>19</sup> This experience is exacerbated in small communities and in First Nations communities where the labour pool is much smaller. There is a real danger here that CETA will facilitate contracting-out to the private sector.

Taken together, the procurement, labour mobility, services and investment provisions in CETA will trump any plans our provinces have to hire managers and skilled workers locally. Trade specialist Scott Sinclair argues that CETA would, "*prohibit governments from setting performance requirements that oblige foreign investors or service providers to purchase locally, transfer technology or train local workers (emphasis added).*"<sup>20</sup>

Federal regulations are currently in place requiring mandatory certification of all water facilities and operators in Canada. High quality training and certification is an instrumental component to the provision of safe water; a lesson Canada learned following the Walkerton disaster in Ontario. A Regulatory Cooperation chapter as proposed in CETA may create incentives to lower, rather than raise, the operator training and certification standards that are currently under the jurisdiction of each province and territory.

Canadian provinces, territories and municipalities must resist the urge to turn to the private sector to fill these desperate financing and staffing deficits. Funding is not a fundamental issue. The problem in Canada is largely one of political will, not money. But the will of the federal government is toward further tying the hands of provincial, territorial and municipal governments in the interest of supporting the commercial ambitions of the EU's largest water corporations.

We will now look more closely at how the proposed Canada-EU free trade agreement will support this privatization agenda and exert pressure to dismantle and privatize Canada's public water system.

## **CANADA-EU TRADE NEGOTIATIONS AND PUBLIC WATER**

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Canada-European Union free trade negotiations are now a year old and progressing rapidly, according to federal and provincial negotiators. There have been five rounds of trade talks, which alternate between Ottawa and Brussels. Provinces and territories are at several of the negotiating tables at the insistence of the EU Commission – the policymaking branch of the EU – because many of the EU’s priorities for CETA fall under sub-federal jurisdiction. These include government procurement, investment and services, technical barriers to trade, labour and labour mobility, environment, monopolies and state enterprises, and regulatory cooperation. From this list of areas we can get a sense of the scope of the CETA negotiations, which clearly goes beyond what most people understand as trade. It is the stated aim of the EU Commission to achieve legislative and regulatory convergence in a number of these areas. Canada as the smaller partner will be expected to make the majority of legislative and regulatory changes.

While much of the architecture of the CETA text has been completed, provincial-territorial offers to the EU in the areas of their jurisdiction have not yet been sent to the European Commission.<sup>21</sup> Initial offers regarding procurement, services and investment will be exchanged within the next few months. These will be the basis for further negotiation, arm-twisting and pressure for deeper commitments. Contentious issues such as government procurement, intellectual property, and agricultural tariffs and policy will probably not be resolved until the final stages of the negotiations. The next round will take place in Brussels, January 17 to 21, 2011, followed by a seventh and perhaps final round in Ottawa in April 2011. The Government of Canada hopes to have a final agreement signed by October 2011.

As we have seen so far, the needs of Canadian municipalities around water infrastructure are clear, as are the problems with relying on the private sector to meet those needs. Already there is pressure on municipalities federally and at the sub-federal level to privatize essential services such as water distribution and treatment. It is in this context that we must understand the Canada-EU free trade negotiations as providing yet another tool to private water companies to see this vision through.

Public water services in Canada are threatened in three related ways by the Canada-EU Comprehensive Economic and Trade Agreement:

- i) Through EU requests to include drinking water and wastewater services in provincial and territorial services commitments.
- ii) Through strong investment protections as they relate to services and market access commitments, and which may grant EU investors rights to underlying water.
- iii) Through the proposed inclusion of provincial-territorial water agencies, municipalities and water utilities in the CETA procurement chapter, which could seriously compromise the ability of local governments to manage public water systems.

Each of these will be treated separately below but it is the way the three will work together to encourage and then protect privatization that is of most concern.

Until very recently, provincial, territorial and municipal purchasing and contracting policies have been excluded from Canada’s international trade agreements. Previous federal governments have also pledged to safeguard water and water services for human use in all Canadian international trade negotiations. But, under the current federal government, this sensible caution has now been thrown to the wind. Preliminary studies suggest that the procurement chapter will also only increase pressure on municipalities, provinces and territories to contract out or privatize essential social services, including water. Before we get to a detailed look at the CETA text, some international context around the controversy of liberalizing services is useful.

## Liberalization of water services: From GATS to CETA

Services range from birth (midwifery) to death (burial); the trivial (shoe-shining) to the critical (heart surgery); the personal (haircutting) to the social (primary education); low-tech (household help) to high-tech (satellite communications); and from our wants (retail sales of toys) to our needs (water distribution).<sup>22</sup>

The controversy over services liberalization at the World Trade Organization (WTO) is long and unsettled. The word “liberalization” is synonymous with “deregulation” in many contexts, and refers to an emphasis on competition and the free flow of capital in the exchange of goods or provision of services. One of the top concerns for developing and developed countries alike relates to the constraints that services agreements, in particular, the General Agreement on Trade in Services (GATS), put on the capacity of governments to regulate in those sectors covered by the agreement.

The ultimate goal of GATS, its so-called built-in agenda for expansion, and subsequent free trade agreements designed to move beyond the level of ambition at the WTO is to create commercial opportunities for private service providers by reducing the role of government in the provision of committed services. According to the International Forum on Globalization, these agreements take the decision on whether or not to privatize water services out of the hands of communities and governments and put it into the hands of trade bureaucrats tasked with enforcing the terms of the agreement.<sup>23</sup>

The WTO, Organization for Economic Co-operation and Development (OECD), as well as major European water firms have attempted to contradict these claims. The WTO argues it is not “after your water” and that GATS rules would not interfere with the decisions of governments to maintain public monopolies in water delivery. As we will see below, these promises ring hollow when you look at the terms of the agreements. The intent of other Bretton Woods institutions, such as the World Bank and International Monetary Fund (IMF), must also be taken into account. These economic governance bodies heavily pushed privatization onto the developing world in the 1980s and 1990s – notably water privatizations – as a condition of receiving loans.

