“Trade treaties, commercialization and health care reform”

by Scott Sinclair
Canadian Centre for Policy Alternatives

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As Canadians debate the future of their health care system, two interrelated factors threaten its long-term sustainability.

If left unchecked, *growing foreign commercial involvement* in the health-care sector will, sooner or later, combine with *far-reaching, (and still expanding) international trade treaties*, to

- undermine our existing medicare system,
- shrink our reform options, and
- make future change more difficult and expensive.

As the Romanow report concluded, Canadians have a window of opportunity to rejuvenate our health care system. But we must act now, before foreign commercial involvement and trade treaties combine forces to slam this window shut.

Canadians have been repeatedly assured that our health care system is beyond the reach of free trade treaties. Unfortunately, as research for Romanow by the Canadian Centre of Policy Alternatives and other health and trade experts shows,[1] these assurances are misleading. The Canadian health care system is already exposed to trade treaty pressures.

Canada's health care system is only partially shielded from the force of international trade treaties. Health care reform is vulnerable to trade challenge.

The latest generation of free trade treaties range far beyond conventional trade matters, such as tariffs and border measures. They are constitutional-style documents that restrict public regulation of investment, services and intellectual property (among other matters).

For example, once entrenched in Canada, foreign health-care insurers and companies can make use of the North American Free Trade Agreement's (NAFTA's) tough expropriation-compensation rules to oppose reforms that harm their investments. These provisions apply *fully* to Canada's health-care sector; there is no exception or exemption for health care to these expropriation-compensation provisions.

Another example where the health care system has been exposed is Canadian negotiators' inexplicable decision in 1994 to cover private health insurance under the World Trade Organization's trade-in-services agreement (the GATS). This means that U.S. or European governments could try to thwart the expansion of our public health insurance system into new areas, such as pharmacare or homecare, by complaining that their private insurers were being denied promised market access.

[1] See *Putting Health First: Canadian Health Care Reform, Trade Treaties and Foreign Policy*, by the Canadian Centre for Policy alternatives Consortium on Globalization and Health, October 2002, available at www.policyalternatives.ca.

To take still another example, excessive intellectual property protection spurred by trade treaties has contributed to higher drug costs in Canada and, with tragic results, in developing countries.

As these examples show, the greatly expanded reach of free trade treaties already poses a serious challenge to medicare.

In fact, Canadian health care policies are, at root, incompatible with the full application of free trade treaties. By establishing a public sector health insurance monopoly, and by regulating who can provide health care services and on what terms, the medicare system cuts against the grain of trade and investment liberalization.

There are, however, certain protections for Canadian health care measures in trade treaties that need to be preserved and strengthened.

In 1996, health care advocates working with provincial and state governments, notably British Columbia's NDP government and the government of Oregon, won an important victory. They gained a general reservation protecting all then existing (as of January 1, 1994) non-conforming provincial and state measures from challenge under most provisions of NAFTA's investment and services chapter.

Another NAFTA reservation shields *new* health policy measures against challenge, but only to the extent that they are related to health as a "social service for a public purpose." (The very serious shortcoming of this exemption is that the greater the commercial or competitive element in the financing or delivery of a health service, the narrower the scope of the safeguard. In other words, when it is most needed, it is least effective.)

Under the GATS, Canada has not yet covered direct health services and it is critical that it continues to exclude them.

Here again, mobilization by health care advocates has had results. The European Commission announced recently that it will bow to intense public pressure and not make any further GATS commitments covering health services (and certain other sectors). Because of strong public pressure and concern, Canada made a similar pledge not to make any commitment covering health services some time ago. And in a policy reversal, Ottawa has now stated that it will not request other countries to make GATS commitments covering health services.

These steps are significant achievements. They demonstrate that advocacy and activism can, and already has, made a difference.

But they are not enough to rectify the threats posed by the GATS to health care. The federal government's assurance that it will not cover "health services" under the GATS is too vague. Commitments in related sectors could adversely affect Canada's health care

system. Canada should undertake to make no further GATS commitments that would affect any aspect of the current health care system or that would impede its future reform.

Canada should not make any further GATS commitments covering any aspect of the health care system (e.g. telehealth, health information systems, or hospital management) or that affect its ability to regulate for health purposes (e.g. distribution of prescription drugs, tobacco or alcohol). And, to minimize future pressure on Canada to cover health, Canada should make no requests of other countries to cover *any* health-related services, including health insurance.

As the Romanow report makes clear, the Canadian health care system is a mixed (public-private) system. The goal must be to preserve the ability of governments to closely regulate Canada's entire mixed health care system: including its public, private not-for-profit and private for-profit components. Governments' ability to shift this mix – without fear of becoming entangled in trade disputes and threat of sanctions – must be fully protected.

