

Reckless Abandon:

Canada, the GATS and
the Future of Health Care

Executive Summary

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Executive Summary

This report assesses the implications of the General Agreement on Trade in Services for Canada's health care system. It examines both Canada's commitments in the existing GATS agreement, which came into effect in 1994, and the agenda of the current round of GATS negotiations, known as GATS 2000, which are informally scheduled to conclude by the end of 2002.

Our report is the most detailed assessment to date of how the GATS affects Canadian health care. Yet it is not a comprehensive analysis, which would require detailed examination of the regulatory environment for each specific health-related service in all 14 federal/provincial/territorial jurisdictions. Instead, the report provides an overview of GATS implications for health care, then assesses its impacts for health insurance, hospital services and home care. The analysis of these three critical health services suggests the full range of GATS impacts. But one of the report's goals is to demonstrate that more comprehensive exploration, and full public debate, of the potentially profound implications of the GATS for the Canadian health care system are urgently required.

The Minister of International Trade and Canadian trade negotiators clearly do not welcome such a debate. The minister and his trade officials have repeatedly and emphatically assured Canadians that health care will not be affected by the GATS. Such assurances are, to put it charitably, misleading. This report finds that Canada's health care system is *already* more exposed to GATS rules than Canadians have been led to believe and that the GATS 2000 negotiations threaten to further extend coverage of health care.

Given the sweeping scope of many GATS provisions, and their fundamental incompatibility with the principles and practices governing the Canadian health care system, Canadians should arm themselves with a healthy dose of scepticism when they are told that our government has ensured that Canadian health care is fully protected from GATS impacts.

Health Care at Home, Market Access Abroad: Canada's conflicting agendas

Our report confirms concerns that Canada's trade policy is driven by narrow commercial interests which conflict with the public interest in maintaining a universal publicly funded health care system.

In section 2.3 we review the federal government's strategy for promoting exports of Canadian health services. Based on highly tendentious growth projections, the government's official strategy document focuses entirely on expanding market access for Canadian telehealth services. The "barriers to market entry" identified in this document include foreign regulatory measures designed to maintain professional standards; guard against malpractice and fraud; contain costs; and ensure patient privacy and confidentiality. To identify these measures as "barriers to market access" for Canadian telehealth exports is to target in other countries the public tools we require to maintain the integrity of our own health care system. If this agenda is allowed to influence Canada's negotiating objectives at the GATS, we may participate in the dismantling of our health care system. Even Canada's commercial health services corporations acknowledge there would be "a price to pay" for pursuing their agenda.

Canada's export promotion policy is not only inconsistent with our domestic policy commitments. It also conflicts with our obligation under the International Covenant on Economic, Social and Cultural Rights to uphold the right to health in our international relations. Targeting the health policies of our trading partners is inconsistent with the obligation "to respect the enjoyment of the right to health in other countries." Furthermore, Canada's willingness to use its negotiating leverage in pursuit of the commercial objectives of health services exporters contradicts the obligation to prevent private businesses and other "third parties" from violating the right to health in other countries.

The priority Canada gives to expanding markets for telehealth is of particular concern because telehealth applications cut across the full range of health care services. Any trade rules which apply to telehealth as a group could restrict how governments provide and regulate home care, diagnostic services, health information and other vital components of the our health care system. There is a danger that telehealth could be covered by GATS rules developed in the e-commerce negotiations which are being fast-tracked in the GATS 2000 negotiations.

Causes for Concern: GATS implications for health care

Sections 3 and 4 of this report examine the health care implications of the GATS. We find that federal government reassurances that health care will not be affected are highly misleading.

Important features of our health care system are already exposed to the full force of the GATS rules. It is alarming that in the previous round of negotiations Canada

passed up all opportunities available to it to explicitly shield these exposed services from the GATS rules. The report uncovers an error in Canada's listing of health insurance, which reinforces fears that our representatives at the GATS table have been negligent in discharging their duty to protect health care.

Our examination of GATS implications for specific health services finds good reason to be concerned that it will interfere with Canada's capability to maintain and renew Medicare:

i) Incredibly, Canadian health insurance is already fully covered under the GATS national treatment and market access rules. Fundamental protection for public health insurance is undefined and strictly limited in scope. This exposes Canada to the threat of trade challenges that restrict options for health reform:

- GATS rules restricting monopolies (Article VIII.4) already expose to challenge any future expansion of Medicare coverage to encompass health services currently covered by private health insurance, e.g. home care, and pharmacare.
- The risk of high compensation costs could deter any such policy initiative.