Though the IMF and World Bank have since admitted their “structural adjustment” programs were too aggressive, their interest in private water remains strong. The International Financial Corporation (IFC), part of the World Bank Group, is currently helping fund Veolia Environment’s expansion into Eastern Europe through Veolia Voda, which is 90 per cent owned by the French firm. Wealthy developed countries such as the EU and United States continue to have a commercial interest in privatizing public services globally. As the primary drivers of including strong services commitments at the WTO, it is clear these governments see services agreements as a way to open up new opportunities and lock in existing privatizations through binding trade rules at the WTO. The lobby group International Financial Services London put it concisely in 2002 when it claimed “Opening service markets to foreign providers (which is what GATS is designed to do) is self-evidently inconsistent with maintaining public monopolies.”<sup>24</sup>

The expansion of services and procurement markets for EU-based multinational firms remains a first priority of the European Commission according to its newly released trade agenda toward 2015:

*Cutting tariffs on industrial and agricultural goods is still important, but the brunt of the challenge lies elsewhere. What will make a bigger difference is market access for services and investment, opening public procurement, better agreements on and enforcement of protection of [intellectual property rights], unrestricted supply of raw materials and energy and, not in the least, overcoming regulatory barriers including via the promotion of international standards.*<sup>25</sup>

Any doubts that the ultimate goal is not privatization of public services, including water, were eliminated in a recently released draft inception report – the first step in a Sustainability Impact Assessment (SIA) of the Canada-EU free trade agreement – which suggested:

*Water utilities in Canada are mostly publicly owned and water consumption per capita is among the highest in the world. Canada-EU trade could allow deeper penetration of EU-based water utilities in Canada. This could lead to changes in water management and water consumption. Public control and management of water resources is a sensitive issue in Canada and it is likely that despite potential environmental benefits, stakeholder concerns will focus on public ownership and the risk of higher cost of water and its impact on low-income families.<sup>26</sup>*

Claims of environmental gains from water privatization, based on assumptions of increased conservation, are refuted by most real-world examples (see examples of remunicipalization below), and the SIA does not elaborate on the loss of democratic control or accountability from going the private route. But the draft report is clear on the commercial gains EU water companies could see in Canada:

*Increased liberalisation in this sector could provide benefits to EU environmental service providers as they are able to capitalise from greater market access to Canada's water management system. Conversely, Canadian providers of environmental services could realise gains from removal of requirements of commercial presence by several EU Member States.*

In other words, water services liberalization is very much intended to open market opportunities for private water firms, whether full privatizations or long-term operational contracts. The preliminary assessment for the EU Commission indicates a two-way opening, so that public water management in Europe may also be threatened.

Considering the continued controversy around services liberalization as it affects essential public services – a major sticking point delaying ratification of the EU's free trade agreements with African, Pacific and Caribbean nations – it is disturbing to see that the federal, provincial and territorial governments in Canada are actively considering including water delivery and water treatment in its trade agreement with the EU. According to Canada's lead negotiator, the decision may be entirely up to the provinces how far they go down the path toward offering these firms new rights to invest in public water.

## **CETA, investment and water services**

The new EU trade direction released this fall suggests the goal of the EU in trade agreements is to seek coherence between internal and external policy, for example “a more complete internal market for services and more systematic regulatory cooperation with major third countries... to facilitate trade in services and the dismantling of behind-the-border barriers.” Canada's transit, health and energy services, remain largely in public hands whereas they are highly privatized in the EU. An important goal of EU negotiators in the CETA talks is to “liberate” some of that public capital to the benefit of large EU-based service providers. More than tariff elimination, the EU is looking to CETA to help it export a regulatory regime designed to encourage competition and the private delivery of many services Canadians would consider essential public services, including public water.

How will this be achieved through CETA? Services commitments in CETA would, in general, prohibit performance requirements for private investors, such as conditions that oblige them to hire or purchase inputs locally, and limits on the number and type of investments. The CETA rules would apply regardless if a firm was foreign or domestic.<sup>27</sup> This is not to say that these firms would operate in a totally unregulated

environment, but that regulations must fit within the strict limits set out in the services chapter of the agreement. These include:

- An outright ban, regardless of nationality of the firm, on any limitations on the number of investments, whether in the form of quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test;
- A ban on limitations on the total value of transactions or assets, the total number of operations, or the total quantity of output;
- A ban on any limitations on the participation of foreign capital (maximum percentage limits on foreign shareholders or the total value of foreign investment); and
- A probation of measures requiring a certain type of legal entity or joint venture to perform a given economic activity in a committed sector, or measures limiting the total number of persons that can be employed in a particular sector.<sup>28</sup>

The result of these services commitments is that investment in a committed sector, defined very broadly, becomes locked in and is protected with a strong dispute resolution system. On the other hand, states do not retain similar guarantees that they will be able to hold foreign investors to account when contracts go awry. For example, cost overruns, exorbitant rate hikes or lacklustre service that frequently accompany water privatizations become difficult or very expensive to fix without infringing on the rights of water corporations under these services and investment provisions. To commit a service sector in a free trade deal is to commit to private delivery. Governments' ability to regulate in these sectors is also restricted; committed sectors become venues for profit-making removed to a large extent from effective public control.

Supporters of CETA argue that the public delivery of these services will be unaffected by new commitments to the agreement's services chapter. But the exclusion in CETA for services provided by government holds only when the service is provided neither on a commercial nor competitive basis. Once there is some degree of for-profit delivery within a committed sector, services commitments come into play, forcing open the sector to private competition.<sup>29</sup> It is this lock-in effect of services commitments – the “foot in the door” argument, which we will revisit in the procurement section below – that makes them so attractive to groups like the European Services Forum (ESF), a powerful corporate lobby group with an interest in financial sector liberalization in particular but also water, with Veolia Environment one of its 30 members.<sup>30</sup>

In other EU trade negotiations, only wastewater services have been sought and, in the case of the EU-Korea Free Trade Agreement, included. But to split the intimately connected delivery and treatment of water does not make sense. Both are more naturally and most accountably delivered as fully public services. Elsewhere in the world, wastewater is given advanced treatment to make it suitable for drinking. Water services and investment commitments risk limiting the ability of municipalities or provincial water agencies to set transparent community-wide or regional water management plans.

