



**HOUSE OF COMMONS
CANADA**

**Canada-United States Agreement
on Government Procurement**

**Report of the Standing Committee on
International Trade**

**Lee Richardson, MP
Chair**

May 2010

40th PARLIAMENT, 3rd SESSION

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has the honour to present its

FIRST REPORT

Pursuant to its mandate under Standing Order 108(2), and the motion adopted by the Committee on Tuesday, March 9, 2010, the Committee has studied Canada-United States Agreement on Government Procurement and has agreed to report the following:

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REPORT ON THE CANADA-US AGREEMENT ON GOVERNMENT PROCUREMENT

INTRODUCTION

In its first meeting of the Third Session of the 40th Parliament, the House of Commons Standing Committee on International Trade (hereinafter the Committee) decided that, because of the importance of Canada's relationship with the United States to economic growth and prosperity in both countries, the study of Canada-US economic relations would be a priority agenda item for that session. As part of that agenda, the Committee agreed that its first order of business would be to study the Canada-United States Agreement on Government Procurement (AGP), which came into force on February 16, 2010.

The AGP was negotiated in response to the "Buy American" provisions in the *American Reinvestment and Recovery Act of 2009* (the ARRA, or the *Recovery Act*). Those provisions explicitly limited foreign companies' access to the estimated US\$275 billion in procurement funds contained in the US\$787-billion stimulus package. As a result, ARRA-financed procurement at the state and local levels for iron, steel and manufactured products was effectively closed to Canadian bidders. Moreover, because of uncertainty about the scope of the "Buy American" provisions, some state and local governments and US companies chose to sever their relationships with Canadian suppliers even in cases where procurement was not ARRA-financed for fear of running afoul of domestic content requirements.

In exchange for access to some sub-national government procurement opportunities in the US for Canadian companies, Canada formally committed, for the first time in any international treaty, to a partial opening of provincial, territorial and municipal procurement markets to US companies. Although in practice many sub-national procurement contracts in Canada were open to bidders from either country prior to the entry into force of the AGP, Canadian governments were under no obligation to offer US businesses access to procurement contract opportunities.

The Committee held six meetings on the Canada-US AGP in March and April 2010. Its objective was to conduct an analysis of the agreement in order to assess its potential impact on Canadian businesses and on government procurement markets in Canada and in the US. Over the course of the hearings, Committee members heard from Minister of International Trade Peter Van Loan, officials from the Department of Foreign Affairs and International Trade (DFAIT) and a wide range of stakeholders, including private businesses, labour representatives, public policy groups and non-governmental organizations (NGOs).

BACKGROUND

A. The “Buy American” Provisions in the ARRA

Even before it was signed into law, the ARRA generated controversy around the world because its proposed “Buy American” provisions threatened to limit foreign companies’ access to procurement contract opportunities in the United States. The issue for those countries was not the absence of a free and open procurement market in the US; as Jenny Ahn (Director, Government Relations, Membership Mobilization and Political Action, Canadian Auto Workers Union) observed, many of Canada’s major trading partners “consistently attach domestic content requirements to public purchases.”¹ Rather, the issue for many countries was that the proposed “Buy American” provisions in the *Recovery Act* signalled that the US was imposing *new* domestic content requirements on top of those already in place.

The ARRA, like the Government of Canada’s Economic Action Plan and similar fiscal stimulus packages around the world, was intended to mitigate the effects of the global financial and economic crisis and to accelerate the eventual recovery. At the same time, however, the G-20 nations called on countries around the world to avoid the temptation of resorting to protectionist measures to bolster their domestic economies.² It was argued that erecting trade barriers in a time of economic downturn would be counterproductive to promoting a sustained recovery in the global economy.

In spite of these concerns, the ARRA was signed into law on February 17, 2009, with the “Buy American” provisions intact. Section 1605 of the *Recovery Act* states that, subject to certain exceptions, none of the funds provided under the *Act* “may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.”³

In acknowledgement of the concerns raised by Canada and others, the ARRA also states that its “Buy American” conditions must be consistent with the commitments made in international trade agreements signed by the United States. However, as Jean-Michel Laurin (Vice President, Global Business Policy, Canadian Manufacturers & Exporters) observed, the promise to abide by international trade agreements was of little comfort to Canadian businesses because the North American Free Trade Agreement (NAFTA) does

1 House of Commons Standing Committee on International Trade, 40th Parliament, 3rd Session, *Evidence*, Meeting No.7, April 1, 2010.

2 For example, the G-20 nations issued a joint communiqué on November 15, 2008 that included the following statement: “We underscore the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty.” The text of the communiqué is available at http://www.g20.org/Documents/g20_summit_declaration.pdf.

3 *American Recovery and Reinvestment Act 2009* P.L. 111-5, Section 1605, Paragraph (a). The document is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1enr.pdf.

not cover federal transfers to states and local governments or procurement by sub-national governments.⁴ As such, even with that stipulation in the ARRA, Canadian companies would continue to be excluded from sub-national procurement opportunities funded by that legislation.

B. US Domestic Content Requirements in Other Legislation

The Committee heard that domestic content requirements are nothing new in US procurement policy. The “Buy American” provisions of the ARRA overlap with two major American domestic content laws: the *Buy American Act* and the *Buy America Statute*.

The *Buy American Act* came into force in 1933 and, in its current state, applies to all US government procurement and construction projects by federal agencies set out in the Federal Acquisition Regulation. Subject to certain exceptions, this *Act* requires that all supplies purchased under qualifying procurement contracts be manufactured in the United States and that at least one-half of all components (by value) be of US origin. Similarly, all materials used in construction projects must also be made in the US.

As Carl Grenier (appearing as an individual) noted, the *Buy American Act* contains certain preferential pricing arrangements that favour local suppliers over Canadian and other foreign competitors. To win a contract, foreign suppliers must undercut the bid of domestic businesses by 6% or 12%, depending on the type of contract. In the case of military contracts, a foreign bid must be 50% less costly.⁵

The *Buy America Statute* was first enacted in 1964 and currently applies to transit-related procurement with a value exceeding \$100,000. Nearly all of these procurement monies are federally funded grants administered by state and local governments, including grants provided by the Federal Transit Administration (FTA) and Federal Highway Administration (FHWA). Under this law, 100% of the manufacturing inputs and construction materials used by FTA-financed activities must be made in the United States in order for the final manufactured good or construction material to satisfy the domestic content requirements of the statute.⁶ Similarly, all iron and steel products and their coatings in FHWA-funded projects must be 100% manufactured in the US.

4 Evidence, Meeting No. 3, March 16, 2010.

5 Evidence, Meeting No. 4, March 18, 2010.

6 For more information, refer to Foley & Lardner LLP, “Buy American Provision in Stimulus Legislation Poses Serious Compliance Challenges for Public Works Contractors and DHS Suppliers,” available at: http://www.foley.com/publications/pub_detail.aspx?pubid=5720.

C. Impact of the ARRA's "Buy American" Restrictions on Canadian Companies

The Committee was told that many Canadian businesses have been affected by the ARRA's "Buy American" provisions. Lynda Watson (Director, North America Commercial Policy, Department of Foreign Affairs and International Trade) stated:

Even from the earliest days when the "Buy American" provisions of the *Recovery Act* appeared, we could already see that this was going to have an impact on companies. My colleagues in our consulates and our colleagues in our regional offices across the country were receiving phone calls from companies saying, "My customer is telling me that I can't bid, and now what am I going to do?" or "I've been trying to bid on this, and I can't understand what they require of me."⁷

The Committee also heard directly from representatives of Canadian businesses. Testifying about the impact of the *Recovery Act's* "Buy American" provisions on his company's operations, Omar Hammoud (President and Chief Executive Officer, APG-Neuros Inc.) stated that, since the ARRA came into effect, his company had lost 20 projects in which it previously had a secure position: "They used our designs, and our proprietary and technical information, and towards the eleventh hour, we were told we were no longer on the project."⁸

In Mr. Hammoud's view, these lost projects cost his company \$8 million. Moreover, he told the Committee that his company had to establish a base of operation in upstate New York so as not to continue to lose access to US procurement opportunities. He stated that this response, necessary for the survival and operation of his business, essentially cost 40 Canadian jobs which otherwise would have been created in the Montreal area.

The experience of Steve Ross (General Manager, Cherubini Group) was similar. Mr. Ross stated that, historically, his company had had little trouble winning state-level procurement contracts, in part because few of those projects were federally funded. Since the *Recovery Act* came into effect, however, the "Buy American" provisions have effectively meant exclusion from the sub-national procurement market for the past year and a one-half.⁹

The Committee heard that, in some cases, state and local governments were not considering foreign bids on procurement contracts, even when foreign companies were eligible to compete for those contracts. It was suggested to the Committee that this exclusion may have been because the governments were unsure if they could use Canadian-made inputs, or because some US municipal governments decided to buy from US suppliers so as to avoid the need to carry two sets of inventories: one of US-made

7 Evidence, Meeting No. 2, March 11, 2010.

8 Evidence, Meeting No. 4, March 18, 2010.

9 Evidence, Meeting No. 5, March 23, 2010.

goods for ARRA-financed projects; and one which included Canadian-supplied goods for projects for which the ARRA did not apply. The well-publicized case of a Toronto company winning a contract to supply a California health care centre with plastic piping, only to have that piping removed because it was made in Canada, illustrates the potential impact that such an exclusion, or even the perception of an exclusion, can have on Canadian businesses.