(ii) Other services related to health insurance – including data-processing and on-line information retrieval – are also already fully covered by the GATS national treatment and market access rules. These rules would allow a foreign-owned commercial insurer operating in Canada to assert a GATS right to process Canadian health insurance claims and records remotely from outside the country.

- *This would reduce the cost to U.S. health insurers of expanding their operations in Canada.*
- *By removing claims processing from Canadian jurisdiction, it would also make it very difficult for provincial health ministries and other regulators to protect the privacy of patient records and ensure that such health information is used for ethical purposes.*

iii) Hospital support services are likely already subject to the GATS national treatment and market access rules. This restricts the ability of hospitals and regional health authorities to “contract in” food, laundry or janitorial services:

- Hospitals and regional health authorities would be vulnerable to a GATS national treatment challenge, charging that “contracting in” modifies the conditions of competition against foreign-owned service providers.
- The federal government would be required to ensure that hospitals or regional health authority reversed “contracting in” decisions, or, if they did not, to provide compensation to the governments of adversely affected foreign service providers.

iv) Medical services in hospitals are protected from the GATS general rules as long as they are provided on a non-commercial basis and not in competition with private health facilities (Article 1.3). This protection is undermined by Alberta’s legislation to permit public funding of private for-profit hospitals, and by more limited revenue-generating activities in other provinces. The combination of the GATS general rules and Canada’s NAFTA obligations,

which could also be triggered by the Alberta legislation, could expose our health care system to a potentially ruinous trade challenge. If the federal government does not act against Alberta, the NAFTA national treatment rule could be triggered, preventing the federal government from intervening to prevent similar practices in other provinces.

- Once *any* foreign-owned health corporation has used NAFTA to gain access to public health funding, the GATS most favoured nation (MFN) rule could extend the rights of *all* foreign-owned corporations. Most dangerously, it would enable them to claim a right to receive the same level of subsidy as is provided to any other foreign-based health corporation.
- Moreover, the GATS principle of “modal neutrality” could be invoked by a for-profit hospital corporation to assert a right to the same level of public subsidy for treating Canadian patients outside the country (e.g. in the United States) as is given to commercial hospitals providing the same service to patients in Canada. A successful trade challenge could give a virtually unlimited number of commercial hospitals beyond our borders a claim on Canada’s public funding for health care, exposing Canada to trade retaliation and potentially overwhelming the capacity of provincial and federal governments to contain costs and regulate the quality of care.
- While this chain of events may appear unlikely, the logic of Canada’s trade obligations makes them possible. As WTO trade tribunals have shown a readiness to apply GATS rules as forcefully as possible, it is imperative that Canada take steps to

protect our health care system *before* it is the subject of a trade challenge.

v) While professional home care services are not covered by the national treatment and market access rules, the general GATS rules already apply.

The MFN provision equips foreign-owned providers to accelerate the commercialization of home care in Canada. MFN requires that the most favourable treatment given to any foreign service or service provider be given “immediately and unconditionally” to *any and all* foreign services or service providers. This allows all home care providers to claim a right to the most advantageous deal given to any single foreign-based providers.

The MFN obligation and the modal neutrality principle could restrict governments’ ability to regulate telehealth applications in home care:

- Conditions for public funding of telehealth applications — e.g. video assessment and monitoring of home care patients — could have a differential impact on commercial providers from different WTO member countries.
- A successful MFN challenge would give foreign-owned companies providing remote telehealth services from outside Canada (cross-border supply) the same access to public funds for home care as foreign-owned companies based in Canada (commercial presence).

vi) Canada can expect to face considerable pressure to extend GATS coverage of home care, which is among the

fastest growing health services and is an area of intense commercial interest. Extension of market access and monopolies rules to home care would restrict options for health reform:

- The market access rules (article XVI.2(e)) could prevent governments from providing public funding only to not-for-profit home care providers.
- The monopolies rules (article VIII) could deter governments from directly providing home care services that were previously contracted to commercial providers.
- These restrictions would limit the ability of governments to provide publicly funded home care services in the most cost-effective manner.

The GATS and the Future of Health Care

Based on the analysis summarized above, the report recommends a number of practical steps the Canadian government should take to ensure that Canada's GATS obligations do not compromise our ability to maintain a universal, publicly funded and regulated health care system.

