

The human right to essential medicines applies to Canadians

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Poor access to medicines for more than a million Canadians is more than a health risk and an economic burden, it is a rights violation. The Sustainable Development Goal for health underscores the link between access to needed or essential medicines, social determinants of health such as food and shelter, and poverty reduction.¹ Canada's current pharmaceutical policy provides care and pharmaceuticals free of charge for inpatients, while outpatient prescription medicines are provided through a patchwork of public and private drug plans that leave many paying for medicines themselves. Twenty percent of Canadians (up to 7.5 million people) are uninsured or underinsured and pay for most of their prescription medicine costs out of pocket.^{2,3} In 2016, 1 million Canadians reported having to choose between purchasing food and heat or a needed prescription.^{2,3} These challenges are exacerbated in the era of coronavirus disease 2019, where 3 million Canadians have now lost jobs and outpatient medicine access is tied to employment (both for those with private insurance from an employer and those who pay for medicines themselves).

National pharmacare, defined as the "public coverage of medically necessary prescription drugs on universal terms and conditions across Canada, including limited patient copayments and a basic list of medications available for all Canadians,"⁴ is being promoted as a sound policy response to these inequalities. The College of Family Physicians of Canada has supported a move toward universal pharmacare.⁵ The core argument in this commentary is that human rights law is a tool that can help the Canadian pharmacare debate move forward. Drawing on the authors' experiences as a physician and academic in family and community medicine and scholars of health and human rights law, this article explains the legal and human rights arguments that supplement the established public health and economic reasons to support pharmacare for all.

Rights to equality, life, and health

The provision of essential medicines is called a *core obligation* under the right to the highest attainable standard of physical and mental health ("right to health") in the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶ This means that essential medicines are so fundamental to human health that without them, the right to health is considered meaningless.⁷ In addition to the right to health, the ICESCR enshrines the rights to equality, social security, shelter, and food, as

well as the right to enjoy the benefits of scientific progress. The Canadian government is legally required to protect and promote the rights in the ICESCR and in the International Covenant on Civil and Political Rights, which protects everyone's inherent right to life.⁸ The Canadian government must also regularly report on its progress to realize these rights, including to the respective treaty-monitoring bodies, the United Nations (UN) Committee on Economic, Social, and Cultural Rights, and the UN Human Rights Committee.

The crux of a human rights argument is that it frames the range of possible pharmacare solutions as duties of the government rather than acts of charity. The right to health implies that the public sector plays an important role in implementing, coordinating, and monitoring a system for universal access to essential medicines, including through a health insurance system that is affordable for all.⁹

How can these legal arguments be used in the Canadian context? Using human rights arguments in a Canadian court in relation to a patient's claim for publicly funded pharmaceuticals is not clear cut. The rights to life and to equality—but not the right to health—are protected by the Canadian Charter of Fundamental Rights and Freedoms and are therefore enforceable in Canadian courts.¹⁰ Nevertheless, the Supreme Court of Canada has indicated that the values and principles in the Canadian Charter should offer at least a comparable degree of protection as international human rights law to which Canada is a party (ie, the ICESCR and the International Covenant on Civil and Political Rights).¹¹ Even with this affirmation, Canadians seeking to use a right to health argument in a Canadian court are in a gray zone.

Essential medicine access is a fundamental part of the right to health, which itself is interdependent with all other human rights. This means that although the government of Canada cannot legally be compelled to enforce the right to health, one can look to other rights, such as to equality and life, for legal arguments to support pharmacare. For example, in 2014 the Supreme Court of Canada protected refugee claimants' access to health care by relying on other Charter rights, including the prohibition of cruel and unusual punishment and anti-discrimination provisions.¹⁰

While Canadian courts have refused to recognize a positive entitlement (ie, a government duty to provide needed health care services) under the right to life or health, the UN Human Rights Committee, an international human rights body, holds the Canadian

government to a different standard. In the 2018 *Toussaint v. Canada* case, the UN Human Rights Committee directly addressed the Canadian government with its finding that the right to life can require the government to provide emergency and essential health care, including essential medications to control diabetes and hypertension, which the claimant was denied as an undocumented migrant in Canada.¹² This decision indicates that emergency and essential health care protecting the right to life is a nonderogable, primary-state obligation. Now we have a disjointed scenario where protecting the right to life is a duty of the Canadian government under domestic and international law; however, the UN Human Rights Committee upholds a higher standard of life and, by extension, health protection compared with the Canadian courts.