Some witnesses, however, were sceptical about the impact of the *Recovery Act's* "Buy American" provisions on Canadian businesses. Teresa Healy (Senior Researcher, Social and Economic Policy Department, Canadian Labour Congress) suggested that there was very little concrete information available on the extent of the harm suffered by Canadian suppliers as a result of those provisions. She also dismissed claims that domestic content requirements in the US were a contributing factor to the decline in Canada-US trade in 2009, and said:

Information on the damages caused to Canadian suppliers because of the Buy American preferences, which have been around since the 1930s, is purely anecdotal. Because of business confidentiality concerns, information is only available to us through the press. As we have no public knowledge of the extent of damages, we cannot simply accept the view that it was US preferences rather than the economic recession itself that is to blame for declining exports.¹⁰

D. The Canadian Federal Government's Response to the ARRA's "Buy American" Provisions

Witnesses told the Committee that even before the ARRA became law, the Government of Canada was actively engaged with the US administration on the subject of "Buy American" and was working to ensure access to US sub-national procurement contracts for Canadian businesses. The issue was raised at several meetings between Prime Minister Stephen Harper and US President Barack Obama, and was the subject of lobbying at the political, diplomatic and administrative levels.

Indeed, this Committee travelled to Washington in April 2009 to meet with Members of Congress and representatives of the US administration. Its objective was to call attention to a number of Canada-US trade and border issues, including the potential impact of "Buy American" restrictions on the integrated sectors of the Canadian and US economies.

In addition to those lobbying efforts, the federal, provincial and territorial governments began to develop an initial proposal for a negotiated settlement in spring and summer 2009. As Dany Carriere (Director, Multilateral Market Access, Department of Foreign Affairs and International Trade) noted, in that proposal, Canada sought to address

10 Evidence, Meeting No. 3, March 16, 2010.

not only the specific issues related to the ARRA, but also other longstanding trade irritants in government procurement between Canada and the US.¹¹

By August 20, 2009, the proposal was finalized and presented to the US Trade Representative (USTR). According to Ms. Carriere, the two sides began formal negotiations on October 1, 2009. After several rounds of negotiations, an agreement in principle was reached on February 3, 2010 and the AGP entered into force on February 16, 2010.

Successful negotiation of the Canada-US AGP required the close cooperation and unanimous consent of the provincial and territorial governments. While the federal government is empowered to negotiate international treaties on behalf of the entire country, the provinces and territories have exclusive domain over their own procurement policies. As such, for Canada to negotiate an agreement with the United States on sub-national government procurement, the provinces and territories were required to consent to opening their procurement markets and to specify the concessions each were willing to make. Marie-Josée Langlois (Director, North American Trade Policy, Department of Foreign Affairs and International Trade) stated:

The provinces and territories were involved throughout the discussions. (The agreement) reflects their interests and the interests of their stakeholders, constituents and municipalities.¹²

In his appearance before the Committee, the Minister of International Trade, Peter Van Loan, characterized the negotiation process in the following way:

[T]he terms that were established were done very much by the provinces and industry, in their interest, based on what they thought was a good deal and the best deal for their workers and businesses. The role of the federal government was very much a leadership role in carrying out those negotiations... [T]he Government of Canada were the lawyers on behalf of our clients, industry, workers, and the provinces and territories in Canada.¹³

Several witnesses congratulated the federal, provincial and territorial governments for the speed with which they came to a consensus proposal to present to the USTR. Michael Buda (Director, Policy and Research, Federation of Canadian Municipalities) called the fact that all of the provinces and territories signed an agreement in less than six months “nothing short of remarkable.”¹⁴ Shirley-Ann George (Senior Vice-President, Policy, Canadian Chamber of Commerce) also commended Canada’s negotiators, and stated:

11 *Evidence*, Meeting No. 2, March 11, 2010.

12 *Ibid.*

13 *Evidence*, Meeting No. 6, March 30, 2010.

14 *Evidence*, Meeting No. 5, March 23, 2010.

[G]iven the normal length of time required to negotiate international agreements, reaching an accord in six months is an impressive accomplishment. When you take into account that the agreement also required the provinces to sign on, reaching an agreement with that group in six months is, frankly, quite mind-boggling.¹⁵

However, the Committee did hear criticisms about the way in which Canada approached these negotiations. In particular, several witnesses expressed their concerns about the lack of consultations leading up to, and during, formal negotiations with the US. Wayne Peppard (Executive Director, British Columbia and Yukon Territory Building and Construction Trades Council) was unaware of any consultations with labour groups or worker representatives in his industry before the agreement was signed:

I can only hope that workers' concerns will be given full consideration should there be an expansion to the commitments with regard to any permanent agreements with any nation for government procurement.¹⁶

Michael Buda expressed his concern about how Canada developed its initial negotiating position. He acknowledged that the provinces and territories have jurisdiction over sub-national procurement in Canada, but also suggested that the municipalities were not consulted during the initial discussions between the federal government and the provinces and territories. He stated that experts in municipal procurement should have been consulted in a deal that includes municipal procurement.¹⁷

Finally, some witnesses were concerned that Canada had set itself up for failure in the way it approached its negotiations with the US. Carl Grenier, for example, argued that because Canada was the only country that truly wanted an agreement on procurement, it was in a naturally poor negotiating position from the outset. He believed that Canada could never negotiate a fair deal when beginning from such a position of weakness, and said:

Canada approached the United States, basically telling them, "We needed a deal at any cost." If you say that to anyone, you'll get one. We did get one, and that cost is high.¹⁸

THE CANADA-US AGREEMENT ON GOVERNMENT PROCUREMENT

The Agreement between the Government of Canada and the Government of the United States of America on Government Procurement consists of three elements:

- an exchange of permanent commitments under the World Trade Organization's (WTO's) Agreement on Government Procurement (GPA);

15 *Evidence*, Meeting No. 4, March 18, 2010.

16 *Evidence*, Meeting No. 7, April 1, 2010.

17 *Evidence*, Meeting No. 5, March 23, 2010.

18 *Evidence*, Meeting No. 4, March 18, 2010.

- a temporary agreement, lasting until September 2011, providing mutual access to certain state, provincial and municipal infrastructure projects; and
- a pledge to explore the scope for further negotiations and an agreement to expedited consultations regarding future procurement-related matters.¹⁹

The Committee examined each of these elements, as discussed below.

A. Permanent Commitments at the WTO

1. Content of the Agreement

By expanding its commitments under the WTO GPA to include sub-national procurement, Canada agrees, for the first time in any international agreement, to provide US companies with a degree of permanent access to procurement markets in all provinces and territories except Nunavut. In exchange, the United States will extend its 1994 WTO GPA commitments on sub-national procurement, which cover 37 US states, to Canada.

The US did not make any new commitments at the WTO under this agreement. The market access commitments by the 37 states had been made in 1994 and, until now, had applied to all WTO GPA signatory countries except Canada; the US had not been willing to extend sub-national procurement commitments to Canada without receiving comparable access in return.

Each country that signs the GPA states its specific commitments in an appendix it submits to the WTO. Annex 2 of that appendix outlines the specific commitments and exceptions for each sub-national entity subject to the agreement. Other nation-wide exceptions are found in each country's general notes to the appendix.

For the United States, some of the exceptions include:

- For 12 of the 37 states, the WTO GPA does not apply to procurement of construction-grade steel (including requirements on subcontracts), motor vehicles and coal.
- The WTO GPA does not apply to set-asides on behalf of small and minority businesses.

19 *Evidence*, Meeting No. 3, March 16, 2010.

- The WTO GPA does not apply to preferences or restrictions aimed at promoting the development of depressed economic areas, or to businesses owned by minorities, disabled veterans and women.
- States reserve the right to apply restrictions that promote environmental quality, as long as such restrictions are not disguised barriers to international trade.
- The WTO GPA does not apply to any procurement made by a covered entity on behalf of non-covered entities at a different level of government.
- The WTO GPA does not apply to restrictions attached to federal funds for mass transit and highway projects.

Canada's commitment to open permanently sub-national procurement markets to the US includes procurement by the vast majority of provincial and territorial departments and most agencies. However, these market access commitments also include a number of exceptions, some of which are province- or territory-specific, and others of which apply to all governments. Some of these exceptions are:

- shipbuilding and repair;
- urban rail and urban transportation equipment, systems, components and materials incorporated therein as well as all project-related materials of iron or steel;
- preferences or restrictions on highway projects;
- the procurement of goods, services or construction for schools boards, publicly funded academic institutions, social service entities or hospitals (this exception does not apply to Ontario or Quebec);
- contracts respecting Federal Supply Classification code 58 (communications, detection and coherent radiation equipment);
- set-asides for small and minority businesses;
- agricultural products made in furtherance of agricultural support programs or human feeding programs; and
- national security, including oil purchases related to any strategic reserve requirements and procurements made in support of safeguarding nuclear materials or technology.