As mentioned already, water services are in Europe, as in Canada, largely in public hands. The majority of private contracts are in the form of concessions to private firms – more often than not with one of the large French multinationals, Veolia Environment and Suez. There has been in the past, pressure from the European Commission to come up with a Europe-wide water policy that would level out widely divergent regulatory environments. For example in England there exists full privatization, in Germany hundreds of small-scale water companies run a largely public network of small utilities), while other countries are hostile to water privatization in any form. Coming up with a unified regulatory regime in the EU will not be an easy task.<sup>31</sup>



Seen in this light, it is possible the EU Commission sees the inclusion of water services in CETA as a game-changer, internationally and domestically. It would be a wedge with which to provoke internal reforms on water regulation and move other countries to include water services in their GATS commitments at the WTO. It is also possible that some provinces, Ontario for example, which is seeking to develop a domestic water technology and water services industry, see commitments on water services as an opportunity to open future markets in the EU. The problem for these provinces is that EU firms clearly have the competitive advantage as it is. Competition would likely wipe out any fledgling domestic industry. And without excluding water utilities, municipalities or water-funding provincial agencies from the procurement chapter, the province will lose all levers with which to effectively grow its local industry.

» **RECOMMENDATION 3:** *Canada's provinces and territories must seek a clear exemption for water services (delivery and treatment) from any commitments they make under CETA.*

### **An investor-to-state dispute process in CETA?**

If Canada gets its way, EU water multinationals will have an even more powerful tool at their disposal to deregulate water services in the form of an investor-state dispute settlement process. This heavy-handed tool offers investors the right to challenge government decisions (laws or regulations) affecting their profits in front of private tribunals. There is no requirement to exhaust domestic legal avenues first, and the provisions of existing investment chapters, for example in NAFTA and Canada's other bilateral trade deals, allow companies to claim damages for indirect expropriation of projected future profits – not just actual monetary losses.

Multinational water companies have used international investment dispute bodies to claim damages in contracts gone awry in Bolivia, Argentina and Tanzania. For example, in 1999 Azurix, a subsidiary of Enron Corporation, paid for the rights to provide water and sanitation services to Buenos Aires for 30 years. There were complaints of pollution due to mismanagement of water treatment services and the Argentine government ended up issuing a warning to citizens to boil their water after an algae outbreak. Customers refused to pay for the water and in the economic crisis of 2001 Azurix demanded a contract renegotiation and higher water rates.

Azurix took Argentina to the International Centre for the Settlement of Investment Disputes under the terms of a bilateral investment treaty with the United States. The company claimed the government of Argentina violated their rights to protection from expropriation without compensation, "fair and equitable treatment" and other standards. The private trade tribunal found in favour of Azurix, fining Argentina \$165 million in compensation. According to the Canadian Council for International Cooperation, this case "demonstrates the high price that can be paid when governments decide to serve the public good in ways later deemed by a tribunal to be contrary to investor interests."<sup>32</sup>

Canadian firms have used the process to challenge environmental and public health decisions abroad. Highly controversial is the CAFTA (Central America Free Trade Agreement) investment suit against the government of El Salvador by Canadian mining firm Pacific Rim. The company is using a US subsidiary in order to invoke CAFTA's protections against expropriation to challenge delays to a mining project in El Salvador due to concerns about the effect on water and the environment.

The process is certainly not limited to the developing world. The list of investor challenges to Canadian public policy is long and the number of challenges increased dramatically over the past five years.<sup>33</sup> For example, Dow Agrosciences is challenging Quebec's cosmetic pesticide ban as an indirect expropriation of profits while Bilcon, another US firm, wants compensation for its failed attempt to establish an environmentally disruptive quarry in Nova Scotia.

Of considerable relevance to water policy in Canada is the very recent NAFTA Chapter 11 settlement with AbitibiBowater, which may have established a de facto right to water for corporations that rely heavily on the resource for industrial activities.

AbitibiBowater, a Canadian-based pulp and papermaking company registered in the United States, complained under NAFTA that its assets, as well as its water and timber rights, had been unfairly expropriated by the Newfoundland and Labrador government. Though private property rights do not exist in Canada as they do in the United States, the current federal government nonetheless settled under the full terms of the Abitibi complaint, meaning that the \$130-million settlement included a payoff for the investor's loss of water rights.

The consequences of this decision for other water-intensive industries, including tar sands development but also the bottled water industry and future private investment in water delivery, are potentially very significant. We use the example here to show that while states may sometimes cautiously avoid challenging the domestic policies of their trading partners, private firms are less scrupulous. The combination of water services liberalization and a binding investor-state dispute resolution process offers too high a risk to Canadian and European communities.

The overwhelming negative impact of investment protections in trade regimes, on human rights, democracy and environmental policy, has led 46 arbitration experts to endorse a new public statement which concludes:

*States should review their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above; should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors.<sup>34</sup>*

- » **RECOMMENDATION 4:** *Under no circumstances should Canada negotiate an investor-state dispute resolution chapter in CETA. The provinces and territories should push the federal government to remove investment from the scope of the agreement while a new model investment treaty is developed with input from the public, and based on Canada's experience with Chapter 11 in NAFTA.*

#### REMUNICIPALIZING WATER SERVICES

After a wave of water privatizations in the 1980s and 1990s, supported by the World Bank and IMF, a growing trend in Latin America, Africa, the United States and Europe is remunicipalization of failed or lacklustre private water experiments. In Bolivia, the citizens of Cochabamba, La Paz and El Alto took back control of water from private subsidiaries Bechtel and Suez because of lack of transparency, failure to meet service targets and exorbitant rate hikes. In 2004, due to widespread dissatisfaction with private water, Uruguay declared water a human right and mandated that water services be handled exclusively by state enterprises. More worrying for Europe's private water firms are the remunicipalizations in Europe and the United States, which undermine their claims of the supremacy of the private model for water delivery and treatment. The ease or difficulty with which water services are brought back into public hands will depend to a large extent on the types of investment protections private service companies are allowed in trade agreements.

