

HEALTH SYSTEM LAW AND POLICY
[LAW 404HS]

January –April 2004
Tuesday: 4:10-6:00 pm, Solarium FA2

COURSE OUTLINE

January 6th

INTRODUCTION

- Expectations regarding seminar participation
- Paper selection and writing
- Handout of possible paper topics
- Discussion of an interdisciplinary approach to policy analysis: law, economics, and political science
- Overview of the course

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Basic Information.....	10
Possible Paper Topics.....	11-14
Research Resources.....	15-22

VOLUME ONE

January 13th

Chapter One

**THE CASE FOR GOVERNMENT INTERVENTION IN HEALTH CARE:
MARKET FAILURE AND DISTRIBUTIVE JUSTICE**

C. M. Flood, “Chapter 2: Arguments in Economics and Justice for Government Intervention in Health Insurance and Health Service Markets” in C. M. Flood, *International Health Care Reform: A Legal, Economic and Political Analysis* (Routledge: London, 2000).....HANDOUT

T. Menzel, “Equality, Autonomy and Efficiency: What Health Care System Should We Have?” (1992) 17: 1 *Jnl. of Med. & Philosophy* 33.HANDOUT

Allen E. Buchanan, *The Right to a Decent Minimum*

Of Health Care, 13 Phil. & Pub. Aff. 55 (1984).....HANDOUT

Supplementary Reading

R. Korobkin, “Symposium: Determining Health Care Rights from Behind a Veil of Ignorance” (1998) U. Ill. L. Rev. 801.

J. Dougherty, “An Axiology for National Health Insurance” (1992) 20: 1-2 Law, Medicine, & Health Care 82.

T. Rice, “Can Markets Give Us The Health System We Want?” (1997) 22(2) Jnl. of Health Politics, Policy and Law 383.

N. Barr, “Economic Theory and the Welfare State: A Survey and Interpretation” (1992) XXX J. Econ. Lit. 741, at Part VI. “Assessment 2: Medical Care”.

S. Rathgeb Smith and M. Lipsky, “Privatization in Health and Human Services: A Critique” (1992) 17 (2) Jnl. of Health Politics, Policy and Law 233.

R. G. Evans, “Going for the Gold: The Redistributive Agenda Behind Market-Based Health Care Reform” (1997) 22 (2) Jnl. of Health Politics, Policy and Law 427

January 20th

Chapter Two

AN OVERVIEW OF THE CANADIAN HEALTH CARE SYSTEM: DO WE NEED MORE THAN JUST MONEY?

C. M. Flood, “The Anatomy of Medicare”, in J. Downie, T. Caulfield & C. M. Flood (eds.) *Canadian Health Law and Policy* (2nd Edition) (Butterworths: Toronto, 2002).HANDOUT

Gerard W. Boychuk, “The Changing Political and Economic Environment of Health Care in Canada”, Discussion Paper No. 1, Commission on the Future of Health Care in Canada,.....HANDOUT

Supplementary Reading

Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, Final Report, November 2002

The Senate, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role, Volume Six: Recommendations for Reform*

C.M. Flood and T. Archibald, “The Illegality of Private Health Care in Canada” (2001) 164(6) Can Med Assoc Jnl 825-830

C. David Naylor, “Health Care in Canada: Incrementalism Under Fiscal Duress” (1999) 18: 3 Health Affairs 9.

January 27th

Chapter Three

REFORMING THE CANADA HEALTH ACT AND IMPROVING ACCOUNTABILITY

The *Canada Health Act*., S.C. 1984, c. 6.....

Colleen M. Flood & Sujit Choudhry, *Strengthening the Foundations: Modernizing the Canada Health Act*, Discussion Paper No. 13, Commission on the Future of Health Care in Canada.....

Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, Final Report, November 2002, Chapter 2, “Health Care, Citizenship and Federalism”.....

The Senate, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role, Volume Six: Recommendations for Reform*, Part I, Accountability, Part III, Health Care Guarantee.....

February 3rd

Chapter Four

THE MEDICARE BASKET: HOW DO WE DECIDE WHAT TO PUBLICLY FUND?

D. Callahan, “What is a Reasonable Demand on Health Care Resources: Designing a Basic Package of Benefits” (1992) 8 *The Jnl. of Contemporary Health Law* 1....

Jacobs, Marmor and Oberlander, "The Oregon Health Plan and the Political Paradox of Rationing"(1999) 24: 1 *Jnl of Health Politics Policy and Law* 161.....

