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November 21, 2002

The Honourable Anne McLellan  
Minister of Health  
Brooke Claxton Building  
Tunney's Pasture  
Address Locator 0916A  
OTTAWA, ON K1A 0K9

Dear Minister,

We are writing, on behalf of the Canadian Union of Public Employees, the Council of Canadians, the Communications, Energy and Paperworkers Union of Canada, the Canadian Federation of Nurses Unions and the Canadian Health Coalition to advise that we have retained counsel to initiate legal proceedings concerning your failure to comply with the requirements of the Canada Health Act.

We have decided on this course of action only after repeated and less formal efforts failed to persuade you and your officials of the need for concerted action to defend our public health care system.

Not-for-profit health care is under unprecedented attack. It is clear that certain provinces are taking advantage of the hiatus in federal health care policy to accelerate their efforts to undermine our public system. With plans to establish for-profit hospitals and clinics underway in several provinces, the privatization of health services has now reached epidemic proportions.

Unfortunately, not only have you failed to defend the public system against these incursions, you have yet to even speak out clearly against them. In fact, your government's failure to respond decisively to this challenge reflects a general neglect of the entire system.

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In addition to the problem of chronic under-funding, the Auditor General has recently, and for the second time in recent years, documented the failure of Health Canada and its Ministers to comply with, and take adequate steps to enforce, the requirements of the Canada Health Act.

Yet, when we met with senior Health Canada officials soon after the Auditor General released her highly critical report, they were adamant that no further steps were necessary to address the deficiencies she had documented.

We appreciate that Mr. Romanow is scheduled to report next week. The thrust of his proposed reforms will surely be to build on, not detract from the current framework of public health care. The need for expanding the current framework cannot be an excuse for further delaying the action urgently needed to preserve the foundations of public health care which must support future reform.

In fact, continued neglect of the public system may result in it being so fundamentally undermined that the prospects for progressive reform will become academic.

This risk is particularly acute in light of Canada's international trade obligations, which prevent it from retracing its steps if public services are abandoned to for-profit providers and foreign investors. To compound this problem, your government appears determined to forge ahead with its trade agenda, whatever the impact on Canadian health care.

In this context, the consequences of proceeding further along the path of privatization, may prove fatal to not-for-profit public health care.

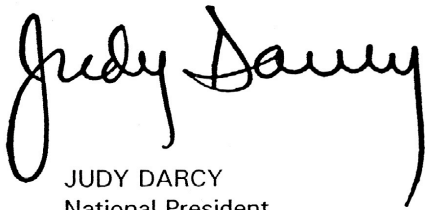
We are committed to doing everything in our power to defend the integrity of Canada's most important social program. But our efforts, overwhelming public support for a strong public system, and repeated criticisms by the Auditor General have failed to convince you of the need to comply with both the spirit and the letter of the Canada Health Act.

Accordingly, we have decided to take the next step, which is to seek a judicial order requiring that you do so.


We have attached a memorandum setting out our concerns in more detail. You will be familiar with most of these. We have also identified ten specific actions urgently needed to restore Canada's public health care system to good health.

We urge you to quickly develop a plan for putting them into place.

Sincerely,



JUDY DARCY  
National President  
Canadian Union of Public Employees



MAUDE BARLOW  
National Chairperson  
Council of Canadians



BRIAN PAYNE  
President  
Communications, Energy and  
Paperworkers Union of Canada



KATHLEEN CONNORS  
President  
Canadian Federation  
of Nurses Unions



MICHAEL McBANE  
Co-ordinator  
Canadian Health Coalition

## **KEEPING OUR OPTIONS FOR REFORM ALIVE: Ten Actions to Restore Public Health Care**

On November 21, 2002 we wrote to the Federal Minister of Health to advise her of our decision to initiate legal proceedings concerning the persistent failure of Health Canada and its Ministers to comply with their obligations under the Canada Health Act. Our letter stressed the need to restore the integrity of Canada's public health care system to preserve a solid foundation upon which to build future reforms.

Much of the debate over the coming months will be dedicated to reforming the current system. We intend to be active participants.

But this action plan has another focus. It calls upon the Minister and her colleagues to attend to the current framework of public health care to prevent it from becoming further undermined while federal and provincial governments debate proposals for reform.

The following sets out an action agenda for meeting these pressing challenges.

### **Putting a Halt to Privatization Now**

From the creeping erosion of the public system that occurs when services are de-listed or moved outside the hospital setting, to the incursions of private hospitals and diagnostic clinics, the public, not-for-profit character of Canada's health system is under unprecedented attack. Canada already ranks well behind many OECD countries in ensuring that health care is publicly, not privately, funded.

