

BRIEF



**CANADIAN
NURSES
ASSOCIATION®**

**PROTECTING CANADA'S PUBLICLY FUNDED,
NOT-FOR-PROFIT HEALTH SYSTEM: NON-
RATIFICATION OF THE TRANS-PACIFIC
PARTNERSHIP**

Brief to the Standing Committee on International Trade

October 2016

CNA is the national professional voice of over 139,000 registered nurses and nurse practitioners across Canada. CNA advances the practice and profession of nursing to improve health outcomes and strengthen Canada's publicly funded, not-for-profit health system.

All rights reserved. Permission to reproduce is permitted without changes and for non-commercial use. Refer to www.cna-aiic.ca/en/terms-and-conditions-of-use#Copyright for all terms and conditions to reproduce.

© Copyright 2016

Canadian Nurses Association
50 Driveway
Ottawa, Ont. K2P 1E2
CANADA.

Tel.: 613-237-2133 or 1-800-361-8404

Fax: 613-237-3520

Website: www.cna-aiic.ca

® CANADIAN NURSES ASSOCIATION and the CNA flame design are registered trademarks of the Canadian Nurses Association.

INTRODUCTION

International trade agreements and the mobility of health professionals can affect the accessibility and quality of health services. The Canadian Nurses Association (CNA) supports the provision of quality health care for all, based on need rather than the ability to pay. Since doing so can best be achieved through a publicly funded, not-for-profit health system, CNA urges governments to protect Canada's health system from exposure to international trade obligations such as the Trans-Pacific Partnership (TPP).

On February 4, 2016, Canada, along with 11 other Pacific Rim countries, signed the TPP trade agreement after seven years of negotiation. The 30 chapters of the TPP agreement concern many matters of public policy and have stated goals to "promote economic growth; support the creation and retention of jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and promote transparency, good governance, and enhanced labor and environmental protections."¹

In spite of these commendable goals, TPP proponents themselves acknowledge the agreement will have a "marginal impact on actual trade volumes and economic growth."^{2,3} Research from the University of Ottawa estimates that the TPP would "add a mere 0.1% of GDP by 2035 to Canada's economy."⁴ At the same time, however, the agreement's "rules would place many new constraints on government policy in areas not strictly related to trade, including public health,"⁵ while posing threats to the evolution of Canada's publicly-funded health system that will affect all Canadians.

CNA has a number of specific concerns about the effects of the TPP on health care and the sustainability of the health system. These concerns include:

- 1 Increased drug costs
- 2 Locking in the privatization of health care
- 3 Legal challenges to health-care regulations
- 4 Impediments to the expansion of elements such as pharmacare in Canada's public health insurance
- 5 Privacy

BACKGROUND

1 Increased drug costs

According to an analysis by the Canadian Centre for Policy Alternatives, “the single biggest direct impact on the Canadian health care system would be to increase drug costs as a result of extending patents.”⁶ Even with a two-year maximum to the Canadian patent term,

if the patent term restoration system required by the TPP were implemented in Canada today it would increase the average market exclusivity for patented drugs by 287 days. By further delaying the availability of cheaper generic medicines, this would result in an annual cost increase of \$636 million, or 5% of the annual cost of patented drugs in Canada, beginning in 2023.⁷

Already, under NAFTA, pharmaceutical giant Eli Lilly is suing Canada (claiming \$500 million in damages) based on patent decisions the federal government made for two of its drugs. The TPP would make it even easier for companies to apply for and extend drug patents than it is under other free trade agreements, including NAFTA and World Trade Organization (WTO) treaties. By accepting the TPP approach to intellectual property and pharmaceuticals, the Canadian government would also undermine citizens in developing countries and diminish its reputation in the developing world. Doctors Without Borders has strongly decried the adverse impacts of the TPP on drug costs and the affordability of life-saving medicines, describing it as the worst trade agreement in history for access to medicines in developing countries.

2 Locking in the privatization of health care

Of major concern are the TPP’s investor protections and the investor-state dispute settlement (ISDS) mechanism, which effectively lock in privatization and impede the expansion of Canada’s public health insurance. For example, “once foreign investors become established in a health sector previously insured or delivered exclusively through the public system, investor-state compensation claims make it costly to reverse course and return these services to the public health care system.”⁸ The TPP

actually makes such claims more likely to succeed by allowing financial services providers, such as health insurance companies, to launch investor-state claims alleging violations of the minimum standards of treatment obligations. . . . In Europe, foreign investors have used investment treaties to challenge reversals of privatization in public health insurance systems. In at least two instances they succeeded.⁹

Also, the TPP’s investment chapter contains no general exception protecting health regulatory measures from the ISDS. The only exception is for tobacco control measures.

But this leaves other health regulatory measures, such as for medical and recreational marijuana, unprotected. Further, violation claims under the ISDS mechanism “bypass the domestic courts and are adjudicated by largely unaccountable arbitration tribunals [which] can order financial compensation.”¹⁰

3 Legal challenges to health-care regulations

The TPP section on cross-border trade in services includes reservations for health-care services but fails to exclude

ancillary health services such as food services, cleaning services, maintenance services, computer and data management services, hospital administration, and other support services that are critical to the health care system. Where such services are contracted out or privatized, attempts to re-regulate or to return them to the public sector could be exposed to legal challenge under the TPP.¹¹

A major concern for nursing is that the Annex II reservation Canada negotiated, which excludes the health-care sector from some of the TPP’s investment and services chapters, relates only to public training.

Specific to the nursing profession, as of 2015 the new entry-to-practice registration exam for nurses is the NCLEX-RN, a product of the National Council of State Boards of Nursing (NCSBN), a U.S.-based private organization. Consequently, measures regulating the testing and training services provided by this U.S. vendor would fall outside the scope of the Annex II reservation.

