



Accountability in Health Care: The Legal Framework

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Provincial and Federal Divide — Impact on the Legal Framework

Types of Health Care Providers

Corporate Status of Hospitals

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Provincial and Federal Divide: Impact on the Legal Framework

In the Beginning, Confederation

– *Constitution Act, 1867*

- s. 91 sets out federal government's powers
- s. 92 sets out provincial governments' powers
- Both levels of government share most powers
- The courts clarify jurisdictional issues when in conflict

– Why Divide Power?

- History and culture
- Recognition of unique interests
- Accommodation of diversity through strong provincial governance

Health – Not of National Importance

- At Confederation, treatment of the ill was a private matter, the responsibility of:
 - Family
 - Neighbours
 - Charities
 - Religious Groups
- The consequence? No Constitutional monopoly on health care
 - Health care is not an enumerated head of power in the *Constitution Act, 1867*, it is “amorphous”

Where there is a jurisdiction, there is a way!

Federal Powers

- ✓ Spending
- ✓ Criminal Law
- ✓ Peace, Order & Good Government
- ✓ Indians, & Land Reserved for Indians
- ✓ Other Powers

Provincial Powers

- ✓ Hospitals
- ✓ Property & Civil Rights
- ✓ Local/Private Matters

Money, Money, Money! The Federal Spending Power

– A Powerful Blend

- Power to legislate re public property (s. 91(1)(a))
- Power to levy taxes (s. 91(3))
- Power to appropriate federal funds (s. 106)

– Creates a Heavy Regulatory Presence

- *Canada Health Act*
 - Establishes provincial eligibility for federal cash contributions towards health insurance costs
 - Publicly administered, comprehensive, universal, portable and accessible
 - Example - Medicare

What Else Does Spending Power Buy?

- Health Promotion
- Health-Related Research Initiatives
 - Canada Health Infoway
 - Canadian Institute for Health Information
 - Health Council of Canada
 - Canadian Institutes of Health Research
- Medical expense deductions under the *Income Tax Act*

A Mighty Sword — Criminal Law Power (s. 91(27))

- Protects health and safety
- Punishes conduct dangerous to health
 - *Food and Drugs Act*
 - *Hazardous Products Act*
 - *Tobacco Act*
 - *Canadian Environmental Protection Act*
 - *Controlled Drugs and Substances Act*

Peace, Order and Good Government (s. 91)

- To prevent or control an emergency
- If a national concern
 - *R. v. Schneider*
 - “Federal legislation in relation to ‘health’ can be supported where the problem is national rather than local in nature...”
 - *Crown v. Zellerbach Canada Ltd.*
 - Matters of national concern “must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern...”

Medicine Chest: Aboriginal Health (s. 91(24))

- Debate about the scope of federal responsibility for Indians, and Land Reserved for Indians
 - First Nations People characterize the provision of health services as a treaty right
 - Treaty No. 6, 1876
 - “In the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen...will grant...assistance of such character and to such extent...necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.”
 - Courts, relying on s. 88 of the *Indian Act*, have found that Aboriginal Peoples are subject to:
 - Laws of general application in force in any province
 - Provincial licensing laws
 - Some exemptions apply (Aboriginal healers and midwives)

First Nations, Inuit and Aboriginal Health Branch

- Provides coverage for a limited range of health-related goods and services not otherwise covered by provinces and territories
 - Drugs
 - Dental care
 - Vision care
 - Medical supplies and equipment
 - Short-term crisis intervention
 - Mental health counselling
 - Medical transportation
- Hires nurses and home care workers
- Transfers responsibility for Indian Health Services to Aboriginal communities

More Federal Powers — Take Your Pick!

– Other Constitutional Bases for Federal Health Regulation

- Naturalization and Aliens (s. 91(25))
- Military and Defence (s. 91(7))
- Creation and Maintenance of Penitentiaries (s. 91(28))
- Quarantine (*Quarantine Act*) (s. 91(11))
- Patents and Inventions of Discovery (*Patent Act*) (s. 91(22))

– Federal Government provides health care services for:

- Some Immigrants and Refugees
- Canadian Armed Forces
- Veterans
- Royal Canadian Mounted Police
- Inmates in Federal Penitentiaries

The Feds Have Been Busy!

