

Accountability in Health Care and Legal Approaches

by

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Introduction

May 2004

Health Care Accountability Papers – No|3 is available at
<http://www.cprn.org> or on request at (613) 567-7500

Introduction

Over 10 years ago, a national legal organization released a report on the role of law in the Canadian health care system.¹ The title of that report, “What’s Law Got to Do with It?” expresses a question that remains highly relevant today as our health care system faces new challenges, especially funding pressures and calls for greater accountability. As health care funders and policy-makers, governments throughout Canada must address competing goals: maintaining universal, comprehensive, publicly insured health care; allocating resources to other important programs and services; and striving for fiscal sustainability.² Within this context, there seems to be growing interest, both on the part of governments and individuals, in using legal mechanisms to define rights and obligations in regard to health care.

The goal of this paper is to identify and analyse five key legal mechanisms, discuss their use (or proposed use), and evaluate their effectiveness as a tool for promoting accountability in health care. Where a mechanism is not currently in use in Canada, we look to international experiences with the same or similar mechanisms to comment on its effectiveness.

The five legal mechanisms this paper addresses are:

1. legal challenges based on the *Canadian Charter of Rights and Freedoms*³ or human rights laws to seek access to services through the publicly funded health care system;
2. legal challenges based on the *Charter* in which individuals challenge restrictions on the ability to exercise choice in regard to health care;
3. legal challenges or complaints directed to bodies created by statute, such as health service review boards and Ombudsman offices, in which individuals challenge the reasonableness or fairness of government health care policies;
4. legal principles (for example, based on tort law, fiduciary law and informed consent principles) that establish an entitlement to a specific level or standard of care; and
5. legislative or policy mechanisms such as patient bills of rights, care guarantees or other statements that set out rights and responsibilities in regard to health care.

We categorize the first four as judicial-based mechanisms because they involve claims before courts or other decision-makers and they give rise to the development and application of legal principles on a case-by-case basis (that is, development of the common law). We describe

¹ Canadian Bar Association Task Force on Health Care, *What’s Law Got To Do With It? Health Care Reform in Canada* (Ottawa: Canadian Bar Association, 1994).

² A recent Conference Board of Canada report states that “[s]ome provinces could spend in excess of 50 per cent of their budgets on health care by 2020.... To turn the situation around before the 2020 crunch, governments will have to make tough decisions. They need to balance their priorities in health and health care with other competing priorities. This challenge cuts to the heart of Medicare....” See Conference Board of Canada, *Understanding Health Care Cost Drivers and Escalators* (Ottawa: Conference Board of Canada, 2004) at i.

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

initiatives that fall into the last category as legislative because they involve the development of laws and policies by elected officials. However, we recognize these categories are not mutually exclusive and, in fact, will overlap because judges and other decision-makers interpret and apply laws established through legislative action.