There are a number of serious concerns with this exam, including poor translation of the French exam, a paucity of preparatory materials for francophone students, a lack of alignment between the exam and competencies required for nursing in the Canadian health-care system and a negative impact on the numbers of eligible graduates entering the workforce.

If provincial governments or the nursing regulatory bodies move to address these concerns, complaints by NCSBN could result in a government-to-government or investor-state dispute under the TPP. To avoid this costly scenario, policy-makers may opt to avoid these problems with the NCLEX-RN exam out of “fear of litigation,”¹² leaving the development of nursing, Canada’s largest health workforce, subject to locked-in policies and regulatory chill.

4 Impediments to the expansion of elements such as pharmacare in Canada’s public health insurance

The TPP, through Annex 26-A, entitled “Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices,” has the effect of biasing prescription

drug pricing against the interests of the public and in favour of industry. Annex 26-A grants companies that produce brand-name pharmaceuticals the right to challenge the decisions of public drug agencies. This will have the effect of shifting the system toward market-based pricing, which will increase costs to the publicly-funded health care system. Using the current state as the baseline, the annex specifies that “‘Canada does not currently operate a national healthcare programme within the scope of this Annex.’ [As a result], if Canada develops a future national health care programme covering drug pricing and reimbursement it will come under pressure to comply with the transparency annex.”¹³

Through increased costs for prescription medications, the federal government and Canadian taxpayers will be hit in two ways. Firstly, as the fifth-largest provider of health services in Canada, the federal government pays the cost of medications for Indigenous peoples, the military, veterans, refugees to Canada and those in federal prisons. Annex 26-A will prevent the federal government from getting the best therapeutic value for taxpayers’ money. Secondly, the transparency annex

could also hamper Ottawa’s future ability to co-operate effectively with provincial and territorial governments in joint measures to make drugs more affordable. For example, the annex would require that drug companies be given new rights to contest decisions not to list their drugs on a national formulary, even when there are lower-priced, medically effective alternatives available.¹⁴

Since a national formulary and strategies for bulk purchasing may be key elements in a national pharmacare program, Annex 26-A could bring complications to the cost-effective implementation of this program for Canada’s publicly-funded health-care system.

5 Privacy

The TPP features “several anti-privacy measures that would restrict the ability of governments to establish safeguards over sensitive information such as financial and health data as well as information hosted by social media services. . . . According to the Canadian government’s summary, the agreement ‘prevents governments in TPP countries from requiring the use of local servers for data storage.’”¹⁵ In opposition to this restriction, there has been a call for data localization based on “mounting concerns over U.S. surveillance activities and the power granted to U.S. law enforcement under laws such as the USA Patriot Act.”¹⁶ With the Canadian adoption of the U.S. NCLEX-RN exam in 2015, the personal information of Canadian nursing candidates is now held by NCSBN in the U.S., which is another concern the nursing community has expressed about this exam. Yet, efforts to address these privacy concerns “by requiring that such data be stored securely within Canada could be disallowed by the TPP e-commerce rules.”¹⁷

CONCLUSION

CNA urges the federal government not to ratify the TPP for the protection and possible expansion of Canada's publicly funded not-for-profit health system. CNA is not alone in taking this position. The Council of Canadians and the Canadian Federation of Nurses Unions also oppose this deal based on many of the concerns raised in this brief.¹⁸

ENDNOTES

¹ Office of the U.S. Trade Representative. (2015, October 4). Summary of the Trans-Pacific Partnership agreement [Media release]. Retrieved from <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (para. 1).

² Sinclair, S. (2016). *Major complications: The TPP and Canadian health care*. Retrieved from the Canadian Centre for Policy Alternatives website: https://nursesunions.ca/sites/default/files/major_complications.pdf (p. 5).

³ Ciuriak, D., & Xiao, J. (2014). *The Trans-Pacific Partnership: Evaluating the “landing zone” for negotiations*. Retrieved from <http://ssrn.com/abstract=2550935> (p. 2).

⁴ Rükert, A., & Labonté, R. (2015, September). The Trans-Pacific Partnership threatens the health of Canadians. Retrieved from the Healthy Debate website: http://healthydebate.ca/opinions/trans-pacific-partnership-and-health_(para. 2).

⁵ Sinclair, S. (2016). *Major complications: The TPP and Canadian health care* (p. 5).

⁶ *Ibid.*, (p. 6).

⁷ (p. 8).

⁸ (p. 10). The ISDS also interferes with the expansion of elements of public health insurance, such as pharmacare, into areas currently insured by private providers.

⁹ (p. 11).

¹⁰ (p. 10).

¹¹ (p. 16).

¹² Rükert, A., & Labonté, R. (2015, September). The Trans-Pacific Partnership threatens the health of Canadians, (para. 4).

¹³ Sinclair, S. (2016). *Major complications: The TPP and Canadian health care* (p. 22).

¹⁴ *Ibid.*, (p. 22).

¹⁵ Geist, M. (2015, October 13). How the TPP may put your health care data at risk: Geist. *Toronto Star*. Retrieved from <http://www.thestar.com/business/2015/10/13/how-the-tpp-may-put-your-health-care-data-at-risk-geist.html> (paras. 5-6).

¹⁶ *Ibid.*, (para. 7).

¹⁷ Sinclair, S. (2016). *Major complications: The TPP and Canadian health care* (p. 17).

¹⁸ Council of Canadians. (n.d.). Trans-Pacific Partnership (TPP). Retrieved from <http://canadians.org/tpp>