- *The Canadian government must unequivocally affirm that safeguarding Canada's health care system will take precedence over securing market access for Canadian exports. It must disavow the dangerous illusion that Canada can gain access to other countries' markets for health services without ever granting access to the Canadian market in return.*

- *The Canadian government should oppose any initiative to extend GATS coverage of telehealth services as a group, and it should ensure that the negotiations on ecommerce and telecommunications do not affect health services provided electronically or by other means.*
- *The Canadian government should conduct a systematic and comprehensive assessment of the health impacts of our commitments under the existing GATS agreement.*
- *The Canadian government should raise the issue of the “governmental authority” exclusion during the GATS 2000 negotiations so that its meaning is clarified, and it is made fully effective. Amendments to this provision will be required to ensure that mixed public-private services, including health care, are fully excluded from the GATS.*
- *Canada should insist on a general exception for health care, which applies to all WTO members and will not be targeted in future rounds of negotiations, Because of the diversity of national health care systems, any such exception must be self-defining (as is the existing general exception for national security measures).*
- *Agreement on explicitly excluding health care from the scope of the agreement, either through amendments to article I.3 or by means of a new general exception, should be a precondition for agreeing to any further commitments in the GATS 2000 negotiations.*
- *Canada should also use every opportunity available to it to explicitly shield health care from the GATS rules. In addition to excluding health care services from the scope of the*

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agreement, our negotiators should enter explicit exceptions and limitations to all GATS commitments which may affect any health care services.

- *Special action is needed to safeguard Canada's ability to modify public health insurance in accordance with domestic policy priorities and without fear of provoking a GATS trade challenge. Canada must invoke GATS Article XXI to modify its schedule of specific commitments in health insurance. It must enter a limitation which explicitly shields public health insurance from these commitments. In order to preserve the ability to extend Medicare, Canada must also change the status of its commitments in commercial health insurance from "bound" to "unbound". This would remove the danger that private corporations could challenge future changes to Medicare which may affect their ability to provide commercial health insurance.*
- *In the GATS 2000 negotiations, the Canadian government should make clear its opposition to extending coverage of health care services. It should:*
 - *oppose negotiations on rules regarding non-discriminatory domestic regulations, which would extend the reach of the GATS far into areas of domestic policy including health policy and working to eliminate the provisional application of the restrictions on domestic regulations contained in article VI; and*
- *insist on maintaining the bottom-up features of the GATS, and oppose so-called "horizontal" negotiations which could extend GATS rules to health service by stealth, i.e. without requiring them to be positively listed.*

Beyond the GATS: Health as a "global public good"

Strengthening Canada's health care system requires pursuing an international agenda. This agenda should not only ensure that trade agreements do not infringe upon the ability of citizens to democratically determine how they will support the health of their societies. It must also strengthen international mechanisms for addressing health issues that transcend national borders.

- *Canada should join leading health experts and support concrete efforts to build international mechanisms for addressing health as a "global public good."*
- *There are practical steps the Government of Canada can take to help initiate this ambitious agenda. The revision of the WHO International Health Regulations is one modest opportunity for Canada to advance global health. By supporting the competence of the WHO in determining legitimate health risks involved in WTO trade disputes, Canada would contribute to strengthening the enforcement of the International Health Regulations.*
- *Canada must also work on a larger canvas to support other nations in meeting the health needs of their citizens. It should support efforts to build a more balanced international economic order in which commercial interests no longer take precedence over human rights, environmental protection, income redistribution and other health-determining conditions. In addition to strengthening the WHO and other international health organizations, Canada should support initiatives to counterbalance the authority of trade tribunals with more accountable forms of global governance.*

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- *The primacy of human rights, including the right to health, should be assured in practice as well as in theory. To this end, Canada should support establishing a mechanism for resolving complaints of violations of nations' obligations under the International Covenant on Economic, Social and Cultural Rights. The federal government should also review its export promotion and trade policies to ensure that they are consistent with its obligation under the Covenant to "respect the enjoyment of the right to health in other countries, and to prevent third parties violating the right in other countries..."*

These steps would better support the values that underlie our health care system than is possible within the framework of the GATS agreement and the commercial principles which it advances. Continued public pressure will be needed to convince our government that the GATS must be fundamentally reformed.