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The Federal Role in Health and Health Care

Publication No. 2011-91-E
22 September 2011
Revised 20 September 2013

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Ce document est également publié en français.

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THE FEDERAL ROLE IN HEALTH AND HEALTH CARE*

Canadians know that both the provinces and the federal government are involved in matters generally related to health and health care, but there is often confusion in the public's mind about provincial and federal jurisdiction. Part of the uncertainty reflects the distinction between health and health care.

Health (in its broadest sense) refers to the desirability of maintaining or achieving a positive state of overall well-being. *Health care* (in its narrowest sense) refers to medical services offered by physicians and hospitals. The federal government has numerous responsibilities relevant to health, but the provinces are responsible for delivering health care to the majority of Canadians.

1 HEALTH AND THE *CONSTITUTION ACT, 1867*

It is not surprising, given the period in which it was written, that the *Constitution Act, 1867* does not explicitly include “health” as a legislative power assigned either to Parliament (in section 91) or to the provincial legislatures (in section 92).

In 1982, the Supreme Court of Canada stated:

... “health” is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.¹

The Constitution, however, does contain some powers relating directly to health and health care. Section 91(11) assigns responsibility for “quarantine and the establishment and maintenance of marine hospitals” to the federal government. Section 92(7) assigns responsibility for most other hospitals to the provinces. Apart from the operation of hospitals, the structure of health and health care in Canada thus rests for the most part on more indirect sources of constitutional power.

In addition to its jurisdiction over hospitals, exclusive provincial responsibility for the direct delivery of most medical services, the education of physicians and numerous related functions is generally agreed to derive from the powers over property and civil rights (section 92(13)) and matters of a merely local or private nature (section 92(16)) in the *Constitution Act, 1867*.

The areas involving health in which the federal government is most directly involved are derived from three constitutional powers: the criminal law power; the spending power; and, possibly, the power to pass laws for the peace, order and good government of Canada. Each of these will be discussed in turn. Other federal government activities bearing on health and health care that derive largely from different powers are identified later.

2 THE CRIMINAL LAW POWER

For many years, the criminal law power of the *Constitution Act, 1867* (section 91(27)) has been the basis for federal legislation in a number of matters relating to health. In this connection, the Supreme Court has taken a broad view of the criminal law power. As Justice LaForest stated in a 1995 tobacco case:

The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil.²

The criminal power is thus the basis for protecting the physical health and safety of the public through control of possible hazards from products/matters such as:

- controlled substances;
- drugs and food;
- medical devices;
- industrial and consumer products;
- cosmetics;
- tobacco;
- radiation-emitting devices such as microwave ovens, x-ray equipment, sun-tanning lamps, ultrasound equipment, laser devices and television; and
- pest control products.

The use of the criminal law power to legislate with respect to assisted human reproduction has been the subject of a constitutional challenge. The Government of Quebec filed a reference with the Quebec Court of Appeal to determine whether sections 8 to 19 (certain prohibited and controlled activities, privacy and access to information), 40 to 53 (inspection, seizure and forfeiture), 60 and 61 (offence and punishment) and 68 (non-application of provisions in a province) of the *Assisted Human Reproduction Act* (AHRA) exceeded Parliament's jurisdiction. On 18 June 2008, the Quebec Court of Appeal concluded that the provisions in question were not validly enacted under the federal criminal law power and infringed on provincial jurisdiction.

In a divided judgment released on 22 December 2010, the Supreme Court of Canada agreed with part of that decision. With a minor variation, four judges agreed with the Quebec Court of Appeal, while four others concluded that all of the challenged provisions of the AHRA were validly enacted. The ninth judge, Justice Cromwell, concluded that some of the provisions were validly enacted (e.g., section 8, use of reproductive material without consent), while others exceeded the legislative authority of Parliament (e.g., section 10(1), using human reproductive material to create an embryo except in accordance with the regulations and a licence). Justice Cromwell's reasons essentially provide the deciding judgment.

In response to this decision, in 2012 the federal government repealed all provisions of the AHRA that the Supreme Court found to have exceeded federal jurisdiction.³ The government announced at the same time that Assisted Human Reproduction Canada (AHRC), a federal agency that had administered the AHRA, would be wound down.⁴ The provisions of the Act that dealt with the establishment of AHRC and its operations were also repealed. Health Canada now administers the remaining provisions of the Act.

3 THE FEDERAL SPENDING POWER

The federal spending power is inferred from Parliament's jurisdiction in the *Constitution Act, 1867* over public debt and property (section 91(1A)) and its general taxing power (section 91(3)).⁵ Thus, Parliament may raise money by taxation and may spend it, or grant it to others, as it sees fit.

Although the provinces are responsible for the direct delivery of most medical services, the federal government uses its spending power to play a strong role in the Canadian medicare system through its financial contributions⁶ and by setting certain national standards by means of the *Canada Health Act*.⁷

Using its spending power, Parliament may set conditions for receipt of the money. The *Canada Health Act*, therefore, is constitutionally about the *financing* of health care, not health care directly, and the national standards it establishes are the conditions to which the provinces must adhere if they wish to continue to receive federal money. The only sanction on a province for breach of any of the Act's criteria or conditions is for the federal government to reduce or withhold payments to the province.

