

**Health System Law and Policy**  
**Dalhousie Law School**  
**Winter Term, 2004**

Thursdays: 4:30-6:30  
William (Bill) Lahey  
W414  
494-1005  
[william.lahey@dal.ca](mailto:william.lahey@dal.ca)

Office Hours: Wednesdays and Thursdays, 2:30- 3:30, or by appointment or by dropping by.

**Course Description and Objectives**

*“When we began to plan medicare, we pointed out that it would be in two phases. The first phase would be to remove the financial barrier between those giving the service and those receiving it. The second phase would be to reorganize and revamp the delivery system and, of course, that’s the big item. It’s the big thing we haven’t done yet”*

Tommy Douglas, 1982

Traditionally, health law scholarship has emphasized the legal aspects of the physician-patient relationship. Increasingly, lawyers are turning their attention to larger system issues and the complex web of relationships between governments, private insurers, doctors and other health professionals, hospitals and other health care delivery organizations, pharmaceutical companies, and patients and communities. Equally, there is an increasing appreciation throughout the health care system of the role of the law (and therefore of lawyers) in the analysis and management of this complex reality and in the development and implementation of policies and in decision-making at virtually all levels of a system extensively defined by the law and legal rights and obligations.

This structure will focus on the structure and dynamics of Canada’s health care system. It will locate Canada’s system amongst the variety of approaches taken internationally to the financing and allocation of health insurance and health care services and to the regulation of the quality of health services.

Issues to be explored include what different theories of distributive justice demand in terms of access to health care, the extent and significance of market failure in health insurance and health service markets, the determination of what services are publicly funded and the means of review of these decisions, how to ensure the accountability of decision-makers, why the present system fails Aboriginal peoples, the regulation of privately financed care (in vitro services, drugs, medical equipment, long term care, etc.), the shift from institutional care to care in the home, the growing attention that is being paid to clinical quality and efficacy issues and options for reform of the medical malpractice system, managed care, and the general issues of privatization (or commercialization), of deregulation (and of “re-regulation”) and of health care system governance.

The principle objective of this course is to make students familiar with and able to evaluate the debates about the quality, dependability and financing of the Canadian health care system that are perennially at the core of the Canadian public policy agenda, as well as those around what Tommy Douglas called the reorganization and revamping of the delivery system. Other more general objectives are:

- to survey a range of the more significant health system law and policy issues and to acquire the analytical tools needed to understand and propose solutions to these and related issues;
- to develop an understanding of how laws, regulations and other systemic policy instruments can shape the structure and functioning of a health care system or the response to questions of policy that effect the efficacy or efficiency of the system;
- to develop an appreciation for the contribution of other disciplines, such as economics, political

- science, philosophy and sociology, to our understanding of health system law and policy; and
- to further develop the research, policy analysis, writing, presentation and team-work skills that are vitally important to effectiveness in the roles that lawyers play as professionals and as citizens in health care policy debates and processes.

### **Evaluation**

- 70% of the course grade will be based upon a major paper on an approved topic; and
- 30% of the course grade will be based upon participation in a policy formulation and reflection exercise.

### **Major Paper Requirement**

#### Topic

Each student must submit a choice of paper topic for approval on or before **4:30 p.m. on Thursday, February 12**. A list of potential topics is attached, but feel free to propose your own topics. The list will hopefully indicate the breadth of choice that is available to you in this course but all the usual limitations apply as to the need for a topic that is feasible given breadth, available research materials, and student and instructor preparedness for the topic.

#### Due Date

The paper is due on or before 4:30 on the last day of classes, **Thursday, April 8**.

#### Optional Review of Outlines/Drafts

Students may submit an outline and bibliography, or a draft of their paper, or both, for my review and comment before submission of their final paper. If students opt to take advantage of this opportunity, the outline or draft must be received by me on or before **Thursday, March 11**.

#### Length/Form

The major paper must be at least 25 pages, but no more than 35 pages, excluding endnotes. Please use endnotes rather than footnotes. The paper must be double-spaced, with standard margins (between 1" and 1½"). Please use 12 point print to ensure standardization.