Although the Canadian government is required to protect the right to life by providing essential health care regardless of the setting, today it discharges this duty only when the treatment requires hospital admission (ie, not for outpatients). Consider a resident of Canada who receives all the necessary care to be treated for appendicitis without any charge. Indeed, failing to treat appendicitis would be an immediate and serious threat to life. In contrast, persons with type 1 diabetes receive insulin free of charge while admitted to hospital but must rely on insurance coverage or their own out-of-pocket payments to access insulin in a community setting. Type 1 diabetes poses a serious health risk and can be fatal. The care-setting criterion established de facto by the 1984 Canada Health Act is intended to place rational limits on public health care expenditures. The criterion is a testament to the era in which the Canada Health Act was adopted and its intent to regulate federal transfers for hospital and physician services.¹³ This requirement also introduces an arbitrary notion to the provision of health care. The care-setting criterion is incompatible with the Canadian government's obligation to protect the right to life by providing emergency and essential health care to all.

Human rights have catalyzed policy progress

Human rights considerations have shifted the social and political priorities in Canada's national policy (eg, on housing) and foreign policy (eg, for sexual, reproductive, maternal, newborn, and child health) so the same could happen for medicine access. For example, the Canadian government made a series of pledges from \$650 million in 2017 to \$1.4 billion annually from 2023 to 2033 to protect sexual, reproductive, maternal, and newborn and child health and rights internationally. These examples illustrate Canada's leadership in the face of geopolitical pressure and potential health rights violations of the world's most vulnerable people.

Arguments based on economic, social, and cultural rights have shifted social and political policy priorities in

Canada, as observed in Canada's first National Housing Strategy. The strategy positions the international human right to adequate housing as the foundation and guiding framework for the national housing policy, and commits the government to introduce new rights-based legislation for housing.¹⁴

International experiences show that human rights can be enshrined in laws that guide decisions about federal health and pharmaceutical insurance. Most other high-income countries provide prescription drug coverage. Although there is no international example that perfectly matches the Canadian context, lessons can be drawn from the experiences of other countries.

Similar to Canada, South Africa lacks universal prescription drug coverage. In 2000, the Constitutional Court of South Africa ordered the government to provide HIV-positive pregnant women with publicly funded antiretroviral medications to prevent mother-to-child HIV transmission based on the constitutional right to health.¹⁵ This decision catalyzed a national mother-to-child-transmission prevention program, which is now available in almost all government clinics. It also laid the foundation for a national AIDS treatment program, which, by 2016, was providing 61% of people in need with access to antiretroviral medications.^{16,17} This case illustrates the power of human rights law to secure publicly funded essential medicines; it could also be used in the context of Canadian pharmacare to drive implementation forward.

Conclusion

We encourage Canadian physicians to adopt human rights arguments, in addition to the public health and economic arguments, supporting universal pharmacare debate for a more just, healthy, and sustainable Canadian society. As the Prime Minister consults with the provinces and territories on strategies to improve access to needed medicines, we remind our policy makers of the legal and human rights arguments for national pharmacare as a means to protect the right to life and its link with the right to health and other human rights.¹⁸ The Canadian societal values of equity in health care and attention to the medically and financially vulnerable echo international and domestic law and reflect the values of the Canada Health Act, while also transcending its limitations. Canadian law rejects the idea that health is a commodity, but action is needed to prevent some patients from falling through the cracks in our legislation. The coronavirus disease 2019 pandemic reinforces the need for a national pharmacare program given the importance of universal access to effective and affordable vaccines and therapies. Now is the time to use the legal and political tools in international and national human rights law to make pharmacare a reality for all Canadians. Where is Canadian leadership on human rights as the national pharmacare debate lurches forward?



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Competing interests

None declared

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