**Grenoble, France:** In 1989, Grenoble handed a 25-year contract to deliver water and sewage treatment services to Compagnie de Gestion des Eaux du Sud-Est (COGESE), a subsidiary of Lyonnaise des Eaux, which is owned by Suez Environment. In 1995 a French court found the privatization had been concluded in exchange for election contributions to the mayor. Overpriced

procurement handed to other subsidiaries of the service provider was ratcheting up costs. A new city council that same year changed the contract to a public-private partnership model but the company retained a veto on important decisions and the favouritism in procurement continued. Gradually the city bought back control of the service until it was fully remunicipalized in January 2001.

**Montara, United States:** In 2003, after suffering poor service and some of the highest rates in California, residents of Montara bought back the municipal water system from American Water, then owned by RWE of Germany. The purchase was financed by a property tax hike of about \$159 per year for every \$100,000 of assessed home value. Water and sanitation services are now administered by the Municipal Water Board, which includes community representatives.

**Hamilton, Canada:** In Hamilton, Ontario, after awarding a contract to Philips Utilities Management Corporation for water and wastewater treatment, the community faced ten years of environmental disasters and financial upheaval. The workforce was cut in half within eighteen months, millions of litres of raw sewage spilled into the Hamilton Harbour, homes were flooded and major additional costs were incurred. Numerous charges over years were laid by the Ontario Ministry of the Environment against the contractor for not meeting effluent standards. The private water contract changed corporate hands four times. In 2004, City Council ended its experiment with privatization and brought operation of its water and wastewater systems back in-house.<sup>35</sup>

**Paris, France:** Water services management in Paris was handed to two private firms in 1995, one a subsidiary of Suez-Lyonnaise des Eaux, the other to a subsidiary of what is now Veolia Environment. These operated as public-private partnerships with majority public control – on paper only. The private companies involved had almost total control over operations, there was little transparency, and rates more than doubled between 1990 and 2003. After a long public and Paris City Council campaign to make water fully public again, water services were remunicipalized in January 2010. According to the president of Eau de Paris, the city's new public utility, the €35 million (\$47 million CDN) in what used to be corporate profits are now reinvested into the water systems, water prices have dropped and stabilized, there is greater synergy between water production, distribution and treatment, and the residents of Paris have been able "to introduce designated environmental, economic, democratic and social objectives, which was not really possible with private operators."<sup>36</sup>

*These and other examples of successful remunicipalization can be found at [www.remunicipalisation.org](http://www.remunicipalisation.org), a project of Corporate Europe Observatory and the Transnational Institute.*

## Sub-federal procurement and water utilities

The last but perhaps most immediate threat to Canada's public water systems may come from the unlikeliest of places. Canada is in many ways pioneering, or should we say playing the guinea pig, when it comes to committing sub-federal procurement by provincial, territorial and municipal agencies in trade agreements. The consequences of recent commitments, and those proposed by the EU in CETA's procurement chapter, would be to further erode policy space of local governments without offering any tangible economic gains to Canadian municipalities.

On February 16, 2010, the Harper government both signed and made public an agreement with the United States – the Canada-US Agreement on Government Procurement – that permanently committed a list of provincial and territorial departments to disciplines on public spending.

The agreement was in two parts:

1. First, it opened up Canada's commitments in the plurilateral WTO Agreement on Government Procurement to include a new list of provincial and territorial government agencies and departments. Sub-federal governments were previously excluded from Canada's GPA commitments.
2. Second, it submitted to the WTO a temporary bilateral arrangement between Canada and the United States that went beyond the GPA commitments to include municipalities for construction projects only, and only until September 2011.

Canada's lead CETA negotiator explained to the Commons Committee on International Trade in November 2010 that the CETA procurement chapter will be much more ambitious:

*We'll be covering a lot more ground in terms of the range of areas that would be subject to government procurement obligations and there won't be as many exemptions as there were in that particular agreement. So it will be much broader than that was, although that [the Canada-U.S. deal] could be seen as a starting point.<sup>37</sup>*

The so-called "Buy America" deal signed earlier this year was highly imbalanced, opening about \$25 billion worth of new contracts to US firms in exchange for perhaps \$4-5 billion worth of 2008 US stimulus cash (which has largely dried up as of writing).<sup>38</sup> Nothing in the agreement will insulate Canadian firms from future "Buy American" conditions on infrastructure spending. As of February 2011 – there was a one-year standstill on the deal – and until October 2011 (unless the agreement is extended), US firms will be able to challenge lost bids on construction tenders above \$8 million in Canadian municipalities without reciprocal recourse for Canadian firms in the US. If this is how the Harper government negotiates, there is little chance of Canadians receiving a fair commercial deal under CETA.

Under the procurement agreement proposed by the EU, covered provincial, territorial and municipal entities must abide by three general conditions:

1. A ban on "offsets" defined as: "any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter trade and similar action or requirement;"<sup>39</sup>
2. A one-size-fits-all procurement method, including a one-stop access point for bidders to see available contracts across the country at all levels of government;
3. A legal means for lost bidders to challenge the result of a concession.