#### Evaluative Criteria

Please review the criteria for the evaluation of major papers found at pages 44-46 of the 2003/2004 Calendar. I am very strongly guided by these criteria in the evaluation of papers in this course and so a review of these pages of the Calendar will give you a good idea of my expectations.

### **Policy Formulation and Reflection Exercise**

#### Objectives

This is a course in health system policy as well as health system law. This exercise is intended to ensure that we think our way through the materials and class discussions as potential system policy-makers or evaluators, as well as from our more traditional perspective as lawyer's called upon to represent particular clients in (for example) litigation. It is also intended to ensure that the course contains a skills development component that reflects the very large role that lawyers play within the health care system as policy-makers, including but not only at the government level.

#### Format and Elements

Students will divide into groups of five. Each group will prepare a one hour presentation on an assigned health system policy issue that (a) is topical, in that it has been recommended or is under consideration by one or more of the health system studies recently completed or under way in Canada; (b) has a relationship to all or most of the class readings and discussions; (c) can be usefully analyzed and considered on the basis of the class materials, our discussions and your individual and collective reflections on those materials and discussions; and (d) draws our attention to the large and underlying question of the role that the law and legal ideas can play in the reform and design of the health care system.

Last year, all groups presented on the same policy issue, which was distributed early in the term so that students could have it in mind as we worked through the readings. That would be the approach that I would like to take again this year, although it may have to be altered depending on how the scheduling issues discussed below are handled. If all groups are to present on the same topic, it will be very important to have all the presentations very close to each other.

However structured, no research beyond the course materials will be required for this exercise and indeed, additional research is discouraged (i.e. it will not be rewarded!) . Along with the emphasis on presentation skills, the emphasis is to be on your own thinking, reflections, judgment, and discussions relative to the policy issue, as informed by the class materials and discussions and your own growing capacity to think critically about social and policy issues as lawyers, not on further independent research. **In sum, this is not an research exercise! It is a thinking exercise!** On the other hand, if your group nevertheless opts to undertake additional research, it must be acknowledged in the presentation.

This will be an exercise in role playing. As presenters, students will be asked to play the role of a team of policy advisors who have been asked to give advice on an important question of health system policy to an audience of influential and interested stakeholders. When not participating as a member of a presenting team, each student will be asked to play the role of a stakeholder who has been asked to consider and listen to the advice being provided by the experts.

After the presentations are complete, each member of the class will submit a 3-5 page reflection paper on the exercise. This will be the work of each individual student, though it can be informed by post-presentation debriefing, including the one we will have in class. But again, no research will be expected, though students will be free to incorporate the course materials as they think useful. But the emphasis will be on what was learned through the exercise, both in terms of the substantive issue, but also in terms of what did or did not work well in making presentations effective.

### Scheduling

I am open to discussion on when we will have the policy development exercise. Last year, students reluctantly agreed to do all of the presentations during a single evening, at which pizza and soft drinks were provided. I think most came, on reflection, to view this as a good approach. It maintained continuity and momentum and the presentations were remarkably varied, leading to some very heated discussions! In discussing the scheduling, I am conscious that we must avoid causing additional pressure immediately before exams or while you are finishing papers. At the same time, I want to be sure that teams have the benefit of a good canvassing of the course materials on which to build before they are required to make their presentations.

The post-presentation reflection papers would be due within a week of the in-class exercise.

### Evaluation

As indicated above, the policy formulation and reflection exercise is worth 30 % of the course grade. Fifty percent of this 30 % of the course grade (i.e. 15% of the course grade) will, for each student, be the grade assigned to the student's group for the presentation. The other half of the grade for the exercise (i.e. another 15% of the course grade) will be based on each student's 3-5 page reflection paper.

## **Course Readings**

Students will not be required to purchase a set of materials for this course. Instead, the readings for each week's class will be photocopied as a package and provided to students at least one week in advance of the class at which they will be discussed.

The following is a schedule of topics that we will address, with the corresponding readings indicated. There may be some change in the readings and we may have to drop or consolidate one or more of the topics to accommodate the policy development and reflection exercise, but such changes should be only of marginal significance.