A complete list of provincial and territorial market access commitments and exceptions at the WTO can be found in Appendix A of the Canada-US AGP.

The US is the only WTO GPA signatory country to which Canada's sub-national procurement commitments will initially apply. Other WTO GPA signatories will not have access to sub-national procurement opportunities in Canada until such time as they negotiate mutually acceptable access to their own procurement markets.

A restriction common to all WTO GPA signatory countries is that procurement contracts must exceed a certain value threshold in order to be subject to the agreement. For sub-national governments in the US, that threshold is US\$554,000 for goods and services and US\$7.8 million for construction services. In Canada, the thresholds are comparable: C\$604,500 for goods and services and C\$8.5 million for construction services. As Carl Grenier told the Committee, these thresholds are in place largely because it is a cumbersome and expensive process to open all contracts to international bidding. The thresholds prevent countries from having to open bidding on contracts which are clearly not worth putting out to international tender.²⁰

2. Witnesses' Views

The Committee heard from some witnesses that, because the Canada-US AGP ensures access to the procurement concessions made by 37 states in the WTO GPA, it provides important benefits to Canada. Scott Sinclair noted that, until the Canada-US AGP was signed, Canadian suppliers did not have the right to challenge decisions to exclude them from bidding on contracts by the 37 states that signed onto the WTO procurement agreement.²¹ Lynda Watson agreed. She observed that the permanent WTO commitments give Canadian companies some much-needed certainty regarding their rights in pursuing procurement contracts in the US. In her view, the Canada-US AGP provides Canadian businesses with a degree of protection against unfair treatment in the allocation of state-level procurement contracts in the US.²² Jean-Michel Laurin noted that Canada now has the same guaranteed level of coverage in the US that European businesses have had for years.²³

At the same time, however, some witnesses criticized the Government of Canada for not securing better permanent market access commitments from the US. They pointed to the fact that US commitments do not include all state-level departments and agencies, and called attention to the numerous carve-outs to which Canada did not receive an exemption. Among the exemptions still in place, some witnesses highlighted the "Buy American" restrictions attached to federally funded mass transit and highway projects, public utility contracts, procurement of vehicles, printing services and construction-grade steel, among others. It was suggested that the United States' carve-outs and exceptions

20 *Evidence*, Meeting No. 4, March 18, 2010.

21 *Evidence*, Meeting No. 3, March 16, 2010.

22 *Evidence*, Meeting No. 2, March 11, 2010.

23 *Evidence*, Meeting No. 3, March 16, 2010.

under the WTO GPA are so broad that Canadian businesses may see little improvement in their access to US sub-national procurement markets.

Guy Caron (National Representative, Special Projects, Communications, Energy and Paperworkers Union of Canada) stated that one of the most important carve-outs in the United States' WTO GPA commitments is the set-aside for small and minority businesses. He noted that 23% of US federal procurement funds is set aside for small businesses and minority businesses.²⁴ The Committee heard that similar set-asides exist at the state level, some of which range from 25 to 40%.

In fact, the Committee heard that the issue of small business set-asides was a primary reason why Canada has historically resisted entering into an agreement on sub-national procurement with the US, whether at the WTO or under the NAFTA. Carl Grenier provided a detailed history of government procurement negotiations at the WTO, drawing upon his personal experience as a member of Canada's negotiating team at the Tokyo Round of General Agreement on Tariffs and Trade (GATT) talks. Mr. Grenier stated that, in his opinion, the US negotiated a last-minute change to the first GATT government procurement agreement in 1979, allowing it to preserve its small business set-asides. This change was a significant setback for Canada, which had expected to benefit considerably from its proximity to US procurement markets.

According to Mr. Grenier, it was because of the persistent refusal of US negotiators to exempt Canadian businesses from the small business set-asides that Canada did not expand its WTO GPA commitments to include sub-national procurement in 1994. In Canada's view at the time, those set-asides prevented Canadian businesses from enjoying the same degree of access to US federal procurement markets as the US had to Canadian federal procurement markets. Mr. Grenier stated that Canada did not wish to exacerbate that imbalance by further extending the inequitable treatment to sub-national procurement. From that perspective, therefore, Mr. Grenier suggested that the Canada-US AGP was of great concern. In his view, Canada gave up access to Canadian provincial and territorial government procurement without making any progress on the issue of small business set-asides or other US exemptions at the WTO.

Dany Carriere acknowledged that the US has significant carve-outs in its WTO GPA commitments, but testified that the provinces and territories, which put the Canadian proposal together, have reserved a number of comparable carve-outs. She stated:

It should be noted that... we have the equivalent carve-out to the American restrictions attached to mass transit. We have the equivalent to preferences restrictions on highway projects. We took an equivalent exclusion that doesn't apply to preferences or restrictions associated with programs promoting the development of distressed areas. The

24 *Evidence*, Meeting No. 5, March 23, 2010.

agreement does not apply to any measure that's adopted or maintained with respect to aboriginal peoples.²⁵

Ms. Carriere also pointed out that municipal, academic, social services and hospital-related procurement in Canada are also excluded from the Canada-US AGP, matching the local exclusions in the US. In her view, Canada's permanent commitments to opening provincial and territorial government procurement under the WTO GPA are comparable to those in the US.

Some witnesses were concerned that, by extending its WTO GPA commitments to include provincial and territorial government procurement, Canadian governments were sacrificing their ability to use public purchasing power to support future economic development. Teresa Healy said:

In the midst of an economic crisis, provinces and territories have given up important policy space that could be better used to support the production of Canadian goods and services in both the public and the private sectors.²⁶

The Committee also heard that, by committing to a partial but permanent opening of provincial and territorial procurement markets, Canada was compromising its ability to implement "Buy Canadian" procurement policies. Several witnesses believed that domestic content requirements were an important component of public procurement, to ensure that at least some of the procurement money spent supports the Canadian economy. Angelo DiCaro (National Communications Representative, Canadian Auto Workers Union) said:

Domestic content policies, when used properly, can be a strategic lever to encourage domestic economic and social development, particularly as that relates to maintaining a strong and vibrant manufacturing base in Canada.²⁷

Wayne Peppard agreed, stating his preference that his tax dollars be spent "promoting Canadian contractors and workers contributing to our economy, and giving the estimated 12% unemployed and unregistered workers who have fallen off EI (Employment Insurance) an opportunity to contribute to the Canadian economy..."²⁸

Jenny Ahn cited the City of Toronto's recent procurement of light rail vehicles as an example of a successful "Buy Canadian" policy. Toronto maintained a 25% Canadian content requirement as a condition of its purchase of these vehicles which, as Ms. Ahn

25 *Evidence*, Meeting No. 2, March 11, 2010.

26 *Evidence*, Meeting No. 3, March 16, 2010.

27 *Evidence*, Meeting No. 7, April 1, 2010.

28 *Ibid.*

stated, “ensured Canada would receive a sizeable share of the economic benefits associated with this record \$1.2-billion public purchase.”^{29, 30}

Others argued that, unlike Canada, the United States appeared not to have any reluctance to implement domestic content requirements that preserved its ability to use public funds to stimulate the domestic economy. Steven Shrybman (International Trade and Public Interest Lawyer, Council of Canadians) commented:

I think the United States understands that spending public money to create public goods is also a reasonable way to make jobs. I don't think U.S. states are going to give up that prerogative.³¹

The Committee also heard from some witnesses that the thresholds below which the permanent access commitments do not apply are set too high and exclude a significant share of procurement contracts. Omar Hammoud observed that, from the perspective of his business, the US\$7.8 million threshold is a major obstacle to accessing procurement contracts in the US. Mr. Hammoud stated that 80% of tendered projects in the US are below that threshold. He also suggested that larger contracts can be subdivided so that each falls below the threshold. He argued that, in this way, governments can avoid opening the bidding process to foreign suppliers.

Shirley-Ann George, however, reminded the Committee that Canada has similar thresholds, which were put in place at the request of the provinces and territories. These thresholds allow domestic governments to preserve some local procurement opportunities for local businesses.

Although witnesses had differing views concerning the permanent commitments made under the Canada-US AGP, one aspect of those commitments on which there was general consensus is the difficulty in estimating or anticipating their effect on businesses in Canada and the US. The variation in procurement commitments from one jurisdiction to the next, the impact of the value threshold, the myriad exceptions and carve-outs, and the fact that states, provinces and territories can waive those exceptions when they choose to do so³² complicate any such analysis.

29 *Evidence*, Meeting No. 7, April 1, 2010.

30 It is worth noting that, since the NAFTA came into effect, Canada has carved out urban rail and transportation equipment as an exception to government procurement provisions in all of its international trade agreements. Urban rail and urban transportation equipment were also carved out of the Canada-US AGP, meaning that the City of Toronto, or any other sub-national government, continues to be free to implement a similar policy if it so desires.

