DALHOUSIE UNIVERSITY | SCHULICH SCHOOL OF LAW
Health Justice Institute

October 1, 2024

Senator Ratna Omidvar
Chair, Standing Senate Committee on Social Affairs, Science and Technology
Senate of Canada
Ottawa, Ontario Canada
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Dear Senator Omidvar,

We, the undersigned, are four law professors who are members of the Health Justice Institute at the Schulich School of Law at Dalhousie University. We write regarding Bill C-64, the *Pharmacare Act*, which is currently before the Senate Committee that you chair. Specifically, we write to describe why it is necessary to amend the legislation to explicitly state that national pharmacare must be "publicly administered.

At present, Bill C-64 is ambiguous about *how* pharmacare is to be implemented. The proposed legislation does not specify program criteria or define several key terms in the proposed legislation, such as "universal," "single-payer," and "first-dollar coverage."[1] This stands in marked contrast to the *Canada Health Act* as well as the recommendations of the Advisory Council on the Implementation of National Pharmacare.[2]

When he appeared before your Committee, the Minister of Health, Mark Holland, was asked specifically about whether pharmacare would be publicly administered. He replied, "I'm ambivalent." Subsequently, in a letter dated September 27, 2024, he wrote to clarify his intentions about how pharmacare would be implemented. The letter, in part, reads:

> Once passed, this Act commits the Government of Canada to working collaboratively with provinces and territories towards the implementation of national universal pharmacare. As a first phase, this means negotiating bilateral agreements with provinces and territories to provide universal, single-payer, first-dollar coverage for a range of contraception and diabetes medications.

[1] Steven G Morgan & Matthew Herder, "Pharmacare Act does not prescribe universal, public pharmacare" (2024) 196:27 CMAJ E942–E943.
[2] Health Canada, "A Prescription for Canada: Achieving Pharmacare for All - Final Report of the Advisory Council on the Implementation of National Pharmacare", (20 July 2020), online: <https://www.canada.ca/en/health-canada/corporate/about-health-canada/public-engagement/external-advisory-bodies/implementation-national-pharmacare/final-report.html> Last Modified: 2019-09-23.

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> For additional clarity, this standard of coverage means that all residents of a participating province or territory will be eligible to receive free access, without co-pay or deductible, to a range of contraception and diabetes medications. Under this program, the cost of these medications will be paid for and administered through the public plan, rather than through a mix of public and private payers. (emphasis added)

This sequence of events triggers three inter-related questions: (1) What effect, if any, does the Minister's Letter have for interpreting Bill C-64? (2) Will amending Bill C-64 create significant delays? And, (3) Should Bill C-64 be amended to explicitly make public administration a mandatory feature of pharmacare?

Below, we answer each question in turn.

1) What effect, if any, does the Minister's Letter have for interpreting Bill C-64?

Canadian courts have long applied the same approach when engaging in statutory interpretation. As articulated by the Supreme Court of Canada, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[3] The text of the legislation, together with its stated purpose(s), are thus central to the exercise of statutory interpretation. A variety of material, often referred to as "extrinsic evidence", can also help courts deduce the object of the Act and the intention of Parliament. Extrinsic evidence can include statements made by members of Parliament in the House of Commons, transcripts of proceedings of Parliamentary Committees, debates over proposed amendments to legislation, and other materials.

Extrinsic evidence may be especially helpful in terms of defining Parliament's intent where the wording of legislation is unclear, as in the case of Bill C-64. The Supreme Court of Canada has, moreover, recognized that ministerial letters can serve as an aid to legislative interpretation, provided they are relevant and reliable.[4] There can be no question of the relevance of Minister Holland's letter. It was written in direct response to the discussion before your Committee. Therefore, on its face, the letter can be used to decipher Parliament's intention if and when Bill C-64 is enacted.

Critically, however, the Supreme Court of Canada has also indicated that a ministerial letter *cannot* be used to constrain the discretion granted under an Act or to add new conditions to a

[3] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras. 21 and 23; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33
[4] *CUPE v Ontario (Minister of Labour)*, [2003] 1 SCR 539.

statute.[5] They cannot override a clear intention to the contrary, expressed in the wording of the legislation.

The text of Bill C-64, including section 6(1), does not specify whether pharmacare is to be administered through a public or private drug coverage plan. Section 6(1) refers to "single-payer, first-dollar" coverage. The term "single-payer" stipulates that coverage will be paid for by one source. But it does not dictate the type of entity that will manage such coverage. Similarly, the term "first-dollar" implies that no patient will have to pay a deductible before they can access a medication covered by pharmacare; further, first-dollar coverage is how existing public drug plans in Canada tend to operate. Again, though, that wording does not pre-empt new pharmacare programs, created pursuant to Bill C-64, from being administered by a private organization.

As a result of these and other wording choices in Bill C-64, an argument can be made that Parliament's intention was *not* to restrict pharmacare from being implemented, that is, administered, exclusively through public drug plans. By extension, Minister Holland's letter cannot be used to limit the discretion about how pharmacare will be implemented that is afforded by the legislation, or to effectively read-in a new condition—namely, that pharmacare agreements must be publicly administered—into the legislative framework.