The existing exemptions in NAFTA and the GATS are not up to this job.

But the risk of trade challenges should be kept in perspective, too. Canada's exposure to foreign investors' treaty claims is, as yet, not that extreme. This is because health care commercialization in Canada is still limited, and the level of foreign involvement is smaller still. (Only foreign interests have enforceable rights under trade treaties.) While real, these risks must not be used as a pretext to thwart essential health care reform.

It should be stressed that it is the public, not-for profit character of Canada's health care system – not the flawed NAFTA and GATS exemptions – that now insulates us from trade challenges. As this defining character is eroded, the risk of trade litigation grows in tandem.

As the Romanow report clearly identifies "any decisions about expanding private for-profit delivery could have implications under international trade agreements that need to be considered in advance."

Public health care advocates may even be able to turn the excesses of trade treaties against the privatisers in the debate over the future of health care in Canada. The majority of Canadians are already opposed to private, for-profit health care. Trade treaties increase the risks of experiments with for-profit health care by making them potentially irreversible. This heightened risk strengthens the case that, where right-wing provincial governments persist with for-profit experiments, the federal government must intervene to enforce the Canada Health Act (CHA) – *before* free trade treaties lock commercialization in.

The federal government has, so far, failed to vigorously enforce the letter and the spirit of the CHA. It is not clear that the federal money the First Ministers' Health Accord

designates for home care, diagnostic services and other areas will even fall under the CHA. This laissez-faire approach invites trade treaty problems.

Avoiding commercialization of health services—and taking prompt action to contain or reverse existing commercialization— is good public policy. It also has the benefit of reducing the risk of future trade treaty challenges.

The Romanow report represents a watershed in the Canadian public discourse on trade treaties and health care. It validates the concerns that many health care advocates and ordinary Canadians have expressed for years about the corrosive effects on trade treaties on medicare. It calls on the federal government to: "Take clear and immediate steps to protect Canada's health care system from possible challenges under international law and trade agreements and to build alliances within the international community."

If Canadian governments act decisively now, as the Romanow report and millions of Canadians citizens urge, a potential crisis can be averted.

First, in stark contrast to the Romanow report, our political leaders have yet to candidly acknowledge that there are clear risks of trade challenge to medicare reform. By ducking the issue of private, for-profit health care, the First Ministers' Health Accord failed to face up to these risks. Denying these threats only makes them more difficult to address.

Second, Canadian governments must halt the creeping commercialization of the health care system before trade treaties lock it in. Wherever provincial privatization projects persist, the federal government must intervene to enforce the non-profit principles of the Canada Health Act. Public pressure will definitely be needed to stiffen Ottawa's resolve.

Next, the federal government must transform its approach to trade treaties and negotiations. There are several important steps that Canada can take to implement the Romanow recommendation to protect Canadian health care system from possible challenges.

- Canada should withdraw its ill-conceived 1994 commitment to cover health insurance under the GATS.

- Canada should put a new exception in its GATS schedule (a "horizontal limitation") making clear that no commitment *in any sector* affects the Canadian health care system or Canada's ability to regulate to protect the health of Canadians.

- Canada should amend its domestic patent laws to take full advantage of the room for compulsory licensing of drugs and get rid of the restrictions that prevent our generic drug industry from exporting affordable drugs to developing countries – where these are drugs desperately needed to cope with the HIV-AIDS pandemic and other public health crises.

- Canada needs to make clear that it will not tolerate investor-state challenges to Canadian health care reform. And it must take immediate steps to change, or get rid of, NAFTA's expropriation-compensation and investor-state provisions.

- In ongoing negotiations such as under the GATS and the proposed FTAA, Canada must not make commitments covering *any* aspect of the health care system (e.g. telehealth, health information systems, or hospital management) or that affect its ability to regulate for health purposes (e.g. distribution of prescription drugs, tobacco or alcohol).

- To be a good global citizen and to minimize future pressure on Canada to cover health, Canada should make no requests of *other* countries to cover *any* health-related services or that affect their ability to regulate for health purposes.

Over the longer-term Canada must change its existing treaty commitments and champion new international health protection treaties that supersede commercial trade agreements. The Romanow report recommendation to build alliances within the international community to achieve such changes is an encouraging start.

All these steps, and others, are necessary to secure the strong, fully effective protection for health care that Canadians were promised, but never provided. There is still much work to do to ensure that our governments put health first.

Finally, and critically, Canadian governments must act quickly and decisively to strengthen medicare. There is now a window of opportunity to renew Canada's health care system without facing serious trade problems. But governments must act now, before it's too late. The need to preempt future trade challenges and to defuse the threat they pose is yet another important reason that Canadian governments must heed the call to strengthen Canada's medicare system without delay.