A National Pharmacare Plan Requires Cooperative Federalism

Introduction: Proposed Pharmacare

Canada is the only OECD country with universal health coverage that does not include prescription drugs.[1] Canadian provinces have different regulations for prescription coverage – offering a mix of programs that subsidize drug costs, often depending on factors such as age and income level.[2] However, an estimated 20% of Canadians have no prescription drug insurance and face considerable upfront costs for pharmaceuticals.[3] These factors have existed in Canada for decades, leading to calls to adopt a universal and public drug insurance plan ("pharmacare").

At their 2018 Policy Convention, the governing Liberal Party passed a proposal to implement a "universal, single-payer, evidence-based and sustainable public drug plan" in Canada.[4] It is widely expected that some version of a public drug plan will be part of the Liberal Party's 2019 re-election platform. On February 27, 2018, the Liberal Cabinet passed an order-in-council which created an independent Advisory Council to study ways to implement national pharmacare.[5] On June 12, 2019, the Advisory Council released its report, recommending that Canada enact a national pharamacare program.[6]

To implement a national pharamacare plan, the federal government must begin negotiations with the provinces and develop a plan for program deliverance and transfer payments. Since health care delivery rests primarily with the provinces, this attempt at cooperative federalism must be negotiated successfully for a national program to be initiated.

Division of Powers and Prescription Drugs

Prescription drugs are a component of Canada's health care system. The on-the-ground constitutional responsibility for health care rests with provincial governments.[7] However, the federal government has a role to play in health care policy since there is "overlapping, and at times confusing, jurisdiction" related to health care in Canada."[8] Justice Estey of the Supreme Court of Canada remarked in 1982 that health is "an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature… of the health problem in question."[9]

In relation to pharmaceuticals, the federal government can patent drugs, "regulate the safety… of medicines entering the market under the *Food and Drug Act*," and use the federal spending power to transfer money to the provinces to subsidize drug programs.[10] Yet, drug coverage and distribution is primarily handled by the provinces, and coverage can vary considerably between them.[11]

Since drug coverage remains, largely, a provincial domain, it is necessary to get provincial acceptance for a pharmacare program to respect the division of powers. Any national

pharmacare program would require some level of standardization and central control from the federal government. For example, a central drug agency would need to be created to purchase pharmaceuticals. This would only become viable with provincial commitments to deal exclusively with the central agency. Further, the provincial governments argue such a plan would create substantial new costs in the delivery of universal drug coverage. They would expect a cost-sharing formula, with the federal government transferring money to the provinces to run these programs. Since negotiations between the orders of government is necessary to decide these details, a national pharmacare program requires cooperative federalism.

Cooperative Federalism

Cooperative federalism is a concept "premised on federal and provincial governments working collectively to achieve mutual policy objectives."[12] Collaboration allows the federal government and the provinces to not be stuck in their "watertight compartments" but to instead implement innovative policies by working together. In some ways, this is necessary in a federal state – life is complicated and is not easily categorized and divided into separate areas of jurisdiction for federal and provincial governments. According to the Supreme Court of Canada: "seeking cooperative solutions that meet the needs of the country… is supported by the Canadian constitutional principles and by the practice adopted by the federal and provincial governments."[13]

As previously mentioned, since health care is a provincial responsibility, negotiations and cooperative federalism is necessary for there to be a functioning national pharmacare program.

Conclusion: A Long Road to National Pharmacare

It may be difficult to successfully negotiate a national pharmacare program in the current political climate. Recently, federal-provincial relations have been strained, primarily over the issue of the federally imposed carbon tax. Multiple provinces have challenged the federal government's jurisdiction to impose the tax, resulting in expensive court battles and critical public statements. For example, in a July 17 tweet, Saskatchewan Premier Scott Moe urged that "federal overreach" in provincial jurisdiction must stop – he cited the federal carbon tax and new federal laws around resource development and extraction.[14] This is just one example of an increasingly strained relationship between some provinces and the federal Liberal government.