The EU is requesting a large list of sub-federal entities to be covered under this chapter, from provincial and territorial agencies and Crown corporations, including energy, transit or transportation agencies not committed under the WTO or US procurement agreement, to air and seaports, universities, hospitals, municipal governments and utilities.<sup>40</sup>

While it is clear that access to sub-national procurement alone does not lead to privatization, under these conditions EU water corporations are being presented with the perfect opportunity to chip away at our public water system. Trade lawyer Steven Shrybman warns:

*Proposed 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.*<sup>41</sup>

To be clear, European corporations already have access to Canadian municipal services. Winnipeg city council just voted in favour of a 30-year contract with French water corporation Veolia Environment. Under CETA, the *legal rights* of these corporations would be entrenched in an international agreement above and beyond the reach of national laws. If European negotiators are successful in including subnational procurement in CETA, European companies would be granted legal guarantees and a dispute settlement process (distinct from the general dispute settlement chapter in CETA or the possible investor-state process) that must be recognized by Canadian courts. This new process could grant private bidders compensation if a panel ruled they should have won a bid for a municipal service. Even if a panel rules in favour of a municipal government choosing against a private contract, it will make the entire process of procurement and tendering far more expensive for local governments.

Here is where existing pressures to privatize water services come into play. As described already, the federal government and some provinces put strings on money for water projects designed to give a helping hand to private water firms operating in Canada. For example, the Building Canada Fund requires municipalities to consider the P3 option in order to qualify for federal infrastructure money for water upgrades. Most private water firms in Canada are European and American (there is no domestic Canadian water service industry). There is a good chance a procurement dispute panel would decide that on market determinations alone, a private firm should have won out over the public option after going through this procurement process. The private firm might then be granted compensation for the lost bid and possibly have the decision overturned.

The administration and legal requirements of the process proposed in the CETA procurement chapter and the WTO Agreement on Government Procurement (applied to municipalities) would be costly in addition to onerous. Canadian municipalities would be forced to publish detailed notices and announcements of intended procurements and issue tenders that comply with CETA procedures and specifications.

In addition to driving up administrative costs and creating litigation risks for Canadian municipalities, CETA would also slow down the process of municipal procurement as EU bidders would have to be granted sufficient time to appeal decisions. Public control and accountability are undermined as municipal councils and our elected officials lose their authority to operate in the best interest of the communities they serve.

The novelty of committing municipalities to international procurement regimes in trade agreements means there are fewer examples to draw on than there are for services and investment protections related to public water. The EU Commission argues that procurement within Europe is largely done under terms similar to those proposed in the CETA procurement chapter. What they fail to mention is that the commercial benefits of open procurement between Canada and the EU, as Canada has experienced with the United States, will run largely one way – to the benefit of very large and competitive European water, construction, energy and transportation firms. We feel the legal risks described in the available analyses are enough to warrant taking a cautious approach.

» **RECOMMENDATION 5:** *There should be no municipal commitments in CETA, and these should be allowed to expire in October 2011 in the Canada-US procurement agreement.*

## **Alternative visions for procurement**

While we are critical of the procurement chapter in CETA we are by no means opposed to open, fair and transparent procurement processes. Despite notable exceptions mentioned above, Canadian municipal and provincial governments rarely include other social criteria when tendering public contracts. Under existing trade agreements, local governments have maintained the freedom to include local (or national) preferences and other local economic development conditions on tenders. And increasingly, governments are adopting a “Triple Bottom Line” approach where economic, social and environmental goals are integrated.

The Capital Regional District of British Columbia's plan to establish sewage treatment facilities that promote environmental innovation is an example of such an approach that is threatened by CETA. As Shrybman points out in his report on CETA and municipalities, by providing a market for Canadian environmental services, the district would be infringing the CETA prohibition on “procurement terms that would require any bidder to source environmental engineering services or technologies from Canadian providers.” Procurement rules also limit the pursuit of ambitious joint ventures whereby water treatment, distribution and energy production are grouped together, perhaps with heat generation and indoor farming experiments.

For example, the public utility responsible for heating the Olympic village in Vancouver, and surrounding commercial and residential buildings, draws heat from the region's wastewater pipes and main sewer line. It transforms that heat into steam which powers the neighbourhood. In November 2010, engineers at the utility were surprised to see rates for homeowners lower than those supplied by BC Hydro. The savings were high and the project resulted in 64 per cent less greenhouse gas emissions than had the village been heated with electric baseboard heaters. Vancouver's mayor said added benefits could be achieved by raising hydro rates a few cents more per kilowatt hour and reinvesting that money in the public system to achieve even greater efficiencies.<sup>42</sup> Large scale infrastructure projects are precisely where municipalities can seek the most bang for their buck in terms of social investment in the community and yet they are the contracts that will be limited by CETA's provisions.

The opportunities lost here are extraordinary. For example, in Ontario clean energy production has been coupled with green job creation through the Green Energy Act. The act grants high feed-in tariffs to wind and solar projects on condition that 25 and 50 per cent of the sourced content (in the form of components or labour) be from the province. The goal of the energy program is to allow the province to phase out its highly polluting coal-fired plants and become a global leader in the development of clean energy technology. Contrary to WTO claims by Japan that the act is an elaborate subsidy that discriminates against foreign firms and should therefore be illegal under the global trade regime, the Green Energy Act is more accurately a creative use of public spending to meet two objectives: environmental protection and good, green job creation. Not surprisingly, the EU has put a bull's eye on the act as something which must be dismantled through the CETA negotiations.<sup>43</sup>

Other procurement strategies such as Ontario's proposed Water Opportunities and Conservation Act, which also claims to have a dual purpose of promoting water conservation strategies at the municipal level while creating markets for Canadian green technology, could be challenged under the CETA procurement rules. Provisions of the act that require public agencies to include water conservation and innovation in their procurement practices — an ambition also of the new Water Charter announced during the 2010 meeting of the Council of the Federation — could also be challenged as an impediment to the profits of multinational water corporations.<sup>44</sup> In fact, as documented by Corporate Europe Observatory, corporations like Veolia have lobbied hard to prevent local governments from adopting strategies that promote reduction in water consumption within Europe, favouring the promotion of water reuse technologies instead, which are more profitable. Through CETA these corporations would have new powers to challenge local measures aimed at reducing water consumption.

