



Building pan-Canadian child care in the shadow of international trade rules:

Questions and answers

How can international trade agreements influence a new public child care program?

Both the North American Free Trade Agreement (NAFTA) and the World Trade Organization's General Agreement on Trade in Services (GATS) apply to public services and social programs.

NAFTA gives corporations unprecedented power to directly challenge policies, programs and laws they see getting in the way of their ability to make a profit. These investment rules allow foreign corporations to challenge government policy, law or practice, and to claim damages. Unless governments tread carefully in establishing a new child care program, corporations will use NAFTA's investor-state provisions to pry open the Canadian child care "market." The WTO's General Agreement on Trade in Services (GATS) would also come into play where child care services are provided on a commercial basis or if the Government of Canada agrees that child care should be a service covered by the GATS rules.

Hasn't Canada negotiated protections for public services and social programs?

Yes and no. There are some protections – but they are limited, and are at risk if commercial, for-profit child care operators are allowed as part of a new pan-Canadian program. Under NAFTA, Canada has reserved the right to expand social programs or establish new ones. The wording of this exception, known as a "reservation" says Canada can introduce or expand a number of services, including child care – as long as they are "services established or maintained for a public purpose."

The US government argues this reservation only applies where services are provided by the public, not private sector. According to the US, for-profit

provision of child care services removes protection from NAFTA's investment and services rules. If this happens, governments would not be able to limit investment by foreign child care companies attracted to Canada by increased and stable public funding. Right now there isn't significant foreign investment in Canada's child care sector, so any new program would be sheltered from foreign corporations who want to provide child care – so long as it provides little or no room for commercial providers.

The GATS applies to all federal, provincial and municipal measures affecting trade in services. The GATS does however exclude services provided “in the exercise of government authority.” These services are defined as those provided “neither on a commercial basis nor in competition with one or more service suppliers.”

In addition, services fall under the most onerous GATS rules only when Canada puts them on the table (known as a “commitment”). Canada has not done so with child care, which is good news because such a commitment could prevent Canada from introducing a public, not-for-profit program because the GATS' market access rules outlaw any monopoly provision of a service.

What if a new pan-Canadian child care program allows for-profit care?

If the federal government allows for-profit child care as part of a pan-Canadian program, the entire child care system is more likely to fall under very restrictive rules imposed by NAFTA and GATS. If this happens, corporations will be able to claim access to a share of the child care “market.”

Both NAFTA and GATS trade disciplines would deny governments the right to prevent foreign child care companies from acquiring a dominant position in the child care sector. NAFTA rules would also mean that governments could not require the boards of directors of child care centres to be comprised of parents or community members.

The GATS could also curb governments' ability to specify qualifications for child care workers, or the licensing requirements for child care institutions, where those regulations are “more burdensome than necessary.” The ability of governments to create and maintain standards in the child care sector would be severely limited.

We already have for-profit care in Canada. Does this mean it's too late?

No. While Canada has for-profit delivery, corporations don't play a substantial role in Canadian child care and there is little if any foreign investment in the sector. This means that a new public child care program that stipulates public, not-for-profit delivery will not be at risk of provoking a NAFTA investment claim.

What about “Mom and Pop” operations?

If a new child care program allows for an increase in the “Mom and Pop,” or small commercial child care operators, there is a stronger likelihood that larger, foreign child care corporations will demand access to the “market.” It is unclear where the tipping point would be in determining, under trade rules, that child care in Canada is commercial in character. It may be that even a marginal participation of commercial players, like “Mom and Pop” operators, would disqualify the Canadian government from arguing that child care is protected by its social services trade reservation. The best protection Canada has is to make child care a not-for-profit public program.

Can’t we try it and see what happens?

Under NAFTA and GATS, there’s no going back. Once a public service or program falls into corporate hands, both deals make it virtually impossible to reverse that decision. Future governments will be locked into a bad decision, leaving them very few options to regulate, change or end a market-driven child care sector.

It is absolutely critical that the federal, provincial and territorial governments shape a pan-Canadian child care program that avoids these serious consequences by focusing on public, not-for-profit delivery. Allowing for-profit child care corporations to establish a significant stake in the system means that we are very likely to lose control of many critical aspects of child care.

It is equally important that the federal government does not put child care on the table at any future trade talks. This includes any discussion of “non-public education” services, which the federal government seems open to negotiating away under the GATS. Establishing a new child care program as a public system is a further and important safeguard.