31 *Evidence*, Meeting No. 5, March 23, 2010.

32 Under international government procurement agreements, countries may reserve the right to make certain exceptions or carve-outs, but may choose to waive them.

Moreover, the Committee heard that the US has a poor record in fulfilling its reporting obligations under the WTO GPA. It is several years late in providing the required documents and, as Scott Sinclair noted, the US does not report detailed statistics on state-level procurement covered under the WTO GPA. These data limitations further complicate any analysis of the impact of the permanent commitments under the Canada-US AGP.

B. Temporary Agreement on Enhanced Coverage

1. Content of the Agreement

The second component of the Canada-US AGP is a series of commitments by both countries to provide temporary access to other sub-national procurement opportunities until September 2011. These temporary access commitments are over and above the WTO GPA commitments described above. The specific commitments are outlined in Part B of the Canada-US AGP and in Appendix C of that agreement.

For its part, the US agrees to waive its “Buy American” restrictions on procurement of Canadian iron, steel and manufactured goods for ARRA-financed, state-administered projects in seven specific programs in all 50 states.³³ Those programs are:

- US Department of Agriculture (USDA), Rural Utilities Services, *Water and Waste Disposal Programs*;
- USDA Rural Housing Service, *Community Facilities Program*;
- US Department of Energy, Office of Energy Efficiency and Renewable Energy, *Energy Efficiency and Conservation Block Grants*;
- US Department of Energy, Office of Energy Efficiency and Renewable Energy, *State Energy Program*;
- US Department of Housing and Urban Development, Office of Community Planning and Development, *Community Development Block Grants Recovery*;
- US Department of Housing and Urban Development, Office of Public and Indian Housing, *Public Housing Capital Fund*; and
- US Environmental Protection Agency, *Clean Water and Drinking Water State Revolving Funds*, for projects funded by reallocated ARRA funds where the contracts are signed after February 17, 2010.

33 Because this concession is included in the United States’ WTO GPA commitments, it remains subject to the US\$7.8 million threshold for construction services.

Canada, in turn, agrees to provide US companies with enhanced access to procurement of construction services by numerous provincial and territorial government agencies, Crown corporations and municipalities until September 2011. As with Canada's permanent commitments outlined earlier, the specific government bodies to which these temporary commitments apply varies from one province or territory to the next. The C\$8.5 million threshold in Canada's WTO GPA commitments also applies to these enhanced access commitments.

Canada's temporary enhanced access commitments are also subject to certain exclusions. In most cases, these exclusions are similar to those contained in Canada's permanent sub-national procurement commitments at the WTO. However, one notable difference is that, under its temporary commitments, Canada reserves the right to place limits on its concessions to match any new restrictive preferential procurement measures that might be introduced in the US by a state or local government.

2. Witnesses' Views

As with the permanent component of the Canada-US AGP, witnesses had significantly divergent views concerning the temporary agreement on enhanced coverage. Some argued that Canada made significant concessions in provincial, territorial and municipal procurement and received very little access to US procurement markets in return. Others believed that Canada made modest, but important, gains into US procurement markets in exchange for acknowledging pre-existing municipal, provincial and territorial procurement policies.

Several witnesses opposed to the AGP told the Committee that the expected gains from Canada's partial exemption to US domestic content requirements in the ARRA are likely to be small. Not only have the vast majority of ARRA procurement funds already been disbursed, but the Canada-US AGP opens to Canadian companies only a small fraction of what remains.

The Committee heard numerous and differing estimates concerning the value of contract opportunities available for Canadian businesses as a consequence of the temporary commitments in the AGP. Scott Sinclair noted that, of the US\$275 billion in procurement funds contained in the *Recovery Act*, the total budget for the seven programs to which Canada secured an exemption was US\$18 billion and that, as of December 31, 2009, two-thirds of those funds had already been allocated. He commented:

Canadian suppliers will therefore have an opportunity to compete for no more than an estimated \$6 billion U.S. of federally funded stimulus projects, representing just 2% of the procurement funded under the *Recovery Act*. The rest falls outside the scope of this agreement.³⁴

34 Evidence, Meeting No. 3, March 16, 2010.

Steven Shrybman stated that even this figure was a generous estimate because it did not take into account all the other carve-outs and exclusions in US procurement rules to which Canada did not receive an exemption. In his submission to the Committee, Mr. Shrybman observed that, under the Canada-US AGP, US offsets, set-asides and local preferences—most of which are established at the state and local level—remain in place. He noted:

This means that, while the US has agreed to remove domestic purchasing requirements as a condition under the seven federal programs, it does not commit to have state and local governments remove their own barriers to Canadian bids on the very projects funded the seven listed programs...³⁵

The Committee also heard that officials from the Quebec Department of Economic Development have estimated the total value of unallocated funds under the seven programs listed above to be US\$1.3 billion.

Opponents of the Canada-US AGP also argued that Canada's modest improvement in access to ARRA-funded procurement came at a great cost. Guy Caron suggested that Canada gave US firms the opportunity to bid, until September 2011, on provincial, territorial and municipal infrastructure and construction procurement worth an estimated C\$25 billion, compared to the 2% of ARRA procurement funds still available to Canadian companies.³⁶ Other sources estimated the value of procurement to be closer to C\$33 billion.³⁷

Steve Shrybman also highlighted what, in his view, are the asymmetries of the temporary market access commitments. Calling the agreement "egregiously one-sided," he called particular attention to the fact that the agreement applies to Canadian municipalities, but not to US municipalities. He said:

Many U.S. municipalities and state governments maintain the very types of local preferences that are precluded by this agreement, and the U.S. has not undertaken to remove them. The imbalance is even greater when one considers the fact that U.S. preferences at a local level may be maintained under this agreement but must be removed in Canada.³⁸

35 Shrybman, S., *The Canada-US Procurement Agreement (Feb. 2010) and Canadian Municipal Procurement*, Submission made on behalf of the Council of Canadians. March 23, 2010.

36 The figure of C\$25 billion was first used in *Buy American Basics*, a report for the Canadian Centre for Policy Alternatives by Scott Sinclair. In that report, Mr. Sinclair stated that a "rough estimate" of the value of municipal procurement opened under the AGP was C\$25-30 billion, based on the fact that the Ontario government estimated that \$10 billion of Ontario procurement was covered under the deal, and that Ontario represents 37% of Canadian gross domestic product. Mr. Sinclair, as well as many others, have since quoted the lowest number in the C\$25-30 billion range.

37 The figure of C\$33 billion was mentioned in testimony by Guy Caron at Meeting No. 5 on March 23, 2010. The figure was attributed to the Canadian Association of Manufacturers and Exporters.

38 *Evidence*, Meeting No. 5, March 23, 2010.

He also argued that, under the temporary access commitments, Canada is obliged to establish a dispute process to be used in cases where a US company feels that it has not been given the appropriate degree of access to municipal procurement in Canada. Mr. Shrybman stated that there is no reciprocal obligation in the US.

Some witnesses also expressed concerns that Canada's commitments in this section of the AGP put many municipal procurement policies at risk. Wayne Peppard noted:

Many municipal procurement policies contain procurement provisions on quality, qualifications, training, safety, employment standards and, in some instances, fair wage and living wage policies. These social and legal commitments now stand to be challenged. Union agreements that provide for local hiring or contracting-out language may [also] be at risk.³⁹

Furthermore, the Committee heard that Canada did not receive any exemptions to "Buy American" provisions other than those specifically included in the ARRA. Several witnesses observed that similar provisions have appeared in other proposed US legislation. Guy Caron commented that several US bills, including the proposed \$100 billion "Jobs for Main Street" legislation, contain "Buy American" preferences. Witnesses suggested that by providing the US with access to a wide range of municipal construction procurement through to September 2011 in exchange for access to limited procurement opportunities in a single program, Canada would have nothing left with which to negotiate, should any of the US infrastructure bills pass with their "Buy American" provisions intact.

Finally, Teresa Healy, among others, expressed concern that the Government of Canada has not been able to produce any accounting of the expected costs and benefits of the agreement. In particular, she cited concerns that there have been "no public studies of the potential damage to the Canadian economy as a result of the presence of larger US suppliers of goods and services in the public sector..."⁴⁰

Witnesses who supported the temporary access commitments of the Canada-US AGP acknowledged that many critics of the agreement have raised legitimate concerns. They accepted that most ARRA funds have already been disbursed and that the agreement opens to Canadian businesses only a fraction of what remains. However, they pointed out that Canada was clearly better off with the deal than without it. Shirley-Ann George, for example, stated that Canadians need to look at the bigger picture. She said:

This is a good agreement for Canada because, first of all, having no agreements would have been worse. The damage and the bleeding that was happening to Canadian

39 *Evidence*, Meeting No. 7, April 1, 2010.

