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Toward Levelling the Legislative Playing Field for Mental Health: Amending the Canada Health Act

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Much progress has been made to destigmatize mental health across Canada since the release of the Senate Committee report "Out of the Shadows at Last" in May 2006.[i]

Before the Senate report, there was the remarkable coming together of the Canadian Alliance for Mental Illness and Mental Health (CAMIMH). Created in the early 1990s, it has certainly helped rally disparate efforts to shine a light on mental health stigma; assisted the Senate Committee in its important work; and continues to advocate effectively for the cause of mental health.

Corporate Canada has also stepped up to the plate. Bell Canada and the tireless efforts of Clara Hughes and others have combined forces to make "Let's Talk" the talk of the town. Out of tragedy we now see a focus on having candid conversations about teenage suicide with the Ottawa-based- "DIFD"campaign.

Other signs of significant progress include: the "I'm just not myself today" program by Partners for Mental Health and the rolling out of the Mental Health Commission of Canada's (MHCC) standards for psychological health in the workplace. Partnerships are key, including the collaborative work of the MHCC and Healthcare*CAN*, the national voice of healthcare institutions across the country.

Finally, and perhaps most significantly for the future, we have a comprehensive National Mental Health Strategy through the MHCC, whose mandate was just extended for another 10 years in the April 21, 2015 federal budget.

This is all great news. But there remains an embarrassing, longstanding legislative lapse. It goes back to a time when mental health was still very much in the shadows and at the bottom of the list of priorities of legislators. Many are surprised to learn, for example, that the *Canada Health Act* - ***CHA*** (1984) excludes freestanding mental health facilities under the definition of insured hospital services.

Specially, under section 2 of the Act:

> "'hospital' includes any facility or portion thereof that provides hospital care, including acute, rehabilitative or chronic care, *but does not include:*
> (a) *a hospital or institution primarily for the mentally disordered,* or
> (*b*) a facility or portion thereof that provides nursing home intermediate care service or adult residential care service, or comparable services for children."

As a consequence, with considerable variation across the country, there are over 25 free standing mental hospitals such as the Royal Ottawa, where I am a volunteer member of the board. They remain in legislative limbo, not bound by either the five criteria or the two conditions set out in the CHA (even though the services provided are normally fully insured by the Ministries of Health).

The consequence of this is that criteria such as portability of benefits across jurisdictions (across the Ottawa River) that apply for non-mental health tertiary care do not apply to mental health services. The interprovincial eligibility and portability agreements that protect Canadians other needed care when visiting or moving, just do not apply for mental healthcare. It means as well that the accessibility

criterion need not apply or be enforced when it comes to charging patients directly at point of care or when being out referred. In principle, it could also mean that benefits could be restricted or denied to the homeless or others who cannot meet normal residency requirements pursuant to the CHA. In short, because of this 31-year old legislative, legal anachronism, free-standing mental health services remain an orphan of Canada's Medicare system. The time is past due to level the legislative playing field for mental health. But, it is not a simple undertaking for a number of reasons.

First, there are legal considerations. The *Canada Health Act* is an example of the federal government using its spending power to incent provinces and territories to enact legislation that conforms to national standards or criteria. Health is generally seen as primarily a provincial constitutional responsibility. So, in return for federal cash contributions, the provinces and territories agree to abide by the CHA criteria and conditions. Justice officials at the time of the passage of the CHA argued with some justification, that since the federal government had not historically contributed financially to building or operating provincial mental health "sanatoria", it would be *ultra vires* for the federal government to include mental health facilities as insured services under the ambit of CHA. As the then Minister of Health (Madame Bégin) put it: "no cash, no clout". As usual, she was right.

This leads directly to a second set of challenges: fiscal considerations. The federal government currently transfers some $34 Billion annually to the provinces and territories under the Canada Health Transfer. While it is difficult to estimate with precision the annual operating costs of the more than 25 free standing mental health facilities across the country, suffice it to say that the price tag for the federal government to meet reasonable requirements for exercising spending power in this area would be in the $2 - $3 Billion range (i.e. 25% of the roughly $12 Billion in public healthcare spending on mental health). Given the current tight fiscal environment, this is a steep hill to climb. But as the economy improves, so do the chances of making a serious federal investment in mental health. Consideration could also be given to redirecting part of the the estimated $25 Billion savings that will otherwise accrue to the federal fisc by reducing the rate of growth in contributions to the provinces under the Canada Health Transfer from 6% to 4% (on average) starting in 2017-18.[ii]

But the third challenge is perhaps the most daunting of all: political considerations. Since 1984, the CHA has acquired iconic status. As Jeffery Simpson has recently pointed out[iii] "opening up" the CHA is seen as the third rail of Canadian politics: touch it and you die! We have made some significant strides on the mental health front due in a major way to some high profile politicians and their families taking on the cause of keeping mental health out of the shadows. They are literally too many to acknowledge here and reflect the fact that 1 in 5 Canadians are affected directly by mental health, including our political leaders. Current political leaders, from both sides of the House of Commons, and captains of industry, will have to redouble their efforts.

Notwithstanding these many challenges, however, the time is past due to right this historical injustice and level the legislative playing field once and for all for mental health. We need to support the resolution passed at our June 2015 Great Canadian Healthcare Debate in PEI, namely: to increase the overall percent of healthcare spending devoted to mental health from the current 7% to 9% over the next ten years. It will take a coalition of the willing to tackle the challenges. It won't be easy or done overnight. Healthcare advocates will have to step up efforts to overcome the legal, fiscal and political challenges summarized here. But let the movement begin now by at least acknowledging this longstanding legislative lapse and commit to removing hospital exclusions to the CHA. Where there's a will there's a way!

*Mr. Tholl also served as a senior public servant at the time of the writing of the Canada Health Act.

[i] Out of the Shadows at Last. *Transforming Mental Health, Mental Illness and Addiction Services in Canada.* The Standing Senate Committee on Social Affairs, Science and Technology, *The Honourable Michael J. L. Kirby, Chair, The Honourable Wilbert Joseph Keon, Deputy Chair,* May 2006.

[ii] Report of the Council of the Federation Working Group on Fiscal Arrangements, July 25, 2012.

[iii] Simpson, Jeffery (2014) "Condition Critical"