The Canadian Community Economic Development Network (CCEDNET) highlights Calgary’s Sustainable Environmental and Ethical Procurement Policy, and Ontario’s Poverty Reduction Strategy as other areas where governments are using procurement to achieve other social goals. Manitoba Hydro sets aside a portion of contracts to Aboriginal companies. Living wage policies in the municipalities of New Westminster and Toronto are other examples of where “market” considerations – the lowest price for the “consumer” – are set aside because of the relatively higher benefits to the community of investment in the community. According to Brendan Reimer with CCEDNET:

*The US Government has targets of procuring 5% of contracts from small women-owned businesses, 3% from Service-Disabled Veteran-Owned businesses, and gives small businesses located in “HUBZones” (Historically Underutilized Business Zones – located in economically distressed communities) a 10% price evaluation preference on tenders and aim for 3% of all federal contract dollars to be awarded eligible businesses.<sup>45</sup>*

In Europe too, governments, labour unions, environmental and anti-poverty groups are looking to maximum social value versus best consumer price on local procurement. The UK government has a policy called “Driving innovation through public procurement” under which, according to its responsible Ministry, the policy encourages “suppliers to develop novel techniques to help deliver public services” and thus “to drive improvements in the performance of public services.”<sup>46</sup> A response to the EU procurement legislation and policy currently underway at the European Commission from a collection of civil society groups suggests:

*there is a cost – we would argue a bigger cost – to pay by not including social and environmental considerations, even if this cost may appear to some harder to quantify. People across the EU and certain businesses are already taking into account social and environmental considerations when buying products or services. EU rules should not prevent contracting authorities from choosing between products and services on the basis of sustainable development considerations.<sup>47</sup>*

The potential to include these kinds of social preferences on water projects while retaining water service and treatment within public hands is significant. That potential will disappear if municipalities and their water utilities are committed to CETA’s procurement chapter. EU officials have highlighted that there are exceptions in CETA which would allow a covered entity to stray from the rules to protect public morals or safety, or human, animal or plant life or health. Set-asides for goods and services procured from persons with disabilities, philanthropic institutions or prison labour are also carved out. But these are very limited cases and government measures claiming an exception would be subject to a cumbersome necessity test to prove they were not the least restrictive measure possible. There are no exemptions for sustainable or ethical sourcing of goods and services, and notably no protections that we can see for existing set-asides, including for Indigenous businesses.<sup>48</sup> It is highly doubtful that a decision to keep a service public on the grounds it is more efficient or accountable would survive a challenge under CETA.

- » **RECOMMENDATION 6:** *In an unstable economic environment defined by climate instability and the increasing precariousness of good employment, local governments should be seeking ways to maximize the social value of public spending rather than adopting international procurement rules set in Brussels and Geneva that give an upper hand to EU-based multinationals.*

## CONCLUSION

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For too long water has been an invisible component of almost all economic activity but especially trade. We need it to produce energy, extract and refine minerals, build consumer products and grow food. Expansion of activity in any of these areas will put added pressure on water – a problem that is starting to be addressed in the concept of “virtual water,” or the water it takes to produce and trade the goods we consume each day. Canada is second only to Australia in the amount of virtual water it exports each year – 60 billion cubic metres, or enough to fill the Rogers stadium in Toronto 37 and a half times.<sup>49</sup> The federal government needs to do an assessment on the full impact of trade on Canada’s water. Such an assessment is outside the scope of this paper, which is focused on the immediate threat to Canada’s publicly owned and operated water delivery and treatment systems.

These public water systems are in desperate need of upgrade. Access to clean water on First Nations reserves is severely compromised and in need of immediate funding. The financing, though hefty, should come from all three levels of government – federal, provincial-territorial and municipal – rather than the private sector. As the cases of remunicipalization above prove, public financing is almost always cheaper while public delivery of water services is the only way to keep those services accountable to the public. The federal government should extend infrastructure stimulus spending where necessary for municipal infrastructure, with an emphasis on replacing aging municipal and First Nations pipes and systems. As one of the richest nations in the world, the problem for Canada is not money but political will.

Current trade negotiations with the European Union include pressure to cover water services and investment. Decisions about whether and how far to accede to this pressure are largely being left up to the individual provinces and territories. Combined with the proposed procurement chapter in CETA, competitive and aggressive EU multinational water firms will be granted a foot in the door to increase privatization of Canada’s public systems. The commercial gains for Canadian firms in the EU from such an arrangement are negligible while the costs to public water are too much to ask.

We believe that public services such as health care, energy, transit, water delivery and postal services should be treated differently than commercial services such as engineering, tourism and construction. These essential services act as important inputs into all economic activities, which reinforces the need for their delivery to be accountable to the public. Our public services provide stability and ensure a decent quality of life for all Canadians. They further act as equalizers in our increasingly unequal society by providing support to the most disadvantaged members of our communities.

Our governments oversee our public services in the public interest and must not consider handing control over to corporations whose interest is profit. The inclusion of water and wastewater services, utilities and municipalities in CETA would undermine the public control and accountability of this vital sector while offering no real gains to domestic or industrial water users. Canada’s drinking and sewage systems are our community assets and public drinking water and sanitation services are a human right and the lifeblood of well-functioning communities.

On a more general note, we ask the federal, provincial and territorial governments, at the negotiating table for the first time with CETA, to be open with the public about what is being asked of Canada in these trade talks. Given how deeply CETA will impact social policy in Canada and the EU, the negotiations should be transparent and allow for open public input and debate.