This is not a certainty. In theory, Minister Holland's letter could be accepted, when read together with the complete legislative history of Bill C-64, as evidence of Parliament's intention to ensure that pharmacare was publicly administered. However, one would only get to this point if a province or a party with standing chose to invest the money and time into litigating a contrary interpretation, and the letter was identified and brought forward as evidence. The fundamental point is that amending Bill C-64 to include an explicit commitment that pharmacare must be publicly administered is preferable to leaving the legislation open to interpretation, and certainly preferable to allowing an interpretation to be adopted and advanced which is contrary to the Minister's intentions, unless and until the matter goes before a court.

Amending the legislation would also represent the Senate playing its rightful role in protecting the interests of Canadians. It would ensure that the position that has been put forward by Minister Holland is realized rather than putting that burden on the backs of individual Canadians.

In our view, avoiding a misinterpretation and the need for expensive, time-consuming litigation, could be achieved by amending section 6(1) of the Bill to read as follows:

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[5] *Ibid*; *R v Neves*, 2005 Court of Appeal of Manitoba; *English v Richmond (City)*, 2021 Court of Appeal for British Columbia.

> 6(1) The Minister must, if the Minister has entered into an agreement with a province or territory to do so, make payments to the province or territory in order to increase any existing public pharmacare coverage — and to provide universal, single-payer, **publicly administered,** first-dollar coverage — for specific prescription drugs and related products intended for contraception or the treatment of diabetes.

(2) Will amending Bill C-64 create significant delays?

We recognize that amending the Bill would require that it be returned to the House of Commons. Given the current political context, we also understand that there is significant concern that returning Bill C-64 to the House may delay or even jeopardize the Bill's passage.

However, as a matter of legislative procedure, returning the Bill to the House of Commons does *not* mean that the proposed legislation must go through three readings in the House all over again and then go through the Senate as well. On the contrary, a dialogue between the House and Senate is initiated and if there is agreement on the amendment by the House, the Bill is deemed to be awaiting Royal Assent—the final stage of the legislative process.[6]

This is precisely what occurred with recent amendments to the medical assistance in dying (MAiD) legislation. The Senate amendments did not go through three readings. Rather, both chambers of Parliament simply agreed to them and they were given Royal Assent.

The amendments to MAiD legislation is not an isolated example. In the vast majority of cases the process of finalizing amendments introduced at the Senate occurs swiftly. A 2015 study[7] of hundreds of amendments introduced by the Senate concluded as follows:

> In most occasions where these amendments occur with the support or acquiescence of the government, the Commons approves the Senate changes very quickly; more than half the time, the Commons has approved Senate amendments within 3 weeks. Only twice in the period studied has the Commons taken more than 60 days to review and approve Senate amendments. (emphasis added)

Given that the Minister's Letter is supportive of implementing pharmacare through public drug plans, it appears that the Government of Canada, together with the New Democratic Party, would support the above amendment to section 6(1), thus ensuring swift enactment.

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[6] "Stages in the Legislative Process - The Legislative Process - House of Commons Procedure and Practice, Third edition, 2017 - ProceduralInfo - House of Commons of Canada", online: <https://www.ourcommons.ca/procedure/procedure-and-practice-3/ch_16_5-e.html#16-5-9>.
[7] *The Senate's Role in Reviewing Bills from the House of Commons*, by Andrew Heard.

(*3) Should Bill C-64 be amended to make public administration a mandatory feature of pharmacare?*

Public administration is essential to the success of national pharmacare. Evidence shows that the administrative costs of private drug plans are approximately 13% of total spending whereas administration costs for public drug plans is in the range of 1.5% of total spending.[8] To sustain national pharmacare and over time expand the list of covered medications, it is critical to manage administrative costs.

In light of this evidence, coupled with the Minister's Letter expressing support for implementing pharmacare through public drug plans, amending Bill C-64 is prudent.

To the extent an amendment precipitates some delay, it is also important to note that the Government of Canada does not need to wait for Bill C-64 to be enacted to begin its discussions with provinces and territories about pharmacare. Indeed, the Government of Canada has already signed a memorandum of understanding with British Columbia that sets the stage for a formal pharmacare agreement.[9] The added time it will take to pass an amended Bill C-64 need not stop similar discussions with other provincial and territorial governments.

For all of the foregoing reasons, we urge members of Senate to amend Bill C-64, locking-in public administration as a mandatory feature of future pharmacare agreements.

Sincerely,

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[8] Morgan & Herder, *supra* note 1.
[9] Health Canada, "Governments of Canada and British Columbia partner to improve contraception and diabetes coverage for residents", (12 September 2024), online: <https://www.canada.ca/en/health-canada/news/2024/09/governments-of-canada-and-british-columbia-partner-to-improve-contraception-and-diabetes-coverage-for-residents.html> Last Modified: 2024-09-13.

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