

THE ACCOUNTABILITY CHALLENGE IN HEALTH CARE: THE CONTRIBUTION OF A HEALTH OMBUDSMAN

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The Accountability Challenge in Health Care: The Contribution of a Health Ombudsman

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RÉSUMÉ

Les Canadiens se préoccupent grandement de la valeur de l'imputabilité (« accountability ») dans la gestion du système de santé. Cette valeur met en exergue l'importance des processus décisionnels – soit comment les décisions sont prises et par qui – et requiert un haut degré de transparence au sein de ces processus. Dans cet article, l'auteur explore le rôle et la capacité d'un ombudsman ayant une mission spécifique dans le secteur de la santé de favoriser l'atteinte d'objectifs d'imputabilité à trois niveaux décisionnels dans le système de santé : 1) politique, 2) managérial et 3) professionnel. L'analyse proposée est basée essentiellement sur l'expérience québécoise, ce modèle offrant l'exemple le plus distinctif d'un ombudsman santé à travers le Canada. En effet, le Protecteur du citoyen du Québec chapeaute un vaste régime de plaintes en deux étapes dans le secteur de la santé et des services sociaux. L'auteur conclut que ce type d'ombudsman offre un potentiel intéressant d'améliorer l'imputabilité aux trois niveaux. Contrairement aux tribunaux, les forces spécifiques de l'ombudsman sont d'offrir une flexibilité quant aux motifs d'intervention et de recommandation dans ce secteur, au surplus d'être aisément accessible aux citoyens. Avec le processus de plaintes qu'ils offrent, les ombudsmans permettent aux patients d'exprimer leurs doléances – leur « voix » – aux décideurs publics, aux administrateurs et aux professionnels de santé. Ainsi, les ombudsmans contribuent à la mise en œuvre des droits des patients et à la définition d'expectatives claires des citoyens envers leur système.

SUMMARY

Canadians are very concerned about accountability and rank this value among their top priorities. The value of accountability speaks to how decisions are actually made and by whom, and to the importance of decision-making processes, and calls for transparency in decision-making. In this article, the author explores the role and capacity of a health ombudsman institution to increase accountability in health care on three levels: 1) political, 2) managerial and 3) professional. The analysis is predominantly based on the Quebec experience as it offers the most distinctive illustration of this type of institution in Canada; the ombudsman in Quebec (*Protecteur du citoyen*) oversees a two-step complaint process in the health care and services network. The author concludes that ombudsman institutions, such as the one in Quebec, offer an interesting, yet not fully realized potential, to enhance accountability on all three levels. Their strengths are that, compared to courts, they have a flexible scope of intervention and discretion in their decision-making and remain accessible to citizens. With the complaint process they provide, they enable patients to voice concerns to policy makers, managers and professionals, and contribute – with varying degrees of success – to the effective exercise of patients' rights as well as to the definition of clear expectations towards healthcare.

INTRODUCTION

Canadians care greatly about accountability and rank such a value among their top priorities.¹ Arguably concomitant with the growing presence of economic discourse, declining trust in government and professional authority,² as well as a greater call for citizen and court involvement,³ further accountability from decision-makers has been recommended by a number of high profile commissions as a key objective of reform in health care.⁴ Some authors consider accountability to now

1. See, for example, J. Abelson & F.-P. Gauvin, *Transparency, Trust and Citizen Engagement – What Canadians Are Saying About Accountability* (Ottawa: Canadian Policy Research Networks, 2004) [Abelson & Gauvin, *Transparency*] (based on four dialogue experiments involving over 1,600 Canadians). Although such experiments did not specifically focus on accountability, the importance of such a value nevertheless came up; the *Romanow Report* clearly points out this fact: Roy J. Romanow QC, Commissioner, *Building on Values: The Future of Health Care in Canada* (November 2002) [*Romanow Report*]; see also Susan V. Zimmerman, *Mapping Legislative Accountabilities* (Ottawa: Canadian Policy Research Networks, 2005).
2. See Abelson & Gauvin, *Transparency*, *supra* note 1, on the increasing lack of trust in governing institutions. R. Rowe & M. Calnan, “Trust relations in health care – the new agenda” (2006) 16:1 *European Journal of Public Health* 4. On the decreasing trust and confidence in representative democracy and traditional political institutions, see [Nevitte 1996 and Ekos 1996]. Cited in discussion paper (Romanow) no. 7 at 3. The Gomery commission also emphasized the need for more accountability in public administration: John Gomery, Gomery Commission Report, Phase II (Ottawa: Gomery Commission, 2006) at Part 4.
3. For the link between citizen involvement and accountability, see, for example, C. Fooks & L. Maslove, *Rhetoric, Fallacy of Dream? Examining the Accountability of Canadian Health Care to Citizens* (Ottawa: Canadian Policy Research Networks, 2004).
4. For an extensive review of all commissions and other works that underline the importance of accountability in health care, see *supra* note 1. See also Abelson & Gauvin, *Engaging Citizens: One Route to Health Care Accountability* (Ottawa: Canadian Policy Research Networks, April 2004) at 3 [Abelson & Gauvin, *Engaging Citizens*]. To name only a few, see the following documents: *Romanow Report*, *supra* note 1; Canada, Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians—The Federal Role* (Ottawa: Standing Senate Committee on Social Affairs, Science and Technology, 2001) [*Kirby Report*]; Quebec, Ministry of Health and Social Services, *Emerging Solutions: Report and Recommendations* (Quebec City: Commission of the Study of Health and Social Services, 2001); Kenneth J Fyke, Commissioner,

be part of a new social contract, one which shapes Canadians' expectations regarding their Medicare system, as well as the governmental apparatus in general.⁵ Nevertheless, despite the need for and acknowledgement of such a value, principles of accountability are still poorly reflected in health care systems across Canada (for practical, political and economical reasons).⁶