40 *Evidence*, Meeting No. 3, March 16, 2010.

businesses would have continued and the jobs would have been permanently lost for Canada.⁴¹

Other witnesses questioned the use of figures suggesting that Canada will gain access to 2% of the US\$275 billion in procurement opportunities in the *Recovery Act*. Marie-Josée Langlois cautioned against the use of such estimates, reminding the Committee that it was “extremely difficult and highly speculative” to estimate the size of procurement markets and contracts because of differences across US departments and programs in how funds are managed.⁴²

Moreover, Ms. Langlois noted that any estimates of the total value of ARRA procurement funding open to Canadian businesses did not include reallocated funds or the value of sub-contracts yet to be awarded. She stated that there will continue to be contracts that become available to Canadian firms as US departments reallocate spending. She further reminded the Committee that the deadline for the final disbursement of ARRA funding is September 2011, which is why the temporary access commitments within the Canada-US AGP expire that month.⁴³

Steve Ross told the Committee that much of the early work funded by the ARRA was the “shovel-ready stuff” such as paving and painting, and not the major projects which can take a year or two to design and plan.⁴⁴ Jean Michel Laurin also observed that one of the main benefits of the agreement is that it sets a precedent in the event that “Buy American” restrictions appear in future US legislation. He stated that Canada had been told repeatedly over the course of negotiations that it could not be given an exemption to US domestic content restrictions because doing so would set a precedent. In Mr. Laurin’s view, Canada was able to get that precedent, along with recognition of the integrated nature of the Canadian and US economies.

While some witnesses were critical that Canada made broad commitments to open provincial, territorial and municipal procurement opportunities in construction services in exchange for only minimal access to ARRA-financed projects, others pointed out that Canada’s own concessions were, in fact, quite modest. Several witnesses, including Michael Buda, observed that the vast majority of municipal procurement in Canada was already open before the AGP came into effect. The Committee heard that it was therefore misleading to suggest that Canada was *opening* an estimated C\$25 billion or C\$33 billion, depending on the estimate, in municipal procurement opportunities to US companies because those opportunities were already open.

41 *Evidence*, Meeting No. 4, March 18, 2010.

42 *Evidence*, Meeting No. 2, March 11, 2010.

43 *Ibid.*

44 *Evidence*, Meeting No. 5, March 23, 2010.

These observations were echoed by Minister of International Trade Peter Van Loan. Appearing before the Committee, he stated that, to gain access to *Recovery Act* procurement in the US, Canada gave up essentially nothing. The Minister suggested that the provinces and territories did not make any new concessions in their temporary commitments in the AGP, but simply gave up the right to close markets which they had already chosen to open. He commented:

The municipalities participating through the Federation of Canadian Municipalities and the provinces all indicated that their procurement processes were unrestricted, by and large. Any restrictions they had were reflected in this agreement in the carve-outs under the WTO procurement agreement provisions. As such, to the extent that they had sensitive sectors they wished to protect within procurement, that was done.⁴⁵

In the Minister's view, therefore, the Canada-US AGP is entirely beneficial for Canada. Although under questioning by the Committee, the Minister admitted that, contrary to what was stated in the March 3, 2010 Speech from the Throne, Canadian companies did not gain permanent access to state and local government procurement in the US, he argued that Canadian firms did gain a partial exemption to US domestic content requirements under the *Recovery Act* in exchange for formal recognition of pre-existing Canadian municipal procurement policies, including exceptions and carve-outs. The Minister said:

As a result, every single dollar benefit, every single gain made through contracting with the United States subsequent to this agreement, represents a net benefit to Canada...⁴⁶

C. Consultations

1. Content of the Agreement

The third part of the Canada-US AGP is an agreement by the two sides to engage in future discussions on the subject of government procurement. These discussions take two forms. The first is a pledge by the two countries to offer expedited consultations on any matter related to government procurement, including the interpretation of the agreement itself. Consultations are to begin within ten days of the initial request.

The second component of this section of the agreement is a commitment by the two sides to explore the possibility of negotiating a formal accord that would expand, on a reciprocal basis, market access in government procurement. These discussions are to take place by February 2011.

45 *Evidence*, Meeting No. 6, March 30, 2010.

46 *Ibid.*

2. Witnesses' Views

Some witnesses welcomed the commitment to the development of a mechanism for expedited consultations. It was suggested that such a mechanism could lead to faster resolution of similar disputes in future. Shirley-Ann George suggested that, given the increase in “protectionist language” (i.e., domestic content requirements) in proposed US legislation, and the fact that Canada was not able to negotiate a blanket exception to “Buy American” provisions in future US legislation, there would likely be a future need for accelerated dispute settlement.

Others, however, called into question the usefulness of the expedited consultation process. Guy Caron noted that the binding commitments in this section of the Canada-US AGP ended at the consultation stage: “There is no guarantee that binding and satisfactory settlements can come from these fast-track provisions, and this consultation process might very well simply be a mere notification.”⁴⁷

Carl Grenier agreed, suggesting that the language in the agreement committing to expedited consultations was nothing more than the standard language found in any other international agreement. As such, he did not expect it to yield any significant benefit to Canada.

On the subject of the commitment to negotiate a broader permanent agreement, the Committee heard several witnesses who favour a more comprehensive deal on government procurement. Most of those witnesses who supported the Canada-US AGP did so recognizing that the agreement was a solid first step towards the further liberalization of Canadian and US procurement markets. Jean-Michel Laurin observed that there remains a broad range of procurement still not covered by this agreement. He expressed his hope that both governments would be able to conclude an agreement that would open more markets, and said:

[S]ome markets remain closed to Canadian companies in the U.S. because of policies that have been there for quite some time [and] municipalities in either the US or Canada are not covered by the long-term portion of this agreement. So there is still a lot to negotiate. There is still a lot of room for improvement in terms of getting better access into markets in the US.⁴⁸

Even so, some witnesses were sceptical that Canada would be successful in negotiating a broader permanent procurement agreement with the US. Scott Sinclair reminded the Committee that any additional concessions by the US would likely require the approval of the US Congress and of state governments. He stated that “Buy American” policies are popular in the US and that Canada likely would not be able to secure an exemption to any of those policies without making significant concessions in return.

47 *Evidence*, Meeting No. 5, March 23, 2010.

48 *Evidence*, Meeting No. 3, March 16, 2010.

Mr. Sinclair and Teresa Healy suggested that Canada would be better served by using procurement as a tool for economic development. Mr. Sinclair stated:

I think it's an intelligent policy that can contribute to our international competitiveness. Others may believe that it's a way to increase our bargaining leverage in future negotiations.⁴⁹

Finally, Steven Shrybman advised the Committee that any future negotiations with the US on expanded government procurement commitments need to be conducted in a transparent manner. For his part, Michael Buda believed that Canada's experience in negotiating the AGP would prove beneficial in that regard, and indicated:

If sub-national procurement is a direction in which the government is going to go in terms of inclusion in future trade agreements, then there's no doubt that this experience has already laid the groundwork for a more expedient and frankly more open process.⁵⁰

CONCLUSION

The Committee heard a wide range of opinions concerning the Canada-United States Agreement on Government Procurement. On one side were witnesses like Carl Grenier and Steven Shrybman. Mr. Grenier suggested that the AGP was "the second-worst agreement Canada has even signed," while Mr. Shrybman called it "egregiously one-sided."⁵¹

Generally speaking, witnesses opposed to the AGP argued that: Canada gained access to only a small fraction of US federally funded state-level procurement contracts under the ARRA; most *Recovery Act* monies had already been allocated; the expedited consultation process lacked teeth; and Canada made significant concessions in opening its own sub-national procurement markets, thereby compromising the ability to use public procurement as an economic development tool in future, and compromising its negotiating position in the event that future US legislation includes similar "Buy American" provisions. Finally, witnesses such as Omar Hammoud suggested that the agreement is misleading in the sense that Canadian businesses do not have as secure a position in the US market as initial impressions might suggest.

On the other side were witnesses such as Shirley-Ann George, who considered the AGP to be "a good agreement and worthy of the support it got from the federal and provincial governments."⁵² Steve Ross stated that securing access to the US market was important to ensure the long-term success of Canadian enterprises and that this agreement was a step in the right direction. In addition, the Committee heard that

49 Ibid.

50 *Evidence*, Meeting No. 5, March 23, 2010.

51 *Evidence*, Meeting No. 4, March 18, 2010 and *Evidence*, Meeting No. 5, March 23, 2010.

52 *Evidence*, Meeting No. 4, March 18, 2010.

estimates of the value of contracts opened to Canadian businesses as a result of the agreement did not include funds reallocated under the ARRA, or the value of sub-contracts yet to be awarded.

Supporters of the agreement argued that, given the timelines involved and the requirement to gain the unanimous consent of the provinces and territories in order to develop a negotiating position, completing this agreement in time to give Canadian businesses access to any ARRA-funding procurement opportunities was, in itself, a significant accomplishment. In their view, the AGP is a success because: Canada gained a partial exemption to “Buy American” provisions under the ARRA; this partial exemption could be used as a precedent in the event that future US legislation contains similar “Buy American” provisions; Canadian businesses now enjoy the same rights under the WTO GPA to bid on US sub-national procurement contracts as do their competitors in Europe and elsewhere; and Canada secured a commitment from the US to negotiate a more expansive permanent agreement on procurement.