### **Part I - Introduction**

#### **Week 1 - Introduction to Health System Law and Policy**

### **Part II - The Legal Structure of the Canadian Health Care System**

#### **Week 2 - The Financing of Care**

Colleen M. Flood, "The Anatomy of Medicare", in Jocelyn Downie et al., Canadian Health Law and Policy, 2<sup>nd</sup> ed. (Toronto, Butterworths, 2002), pp. 1-54.

*Canada Health Act*, R.S.C. 1985. c. C-6.

Colleen M. Flood, Tom Archibald, "The Illegality of private health care in Canada" *CMAJ* 2001: 164(4), 825-30.

#### **Week 3 - The Delivery of Care: Devolution, Deinstitutionalization & Home Care**

Jonathan Lomas et al., "Devolving Authority for Health Care in Canada's Provinces: 1. An Introduction to the Issues" *CMAJ* 1997: 156(3): 371-7.

James Bickerton, "Reforming Health Care Governance: The Case of Nova Scotia" (1999) 24 *Journal of Canadian Studies* 159, 159-190.

*Health Authorities Act*, S.N.S. 2000, c. 6.

*Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission)* (1997), 36 O.R. (3d), [1997] O.J. No. 3142 (Div. Ct.).

Gerald Wistow, "Decentralisation from acute to home care settings in England" *Health Policy* 41 Suppl. (1997), S91-S108.

#### **Week 4 - Reflecting on the Functions (and Limits) of Law in Health System Policy**

Diane Longley, "Chapter 1: First Principles" (pp. 1- 20) and "Chapter 5: The Art of Governance"(157-177), in Health Care Constitutions (London, Cavendish Publishing Limited, 1996).

Shalom Glouberman and H. Mintzberg, "Managing the Care of Health and the Cure of Disease - Part I: Differentiation" (2001) 26 *Health Care Management Review*, 56-70.

W. M. Sage, "The Lawyerization of Medicine," (2001) 26 *Journal of Health Politics, Policy and Law*, 1179. (16 pages)

### **Part III - The Case for Public Health Care**

#### **Week 5 - Market Failure, Distributive Justice, Compassion**

Collen M. Flood, "Chapter 2: Arguments in Economics and Justice for Government Intervention in Health Insurance and Health Services Markets", in International Health Care Reform: A Legal, Economic and Political Analysis (London: Routledge, 2000), pp. 15-40.

Ronald Dworkin, "Justice in the Distribution of Health Care," (1993) 38 *McGill L.J.* 883 (14 pages).

Susan Pinker, "The Chaoulli case: one-tier medicine goes on trial in Quebec" *CMAJ* 1999: 161(10) , and "Why does such a big issue rest on the shoulders of two citizens? FP asks after losing private medicine battle" *CMAJ* 2000: 162(9).

Nuala P. Kenny, "Chapter 6: A Crisis of Another Kind: Compassion, Justice and Health", in What Good is Health Care: Reflections on the Canadian Experience (Ottawa: CHA Press, 2002), pp. 159-183.

#### **Week 6 - The Allocation of Resources to and within the Health Care System**

P. T. Menzel, "Equality, Autonomy, and Efficiency: What Health Care System Should We Have?" (1992) 17:1 *The Journal of Medicine & Philosophy* 33. (17 pages)

D. Callaghan, "What is a Reasonable Demand on Health Care Resources: Designing a Basic Package of Benefits," (1992) 8 *Journal of Contemporary Health Law and Policy* 1.

Candace Johnson Redden, "Health Care as Citizenship: Examining Social Rights and Entitlement,"(2002) 35 *Canadian Journal of Political Science* 103. (103-125)

### **Part IV - Selected Topics**

#### **Week 7 - The Divisions of Responsibility and Accountability Between Governments**

Sujit Choudry, "Bill 11: The Canada Health Act and the Social Union: The Need For Institutions", in Timothy A. Caulfield and Barbara von Tigerstrom, eds., Health Care Reform & the Law in Canada (Edmonton: University of Alberta Press, 2002), pp. 37-84.

