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July 6<sup>th</sup>, 2009

Manitoba Society of Pharmacists  
202 – 90 Garry Street  
Winnipeg, Manitoba  
R3C H41

**Attention: Mr. Scott Ransome, Executive Director**

Dear Sir:

**Re: ESI Pharmacy Provider Contract Review**

Further to your email message of June 19, 2009, we have now had an opportunity to review the final version of the ESI Canada Pharmacy Provider Agreement and the Pharmacy Claims Submission Kit. It is our understanding that the Agreement was prepared by the First Nations and Inuit Health Branch of Health Canada and has undergone extensive revisions at the request of the Canadian Pharmacists Association along with other professional associations. For this reason we have restricted our comments to those provisions which in our opinion are the most concerning. We note that the Pharmacy Claims Submission Kit contains an extensive summary of the Agreement and therefore we have only provided a brief summary of the Agreement for ease of reference.

**Brief Summary**

The purpose of the ESI Canada Pharmacy Provider Agreement (the “**Agreement**”) is to set out a framework for pharmacies to provide services to eligible First Nations and Inuit persons not covered by any other benefit plan or plans (the “**NIHB Clients**”). The Agreement sets out the rules and procedures that a participating pharmacy (the “**Provider**”) must follow in providing approved services to the NIHB Clients in order to qualify for payment by ESI Canada, on behalf of Health Canada. This includes sections regarding verification of edibility, pricing restrictions on product and dispensing fees, standards of professional care, claims submission procedures, claims adjudication and payment, counterfeit drug reporting requirements, audit procedures, insurance requirements, liability and indemnification provisions, records and privacy requirements, default, termination and disaster planning. In some instances these requirements are very similar to those which pharmacies in Manitoba are required to follow in order to comply with MPhA requirements and in some cases the Agreement is considerably more onerous.

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31509-0009

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Issues for consideration

We note the following sections of the Agreement which in our opinion need further consideration:

1. **Section 1(10) “Usual and Customary Professional Fee”** - this section requires that the dispensing fee charged by the Provider to NIHB Clients be “the lowest dispensing fee charged” by the Provider for customers of its business subject to certain exceptions. We question setting the dispensing fee at the minimum amount. We can only assume that the claims verification and submission requirements of the Agreement require additional administrative time spent in providing pharmacy services to NIHB Clients. This would presumably merit a higher dispensing fee. Secondly, the fact that the fees may be different from pharmacy to pharmacy introduces potential inequality between pharmacies and the real possibility of fee disputes between ESI Canada and Providers. This problem is potentially compounded by the lack of an adequate dispute resolution mechanism under the Agreement.
2. **Section 3.3(2) Advertising and Promotions** - this section prevents a Provider from extending a promotional program aimed specifically at NIHB Clients. We would suggest that this should be left to the discretion of individual Providers.
3. **Section 4.1(1) Dispensing** – this section places a mandatory obligation on the Provider to provide services in respect of NIHB Clients with a prescription for medication, subject to the exception contained in **section 3.4(2)** not to provide services “if, in the pharmacist’s reasonable professional judgment, such drug should not be dispensed to such Client”. We would recommend that the exclusion be expanded upon to include the right to refuse to provide services to NIHB Clients who are committing or have previously committed wrongful acts in the premises.
4. **Section 4.2(1)(a) and (b) Claims Submission** - these sections limit the amount that may be claimed for both products and dispensing fees to the minimum charged by the specific Provider to its non-NIHB Clients. **Section 4.2(1)(b)** includes the right by ESI Canada to set a dispensing fee at an amount lower than the minimum that the Provider routinely charges for non-NIHB Clients. Specifically, **section 4.2(1)(b)** states that the dispensing fees shall be “the lesser of: the Usual and Customary Professional Fee of the Provider: or (ii) any maximum for such dispensing fees as may be set out in any applicable regional schedules for professional fees referred to in the Pharmacy Claims Submission Kit. This is most concerning as **section 12.1(2)** provides that ESI Canada may unilaterally amend the Pharmacy Claims

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Submission Kit. Presumably this includes the right to unilaterally reduce the schedule of professional fees.

