

Alberta's Bill 11: Will trade tribunals set domestic health policy?

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It is rare for a single piece of provincial legislation to attract as much national attention as did Alberta's Bill 11. Proclaimed law in September 2000, the Health Care Protection Act¹ permits for-profit corporations to operate facilities for "day surgery" procedures, including some that require an overnight stay. Surgeons will continue to bill the provincial health plan, with no direct charges to the patient. For-profit facilities will be reimbursed by the government, using public funds in a manner previously reserved for not-for-profit institutions. The facilities may provide "enhanced" nonmedical services for which the patient may elect to pay, but additional charges for routine care are proscribed. According to the Alberta government, this innovation will help reduce waiting lists for surgical procedures, while placing no cost burden on patients and requiring no capital from the government.² Opponents of the bill have focused on the very real possibility that it may usher in a two-tier health system in which a person's capacity to pay will determine the speed of service provision. The two-tier debate has deflected attention from the more arcane and yet more immediate concern that Bill 11 will allow international trade tribunals to intrude into our domestic health policy.

The goal of the North American Free Trade Agreement (NAFTA), which was signed by the United States, Mexico and Canada in 1994,³ was to remove barriers to the free market in international trade. This was to be accomplished by clauses that ensured that all signatories received equal access to foreign opportunities and treatment that was no less favourable than that given to domestic interests. This agreement could have opened the door to foreign investment in Canada's health care system and, perhaps, increased privatization. However, signatories were allowed to declare reservations and exemptions, which Canada did in Annex II:

Canada reserves the right to adopt or maintain any measure with respect to ... the following services to the extent that they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health and child care.

Seemingly, the health care system would be protected from the free market forces unleashed in the larger economy.

There is no clear consensus that this interpretation is correct. US trade representatives argue that if Canadian firms are allowed to provide hospital services previously provided exclusively by the not-for-profit sector, the exemption clause in Annex II no longer applies. Such services, the argument goes, would no longer be provided only "for a

public purpose" but would now also have a commercial purpose.^{4,5} Bill 11 will thus lead to a NAFTA dispute resolution process. In the event of a decision in favour of the inclusive position taken by the United States, significant Canadian public policy will be set by an unelected tribunal. More important, if the Alberta bill does open the door for foreign investors to provide hospital services in that province, and if the federal government continues to provide health care funding to Alberta, this may be perceived as a national sanction for a mixed private-public system.⁵ The door would then be opened even wider, allowing similar free market invasion of Canada's other provinces.

Although some of the implications of Bill 11 for the NAFTA are ambiguous, there is a reasonable certainty that a trade tribunal will be asked to rule on issues that are germane to the Canadian hospital sector. For those who wish to preserve the public governance of Canadian health care, this is clearly unacceptable. Moreover, this exercise cannot be deemed an experiment, as some proponents have suggested. There is no retreat from liberalizing a sector of trade: such a retreat would entail prohibitive reparations to firms doing, or deprived of a future opportunity to do, business in that sector.⁴ To appreciate more fully the implications of Bill 11, it is instructive to look beyond the NAFTA to rules that govern trade in the wider world.

The NAFTA is a 3-country agreement signed before, but closely mirrored by, the 1995 General Agreement on Trade in Services (GATS).⁶ The product of the Uruguay Round of trade talks, the same meeting that produced the World Trade Organization, this document has been signed by 134 nations and covers 160 types of service. Generally, all services are covered by the agreement except those supplied in the exercise of governmental authority and that are supplied neither on a commercial basis nor in competition with other service providers. The agreement rests on the principle that access given to one nation's services and suppliers must be extended to all signatories. Although approximately half of the participating countries appended a list of exemptions to the broad terms, over a quarter agreed to open their hospital sectors to foreign service suppliers. Moreover, all the participating countries agreed to successive rounds of talks designed to break down the remaining barriers to free trade in services.

The United States and the European signatories have been the most committed to the full inclusion of health care under the GATS. The World Trade Organization Secretariat itself predicted in 1998 that "the commercial

provision of health services via foreign clinics or practices is likely to occur especially between developed countries,"⁷ and went on to comment that it was "difficult to see the rationale" for the prohibition of private facilities in systems based entirely on public hospitals.⁷ Indeed, the document states that if a public-private mix is allowed in the hospital sector, health care arguably is no longer excluded from the agreement's full jurisdiction. The United States, it is worth noting, has used the dispute resolution process more aggressively than any other signatory.⁸ In the wake of Bill 11, one might anticipate vigorous arguments that Alberta hospitals are now exposed to the full force of the GATS.

Rather than confront the trade-related issues raised by Bill 11, the federal government has simply asserted that Ottawa will monitor Alberta to ensure that the Canada Health Act is not violated.⁹ At the same time, however, the Canadian government is actively participating in preparations for the World Trade Organization talks, scheduled for March 2001, which are aimed at further liberalizing global trade in services.¹⁰

The widespread protest that greeted the World Trade Organization meeting in Seattle in 2000 was mirrored by the public outcry in Alberta against Bill 11. Polls suggest that only 39% of Albertan citizens supported the legislation,¹¹ while it was opposed by a vocal coalition of workers,¹² nurses¹³ and academics.^{14,15} These groups will doubtless again protest when trade dispute resolution procedures inevitably follow the implementation of Bill 11. The legislation assumes significance as an early warning that, without due vigilance, seemingly minor structural changes may have far-reaching consequences for a national health care system.¹⁶ Although some observers argue that such a process is already evident in the United Kingdom,^{17,18} these are early days in Alberta and, as yet, in the rest of Canada.

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