» **RECOMMENDATION 7:** *The federal, provincial and territorial governments have a responsibility to seek and receive prior informed consent from the Canadian public on what a trade agreement with the EU could look like. Considering the scope of the CETA negotiations, the prospect of having an agreement announced in 2011 as a fait accompli is unacceptable.*<sup>50</sup>



## SUMMARY OF RECOMMENDATIONS

- 1. Recommendation 1:** That the federal government establish a *National Public Water Fund* to finance water and wastewater upgrades to be cost-shared with provincial and municipal governments.
- 2. Recommendation 2:** That the federal government respect the right of First Nations communities to prior informed consent, and consult and include them in any negotiations having to do with the water and wastewater facilities on First Nations reserves. Direct financial support will also be required to improve water and wastewater facilities on First Nations reserves and communities beyond 2012 when funding for the First Nations Water and Wastewater Action Plan (FNWWAP) expires.
- 3. Recommendation 3:** That Canada's provinces and territories seek a clear exemption for water services (delivery and treatment) from any commitments they make under CETA.
- 4. Recommendation 4:** That under no circumstance should Canada negotiate an investor-state dispute resolution process in CETA. The provinces and territories should push the federal government to remove investment from the scope of the agreement while a new model investment treaty is developed with input from the public.
- 5. Recommendation 5:** That municipalities and water utilities be excluded from CETA's procurement chapter. There should be no municipal commitments in CETA, and provinces and territories should let municipal procurement commitments on construction projects under the Canada-US Agreement on Government Procurement expire in October 2011.
- 6. Recommendation 6:** That local governments, and the provinces and territories, should be seeking ways to maximize the social value of public spending rather than adopting international procurement rules set in Brussels and Geneva. Local sourcing, hiring and training have a place in public policy that is not trade-distorting in any meaningful sense of the term.
- 7. Recommendation 7:** That the federal government consult widely and openly with Canadians on the potential impacts of CETA on Canadian domestic policy, including public water management. The federal, provincial and territorial governments have a responsibility to seek and receive prior informed consent from the Canadian public on what a trade agreement with the EU could look like. Considering the scope of the CETA negotiations, the prospect of having an agreement announced in 2011 as a *fait accompli* is unacceptable.

## (ENDNOTES)

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1. While the Agreement on Internal Trade (AIT) (Article 11.02, Natural Resources Processing) specifically excludes “water, and services and investments pertaining to water,” municipal procurement services for construction, which would cover water infrastructure upgrades, are temporarily covered under the Canada-US Agreement on Government Procurement. As of February 16, 2010, procurement of water services by provincial governments is now covered permanently under the WTO’s AGP, the top of a slippery slope for covering water services in future trade agreements. Finally, water remains categorized in NAFTA as a tradable good by virtue of it not being explicitly excluded as raw logs and other resources have been.
2. Balancing budgets: Don’t do it on backs of cities, Toronto Star editorial, Nov. 18, 2010 <http://www.thestar.com/opinion/editorials/article/892537--balancing-budgets-don-t-do-it-on-backs-of-cities>
3. Given Canada’s Most Favoured Nation commitments in NAFTA, CETA would open new market opportunities not just for EU-based water firms but also American companies, although with no reciprocal commercial benefits for Canadian firms in the US and Mexico.
4. “A Draft SIA relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between The EU and Canada,” available on the European Commission website: [http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc\\_146459.pdf](http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146459.pdf)
5. The report is informed by copies of the January and October 2010 drafts of CETA, leaked publicly in October by the Trade Justice Network. It will also reference civil society briefings over the past year with Canada’s lead CETA negotiator, Steve Verheul.
6. Canada’s infrastructure deficit a sad legacy for future generations *Saeed Mirza, Ph.D., Professor of Civil Engineering and Cristian Sapos, Ph.D. Candidate, McGill University*
7. Source: [http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php#how\\_many](http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php#how_many)
8. In addition to a backlog in maintenance and repair needs to address aging infrastructure and our deteriorating water treatment facilities, our cities face new challenges such as climate change, population growth, diverse social needs and new environmental regulations and standards.
9. <http://www.financialpost.com/opinion/columnists/Public+accepts+deals/3908738/story.html>
10. Report of the UK House of Commons Transport Committee, printed January 16, 2008: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/45/4502.htm>
11. (Thill, Scott (2010). Watch Out: The World Bank Is Quietly Funding a Massive Corporate Water Grab. [http://current.com/news/92813260\\_watch-out-the-world-bank-is-quietly-funding-a-massive-corporate-water-grab.htm](http://current.com/news/92813260_watch-out-the-world-bank-is-quietly-funding-a-massive-corporate-water-grab.htm)
12. Report of the Auditor General of Québec to the National Assembly for 2010-2011. <http://www.cupe.bc.ca/sites/default/files/Quebec%20AG%202010%20report%20on%20Hospital%20P3s.pdf> . Accessed December 8, 2010.
13. Source: Capital Regional District (“CRD”) Core Area and West Shore Wastewater Treatment Programs Review of Business Case in Support of Funding from the Province of British Columbia
14. Global Water Intelligence Report: Crouching Tiger, Hidden Dragon. Vol 7, Issue2 (2006) <http://www.globalwaterintel.com/archive/7/2/market-insight/crouching-tiger-hidden-dragon.html>
15. Source: <http://www.epsu.org/a/6071>
16. Source: <http://www.corporateeurope.org/water-justice/content/2010/02/aquiris-veolias-lost-bet-brussels>, and <http://www.epsu.org/a/6071>
17. See AFN briefing note: <http://www.afn.ca/misc/Bill-S-11.pdf>