Colleen M. Flood, Mark Stabile, and Carolyn H. Tuohy, “The Borders of Solidarity: How Countries Determine the Public/Private Mix in Spending and the Impact on Health Care”, in (2002) 12: 2 *Health Matrix: Jnl. Of Law-Medicine*.....

Kevin. A. Schulman et ors, “The Effect of Race and Sex on Physicians’ Recommendations for Cardiac Catheterization” (1999) 340 *The New England Jnl. of Medicine* 618-626.....

Government of Ontario Press Release, “Update – Clarification of OHIP coverage of hearing tests”, 9 August 2001.....

Supplementary Reading

C. J. Halligan, “‘Just What The Doctor Ordered’: Oregon’s Medicaid Rationing Process and Public Participation In Risk Regulation” (1995) 83 *Georgetown Law Journal* 2697

February 10th

Chapter Five

ADMINISTRATIVE LAW CHALLENGES TO RATIONING HEALTH CARE

- C. Abraham, “Tenacious woman scores medical victory,”
Globe and Mail, Fri., Aug. 27, 1999..... V, 1-2
- Health Insurance Act R.S.O. H.6, ss. 20-21. V, 3-4
- Health Insurance Act – General Regulation, R.R.O. 1990, Reg. 552, s. 28.5.....V, 5-6
- Stein v. Québec (Regie de l'Assurance-maladie)*, [1999] Q.J. No. 2724.....V, 7-16
- R v. Cambridge District Health Authority ex parte B.*
[1995] 1 FLR 1055..... V, 17-25
- Shortland v. Northland Health Ltd* [1998] 1 NZLR 433.....V, 26-39

NO CLASSES—READING WEEK – February 16-20

February 24th

Chapter Six

**CHARTER AND CONSTITUTIONAL CHALLENGES TO RATIONING
HEALTH CARE IN CANADA**

- Cameron v. Nova Scotia (Attorney General)*,
[1999] 177 DLR (4th) 611 (edited)..... VI, 1-30
- Auton (Guardian ad litem of) v. British Columbia
(Minister of Health)*, [2000] B.C.J. No. 1547 (edited)..... VI, 31-47
- Stanley H. Hartt & Patrick J. Monahan, *The Charter and Health Care: Guaranteeing
Timely Access to Health Care for Canadians*, C.D. Howe Institute Commentary, No. 164,
May 2002, pp. 8—28 (edited) VI, 48-69
- Chaoulli c. Quebec (Procureure generale)* [2000] J.Q. No. 479 (QL) (Quebec Superior
Court), Piche J., Feb. 25 2000.....VI, 70-74

March 2nd

Chapter Seven

ABORIGINAL HEALTH & THE DETERMINANTS OF HEALTH

The Problems:

- John O’Neil, Laurel Lemchuk-Favel, Yvon Allard, and Brian Postl,
“Community Healing and Aboriginal Self-Government”,
in H. H. Hylton (ed.), *Aboriginal Self-Government in Canada:
Current Trends and Issues*, 2nd ed (Saskatoon: Purich Publishing
Inc., 1999) 130-156.....VII, 1-14

Impediments:

“The Context of Delivery of Health Services to Status Indians and Inuit by Medical Services Branch,” Program Transfer and Policy Development, Medical Services Branch (Report), September 6, 1988..... VII, 15-25

Suggested Solutions:

Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, Final Report, November 2002, Chapter 10..... VII, 26-46

“The Treaty Right to Comprehensive Health Care,” *First Nations Health News*.....VII, 47-48

“Native Leaders Fear Results of Health Transfer,” *Wawatay News*, September 23, 1999.VII, 49

Supplementary Readings

Gathering Strength: Canada's Aboriginal Action Plan (Ottawa: Ministry of Indian Affairs and Northern Development, 1997)

Bill 43, *An Act Respecting the Regulation of Health Professions*, S.O. 1991, c. 18, s. 35.

Bill 56, *An Act Respecting the Regulation of Midwifery*, S.O. 1991, c.31, s. 8.

Bill 119, *An Act to Prevent the Provision of Tobacco to Young Persons*, S.O. 1994, c. 10, s.13.

