

When Worlds Collide:

Implications of International
Trade and Investment
Agreements for Non-Profit
Social Services

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Matthew Sanger



Canadian Centre for
Policy Alternatives



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Social Development

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 567
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Contents

Acknowledgements	i
Chapter 1	
Introduction	1
Chapter 2	
The hidden partners of the welfare state: The non-profit sector and delivery of social services	13
I. Introduction	13
II. Defining the non-profit sector	14
III. The non-profit sector, the market, the state, and delivery of social services: A conceptual framework.	20
IV. The historical evolution of non-profit social services in Canada	29
V. Terra incognita: Mapping the non-profit social services sector in Canada	35
VI. The funding/regulatory relationship between the Canadian state and the non-profit sector	41
VII. Implications of funding regimes for the non-profit social Services sector	69
VIII. Conclusions and implications	77
Chapter 3	
Home care: A case study of the potential implications of Canada's international trade obligations for non-profit social services	79
I. A profile of home care services in Canada	80
II. What trade rules apply?	89
III. Discussion of potential trade challenges	99
IV. Conclusion	111
Chapter 4	
Conclusion and implications	113

Appendix 1

International trade and investment agreements: Key features relevant to non-profit social services organizations	119
1. Introduction	119
2. Trade rules apply to government measures and are most likely to be enforced in areas of significant commercial interest.	120
3. Canada and the new generation of international trade agreements	121
4. The General Agreement on Trade in Services (GATS)	127
4.1 GATS rules which apply to all service sectors	128
4.2 GATS rules which apply selectively	130
4.3 Hybrid rules and principles	132
4.4 Scope of the GATS agreement	134
4.5 GATS rules: coverage, limitations and exemptions	138
5. NAFTA – services, investment	140
6. Procurement	143
6.1 Procurement rules	145
6.2 Procurement rules: Scope, coverage and exceptions	153

Appendix 2

Home care and health care reform: Options for expanding publicly funded services	161
a) A national cost-sharing program	161
b) Tax credits, deductions and incentives	162
c) Collective insurance for home care	163
d) Measures to support informal caregivers	163

Appendix 3

Glossary of key GATS terms	165
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References	172
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Endnotes	183
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Chapter 1

Introduction

The overarching goals of this project are to advance knowledge of the implications of international trade and investment agreements such as the North American Free Trade Agreement (NAFTA) and the General Agreement on Trade and Services (GATS) for the voluntary non-profit sector engaged in social services delivery, and to draw out the implications for public policy.

Our specific focus is on non-profit social services (as opposed to public and commercial services). With this focus, our project has the following objectives:

- raise awareness within the trade policy community about the significance of the non-profit sector to Canadian society and the economy, and the importance of creating and maintaining an appropriate regulatory and financial framework for supporting non-profit activity;
- identify the implications of Canada's actual and potential trade obligations for public policy in support of non-profit social services;
- advance knowledge and dialogue about how Canada's trade policy can best safeguard the ability of the non-profit sector to continue to serve and support Canadians; and
- develop specific policy recommendations to ensure that Canada's trade policy safeguards the capacity of the non-profit sector and Canadian governments (at all levels) to jointly determine the appropriate financial and regulatory framework in which non-profit social services operate.

The implications of international trade and investment agreements for the non-profit sector are largely unexplored. Since the NAFTA negotiations, which for the first time included services in a free trade agreement, there has been a lively public policy debate in Canada about the implications for human services. This debate, however, has focused almost exclusively on publicly provided services, particularly health care and education, with only passing reference to the role of the non-profit sector.

The significance of a strong non-profit sector for social inclusion and cohesion and for the delivery of high quality, responsive social services is now widely recognized in public policy discourse. With the Voluntary Sector Initiative, the federal government is committed to developing a stronger and more strategic relationship with the non-profit sector. Similar initiatives are under way in some provinces.

These developments coincide with an acceleration of two distinct sets of trade negotiations, each of which has implications for public policy in support of the non-profit sector. Canada is signatory to the World Trade Organization agreement on services trade, known as the General Agreement on Trade in Services (GATS). Negotiations to strengthen and expand the GATS rules have been under way since January 2000, and are expected to conclude by the January 2005 deadline for the Doha round of WTO negotiations. Negotiations to conclude a hemispheric Free Trade Area of the Americas (FTAA) are also expected to accelerate in the near future. These negotiations – which will build on the NAFTA, including its services chapter – are scheduled to conclude by 2005.

Public policy regarding the non-profit sector is affected by international trade and investment agreements even

though very few non-profit organizations directly engage in any form of international trade. This is because public measures to support and regulate non-profit services could be considered to affect the ability of foreign-owned commercial firms to establish operations in Canada, to provide services to Canadian governments and consumers, and to benefit equally from government supports provided to the non-profit sector.