R. Pelletier, "Intergovernmental Cooperation Mechanisms: Factors for Change?" (2002) Discussion Paper No. 29 for the Royal Commission on the Future of Health Care in Canada (Roy J. Romanow, Q.C., Commissioner).

Wayne Warry, "Chapter 3: Vision and Illusion: Health-Care Planning and Community Control" in Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government (Toronto, Buffalo and London: University of Toronto Press, 1998), 93-128.

#### **Week 8 - Privatization**

*Health Care Protection Act*, S.A. 2000, c. H-3.3.

S. Lewis and C. Maxwell, "Decoding Mazankowski: A Symphony in Three Movements," (2002) 2 *HealthcarePapers* 20. (6 pages).

C.H. Tuohy, C.M. Flood, and M. Stabile, "How Does Private Finance Affect Public Health Care Systems? Marshalling the Evidence from OECD Nations" (paper submitted to the *Journal of Health Politics, Policy and Law*).

S. Rathgeb Smith and M. Lipsky, "Privatization in Health and Human Services: A Critique," (1992) 17 (2)

*Journal of Health Politics, Policy and Law* 233. (233-253)

### **Week 9 - The Pursuit of Efficiency**

Julian Le Grand, "Competition, Cooperation or Control? Tales From the British National Health Service," (1999) 18:3 *Health Affairs* 27. (13 pages)

J.D. Orentlicher, "Paying Doctors More to Do Less: Financial Incentives To Limit Care" (1996) 30 *University of Richmond Law Review* 155.

*Pegram v. Herdich* (2000), 530 U.S. 211, 120 S. Ct. 2143. (17 pages)

*Rombaut v. New Brunswick (Minister of Health and Community Services)* [2000] N.B.J. No. 126, No. S/C/751/94.

J.M. Finder, "The Future of Clinical Practice Guidelines," (2000) 10 *Health Matrix* 67.

Janice Gross Stein, "Chapter 1: The Cult of Efficiency", in The Cult of Efficiency (Toronto: House of Anansi Press, 2001), pp. 1-44.

### **Week 10 - The Pursuit of Quality**

Linette McNamara, Erin Nelson and Brent Windwick, "Regulation of Health Care Professionals," in Jocelyn Downie et al., Canadian Health Law and Policy, 2<sup>nd</sup> ed. (Toronto: Butterworths, 2002), 55-89.

G.R. Baker and P. Norton, "Making Patients Safer! Reducing Error in Canadian Healthcare" (2001) 2 *HealthcarePapers* 10. (18 pages)

A.C.L. Davies, "Don't Trust Me, I'm a Doctor – Medical Regulation and the 1999 NHS Reforms," (2000) *Oxford Journal of Legal Studies*

C. Newdick, "NHS Governance After *Bristol*: Holding On, or Letting Go?" (2002) 10 *Medical Law Review* 111. (111-121).

### **Week 11 - Health Ahead of Health Care?**

K. Bruce Newbold, "Problems in Search of Solutions: Health and Canadian Aboriginals," (1998) 28:1 *Journal of Community Health*, 59. (59-73).

Nuala P. Kenny, "Chapter 3 - Never Enough: The Medicalization of Life," in What Good is Health Care? Reflections on the Canadian Experience (Ottawa: CHA Press, 2002), pp. 73-100.

Pierre-Yves Cremieux et al., "Health Care Spending as Determinants of Health Outcomes," (1999) 8 *Health Economics*, 627-639.

Tee L. Guidotti, "Commentary: 'Why Are Some People Healthy and Others Not?' A Critique of the Population - Health Model" (1997) 30:4 *Annals of the Royal Society of Physicians and Surgeons*, 203.

### **Week 12 - Litigating Health Care Policy Issues**

*Auton (Guardian ad litem of) v. British Columbia (Attorney General)* (2002) 220 D.L.R. (4<sup>th</sup>) 411 (B.C.C.A.)

*Stein v. Quebec (Regie de l'Assurance-maladie)* [1999] Q.J. No. 2724 (Que. Sup. Ct.).