– Some Examples of Federal Health Care Legislation

- *Assisted Human Reproduction Act*
- *Canada Health Act*
- *Canadian Centre on Substance Abuse Act*
- *Canadian Charter of Rights and Freedoms*
- *Canadian Environmental Protection Act*
- *Canadian Institutes of Health Research Act*
- *Constitution Act, 1867*
- *Controlled Drugs and Substances Act*
- *Criminal Code*
- *Food and Drugs Act*
- *Hazardous Products Act*
- *Patent Act*
- *Personal Information Protection and Electronic Documents Act*
- *Quarantine Act*
- *Tobacco Act*

Provincial Jurisdiction: Where It's At!

- Provincial power over:
 - Hospitals, Asylums and Charitable Institutions (s. 92(7))
 - Property and Civil Rights (s. 92(13))
 - Local or Private Matters (s. 92(16))
- Gives the provinces ***primary constitutional responsibility*** for health care in Canada

As Diverse and Complex as an Episode of *Grey's Anatomy*

- Many aspects to provincial hospital regulation, for example:
 - Establishment
 - Maintenance
 - Funding
 - Governance
 - Physician Privileges
 - Health Records
 - Privacy and Confidentiality
 - Rights of Patients and Employees

It's a Matter of Rights!

– Property and Civil Rights

- Supports provincial regulation of most legal relationships between individuals
 - Including those traditionally governed by civil and common law property, contract and tort law
 - Power to regulate health professionals and practices
 - Accreditation
 - Training
 - Licensing
 - Discipline
 - Definition of Practices

It's a Neighbourhood Thing

- Matters of a Local and Private Nature
 - Provincial Administration of:
 - Administration of health insurance regimes
 - Public health and protection at the municipal level
 - Sale of drugs

The Provinces Have Been Busy!

– Some Examples of Provincial Health Care Legislation

- *Ambulance Act*
- *Animals for Research Act*
- *Apology Act*
- *Audiology and Speech-Language Pathology Act*
- *Broader Public Sector Accountability Act*
- *Cancer Act*
- *Charities Accounting Act*
- *Child and Family Services Act*
- *Chiropody Act*
- *Chiropractic Act*
- *Commitment to the Future of Medicare Act*
- *Community Care Access Corporations Act*
- *Coroners Act*
- *Corporations Act*
- *Dental Hygiene Act*
- *Dental Technology Act*

- *Dentistry Act*
- *Denturism Act*
- *Development Corporations Act*
 - *Echo: Improving Women's Health in Ontario*
 - *eHealth Ontario*
 - *HealthForceOntario Marketing and Recruitment Agency*
 - *The Walkerton Clean Water Centre*
- *Dietetics Act*
- *Drug and Pharmacies Regulation Act*
- *Drug Interchangeability and Dispensing Fee Act*
- *Drugless Practitioners Act (to be repealed by proclamation)*
- *Environmental Protection Act*
- *Excellent Care for All Act*
- *Fair Access to Regulated Professions Act*
- *Freedom of Information and Protection of Privacy Act*
- *Good Samaritan Act*
- *Healing Arts Radiation Protection Act*
- *Health Care Consent Act*
- *Health Facilities Special Orders Act*
- *Health Insurance Act*
- *Health Protection and Promotion Act*
- *Health System Improvements Act*
- *Home Care and Community Services Act*
- *Homemakers and Nurses Services Act*
- *Homeopathy Act*
- *Homes for Special Care Act*
- *Human Rights Code*
- *Immunization of School Pupils Act*
- *Independent Health Facilities Act*