The evidence is clear – for-profit hospitals provide more costly services, or less of them – usually both. They also represent an important stepping-stone on the path to two-tiered health care. More disturbing are the conclusions of two recent reports published in prestigious medical journals, which conclude that private for-profit hospitals and clinics cut corners in a manner that increases the death rate for patients.<sup>1</sup>

It is simply impossible to reconcile the reality of for-profit hospital care with the objectives and criteria of the Canada Health Act. By the same token, public not-for-profit hospitals are the bedrock upon which our public health care system

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<sup>1</sup> P.J. Devereaux, et al: *A systematic review of meta-analysis of studies comparing mortality rates of private for-profit and private not-for-profit hospitals*. CMAJ MAY 28, 2002, 66 (11), and see also: *Comparison of Mortality Between Private For-Profit and Private Not-For-Profit Hemodialysis Centers*; Journal of the American Medical Association, Vol. 288 No. 19, Nov. 20, 2002.

stands. If the objectives of the Act are to be achieved, hospitals must remain accountable to patients and communities, not shareholders and foreign investors.

The federal government has considerable authority to enforce the requirements of the Canada Health Act. This includes the right to entirely withhold funding from provinces in breach of their obligations. Yet as the Auditor points out, no penalty has ever been levied for non-compliance with the criteria of the Act.

Action #1:

**Given the rush to establish private hospitals in several provinces, the Minister of Health and her colleagues must clearly signal their intention to substantially reduce, if not entirely withhold funding to any province that participates in these reckless and wasteful privatization schemes – and do so immediately.**

**As the first step, *notices of concern* under Section 14 of the Act, must be delivered to all provinces that either sanction, or actively promote such privatization projects.**

As the federal Minister knows, a favourite strategy of those seeking to privatize health care, is to establish private and two-tiered health care services that are delivered just outside the framework of the Canada Health Act. By skirting the system, private investors hope to establish beachheads from which to make further inroads in the public system.

Because private hospitals and clinics can't compete with non-profit providers, their viability depends upon being able to provide services at a higher cost. These may be so called "add-ons" to insured health services, or services provided at a premium to persons excluded from the public insurance scheme. With respect to the latter, these are usually workers with compensation claims, and individuals, such as armed forces personnel, for whom the federal government purchases health care services directly.

When the federal government purchases private health care services for the RCMP, armed forces personnel and others, it provides an essential revenue stream for private hospitals and clinics, and effectively becomes a partner in schemes to establish two-tiered health care in Canada.

Action #2

**If the proliferation of private hospitals and clinics is to be halted, the federal government must also immediately stop the direct flow of federal funds to for-profit providers by declining to purchase health care services from private clinics and hospitals.**

## **Complying with the Legal Requirements of the Canada Health Act**

For the second time in recent years, the Auditor General has issued a report that is sharply critical of Health Canada's failure to live up to its obligations under the Canada Health Act. While we acknowledge that some efforts have been made to address deficiencies previously exposed by the Auditor, as she points out, these efforts have been halting and fall short of an acceptable mark.

As the Minister will know, her obligations under the Act are a matter of law, not discretion. Accordingly, if the Minister is to comply with her legal obligations, steps must be taken immediately to address the problems of non-compliance documented by the Auditor General.

### Action #3

**Regulations must be established to require, as a condition of entitlement to federal funding, that provincial governments provide sufficient information to establish whether they are in compliance with the criteria, as well as the conditions, of the Canada Health Act. As confirmed by the Auditor General, the current regime of voluntary reporting is not working.**

### Action #4

**The Minister's annual report to Parliament must include *all relevant information on the extent to which provincial health care insurance plans comply with the requirements of the Canada Health Act.*<sup>2</sup> The Auditor General confirms that the Minister's most recent reports have not provided the information she is required, by law, to place before Parliament.**

Because the provinces and the territories are free to define the scope of public health care coverage as they see fit, significant discrepancies exist in the availability of insured health services from one part of the country, to another. Yet the comprehensiveness, portability and other criteria of the Act require a common baseline of health care services throughout Canada.

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<sup>2</sup> Italicized portions represent quotations from the 2002 Status Report by the Office of the Auditor General of Canada — Chapter 3 *Federal Support of Health Care Delivery*.