One subject on which witnesses were in relatively widespread agreement was the difficulty in estimating the potential impact of this agreement. In response to questioning by the Committee, DFAIT witnesses acknowledged that they did not have access to information on the expected value of contracts that Canadian businesses could win under this agreement, and nor did they have access to information about the value of Canadian procurement markets that are now open to US contractors.

However, the Committee heard from other witnesses that, given the complexity of procurement contracting, it is entirely understandable that these data may not be available. Moreover, the Committee heard that not only is it difficult to predict the impact the AGP will have on Canadian jobs and procurement today, but that measuring the impact of this agreement will continue to be a challenge in the future. Carl Grenier pointed out that data on the awarding of procurement contracts are difficult to obtain and, as Shirley-Ann George stated, “I think a year from now, we’re going to be looking back at [this agreement] and still being frustrated that we don’t have enough information.”⁵³

The Committee accepts that it may be impossible to determine precisely the costs and benefits of this agreement for Canadians; the data simply do not exist at present to make a reliable estimate as to its impact. Moreover, it is important to note that procurement markets in Canada are small relative to those in the US or the European Union, with which Canada is currently negotiating a Comprehensive Economic Partnership Agreement. In our view, there is more to be gained from improving access to those markets than there is from reserving access to Canadian procurement markets for Canadian companies. As Jean-Michel Laurin stated:

53 Ibid.

[T]he US or the European Union... are 10 times larger than our own market...[W]e have a lot more interest in having access to those markets than privileged access to our own domestic market.⁵⁴

However, we also agree with those witnesses who suggested that Canada's focus should be on how it can expand procurement opportunities for Canadian businesses in the US and make progress on overcoming some of the significant carve-outs, high thresholds and other barriers that remain in the way of a truly open market for government procurement between the two countries. In that spirit, we look forward to the upcoming discussions between Canada and the US on a new permanent agreement on government procurement.

Based on the evidence collected on the issue of domestic content requirements in government procurement policy generally, and the Canada-US Agreement on Government Procurement specifically, as well as its own deliberations on those matters, the Committee makes the following recommendations:

Recommendation 1:

That the Department of Foreign Affairs and International Trade put concrete measures in place and take the actions necessary to ensure that the rights of Canadian entrepreneurs seeking public procurement contracts in the United States are respected by US authorities.

Recommendation 2:

That the Department of Foreign Affairs and International Trade (DFAIT) set up a mechanism to collect economic data regarding the application of the Canada-US Agreement on Government Procurement, and thus enable it to assess the agreement's impacts on enterprises and employees in Canada. DFAIT should submit a report on this issue to the Committee.

Recommendation 3:

That the Government of Canada take the steps necessary to monitor the impact of the Canada-US Agreement on Government Procurement (AGP) on employment in Canada, as well as on Canadian businesses and communities. Information should be collected that allows the Government of Canada to determine: the value of US public procurement contracts that Canadian businesses are accessing as a result of the AGP; the value of Canadian public procurement contracts US firms are accessing; and how many jobs are being created or lost as a result. This monitoring process should include the collection of

54 *Evidence*, Meeting No. 3, March 16, 2010.

critical quantitative and qualitative information to enable an effective impact analysis of the AGP on government procurement markets in Canada and the US, which Canadian negotiators and officials from the Department of Foreign Affairs and International Trade were unable to provide to the committee. The data collected, and any impact assessment reports which result, should be made available to the Committee.

Recommendation 4:

That the Government of Canada establish a process for an ongoing exchange of information with provinces, municipalities and representatives of key business and labour sectors with the aim of assessing the net impact of federal, provincial and municipal government procurement on domestic job creation and the Canadian economy. This information should be made available to the Committee.

Recommendation 5:

That the Government of Canada seek exemptions from Buy American provisions in steel and other highly integrated sectors of the Canadian and US economies.

APPENDIX LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<p>Department of Foreign Affairs and International Trade</p> <p>Dany M. Carriere, Director, Multilateral Market Access</p> <p>Marie-Josée Langlois, Director, North America Trade Policy</p> <p>Lynda Watson, Director, North America Commercial Policy</p>	2010/03/11	2
<p>Canadian Centre for Policy Alternatives</p> <p>Scott Sinclair, Senior Research Fellow</p> <p>Canadian Labour Congress</p> <p>Teresa Healy, Senior Researcher, Social and Economic Policy Department</p> <p>Canadian Manufacturers and Exporters</p> <p>Jean-Michel Laurin, Vice-President, Global Business Policy</p>	2010/03/16	3
<p>As an individual</p> <p>Carl Grenier,</p> <p>APG-Neuros Inc.</p> <p>Omar Hammoud, President and Chief Executive Officer</p> <p>Canadian Chamber of Commerce</p> <p>Shirley-Ann George, Senior Vice-President, Policy</p>	2010/03/18	4
<p>Cherubini Group</p> <p>Steve Ross, General Manager</p> <p>Communications, Energy and Paperworkers Union of Canada</p> <p>Guy Caron, National Representative, Special Projects</p> <p>Council of Canadians</p> <p>Steven Shrybman, International Trade and Public Interest Lawyer</p> <p>Federation of Canadian Municipalities</p> <p>Michael Buda, Director, Policy and Research</p> <p>Federation of Canadian Municipalities</p> <p>Adam Thompson, Policy Analyst</p>	2010/03/23	5

Department of Foreign Affairs and International Trade	2010/03/30	6
Don Stephenson, Assistant Deputy Minister, Trade Policy and Negotiations		
House of Commons		
Peter Van Loan, Minister of International Trade		
British Columbia and Yukon Territory Building and Construction Trades Council	2010/04/01	7
Wayne Peppard, Executive Director		
Canadian Auto Workers Union		
Jenny J.H. Ahn, Director, Government Relations, Membership Mobilization and Political Action		
Canadian Auto Workers Union		
Angelo DiCaro, National Communications Representative		

MINUTES OF PROCEEDINGS

A copy of the relevant Minutes of Proceedings ([Meetings Nos. 2, 3, 4, 5, 6, 7, 8, 10, 11 and 17](#)) is tabled.

Respectfully submitted,

Lee Richardson, MP
Chair

Dissenting Opinion of the Conservative Party

May 2010

Since the inception of the Buy American provisions outlined in the *American Recovery Act*, Canada has been actively engaged with our American counterparts to address our concerns with this legislation and the implications it has had and continues to have on Canada. By negotiating and resolving this agreement, our Government stood up for Canadian businesses and workers who were clearly negatively affected by the protectionist measures included in the Buy American portion of the *American Recovery and Re-investment Act* (ARRA). The final product of these negotiations is an agreement that will benefit business and workers on both sides of the border.

Canada initially presented a proposal to address this issue to the United States on August 20, 2009, with negotiations that concluded in less than six months. These negotiations resulted in the *Canada-US Agreement on Government Procurement*. This is a significant accomplishment for any government negotiating an agreement in any country in the world. The *Canada-US Agreement on Government Procurement* entered into force on February 16, 2010. This type of timeframe for the creation, negotiation, and implementation of an agreement is unprecedented and an “impressive accomplishment” as stated by Ms. Shirley-Ann George (Senior Vice-President, Policy, Canadian Chamber of Commerce). Ms. George also heralded the agreement as vital in combating the protectionist sentiments within the U.S. Congress and U.S. political arena. By signing such an agreement with the United States, Canada has clearly established a special

relationship with the United States and set the stage for improved consultations and negotiations in the future.

In addition to the exceptional speed that this agreement was negotiated and brought into effect, the signing of this agreement marks another historic accomplishment for Canada. For the first time, the provinces and territories played an integral part in the decision making process for an International Trade Agreement. This cooperation towards a common goal between the provinces, territories, and the Federal Government is promising for future negotiations. Market access offers were received from the provinces and territories, as well as a list of municipalities within the temporary agreement. Municipalities are in the realm of the provinces and territories, as such, the provinces and territories were responsible for municipal consultations. Whether or not the provinces and territories consulted with procurement experts in their municipalities is unknown. In any case, Minister Day consulted and spoke with the Federation of Canadian Municipalities (FCM) in June 2009, and again in September. The consultation of the provinces and territories throughout this process is important to consider as critics of the agreement claim that the Federal Government has brokered a bad deal for the provinces and territories. These critics fail to mention the extensive manner in which the provinces and territories were consulted throughout the process, and how their input was integral in brokering this historic agreement.