- *Kinesiology Act*
- *Laboratory and Specimen Collection Centre Licensing Act*
- *Local Health System Integration Act*
- *Long Term Care Homes Act*
- *Mandatory Blood Testing Act*
- *Mandatory Gunshot Wounds Reporting Act*
- *Massage Therapy Act*
- *Medical Laboratory Technology Act*
- *Medical Radiation Technology Act*
- *Medicine Act*
- *Mental Health Act*
- *Midwifery Act*
- *Ministry of Health and Long-Term Care Act*
- *Ministry of Health Appeal and Review Boards Act*
- *Naturopathy Act*
- *Nursing Act*
- *Occupational Health and Safety Act*
- *Occupational Therapy Act*
- *Ombudsman Act*
- *Ontario Agency for Health Protection and Promotion Act*
- *Ontario Drug Benefit Act*
- *Opticianry Act*
- *Optometry Act*
- *Patient Restraints Minimization Act*
- *Personal Health Information Protection Act*

- *Pharmacy Act*
- *Physician Services Delivery Management Act*
- *Physiotherapy Act*
- *Prepaid Hospital and Medical Services Act*
- *Private Hospitals Act*
- *Psychology Act*
- *Psychotherapy Act*
- *Public Guardian and Trustee Act*
- *Public Sector Compensation Restraint to Protect Public Services Act*
- *Public Hospitals Act*
- *Quality of Care Information Protection Act*
- *Regulated Health Professions Act*
- *Respiratory Therapy Act*
- *Retirement Homes Act*
- *Social Work and Social Service Work Act*
- *Statutory Powers Procedure Act*
- *Substitute Decisions Act*
- *Tobacco Damages and Health Care Costs Recovery Act*
- *Traditional Chinese Medicine Act*
- *Trillium Gift of Life Network Act*
- *Trustee Act*
- *Vital Statistics Act*
- *Workplace Safety and Insurance Act*

Types of Health Care Providers

Good People in a Noble Profession

– Types of Health Care Providers

- Institutions
- Regulated Health Professionals
- Non-Regulated Workers

– Institutions

- Charitable Institutions
- CCACs
- Community Psychiatric Hospitals
- Homes for Special Care
- Independent Health Facilities
- Laboratories
- Long-Term Care Homes
- Mental Health Institutions
- Public and Private Hospitals
- Public Health Agencies

Regulated Health Professionals

- Authorized to perform certain controlled acts relating to health care
- Requirements:
 - Education (Degree, Masters, PhD etc.)
 - Competency Standards
 - Ethical Standards
 - Governed by a regulatory body

Regulated Health Professionals

- Audiologists
- Chiropodists
- Chiropractors
- Dental Hygienists
- Dental Technologists
- Dentists
- Denturists
- Dieticians
- Homeopaths
- Kinesiologists
- Massage Therapists
- Medical Laboratory Technologists
- Medical Radiation Technologists
- Midwives
- Naturopaths
- Nurses
- Occupational Therapists
- Opticians
- Optometrists
- Pharmacists
- Pharmacy Technicians
- Physicians
- Physiotherapists
- Podiatrists
- Psychologists
- Psychotherapists
- Respiratory Therapists
- Social Workers
- Speech Language Pathologists
- Traditional Chinese Medicine Practitioners

Non-Regulated Health Care Providers

- Offer personal or basic care
 - Supervised by a regulated professional
 - Education varies from on-the-job training to college education
- Dental Assistants
- Diagnostic Sonographers
- Paramedics/Emergency Medical Technicians
- Personal Support Workers
- Physician Assistants
- Homemakers

Corporate Status of Hospitals

It's Not What You Think!

- Ontario public hospitals are private not-for-profit Corporations, not owned by government
 - Incorporated under provincial legislation
 - Articles of Incorporation dictate hospital's objectives
 - Governed and managed by private citizens
- Public Hospitals are:
 - Highly regulated by provincial legislation
 - Dependant on public funding (85%)

Charter Rights and Private Facilities

- *Eldridge v. BC (AG)*, 1997
 - “The Charter applies to private entities in so far as they act in furtherance of a specific government program or policy.”
 - “Just as governments are not permitted to escape Charter scrutiny by entering into commercial contracts or other “private” arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.”
 - Scrutinize the quality of the act, not the actor.

Thank you for your time and attention!

– ***Questions??***