Action #5

**By failing to establish minimum standards of health care service, Health Canada has effectively allowed the criteria of the Act to be defined as the lowest common denominator of provincial delivery. Minimum standards must be established to ensure comprehensive coverage for all medically necessary or required services and for all Canadians.**

Action #6

**Steps must be taken to address the chronic and persistent failure of Health Canada to enforce the requirements of the Act. The Auditor General points out that, *the majority of non-compliance issues identified by Health Canada over the past ten years have remained unresolved for five years or longer.***

Action #7

**If Parliamentarians and Canadians are to make informed judgments about the extent of federal support for public health care, the portion of federal transfer payments that is to be dedicated to health care service delivery must be clearly identified.**

### **Confronting the Threat of Trade Challenges and Foreign Investor Claims**

A recent discussion paper published by the Romanow Commission<sup>3</sup> has confirmed what many of us have been saying for a long time about the risks posed by Canada's international commitments to the integrity of Canada's public health care system. Jon Johnson, who authored the report, is one of Canada's leading authorities on international trade law and has often worked closely with federal officials on the trade file.

Mr. Johnson confirms the concerns raised by other trade lawyers, including those expressed in legal opinions prepared for the Canadian Health Coalition and CUPE nearly three years ago concerning hospital privatization in Alberta. Yet, these well-documented concerns have only been greeted with persistent denials by federal trade officials.

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<sup>3</sup> Jon R. Johnson, Goodmans LLP, *How Will International Trade Agreements Affect Canadian Health Care?* [Discussion paper No. 22, September 2002]

Mr. Johnson has now clearly confirmed the two most important conclusions of those opinions, namely that:

1. Canada's reservations for health care services under the North American Free Trade Agreement are not comprehensive and leave important public health care measures vulnerable to trade challenges, and more importantly, foreign investor claims under Chapter Eleven of NAFTA.
2. The introduction of new private investment into the public health care system has two serious negative consequences: 1) it undermines the integrity of the exceptions and reservations for health care in both NAFTA and World Trade Organization agreements, and 2) it significantly increases the risk of foreign investors claims.

As his report confirms, for Canada to claim the protection afforded by the limited safeguards for health care it has declared, it must be vigilant to maintain the public character of those services unadulterated by private investment. It is absolutely crucial therefore that no further private inroads be allowed into Canada's public system.

By introducing foreign investment into areas of health care service delivery that were previously delivered on a not-for-profit basis by the public sector, private clinics and hospitals open the door to trade challenges and foreign investor claims. These incursions may in turn have profound impacts on the entire health care system.

This is another critical reason for the Minister using her authority to prevent Ontario, Alberta and other provinces from throwing the doors of their health care systems open to private and foreign investment.

It is unconscionable for federal trade officials to continue to offer glib and misleading assurances that Canada's health care system is safe from attack under NAFTA and WTO.

There are two steps the federal government must take to address this problem.

Action #8

**The federal Minister of International Trade must acknowledge the risks posed by Canada's international trade commitments, so they can be addressed. He must also refuse to compound current problems in present GATS and FTAA negotiations.**

Action #9



**Federal officials must be directed to mend the gaping holes that currently exist in the safety net for public health care under both NAFTA and WTO regimes. Federal officials insist that our trading partners respect our desire to maintain our public health care system. It is time to get that commitment in writing.**

## **Restoring Health Care Funding**

According to the Canadian Healthcare Association,<sup>4</sup> Canada ranks ninth among OECD countries in public spending on health care. In fact, private sector involvement in health care in Canada is nearly twice as great as in Britain – often presented as a poster child by the privatization industry.

In other words, when compared to other OECD countries, public funding for health care in Canada is lower, and private sector funding, among the highest – and this imbalance is only getting worse. Moreover, as the Auditor General reports, public health care expenditures in Canada are actually declining as a percentage of both total health care expenditures and GDP.

The provinces are also under-funding the system and contribute a smaller proportion of the overall health care pie than they are leading Canadians to believe. But at the end of the day, on an issue of such vital national importance, leadership must come from the federal government.

### Action # 10

**Public health care used to be a fully cost-shared program. It is time to restore that fundamental condition for a truly national health care program.**

### **In sum:**

We believe that Canada's health care system is still one of the best in the world, but it will certainly not maintain that status if the Minister of Health fails to use her authority to prevent the system from being further eroded while we study the problem and debate reforms. The Minister has both a legal and moral obligation to address these challenges immediately.

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<sup>4</sup> The Private-Public Mix in the Funding and Delivery of Health Services in Canada: Challenges and Opportunities CHA Policy Brief© 2001 by CHA, 17 York Street, Suite 100, Ottawa, ON K1N 9J6.

There will of course be significant challenges ahead as we work to expand the public system in the areas of pharmacare, home care and dental care. But the first priority must be to preserve the public health care foundation upon which those new initiatives will be built.

We urge the federal government to give this action plan its immediate and focused attention, and to quickly announce a timetable for the concerted actions needed to preserve the integrity of our public health care system.

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