March 9th

Chapter Eight

ACCESS TO AND THE PRICING OF PRESCRIPTION DRUGS

R. G. Elgie, “Regulating Prices of Patented Pharmaceuticals in Canada: The Patented Medicine Prices Review Board” (May 1996) 13: 2 Food, Drug, Cosmetic and Medical Device Law Digest 80--83.VIII, 1-9

M. Shuchman, “Drug firm threatens suit over M.D.’s product review,” *Globe and Mail*, Wed., Nov. 17, 1999.VIII, 10-12

S. Jacobzone, "Pharmaceutical Policies in OECD Countries: Reconciling Social and Industrial Goals (OECD Report: 2000).....VIII, 13-36

Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, Final Report, November 2002, Chapter 9 (pp189—201)..... VIII, 37-58

Rosalie Gardiner, "AIDs – the Undeclared War", Towards Earth Summit 2002, Social Briefing no. 1, available online at <http://www.earthsummit2002.org/es/issues/AIDS/hiv.pdf>
.....VIII, 59-68

Amir Attaran & Lee Gillespie-White "Do patents for antiretroviral drugs constrain access to AIDS treatment in Africa?" (2001) 286 JAMA 1886-1892.....VIII, 69-75

David Spurgeon, "Canada forced to honour Bayer's patent on ciprofloxacin" *BMJ* 2001;323:956(27 October).....VIII, 76

March 16th

Chapter Nine

HEALTH REFORM: CLOSING HOSPITALS AND THE SHIFT TO HOME CARE AND REGULATING THE LOCATION, NUMBER AND INCOME OF DOCTORS

D. Orentlicher, "Paying Physicians More to Do Less: Financial Incentives to Limit Care" (1996) 30 University of Richmond Law Review 155.....IX, 71-104

Waldman v. British Columbia (Medical Services Commission) (1999) 177 D.L.R. (4th) 321 (B.C.C.A) (headnote).....IX, 105-107

Rombaut v. New Brunswick (Minister of Health and Community Services) [2001] N.B.J. No. 243,.....IX, 108-131

Colleen M. Flood, "Moving Medicare Home: The Forces Shifting Care Out of Hospitals and into Homes" in T. Caulfield & B von Tigerstrom (eds), *Health Reform & the Law in Canada: Meeting the Challenge*.....X, 1-14

Supplementary Reading

Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, Final Report, November 2002, Chapters 4 & 5, "Investing in Health Care Providers" and "Primary Health Care and Prevention".....IX, 1-45

The Senate, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role, Volume Six: Recommendations for Reform*, Chapter 4.....IX, 46-70

G. L. Stoddart and M. L. Barer, "Will increasing medical school enrolment solve Canada's physician supply problems?" (1999) 161 (8) Canadian Medical Association J. 983

J. Ibbitson, "Big changes proposed for family doctors," *Globe and Mail*, Wed., Dec. 22, 1999

M. Mills, "Canada's health-care crisis: we may already have the cure," *Globe and Mail*, Tues., Jan., 18, 2000

L. Priest, "Busy M.D.'s rake in huge OHIP fees," *Globe and Mail*, Tues., March 28, 2000.

G. L. Stoddart, M. L. Barer, R. G. Evans, V. Bhatia, "Why Not User Charges? The Real Issues" The Premier's Council on Health, Well-being and Social Justice, September, 1993.

C. M. Flood, "Will Supplementary Private Insurance Reduce Waiting Lists?" *Canadian Health Facilities Law Guide*, September 24, 1996

S. M. Hutton, "Physician Freedom of Contract in Ontario: An Economic Justification for the Ban on Extra-Billing with Some Recommendations for Structural Change" (1989) 47 *University of Toronto Law Review* (Supp.) 780

M.L. Barer and L. Wood, "Common Problems, Different Solutions: Learning from International Approaches to Improving Medical Services Access for Underserved Populations" (1997), 20:2 *Dalhousie Law Journal* 321

Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada*, Final Report, November 2002, Chapter 8, "Home Care: The Next Essential Service"X, 15-32

The Senate, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role, Volume Six: Recommendations for Reform*, Chapters 8 & 9.....X, 33-55

Lalonde v. Ontario (Commission de restructuration des services de sante) 6 O.R. (3d) 505 [2001] O.J. No. 4767 (Montfort Hospital Case)

Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission) [1997] O.J. No. 3142 (No. 394/97)

Health Services Restructuring Commission, News Release -- Health Services Restructuring Commission Releases Metro Toronto Plans, March 6, 1997