Within the agreement, Canadian companies gain access to contracts financed with U.S. stimulus fund. Additionally, Canada received permanent access to government

procurement from 37 U.S. states. Beyond this, Canadian firms also have the right to participate in a number of infrastructure projects funded by 7 programs under the *American Recovery Act* until it expires on September 30, 2011. Finally, Canadian firms have the ability to bid on the lucrative sub contracts of many of these projects that have already been allotted. It is due to these lucrative sub contracts that the true value of funds to be sought by Canadian firms remains unknown. This view was strongly supported by Ms. Marie-Josée Langlois (DFAIT - Director of North American Trade Policy) when she appeared before the committee on March 11, 2010. These sentiments were further echoed by the testimony of other witnesses such as Steve Ross (GM Cherubini Group Inc.) who indicated that his company planned to bid on many of these sub contracts that remain to be tendered. Mr. Ross expressed that for many of the largest contracts, the more basic cosmetic elements had already been tendered however the lucrative aspects such as the steel fabrication that his company produces had yet to be purchased and would be secured by the aforementioned sub contracts. Mr. Ross went on to state that his company felt completely comfortable competing with American companies and was confident that his company would find success in bidding on the available sub-contracts.

In addition to the direct provisions of the Canada-US Agreement, Canada now has a fast track consultation process to address any future bilateral government procurement issues. This is one of the many aspects of the agreement that was heralded by several of the witnesses heard by the committee including Shirley-Ann George (President, Canadian Chamber of Commerce). The reason behind this support being that the United States has never given such a commitment in the past. Additionally, the United States went to the

negotiating table with the intention of not giving such assurances and despite this, our Government was able to produce them.

Canada-US Agreement on Government Procurement is a great deal for Canada. This Agreement demonstrates that the benefits of open markets are recognized on both sides of the border. Finally, this agreement further enforces the special nature of the relationship between our two governments and sets a positive example for all future negotiations as well as the development and enhancement of that special relationship.

For the most part the Government is in agreement with the findings of the Standing Committee on International Trade (CIIT) report on “The Canada-US Agreement on Government Procurement” however there are some changes that have been put forward and approved by the collective opposition parties that the Government views as inaccurate. It is in light of these changes by the opposition parties that the Government submits this dissenting report and proposed changes.

Paragraph 3

This paragraph should be restored to the original version as written in the first draft copy and should read as follows:

“The Canada-US AGP is an historic agreement for Canada. In exchange for improved access to sub-national government procurement opportunities in the US for Canadian companies, Canada formally committed, for the first time in any international treaty, to a partial opening of provincial, territorial and municipal procurement markets to US

companies. Although in proactive many sub-national procurement contracts in Canada and the US were open to bidders from either country prior to the entry into force of the AGP, Canadian and US sub-national governments were under no obligation to offer the other country's businesses access to procurement contract opportunities."

Paragraph 16

Paragraph 16 states in its first sentence that:

"The experience of Steve Ross (General Manager, Cherubini Group) was similar."

This sentence should read:

"The experience of Steve Ross (General Manager, Cherubini Group) differed."

Plain and simple, the experiences of Mr. Ross differed greatly from those of Mr. Hammoud and this is reflected through his testimony.

Paragraph 20

This paragraph should be restored to the original version as written in the first draft copy and should read as follows:

"Indeed, this Committee travelled to Washington in April 2009 to meet with Members of Congress and representatives of the US administration. Its objective was to call attention to a number of Canada-US trade and border issues, including the potential impact of "Buy American" restrictions on the integrated Canadian and US economies."

Paragraph 27

Referring to the opinions of Michael Buda (Canadian Federation of Municipalities), this paragraph should have an additional sentence at the end reading:

"Mr. Buda also stated that this deal was well done and said that it moved things forward with regard to formalizing municipal procurement regulations."

Paragraph 40

This paragraph does not illustrate the reality of the situation. When describing the exemptions of the deal, it should be noted that federally funded mass transit and highway projects were never on the table for Canada either. Many municipalities such as Toronto enforce strong domestic procurement policies for mass transit. Beyond this, the exemption in this deal with regard to construction grade steel only applies to the province of Quebec. Finally, many of the other carve-outs listed were exempt long before the most recent Buy American provisions and as such were available to alter within this agreement on either side of the negotiation table.

Paragraph 41

This paragraph states that:

"one of the most important carve-outs in the United States' WTO GPA commitments is the set-aside for small and minority businesses."

This should read:

“one of the most important carve-outs in the United States’ WTO GPA commitments is the set-aside for small and minority owned businesses.”

In reference to the set-aside program for small/minority-owned businesses there is nothing preventing them from sub-contracting or sourcing from non-qualified companies (companies that do not directly qualify for this specific program), whether large or even foreign, and many Canadian companies are very successful in sub-contracting to successfully qualified US businesses.

Paragraph 50

Noting the opinions of some witness who argued that Canada is reluctant to implement domestic content of buy Canadian policies, this paragraph should have an additional paragraph at the end reading:

“Domestic procurement with regard to mass transit was included in the Agreement with the province of Ontario signing on.”

Paragraph 55

This paragraph should be restored to the original version as written in the first draft copy and should read as follows:

“The second component of the Canada-US AGP is a series of commitments by both countries to provide temporary enhanced reciprocal access to other sub-national procurement opportunities until September 2011. The temporary commitments are specified in Part B of the Canada-US AGP and in Appendix C of that agreement. These temporary reciprocal access commitments are over and above the WTO GPA commitments described above.”

Paragraph 57

Sentence one of this paragraph should read:

*“Canada, in turn, agrees to provide US companies with enhanced access to procurement of construction services by **selected** provincial and territorial government agencies, Crown corporations and municipalities until September 2011.”*

Paragraph 73 of the second copy of the draft should be placed back into the final report.

That paragraph read:

“For his part, Steve Ross told the Committee that much of the early work funded by the ARRA was the “shovel-ready stuff” such as paving and painting, and not the major projects which can take a year or two to design and plan. He suggested that there was still another US\$20 billion in work yet to be done as part of the US stimulus package.”

Paragraph 74

What would be paragraph 73 in the original draft should be restored to the original version as written in the first draft copy and should read as follows:

“Jean Michel Laurin also observed that one of the main benefits of the agreement is that it sets a precedent in the event that “Buy American” restrictions appear in future US legislation. He stated that Canada has been told repeatedly over the course of

negotiations that it could not be given an exemption to US domestic content restrictions because doing so would set a precedent. In Mr. Laurin's view, Canada was able to get that precedent, along with recognition of the integrated nature of the Canadian and US economies."

Paragraph 77

Sentence two of this paragraph states that:

"Although under questioning by the committee, the Minister admitted that, contrary to what was stated in the 3 March 2010 Speech from the Throne, Canadian companies did not gain permanent access to state and local government procurement in the US, he argued that Canadian firms did gain a partial exemption to the US domestic content requirements under the Recover Act in exchange for formal recognition of the pre-existing Canadian municipal procurement policies, including exemptions and carve-outs."

The Minister did argue that *"Canadian firms did gain a partial exemption to the US domestic content requirements under the Recovery Act in exchange for formal recognition of the pre existing Canadian municipal procurement policies, including exemptions and carve outs"* however, the Minister at no point of the questioning before committee, admitted that *"contrary to what was stated in the 3 March 2010 Speech from the Throne, Canadian companies did not gain permanent access to state and local government procurement in the US"*. One must only look at the transcript for the committee meeting to verify this.

Paragraph 87

Sentence one, as written is somewhat misleading. This sentence should read:

"Generally speaking, of the witnesses that were opposed to the AGP, the arguments most commonly produced were that:"

Paragraph 91

This sentence should remain as it was in the draft to include as sentence two:

"However, we do support the principle and direction of this agreement. The Canada-US AGP provides Canadian businesses with improved access to sub-national procurement markets in the US and makes some progress in removing a longstanding barrier to trade between Canada and the US, allowing for further integration of our two economies. Furthermore, we are compelled by the argument that Canada's improved access to the US market comes at very little cost. Minister Van Loan and several other witnesses stated that sub-national procurement markets in Canada were already largely open before the AGP entered into force; in effect, the provinces and territories agreed to little more than to continue operating in the same way they had before."

The Canada US Agreement on Government Procurement (CUSGP) A Supplementary Opinion of the NDP

Peter Julian MP

May 2010

New Democrats welcomed an open discussion to assess the outcomes of the Canada US Procurement Agreement and sincerely thank the members of the committee for supporting our motion for hearings on this issue.

The NDP regret that the conservative government has hastily finalised the agreement without consultation with many of the stakeholders, including parliament. Unfortunately, the agreement was signed rapidly and without due regard for meaningful consultations.

The NDP is pleased that the committee conducted broad and extensive hearings on Canada-US procurement. The report of the Standing Committee on International Trade provides a fair and useful account and analysis of the key issues brought forth by a broad spectrum of witnesses. We are however also providing a supplementary opinion to highlight the major flaws of this agreement as well as the NDP's perspective on a *Buy Canadian* public procurement policy which stands in opposition to the policy upheld by both the Conservative government and the Liberal party.

The NDP's main objections to the CUSGP

"To sum up, the GPA commitments will curtail Canadian provincial governments' ability to prefer Canadian goods or suppliers or to use government purchasing as an economic development tool, while leaving existing Buy American preference policies almost fully intact".