The emergence of accountability as a value/objective in health-related matters has had the advantage of encouraging a further exploration of the roles, responsibilities, and interactions of various actors in the Medicare system. The value of accountability speaks to how decisions are actually made and by whom, to the importance of decision-making processes – in this way, it shares a similar concern with procedural justice, yet with a different rationale, scope of reach, and goal – and calls for transparency in decision-making. It seeks to improve accountability relationships between health care providers and patients, health care managers and governments, and between citizens and governments (or public institutions).

Accountability is arguably important to ensuring the financial sustainability of the Medicare system. Abelson and Gauvin's work underlines that Canadians want information on where their money is going and how decisions in health care are actually made.⁷ Until they have more evidence of effective management, which they currently doubt, Canadians will remain disinclined to support further public expen-

Caring for Medicare – Sustaining a Quality System (Saskatchewan: Saskatchewan, April 2001) [*Fyke Report*]; Claude Castonguay, Joanne Marcotte & Michel Venne, *Report of the Task Force on the Funding of the Health System. Getting our Money's Worth* (Quebec City: Quebec, February 2008) [*Castonguay Report*]. Abelson and Gauvin, "Transparency", *supra* note 1, clearly put forward the link between people's need for more trust in health care and the call for accountability.

5. See *supra* note 3; M.P. MacKinnon, *Citizens Dialogue on Canada's Future: A 21st Century Social Contract* (Ottawa: Canadian Policy Research Networks, 2003).

6. See C.M. Flood, D. Sinclair & J. Erdman, "Steering and Rowing in Health Care: The Devolution Option?" (2004) 30 *Queen's L.J.* 156; Health Council of Canada, *Rekindling Reform: Health Care Renewal in Canada, 2003-2008* (Toronto: Health Council of Canada, 2008); M. Jackman, "Charter Review as a Health Care Accountability Mechanism in Canada" (2010) *Health L.J.* 18. There the increased concern for governance models which include more accountability is undeniable. See, for example, the interesting comments in R.H. Desmarteau & M. Nadeau, "La gouvernance dans les établissements socio-sanitaires du Québec: diagnostic et prescription." In *Le Point en Administration de la santé et des services sociaux*, vol.4, no 4, p. 4; W. Lahey, "New Governance Regulation and Managerial Accountability for Performance in Canada's Health Care Systems" in R.P. Kouri & C. Régis, ed., *Grand Challenges in Health Law and Policy*, Cowansville, Éditions Yvon Blais, 2010.

7. Abelson & Gauvin, *Transparency*, *supra* note 1.

ditures in health care.⁸ In other words, if governing institutions want to convince Canadians to continue funding Medicare or to invest more money in health care, they will need to prove their capacity for good management and be accountable for it. However, it might seem easier for governments to walk away from health care.

Accountability has captured the imagination and interest of politicians, health care providers (and their associations), academics from various fields, and citizens. Notions concerning forms of accountability are now more defined and refined, and also more intricate. There is no clear consensus about the components of such a value in the literature, and fields of study have tackled the issue from different perspectives.⁹ For example, whereas economists may focus on the role of market tools in achieving more accountability, jurists might be more interested in the role of legal means to do so. The lack of consensus regarding the components of accountability in health care is, in part, representative of the complexity of such a field, as well as of the related difficulty in identifying clear responsibilities in our Medicare system.¹⁰ Disagreement on the very goal of accountability (i.e. accountability for what, to whom and at what cost) makes it even more difficult to reach an agreement on the means to achieve it. In short, the quest for more accountability is far from over and its aim remains to be clearly defined.

In this article, it is not our goal to resolve the complex issues surrounding accountability in health systems. We have the far more modest objective of exploring the role and capacity of a health ombudsman institution to increase accountability in such a system.¹¹ We predominantly base our analysis on the Quebec experience as it offers the most distinctive illustration of this type of institution across Canada;¹² it is the only

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8. *Ibid.* at 11. Besides, Abelson and Gauvin mention that including participants in the deliberative process tends to make them more aware of the complexities of decision-making in the health sector, and, as such, more respectful as concerns existing decision-makers: at 15.
 9. As an example of an innovative perspective on the issue of accountability in health care, see W. Lahey, "New Governance Regulation and Managerial Accountability for Performance in Canada's Health Care Systems" in R.P. Kouri & C. Régis, ed., *Grand Challenges in Health Law and Policy*, Cowansville, Éditions Yvon Blais, 2010.
 10. See among others, R.H. Desmarteau & M. Nadeau, *supra* note 6.
 11. For an interesting analysis on the effectiveness of Charter Review as an accountability mechanism in health care, see M. Jackman, *supra* note 6. The author concludes that Charter Review currently does little to improve accountability in the health care system. Considering this, the exploration of other accountability mechanisms in health care is certainly relevant.
 12. As we later discuss, what we refer to as the "Health Ombudsman in Quebec" is in fact the "Protecteur du citoyen." The Protecteur is the provincial ombudsman, yet with