Janet E. Fast et al., *Conceptualizing and Operationalizing the Costs of Informal Elder Care* (Final Technical Report to the National Health Research Development Program (NHRDP) March 17, 1997), p. 1-15

J. Coutts, "Health-care cuts hit women hardest, economists told", *The Toronto Globe and Mail*, Monday, August 25, 1997, p. A5

March 23rd

Chapter Ten

TO THE MARKET!: MANAGED CARE AND MANAGED COMPETITION

Robin Toner and Sheryl Gay Stolberg, “Decade After Health Care Crisis, Soaring Costs Bring New Strains” *The New York Times*, August 11, 2002.....XI, 1-16

Marie C. Reed, Ha T. Tu, “Triple Jeopardy: Low Income, Chronically Ill and Uninsured in America”, Issue Brief No. 49, February 2002, online at <http://www.hschange.org>XI, 17-23

A. C. Enthoven, “The History and Principles of Managed Competition” (1993 Supp.) 12 *Health Affairs* 24.XI, 24-48

Editorial, “Score One for Accountability on Managed Care Front”, May 14, 2001.....XI, 49-50

Tanya Albert, “Pennsylvania court rules that ERISA does not exempt health plans from liability” May 7, 2001.....XI, 50-53

Tanya Albert, “Higher Accountability for HMO Medical Directors”, May 14, 2001.....XI, 53-56

Lauren Randel et ors, “How Managed Care Can Be Ethical”, (2001) 20: 4 *Health Affairs* 43—56.....XI, 57-70

Supplementary Reading

D. Mechanic, “Managed Care: Rhetoric and Realities” (1996) 31(2) *Inquiry* 124.

Michael T. Cahill & Peter D. Jacobson, “Pegram’s Regress: A Missed Chance for Sensible Judicial Review of Managed Care Decisions” (2001) 27 *AM. J.L. & Med.* 421

March 30th

Chapter Eleven

CONTRACTING OUT TO PRIVATE FOR-PROFIT CLINICS AND INTERNAL MARKET REFORM

S. Rathgeb Smith and M. Lipsky, “Privatization in Health and Human Services: A Critique” (1992) 17 (2) *Jnl. of Health Politics, Policy and Law* 233.....XII, 1-11

P.J. Devereaux et ors, “A Systematic Review and Meta-Analysis of Studies Comparing Mortality Rates of Private For-Profit and Private Not-for-Profit Hospitals” (2002) 166 (11) *CMAJ* 1399-406.....XII, 12-19

T. Arnold, “Colon screening available for \$1,000.00” April 24, 2002, *National Post*.....XII, 20-21

T. Caulfield, C. M. Flood & B von Tigerstrom, “Comment: Bill 11, Health Care Protection Act” (2000) 9: 1 *Health Law Review* 22-27.....XII, 22-27

J. L. Grand, "Competition, Cooperation, Or Control? Tales From the British National Health Service" (1999) 18: 3 Health Affairs 27.....XII, 28-34

Supplementary Reading

P. Allen, "Contracts in the National Health Service Internal Market" (1995) 58 (3) Modern Law Review Limited 321.

Carolyn Hughes Tuohy, Colleen M. Flood, and Mark Stabile, "How Does Private Finance Affect Public Health Care Systems? Marshalling the Evidence from OECD Nations"(working paper submitted to the Jnl of Health Politics Policy and Law, April 2001)

S. M. Hutton, "Physician Freedom of Contract in Ontario: An Economic Justification for the Ban on Extra-Billing with Some Recommendations for Structural Change" (1989) 47 University of Toronto Law Rev. (Supp.) 780.

G. L. Stoddart, M. L. Barer. R. G. Evans, V. Bhatia, "Why Not User Charges? The Real Issues" The Premier's Council on Health, Well-being and Social Justice, September, 1993.

C. M. Flood, "Will Supplementary Private Insurance Reduce Waiting Lists?" *Canadian Health Facilities Law Guide*, September, 1996.

April 6th

Chapter Twelve

ANATOMY OF A CRISIS: LEARNING FROM SARS

Learning from SARS: Renewal of Public Health in Canada: A Report of the National Advisory Committee on SARS and Public Health (Health Canada, October 2003). Online at <http://www.hc-sc.gc.ca/english/protection/warnings/sars/learning.html> ("the Naylor Report")

C. M. Flood & A. Williams, "A Tale of Toronto: National and International Lessons from the SARS Crises" (forthcoming Michigan State University Detroit College of Law, 2004)