18. CUPE Ontario and the Council of Canadians. Say bye to buy local. A Primer on Trade Deals Impacting Canada.
19. Environmental Labour Market Research (ELM). Municipal Water and Waste Management. Labour Market Study. <http://www.eco.ca/pdf/Municipal%20English.pdf>. Accessed May 13, 2010.
20. Scott Sinclair (2010). Negotiating from Weakness: Canada-EU trade treaty threatens Canadian purchasing policies and public services
21. From a briefing by Canada's lead negotiator, October 28, 2010.
22. "Facing the Facts: A Guide to the GATS Debate," by Scott Sinclair and Jim Grieshaber-Otto for the Canadian Centre for Policy Alternatives, 2002.
23. The WTO's Threats to Global Water Security: The General Agreement on Trade in Services and Beyond: International Forum on Globalization, <http://www.ifg.org/pdf/cancun/issues-WTOwater.pdf>
24. EU Commission and International Financial Services London quoted in a Corporate Europe Observatory briefing note <http://archive.corporateeurope.org/water/infobrief3.htm>
25. See the EU Commission communication "Trade, Growth and World Affairs," [http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc\\_146955.pdf](http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146955.pdf)
26. "A Trade SIA relating to the Negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada," August 2010: [http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc\\_146459.pdf](http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146459.pdf)
27. See "Negotiating from Weakness: Canada-EU Trade Treaty Threatens Canadian Purchasing Policies and Public Services," by Scott Sinclair, Canadian Centre for Policy Alternatives: <http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Negotiating%20From%20Weakness%20EU%20Canada.pdf>
28. These are paraphrased from the October draft text of CETA, leaked publicly on October 26, 2010 and available at <http://tradejustice.ca>.
29. See "Facing the Facts: A Guide to the GATS Debate," by Scott Sinclair and Jim Grieshaber-Otto for the Canadian Centre for Policy Alternatives, 2002.
30. The ESF has requested that through the CETA negotiations Canada remove all foreign ownership reviews on major acquisitions; all remaining equity caps on investment, and "better access to Canadian public procurements at all levels, in all public entities, for relevant services sectors (architects, engineers, construction services, transport services, waste management services, water distribution services, education services, IT and Computer restated services, financial services, etc.)." Source: <http://www.esf.be/new/wp-content/uploads/2010/03/ESF-Priorities-for-EU-Canada-CETA-March-2010-Final.pdf>
31. See Corporate Europe Observatory <http://www.corporateeurope.org/water-justice/blog/martin/2010/01/21/new-commissions-views-water>
32. From a Canadian primer on bilateral investment treaties produced by the Canadian Council for International Cooperation: [http://www.ccic.ca/\\_files/en/what\\_we\\_do/trade\\_2010-04\\_investmt\\_treaties\\_primer\\_e.pdf](http://www.ccic.ca/_files/en/what_we_do/trade_2010-04_investmt_treaties_primer_e.pdf)
33. For a complete list of NAFTA claims, see: <http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Chapter%2011%20Investor%20State%20Disputes.pdf>
34. See the public statement, released August 31, 2010: [http://www.osgoode.yorku.ca/public\\_statement/documents/Public%20Statement.pdf](http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf)
35. Public Works, CUPE, Lets be clear - City of Hamilton-Wentworth, Ontario Contracted-In Water: Public Excellence. May 2007. [http://cupe.ca/updir/Hamilton\\_Contracted-In\\_Water\\_\\_Public\\_Excellence.pdf](http://cupe.ca/updir/Hamilton_Contracted-In_Water__Public_Excellence.pdf)

36. 'Paris: local authorities regain control of water management,' by Anne Le Strat, August 2010: <http://www.tni.org/article/paris-local-authorities-regain-control-water-management>
37. Full transcript of Steve Verheul's comments to trade committee can be found here: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4775831&Language=E&Mode=1&Parl=40&Ses=3>
38. See "Buy American Basics," by Scott Sinclair for the Canadian Centre for Policy Alternatives: [http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Buy\\_American\\_Basics.pdf](http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Buy_American_Basics.pdf)
39. From the October draft text of CETA, available at <http://tradejustice.ca>
40. The EU will almost surely seek protections for EU firms involved in private-public partnerships, as negotiators secured in the EU-Korea Free Trade Agreement. A supplementary analysis of where P3s fit into trade agreements would be useful in the Canada-EU context but is beyond the scope of this paper.
41. See Shrybman, Steven (2010) [http://www.civicgovernance.ca/files/uploads/FINAL-Shrybman\\_CETA\\_report.pdf](http://www.civicgovernance.ca/files/uploads/FINAL-Shrybman_CETA_report.pdf)
42. "Vancouver flush with savings from sewage-heat project," Postmedia news, December 3, 2010: <http://www.canada.com/technology/Vancouver+flush+with+savings+from+sewage+heat+project/3922379/story.html#ixzz176bPwghL>
43. At the time of publishing, Japan had yet to decide whether to pursue its WTO claim by requesting a panel. Japan and Canada were still in the consultation phase, with participation by the US and EU governments.
44. The Water Charter is available: <http://www.councilofthefederation.ca/pdfs/PremiersEndorseWaterCharter.pdf>
45. Fast Facts: Making Waves out of Ripples, a report for the Canadian Centre for Policy Alternatives, August 18, 2010: [http://www.policyalternatives.ca/sites/default/files/uploads/publications/commentary/docs/FF\\_procurement\\_081810.pdf](http://www.policyalternatives.ca/sites/default/files/uploads/publications/commentary/docs/FF_procurement_081810.pdf)
46. See Shrybman, Steven (2010) [http://www.civicgovernance.ca/files/uploads/FINAL-Shrybman\\_CETA\\_report.pdf](http://www.civicgovernance.ca/files/uploads/FINAL-Shrybman_CETA_report.pdf)
47. EPSU and Civil Society letter to Commissioner Barnier on Procurement, November 23, 2010: <http://www.epsu.org/a/7048>
48. Based on a copy of the November draft of the Sustainability Impact Assessment for CETA, provided to CUPE prior to a November 26 consultation.
49. Rahman, Nabeela, *Leaky Exports: A portrait of the virtual water trade in Canada*, forthcoming (2011)
50. The authors recognize prior, informed consent as a right of Indigenous peoples on all economic projects that affect their lands, surrounding water and air. The language is used in the context of CETA negotiations to underline the extent to which the agreement will impact social policy. Canadians are entitled to be fully informed about the CETA negotiations. Full transparency and democratic engagement in trade policy is necessary for that policy to meet the social and economic needs of Canadians.

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