Government measures to support the non-profit social services sector include subsidies and tax supports; exclusive and preferential contracting regimes; and effective exclusion of commercial providers from some markets. These could be deemed to “discriminate” against foreign commercial providers. These government measures could become the subject of a trade challenge if they were alleged to discriminate in favour of Canadian not-for-profit providers, or otherwise have the effect of altering the terms of competition to the detriment of foreign-owned commercial providers.

While we are unaware of any instance in which such procedures have been used to date to challenge Canadian government policies towards the non-profit sector, the possibility is a serious one, and could become more so depending upon the future evolution of trade and investment agreements.

The federal government has publicly committed to safeguarding our collective ability as Canadians to support, regulate, and deliver social services as we see fit. However, existing and proposed safeguards may not be drafted in such a way as to adequately protect the policy options of not-for-profit delivery and continued government support for the non-profit sector. To be well-founded, safeguards must be drafted so as to take into full account

the fact that many publicly financed social services are simultaneously delivered by public, commercial, and voluntary sector providers. Governments frequently wish to deliver services through the not-for-profit rather than the public sector, and some have experimented with competitive bidding between the not-for-profit and commercial sectors. Trade and investment rules could turn such experimentation into an unintended one-way street to commercial delivery if complex modes of support and delivery are not fully understood by officials and trade negotiators.

Uncertainty as to potential outcomes is exacerbated by the novelty of many of the GATS provisions, by the inherently uncertain outcomes of negotiations, and by the complexity and ever-changing character of the relationships between governments and the non-profit social services sector.

Our experience with NAFTA (e.g., with respect to investor challenges to environmental regulatory decisions) has shown that trade obligations, once in place, can lead to unintended consequences. While certain provisions of both NAFTA and the GATS are clearly intended to shield social services from Canada's trade obligations, their effectiveness is uncertain. Caution is also prompted by the fact that NAFTA and WTO trade dispute panels have favoured very limited interpretations of the scope of exceptions for public programs. Trade rules are likely to be applied to public policies in areas where there is a mix of non-profit and for-profit provision and where transnational corporations have commercial interests at stake, as is the case in some social services such as home care.

The potential for tension or outright conflict between Canadian social policy and Canadian trade policy arises from several factors. A meeting of the expert Advisory Group for this project brought together trade experts, and persons knowledgeable of and active within the not-for-profit sector. Several commented on the “clash of cultures” between the world of trade policy and the world of social policy.

Trade policy is primarily driven by the economic agenda of governments, and producer interests are highly influential. Trade policy officials see their primary purpose as promoting economic growth and efficiency, though they are cognizant of the need to preserve space for domestic decision-making over social policy.

Social policy is dictated by a different set of goals and values, and most social policy practitioners are concerned, with Canadian citizens, to maintain a space and a sphere which is insulated to at least some degree from the dictates of the market and from commercial pressures.

The structure and language of trade agreements is highly legalistic, which is both inevitable and desirable given the need for precision and clarity in legally enforceable and binding agreements between states. But, as the following analysis makes clear, the sphere of social services delivery is, above all, “messy.” It fails to conform to a single logical or coherent model. Policies are diverse, and even contradictory. Different governments do different things, based on their goals, or inherited practices, or inertia. Even the same government may pursue multiple and contradictory policies and practices, depending upon the specific service.

To impose binding rules on how governments should regulate the delivery of social services and how they

should relate to commercial and not-for-profit providers is to seek to impose order on a real world which is not very amenable to abstract order. At our Advisory Committee meeting, Bill Dymond, a former senior trade official, made the strongest case in principle for applying trade rules to social services. His argument was that detailed rules are better than a “carve-out,” since governments then have greater certainty, and thus greater freedom, to act. But he conceded that the task of drafting rules was probably all but impossible given the complexity of social services delivery and lack of knowledge, and noted that was why the approach in NAFTA was to “carve out” social services. The strength of the NAFTA exemption is considered critically below, drawing attention to the potential problem of unintended consequences from negotiating binding rules.

Even if social services delivery could be delivered according to rules which were in conformity with the obligations of trade and investment agreements, the fact remains that citizens and governments can and will wish to periodically change the rules of the game. As is made clear below, governments differ on the appropriate role of for-profit and not-for-profit providers in the delivery of services, and the direction of change can run both ways. Trade and investment rules have to take account not only of the complexity of the delivery of services, but also of the reality of clashing goals and values and the certainty of politically driven change.

Most of the experts at the workshop agreed that a key goal of Canadian policy should be to maintain a diverse and flexible system of social services delivery. In short, trade rules should preserve our collective capacity to make

democratically determined choices, to change the system as we see fit at particular times and in particular places.

To anticipate the detailed discussion that follows, it is useful to very briefly summarize some key areas of potential conflict between mechanisms of government support for social services, non-profits, and the terms of NAFTA and the GATS.

Governments can and do exclude foreign commercial firms from some social services markets, engage in preferential contracting arrangements with non-profits, and provide tax breaks and subsidies to non-profits. By contrast, the key operative principles of trade and investment agreements (subject to numerous qualifications) are market openness and non-discrimination. Government measures which have the effect of limiting competition or favouring domestic service providers are at odds with these principles.