5. **Section 5 Claims Payment – section 5.2(2)** allows for a re-adjudication of claims that are rejected or reversed, provided that the Provider requests re-adjudication within thirty (30) days. The decision of ESI Canada on the re-adjudication is final. The Agreement does not provide for an appeal or arbitration of claims to an outside third party. This leaves litigation to the appropriate level of court as the only option for dispute resolution. We recommend requiring a system for arbitration of disputes with an outside third party. The Canadian Pharmacists Association and/or the provincial associations could represent the interests of their members in working with ESI Canada to devise and operate the arbitration system and creating a list of approved Arbitrators. This would allow for quicker and more cost effective dispute resolution.
6. **Section 5.3 No Claim Against Clients – section 5.3** prohibits a Provider from taking any action against a NIHB Client for any claim that is rejected in whole or in part. This would result in the Provider having to pay for the costs of a product that was provided to a NIHB Client in good faith. In an extreme example a claim could be rejected due to a NIHB Client's misrepresentation or outright fraud and the Provider would not be permitted to seek compensation from the NIHB Client. We would recommend that this section be deleted.
7. **Section 6 – Claims Audit – section D.4 (1) of Annex “D”** states that “In the majority of cases an audit conducted by ESI Canada will focus solely on the two years prior to the audit date”. The annex then proceeds to set out that in exceptional cases the audit period may be extended. We would recommend that the audit process be capped at the lesser of two years or the time period from the date of the last audit.
8. **Section 6 – Claims Audit – section 6(4)** provides ESI Canada with the unilateral ability in its sole discretion to reverse paid Claims and terminate the Agreement in the event that the Provider does not “comply with the requirements of this Section 6”. **Section 6** includes broad requirements to cooperate and provide information and access to the premises and records of the Provider. We would once again recommend requiring a system for arbitration of disputes with an outside third party.
9. **Section 10(1)(a) – Default** – the word “material” should be inserted in **section 10(1)(a)** so as to read “it is in breach of any material term or condition of this Agreement”. Additionally, we note that this section is not bilateral, in that the

right to terminate due to default only exists in favour of ESI Canada. This right should apply to both parties to the Agreement.

10. **Section 10(1)(c) – Default** – this section broadly sets out that if a Provider “or any pharmacists it is [sic] employs or contracts with to provide NIHB Pharmacy Services, ceases to be licensed or permitted to provide pharmacy services under applicable provincial laws or pharmacy regulatory authorities”. On a literal reading this could result in the termination of the Agreement as a result of the conduct of a single pharmacist employed by the Provider. This provision needs to be further refined.
11. **Section 11 – Termination** – this section permits either party to terminate the Agreement on 45 days written notice. Assuming that our recommendation to allow Providers to terminate the Agreement for cause is implemented, we would recommend amending this section to require that a minimum of 90 or 180 days notice be provided by ESI Canada to terminate the Agreement. Additionally, ESI Canada should be required to exercise its right to terminate the Agreement in good faith and on commercially reasonable grounds.
12. **Section 12.1(2)** – as discussed above this section states that “ESI Canada may unilaterally amend the Pharmacy Claims Submission Kit and its policies and procedures at any time, in its sole discretion, and Health Canada may unilaterally amend the NIHB Drug Benefit List and its policies and procedures at any time, in its sole discretion, and such amendments shall not require the consent of the Provider or any Pharmacy.” As the Pharmacy Claims Submission Kit contains many material components to the Agreement, including pricing, we would recommend deleting this section.
13. **Section 12.6(1) Disaster Planning** – this section states that “[t]he Provider agrees that it shall take reasonable steps to cooperate and coordinate with ESI Canada to facilitate disaster planning efforts for continued provision of NIHB Pharmacy Services in cases of a disaster, emergency or an event described in subsection (2), below.” We would suggest that this section needs to either be further refined to spell out what would constitute “reasonable steps” or be deleted entirely.

The opinions expressed herein are effective the date hereof and have been furnished at your request, are solely for the benefit of the Manitoba Society of Pharmacists and its members and may not be relied upon by any other person without our prior written consent.

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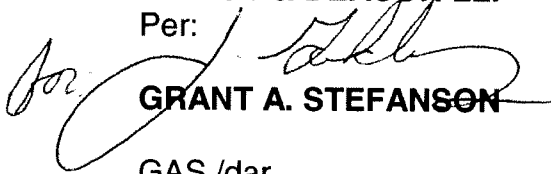
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We would be pleased to answer any questions that the Manitoba Society of Pharmacists or its members have regarding the Agreement.

Yours truly,

**D'ARCY & DEACON LLP**

Per:

A handwritten signature in black ink, appearing to read "Grant A. Stefanson", is written over the printed name. The signature is fluid and cursive, with a large initial "G" and "A".

**GRANT A. STEFANSON**

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