Regarding national pharmacare, the tone between the provinces and the federal government is already negative. Alberta Premier Jason Kenney has stated that a federal government should "respect provincial jurisdiction" and that he "would hope the federal government would show much more respect for the provinces that deliver these services."[15] After meeting in July 2019, Canada's provincial Premiers issued a joint statement saying that they "want the option to opt out of any federal pharamacare program and keep the additional money Ottawa would otherwise spend on drugs in their provinces."[16] To cooperate with any plan, the provincial governments are insisting on

stable, predictable, and consistent funding from the federal government to offset any provincial costs of drug delivery.

There would be much at stake in pharamacare negotiations between the federal government and the provinces. The existence of a public drug program would depend on these negotiations. Therefore, a national pharamcare program is possible and attainable – but for it to come to fruition, cooperative federalism between the federal, provincial, and territorial governments is required.

[1] Colleen M Flood et al, *Universal Pharmacare and Federalism: Policy Options for Canada* (September 2018) at 4, online (pdf): *Institute for Research on Public Policy* <irpp.org/wp-content/uploads/2018/09/Universal-Pharmacare-and-Federalism-Policy-Options-for-Canada.pdf> [Flood et al]. The OECD, The Organization for Economic Cooperation and Development, is an international organization with 36 member states which represent high-income countries with advanced economies.

[2] *Ibid.*

[3] *Ibid.*

[4] Liberal Party of Canada, "Implementing Universal Access to Necessary Medicines" (21 April 2018), online: *Liberal Party of Canada* <2018.liberal.ca/policy/implementing-universal-access-to-necessary-medicines/>. It is widely expected that some version of a public drug plan will be part of the Liberal Party's 2019 re-election platform.

[5] PC 2018-0187, C Gaz I, 152.

[6] Government of Canada, *A Prescription for Canada: Achieving Pharmacare for All, Final Report of the Advisory Council on the Implementation of National Pharmacare* (June 2019), online (pdf): *Government of Canada* <canada.ca/content/dam/hc-sc/images/corporate/about-health-canada/public-engagement/external-advisory-bodies/implementation-national-pharmacare/final-report/final-report.pdf> [Federal report].

[7] Flood et al *supra* note 1 at 15-16. There are three main sections of the *Constitution Act, 1867* which grant health care jurisdiction to the provinces. Section 92(7) grants the province control over, among other things, "hospitals." Section 92(13) grants the provinces control over "property and civil rights," which has been expansively interpreted to grant control for, among other things, health care. Third, s 92(16) grants jurisdiction to "matters of a strictly local or private nature," which has been interpreted to include the regulation of health.

[8] *Ibid.*

[9] *Schneider v The Queen*, [1982] 2 SCR 112 at 142.

[10] Flood et al *supra* note 1 at 16-18; *Astra-Zeneca Canada Inc v Canada (Minister of Health)*, 2006 SCC 49 at para 12. The federal patent power comes from s 91(22) of *the Constitution Act, 1867* and the power to regulate the safety of drugs comes from the criminal law power in s 91(27).

[11] Federal report *supra* note 6 at 33-34. It is important to note that Quebec has made drug insurance mandatory for all residents; in the other provinces there is a range of quality of public drug coverage.

[12] Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016) 76 SCLR 27 at 34.

[13] *Ref Re Securities Act*, 2011 SCC 66 at paras 132-133.

[14] Scott Moe, "Premiers across Canada share concerns of federal overreach into private investments and provincial jurisdiction with Bills C-69, C-48 and the Carbon Tax. Federal overreach must stop." (17 July 2019 at 8:02), online: *Twitter* <twitter.com/PremierScottMoe/status/1151492338847494146>.

[15] Justin Giovannetti, "Premiers call for the authority to opt out of proposed national pharmacare program" (11 July 2019), online: *The Globe and Mail* <theglobeandmail.com/canada/article-premiers-call-for-the-authority-to-opt-out-of-proposed-national/>.

[16] *Ibid.*