At the outset, it should be noted that the potential for conflict between this principle and government measures is minimized to a significant degree by the fact that Canada has not listed social services under the GATS, and that NAFTA reserves (or carves out) both existing non-conforming provincial measures and existing or new measures concerning social services “established or maintained for a public purpose.” However, the NAFTA reservations are untested and, we believe, would prove far from watertight if they were challenged. It is also unclear if these carve-outs apply to all social services.

Government regulation and practices effectively exclude foreign commercial providers from some social services markets, violating the key principle of national treatment in terms of trade in services and investor access to the Canadian market. These policies to exclude foreign

commercial providers from social services markets largely depend upon the effectiveness of exclusions and carve-outs.

It is important to note that the NAFTA exemption does not apply to “expropriation” of the assets of an investor. This means that, if governments decided to roll back foreign commercial delivery in an area which had previously been opened up to foreign commercial providers (e.g., home care in Ontario), foreign investors could demand potentially prohibitive compensation. Thus NAFTA could function as a “ratchet” in terms of growing commercialization of social services.

While not entirely excluding either domestic or foreign commercial providers, many governments provide implicit preferences to not-for-profits in the tendering of contracts through exclusive or preferential tendering arrangements. These common practices could be threatened by GATS provisions on national treatment, market access, and domestic regulation *if* social services were to be scheduled by Canada.

Most public contracts for social services are probably not affected by provisions in the NAFTA procurement chapter and the WTO Agreement on Government Procurement. This is because most contracted social services are unlikely to be defined as procurement for the purposes of these trade agreements (which stipulate that procurement rules apply only to contracts for goods and services for the “direct benefit and use of government”). The relevant safeguards – Canada’s reservations for health and social services and general exceptions for services provided by philanthropic institutions – therefore only apply in a few cases which meet the definition of government procurement, such as contracts for home care serv-

ices for direct federal government employees such as military personnel. Other contracted home care services are subject to the rules and safeguards of the GATS and NAFTA services and investment provisions.

It is relevant to anticipate possible constraints imposed by procurement rules, however, because Canada will be under pressure to extend its commitments in government procurement negotiations at the WTO and, possibly, in the FTA negotiations. Implicit preference for non-profits in contracting, lack of a “transparent” tendering process for contracts, and informal tendering arrangements such as multi-year funding arrangements and contract roll-overs for non-profits are common and could be challenged *if* WTO and NAFTA agreements on government procurement were to be extended to provincial and local governments; *if* the exemption for philanthropic institutions were to be lifted (this applies only to charities); *if* Canada removes or weakens its specific safeguards for health and social services; and *if* procurement is defined more broadly to include contracts for services provided to persons, as well as those for governmental purposes.

“Subsidies” to not-for-profit providers, such as grants and open-ended contribution agreements, could be construed as providing “unfair” and illegal subsidies to organizations involved in competitive tendering for contracts in competition with for-profit foreign (and domestic) providers. Unlike NAFTA, GATS National Treatment and Market Access rules in principle apply to subsidies, although no specific subsidies disciplines have been developed. In-kind government support could be considered a subsidy also. These measures are potentially threatened by NAFTA *if* a subsidies code were to be developed and *if* the reservation for social services afforded no pro-

tection. Subsidies are also potentially threatened by GATS, *if social services were to be scheduled by Canada and if GATS subsidies disciplines were to be developed*. Potentially, for-profit firms could claim eligibility for contributions, or press for their elimination unless the activity for which the contribution was provided was strictly segregated.

Finally, tax preferences for non-profits, which are significant, are potentially threatened under GATS *if social services were to be scheduled and if GATS subsidies disciplines were to be developed*.

Our analysis below suggests that the dangers of a conflict between social policy and trade policy are more potential and prospective than actual, underlining the need for caution in future negotiations, some rethinking of objectives, and finding sound bases for coherence between social policy and trade policy.

This research project has been designed to engage representatives of the non-profit sector in informed dialogue with trade policy experts. The research team has met with an advisory committee of experts on the not-for-profit sector and on international trade and investment agreements. This paper reflects their input.

This working paper is organized as follows:

Chapter 2 provides an overview of the role of the non-profit sector in the delivery of social services, focusing upon the ways in which governments sustain, support, and regulate the sector. It also defines the sector, and maps its changing relationship with governments.

This section provides the broad context for understanding actual and potential implications of trade and investment agreements.

Chapter 3 is a case study of home care services. After summarizing how home care services are currently provided and proposals for expanding provision of home care, this section discusses how Canada's international trade obligations apply in the sector and the possible impediments they pose for policy reform.

(An appendix to this report contains a more detailed discussion of key provisions of trade and investment agreements that are of relevance for non-profit social services.)

Chapter 4 pulls some of the threads together and advances several policy recommendations.