In a 1997 decision of the Supreme Court of Canada, Justice LaForest stated that Parliament has played its role in the provision of medical care

by employing its inherent spending power to set national standards for provincial medicare programs. The *Canada Health Act* ... requires the federal government to contribute to the funding of provincial health insurance programs provided they conform with certain specified criteria. (The constitutionality of this kind of conditional grant, I note parenthetically, was approved by this Court in *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 567.)⁸

In the past, some commentators argued that it should be required that federal money be spent for federal purposes. Now, however, the accepted view is that Parliament may contribute its revenues to matters that, legislatively, are within provincial jurisdiction:

It seems to me that the better view of the law is that the federal Parliament may spend or lend its funds to any government or institution or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate. There is a distinction in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant) ... [footnote omitted].⁹

It is the spending power that provides the basis for federal initiatives in areas such as:

- health research;
- health promotion;
- health information;
- disease prevention and control; and
- pilot projects in connection with provincial health care initiatives.

4 PEACE, ORDER AND GOOD GOVERNMENT

The introductory words to section 91 of the *Constitution Act, 1867*, the section that enumerates most of Parliament's legislative powers, gives Parliament the power to

make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

The courts have interpreted this residual power to be available primarily in times of emergency, or when a matter of "national concern" arises. For an issue to qualify as a national concern it must be indivisible, such that it would either be impossible for the provinces individually to deal with it, or it would require the cooperation of all of them, without which the country would suffer.¹⁰

The degree to which the peace, order and good government (POGG) power might be available to Parliament in a specific matter relating to health is an open question. There is little doubt that the power could be invoked should a national health emergency arise that the provinces could not deal with themselves.

Although the Supreme Court of Canada has from time to time made general statements that the POGG power holds some potential as a support for federal legislation, there is little specific case law from that court on the point. Moreover, in light of its expansive view of the criminal law power, the POGG power is less relevant than it might otherwise be.¹¹

5 OTHER FEDERAL RESPONSIBILITIES THAT BEAR ON HEALTH

Thus far, this paper has dealt essentially with the federal government's responsibility for matters directly related to public health and safety under the criminal law power, and its actions through the spending power. A number of other federal responsibilities also have a health *aspect*, and involve various departments and agencies.¹² These include:

- First Nations and the Inuit;
- active members and veterans of the military;
- prisoners in federal penitentiaries;

- health requirements for people applying to immigrate to Canada;
- occupational health and safety standards for employees in federally regulated industries;
- patents for medicines;
- environmental research and monitoring;
- fitness and amateur sport; and
- fitness for duty of air traffic controllers and pilots.

NOTES

- * The original version of this document was prepared by Margaret Young, formerly of the Library of Parliament.
1. [Schneider v. The Queen](#), [1982] 2 S.C.R. 112, p. 142.
 2. [RJR-MacDonald v. Canada \(Attorney General\)](#), [1995] 3 S.C.R. 199, para. 32.
 3. [Jobs, Growth and Long-term Prosperity Act](#), S.C. 2012, c. 19.
 4. Health Canada, "[Assisted Human Reproduction](#)," *Drugs and Health Products*.
 5. Karine Richer, [The Federal Spending Power](#), Publication no. 07-36-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 13 November 2007.
 6. Shahrzad Mobasher Fard, [The Canada Health Transfer](#), Publication no. 08-52E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 15 January 2009.
 7. *Canada Health Act*, R.S.C. 1985, c. C-6. For more on this topic, see Odette Madore, [The Canada Health Act: Overview and Options](#), Publication no. CIR 94-4E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 16 May 2005.
 8. [Eldridge v. British Columbia \(Attorney General\)](#), [1997] 3 S.C.R. 624, para. 25.
 9. Peter W. Hogg, *Constitutional Law of Canada*, Loose-leaf, 5th ed., Carswell, 2007, c. 6, pp. 18–19.
 10. For a thorough discussion of the Court's view of the national concern aspect of the peace, order and good government [POGG] power, see [R. v. Crown Zellerbach Canada Ltd.](#), [1988] 1 S.C.R. 401.
 11. See, for example, *Schneider v. The Queen*, judgments of Justice Laskin and Justice Estey; and [R. v. Wetmore](#), [1983] 2 S.C.R. 284, in which Justice Dickson discussed the POGG power in relation to the *Food and Drugs Act*, only to reject it as a constitutional basis for the Act. Although the Quebec Court of Appeal in *RJR-MacDonald v. Canada (Attorney General)* upheld the Act in question under the POGG power, the Supreme Court of Canada found that it was criminal law and therefore did not find it necessary to discuss the POGG power.
 12. Nancy Miller Chenier, *Federal Responsibility for the Health Care of Specific Groups*, Publication no. 04-52-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 14 December 2004.

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Jackman, Martha. "[Constitutional Jurisdiction Over Health in Canada.](#)" *Health Law Journal*, Vol. 8, 2000.