*SooBramoney v. Minister of Health (Kwazulu-Natal)* [1997] S.A.J. No. ?, Case No. CCT 32/97

(Republic of South Africa Constitutional Court).

Ron Paterson, "The Patients Complaints System in New Zealand," (2002) 21:3 *Health Affairs*, 70.

Christopher P. Manfredi and Antonia Maioni, "Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada," (2002) 27:2 *Journal of Health Politics, Policy and Law*, 213. (213-240)

## **Part V - Applying What We've Learned**

Week 13 - Health System Policy Development and Reflection Exercise

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In addition, I will be relating each of our topics of discussion to the proposals that have been made in the various recent reviews of the Canadian health care system. In doing that, I will be providing information on the status of those proposals. The objective will be to ensure that students have a good understanding of what are the areas of consensus and of contention among these programs for reform and renewal.

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### **Health System Law and Policy - Some Possible Paper Topics**

- (1) The role of legislation in health system reform
- (2) Systemic problems and individual consequences: what are the legal connections?
- (3) Health care vs. hospital care: the scope of the Canada Health Act
- (4) The implications of Alberta's Bill 11 (or more generally, of privatization or commercialization and health care)
- (5) What does "medically necessary" mean and who should decide?
- (6) The meaning and implications for health system reform of "public administration" in the Canada Health Act
- (7) Judicial review of administrative and executive discretion: the implications for Departments of Health (or for the Health System Generally)
- (8) The public interest and the self-governing health professions: what does compatibility demand?
- (9) The interface between the professional ethics of the caring professions (or one of them) and the roles played by those professionals within the health care system as care providers, as policy-makers, as managers, as advocates, as members of unions or professional associations
- (10) Who has legal responsibility for the health care system (or, Who in the heck is in charge here)?
- (11) How are private health care transactions regulated in Canada and what reforms are warranted?
- (12) The implications of the values of Canada's health care system to judicial decision-making in health related cases (for example, statutory interpretation, judicial review, constitutional adjudication, malpractice cases, etc.)
- (13) Is aboriginal self-government on the road to aboriginal health?
- (14) Are doctors health system adjudicators and should the law treat them as such?
- (15) Is the legal status of doctors as independent contractors changing? Should it?
- (16) Comparison of health system reform in Canada and another country (or lessons for Canada in experience of another country or vice-versa)
- (17) Tony Blair's National Health Care Service: lessons for Canada's reformed (or reforming) health care system
- (18) The failure (?) of managed care in the United States and the implications for Canada's reformed (or reforming) health care system
- (19) The reform of Canadian health system reform - or where to from here? (one possibility is to focus on the various reviews of the reformed health care system that have been undertaken by governments, research institutions or academics)

- (20) Inter-provincial health care policy comparisons, for example, of different approaches to or experiences of health system reform (perhaps an opportunity to reflect on the consequences of Canada's federalism to Canada's health care system)
- (21) Legal and policy critique of the process of health care reform (in Canada, in a Canadian province, elsewhere or comparative)
- (22) The systemic implications of health professions malpractice law and the opportunities or need for reform
- (23) How does "the system" ensure quality of care: tort law, professional regulation, (other) statutory or system regulation, management, or markets (consumer choice)
- (24) NAFTA and the Canadian health care system (or more generally, the implications of international trade agreements or another aspect of the international system for national health care policy in Canada, in another country or generally)
- (25) International aspects of public health (ex. the international response to the AIDS epidemic)
- (26) Canada's international obligations (or Canada's foreign policy) and the health or health care systems of other nations
- (27) Gender and the health care system (for example, the implications of the shift, as part of health care reform, from hospital care home care)
- (28) The Charter and health care - perhaps in relation to the right to care and the restriction of that right due to financial constraints or the configuration of the system or perhaps in relation to public health protection
- (29) The legal and policy framework for medical research
- (30) Legal and policy critique of Canada's drug approval process, or of Canada's drug patent laws or of the international impact of drug patent laws
- (31) Why is primary care reform so elusive? (Perhaps with a focus on the role that the law has played or might play)