Scott Sinclair (Senior Research Fellow, Canadian Centre for Policy Alternatives)

The CUSGP amounts to a unilateral give away. The deal gives away access to all levels of government procurement with no substantial limitations or fixed term of entry, and without any substantial guarantees of access to the American market, and without a clear effective dispute resolution mechanism. The deal, negotiated from a position of weakness, happened after 98% of the funds provided under the American Recovery and Reinvestment Act of 2009 were committed.

The Importance of preserving broad policy options for public procurement for domestic job creation and regional development cannot be understated and should be at the heart of Canada's procurement policy.

Federal, provincial and territorial procurement was worth approximately \$ 22 billion to Canadian businesses in 2006-2007. This figure does not include municipalities, government agencies, health entities and crown corporations. The CCPA estimates that in Canada the purchase of goods and services by all levels of government and public sector institutions amounts to at least \$100 billion annually.

Yet, neither the Harper Government nor department officials appearing before the committee have provided any information on the assumptions on which they based their agreement. We see no impact assessment, hardly any numbers, no net effect on jobs and no explanation as to what assumptions the agreement was based on. The following critical questions were left unanswered:

- How much US stimulus spending did the government assume we would get?
- How much (on a state-by-state basis) does the government assume the provinces will be able to access?
- What are the net jobs/economic impacts of the CUSGP?

US states operate in a market 11 times the size of the Canadian market. American firms bidding for provincial and municipal procurement would use their scale advantage to outbid Canadian small and medium size businesses that are permanently located in the community and support local job creation and produces.

Moreover the deal has the potential to free interprovincial procurement competition which further impairs the ability of provincial & municipal governments to stimulate and sustain local economic development, which would hurt job creation in some of the poorer regions of Canada.

"Unfortunately, this agreement is only the second-worst agreement that Canada has ever signed. The first one was softwood lumber.... Canada approached the United States basically telling them we needed a deal at any cost. If you say that to anyone, you'll get one, and we did get one, and that cost is high".

Renowned Trade Expert Carl Grenier, Professor & Former Trade Negotiator

The NDP reaffirms its support for a Buy Canadian Government Procurement Policy

When we try to sell in Ontario or in Quebec, 15 minutes away from our home base, we find we're actually out-manoeuvred by the U.S. competitors that put the pressure on us in the U.S., stretch our means and make our means thin in terms of financing, then they can come and compete with us in our own backyard and they can win against us. So we're hurting on both sides... to think that there is actually reciprocity between the U.S. and the Canadian economies. It's not true. We know the situation".

Omar Hammoud (President and Chief Executive Officer, APG-Neuros Inc.)

New Democrats deplore that the Liberal and Conservative Members of the committee have rejected our recommendation for a Buy Canadian Policy for public sector expenditure. New Democrats firmly believe, as has been concisely stated by Wayne Peppard, the Executive Director of the British Columbia and Yukon Territory Building Construction Trades Council, that "[s]uch a policy could be a win-win if it were to develop meaningful language to support Canadian manufacturing while continuing to be a part of an integrated and cooperative North American market..."

This policy principle should be a part of a broader national procurement strategy and economic recovery package. The NDP wants a free, fair, and equitable "Buy North America" policy for federal, state and provincial, and local procurement. Such a shared procurement market will allow governments to target

their recovery packages effectively but ensure that items such as automobiles and steel products, whose component parts may cross the border four or five times in the course of manufacturing, are not excluded. These exemptions could be worked out on a case by case basis, through the use of quotas, or through individual policies that take into account the realities of certain sectors of the economy. Managed correctly, these policies will create a shared North American procurement market that will ensure that stimulus money will be spent efficiently within North America but still provide for the creation of jobs at home.

We should remember that U.S. states have always had, and have often utilized, the authority to prefer local or domestic products in their procurement. Canadian jurisdictions should retain the same ability under their own Buy Canadian policies with provisions for reciprocal exemptions for the United States.

The Conservative government and the Liberals have erroneously framed Buy American policies as an extension of rising protectionist policies, and subsequently undermined their legitimacy. As pointed out by Dr Teresa Healy, this will have “a chilling effect on government’s commitments to use public purchasing power to support economic development in the future”.

By negotiating from a position of weakness, the Government has missed a unique opportunity to push for a fair and sustainable sharing of the benefits of public investment and level the playing fields in what is undoubtedly a highly competitive, yet uneven, landscape for public procurement.

Carl Grenier has noted that “... in this instance, the U.S protected its stake and we didn’t, and that’s a permanent thing, unfortunately”

Canada should conduct robust negotiations on procurement grounded in the principle of Fair Trade, consistent with the NDP’s Made in Canada Procurement Policy Bill (C-435 & C-392).

To help develop Made in Canada procurement policies, the NDP has introduced Bill C-435 in the House of Commons that lets the government favour products made in Canada in new procurement spending. This bill will follow all of our WTO-NAFTA treaty obligations, but will ensure that any federal tax dollars spent outside of Canada only flow to those countries which grant Canada reciprocal procurement access and respect certain core labour standards set by the International Labour Organization.

While Bill C-435 (Made in Canada Procurement Act) supports a reciprocal arrangement with the US, it would also ensure that Canadian companies and industries are given priority on all government procurements and services. Fair Trade in government procurement would be achieved by ensuring that a 50% Canadian content on the value of a product manufactured in Canada, as well as making room for exemptions and thresholds. It would encourage a healthy transparent framework to help facilitate negotiations between the federal government, provinces, as well as the American and State governments. Bill C-435 (Made in Canada Procurement Act) is also WTO and NAFTA compliant.

The NDP’s Views on Government Procurement

The Conservative Government and the Liberal Opposition see the Buy America provisions in US states and local stimulus spending as a threat to North American trade and creeping protectionism, contrary to the spirit of free trade. This kind of rhetoric is simply an attempt to scare Canadians into following an agenda of deep integration with the US. However, the debate about whether the U.S. stimulus spending legislation’s

targeted procurement policies endanger the free market or constitute “protectionism” misses the larger point, because the issue of government procurement is only marginally related to trade.

The U.S. is certainly our most important trading partner, and for the most part increased cross-border commercial traffic has benefited both of our countries. However, the Canada-US agreement on procurement is not about commercial trade or private investment, and so questions of “protectionism” or “free trade” do not apply.

Procurement rules and agreements should promote domestic job creation within sustainable practices; the focus should be on businesses and cooperatives that invest in their communities.

Public spending is not private commerce; it comes from taxpayers and should work for the benefit of the community. As Canada and the U.S. attempt to climb out of the global economic recession, it makes sense for our various levels of government to attempt to target their recovery packages in their own countries and localities.

If the point of Keynesian stimulus spending is essentially to put more money into the economy, then don't democratically-elected governments have a right and a responsibility to ensure that their taxpayers' money is being spent to the benefit of those taxpayers?

Is the objective behind a reciprocal procurement policy based on Free Trade to create jobs for Canadians though increased exports from the private sector? If it is, then why pursue a policy that looks at jobs depending ironically on the public spending of the government of another country?

It is misleading to suggest that we need the public spending of another country (and not our own) to generate jobs here in Canada. Why not have Canadian governments (federal, provincial, municipal) put a priority on creating the jobs here in Canada instead of eyeing the pittance coming from another country's sub national government?

This is why the NDP has been advocating for a “Buy Canadian” strategy with regard to our own stimulus spending. Such a strategy would give Canadian jurisdictions more control over their stimulus spending and a stronger bargaining position in seeking exemptions from Buy America provisions.

A Buy Canadian policy would allow Canadian provinces and municipalities the same ability that U.S. jurisdictions have to target their stimulus spending within the country, and give Canadian firms more opportunities to do business here.

“Trade reciprocity does not mean blindly and needlessly forcing countries to dismantle policies that aim to achieve positive social and economic ends. Trade reciprocity also does not mean abiding by the strictest doctrines of free trade, at any cost”Many of our largest trading partners, including the United States, the EU, China and Japan, which make up 90% of our trade in goods and services, consistently attach domestic content requirements to public purchases. These policies actively promote domestic economic development but it also encourages foreign investment. These are also not all knee-jerk reactionary policies to the economic crisis...”

Jenny J.H. Ahn (Director, Government Relations, CAW)

It is important that the federal government sets this example, but the provinces and municipalities must also do their part and ensure that their own stimulus spending goes to the right targets by passing their own Buy Canadian provisions. These provisions are somewhat unevenly reflected in the thresholds of provincial exemptions and carve outs in the February 2010 Canada-US agreement on procurement.

Therefore, the NDP recommends

"that the Government of Canada develop a Buy Canadian policy for public expenditure which would prioritize a cooperative approach to domestic job creation and seek exemptions from Buy American provisions in steel and other highly integrated sectors of the Canadian and US economies."

The Conservative government should learn from its mistakes and abandon its standard practice of entering into trade or public procurement negotiations with the aim of negotiating a deal at any cost, often without proper consultations and without conducting sustainability impact assessments. It should have the courage to provide transparent information to all stakeholders and ensure that representatives of all Canadian sectors affected by these negotiations are included in the process.

Peter Julian MP (Burnaby-New Westminster)

NDP International Trade Critic

