

Clarification given to municipalities regarding impact of trade agreements on PPP

In his introductory remarks at a Council-sponsored breakfast event on March 24, 2003, CCPPP Chairman Michael Wilson outlined the rationale behind commissioning Robert Paterson to develop the first-ever Canadian guidance on trade agreements and public-private partnerships.

Organized opposition to proposed water/wastewater projects in Vancouver, Moncton and Halifax used the argument that international trade agreements expose municipal PPP's to serious risks and should not be pursued. While these groups were not successful in all cases, they did raise significant doubts in the municipal sector about the impact of trade agreements and the long-term financial implications of entering into contracts with foreign companies.

With preliminary legal opinions dismissing such criticisms, CCPPP recognized the need to conduct a thorough review and to provide some guidance for those needing to counter the arguments. A respected authority on international trade law was sought to provide a thorough and objective analysis. "All indicators pointed in the direction of Robert Paterson, Associate Dean of the Faculty of Law at the University of British Columbia," said Michael Wilson, because of his outstanding credentials in the field and his astute knowledge of international law. Several legal firms and city managers reviewed Mr. Paterson's report to ensure that the language was clear and content relevant for an audience unfamiliar with complex international agreements. The result is a document entitled "Public-Private Partnerships and Trade Agreements: Guidance for Municipalities". The following is a summary of Mr. Paterson's remarks at the launch of the report on March 24, 2003 in Toronto.

Mr. Paterson began with the frank assertion that "Municipalities in the legal sense are not bound by international legal agreements as such." Since they derive their power from the

provinces, they are not seen as having the authority to enter international agreements and are therefore not bound by them. Canada remains responsible for these agreements and must address any complaints or violations. Furthermore, there is no legal way that a municipality can be forced to pay damages.

"Most of the rules from the General Agreements on Trade in Services (GATS) and the North American Free Trade Agreement were trying to improve on the history of unilateralism," he said. Most of the opposition rallies around Chapter 11 of NAFTA he said, because the unique powers it attributes and the private power to bring grievances. The arguments that environmental regulations and access to water are inhibited and that municipalities are unable to act of their own accord are wrong, he stressed. He outlined four main arguments to address these concerns:

1. These types of agreements are not new: Canada already had a series of Chapter 11 type agreements with individual countries over the past 20 years.
 2. Municipalities and provinces can never be made defendants, even though violations can be alleged against them.
 3. There have been very few claims (not over 30 in total), and only a few of those have been ruled upon. None have been made against Canada concerning a municipal action.
 4. Generally, the tribunals ruled that if regulatory measures are reasonable and are in good faith, they are not violations. A pattern of deception (i.e. lack of reasonableness) on the part of a
-

municipality is the basis for a grievance. Many municipal by-laws are already subject to reasonableness clauses anyway.

Mr. Paterson cited the *Feldman* case as reassurance that municipalities are free to make reasonable laws. The case involved a dispute over the alleged refusal of Mexico to rebate excise taxes on cigarettes exported by a Mexican company controlled by the claimant (a U.S. citizen). The proponent contended (among other things) that a change in environmental regulations following the agreement constituted expropriation. Mr. Paterson noted that the tribunal's ruling effectively said: "That's too bad, it's a normal risk of doing business." Mr. Paterson strongly recommends that hiring good legal counsel should be due process in drafting contracts. Some have even suggested that contracting out of international trade agreements altogether is an option for municipal contracts. "Any properly written document should anticipate the risks and mitigate the damages," he added. He advised people to review the paper, included in Appendix IV of the CCPPP report, submitted by Paul Lalonde of Heenan Blaikie LLP.

In response to the claim that Chapter 11 exposes countries to ad-hoc arbitrary tribunals, he said this is no different than ordinary court cases. "They are usually subject to a degree of uncertainty anyway," he stressed.

With regard to provisions on procurement, Mr. Paterson said they are designed to alleviate the pressures on government bodies to hire local suppliers. International agreements encourage tenders to open competition to a wide range of bidders, which "ultimately complements the theory of 'free' trade," he said. The most recent Chapter 11 case in this area (*ADF*), "reassures us

that rules don't apply to government procurements," he stressed.

Mr. Paterson calmed government officials that the chances of a successful Chapter 11 claim are "very unlikely". There have been no examples thus far. Moreover, arbitral opinions suggest that unless there was bad faith, it is not possible for an investor to argue expropriation.

He believes that the rules of international agreements are ultimately "citizen friendly". Based in the 1947 GAT, there must be non-discrimination between domestic, local, regional and national. "Recent agreements actually clarify the regulations," he said. Governments should be interested in the best deals for their electorate, he emphasized.

When asked about the scenario of a municipality entering a cost-sharing agreement and its applicability to the Agreement on Internal Trade (AIT), Mr. Paterson noted that the applicability of the agreement has recently been extended to the MASH sector, which includes municipalities. Although private parties have redress, he said that it's a work in progress.

In regards to GATS, the rules are difficult to generalize, he said, but disputes cannot be privately generated. In the event of a successful challenge to a municipality, Mr. Paterson reassured government officials about the consequences. If found to be in contravention of GATS, the private party would have to lobby its own national government to deal with the Canadian government. It would still have to convince the national government and the tribunal to find fault, and ultimately the federal government would be responsible for any compliance or remediation.

Professor Paterson's overall message to Canadian municipalities: the issues raised by opponents to PPP related to trade are inflated and do not pose the threat they would suggest.

Mr. Paterson spoke at an event on March 24, 2003, as part of The Canadian Council for Public-Private Partnerships' continuing breakfast series on topical PPP issues. Those in Western Canada may note that these issues will be discussed at an upcoming CCPPP conference in Vancouver on June 25, 2003 – see our website (www.pppcouncil.ca) for more details. Copies of the full report "Public-Private Partnerships and Trade Agreements: Guidance for Municipalities" can be ordered through the CCPPP office at (416) 861-0500.

The content of these remarks is intended for information only, and should not be relied upon as a substitute for obtaining separate legal advice. You may contact CCPPP for the names of law firms specializing in this type of law.