

CONSTITUTIONAL JURISDICTION OVER PUBLIC HEALTH

- A. Introduction
- B. Federal Jurisdiction
- C. Provincial Jurisdiction
- D. Contentious Jurisdictional Issues
 - 1. The Health Insurance Question.
 - 2. Responsibility for Indian Health.

A. Introduction:

The words health or public health do not appear in the British North America Act, 1867.¹ The situs of responsibility for health matters at the time of Confederation was commented on by the Rowell Sirois Commission:

In 1867 the administration of public health was still in a very primitive stage, the assumption being that health was a private matter and state assistance to protect or improve the health of the citizen was highly exceptional and tolerable only in emergencies such as epidemics, or for purposes of ensuring elementary sanitation in urban communities. Such public health activities as the state did undertake were almost wholly of local and municipal governments. It is not strange, therefore, that the British North America Act does not expressly allocate jurisdiction in public health, except that marine hospitals and quarantine (presumably ship quarantine) were assigned to the Dominion, while the province was given jurisdiction over other hospitals, asylums, charities and eleemosynary institutions. But the province was given jurisdiction over "generally all matters of a merely local or private nature in the Province", and it is probable that this power was deemed to cover health matters, while the power over "Municipal institutions" provided a convenient means for dealing with such matters.²

Over the past century however, governments at all levels have become increasingly involved in the provision of health services. Recently the senior levels of government have become extremely concerned about the expenditures required to provide these services.³ The rate of increase in costs is itself increasing.⁴ Concurrently the lack of a health care *system* is repeatedly and universally decried. Dr. Maurice Le Clair, the Federal Deputy Minister of Health, wrote in 1972:

Everyone - governments at all levels, physicians, organized medicine, hospital authorities, the Economic Council of Canada - all agree that something must be done. We cannot afford the inefficiencies, the escalating cost increases, the inequities of access to and quality of health care services in Canada. The current financing programs for the 'non-system' not only allows these, but in some cases, actually promotes them.⁵

The purpose of this paper is to show how the courts have divided the authority over public health between Parliament and the Legislatures thereby playing their role in the creation of the 'non-system'. The review that follows will demonstrate that provincial jurisdiction has not been founded exclusively upon ss. 92(16)⁶ and 92(8)⁷, as was contemplated at

1. 30 & 31 Victoria, c. 3 (U.K.).
 2. **Report of the Royal Commission on Dominion Provincial Relations**, Book 11, pp 32-33
 3. **Task Force on the Cost of Health Services in Canada**, Ottawa, Queens Printer, 1970; **Community Health Centre Project** (Hastings Committee), Queens Printer, 1972; **Report of the Commission of Inquiry on Health and Social Welfare** (Nepveu-Castonquay Report), Quebec, 1970; **Report of the Committee on the Healing Arts**, Toronto, Queens Printer, 1970; **White Paper on Health Policy**, Winnipeg, Queens Printer, 1972; **Health Security for British Columbians**, Victoria, 1973.
 4. **Community Health Centre Project** (Hastings Committee), p. V.
 5. **Canadian Medical Association Journal**, January, 1972.

union. The jurisdiction granted the federal government as well has been claimed through invocation of a number of statutory provisions.

B. Federal Jurisdiction:

The only express provision for Federal jurisdiction in the health field is contained in ss. 91(11), "Quarantine and the Establishment and Maintenance of Marine Hospitals." Many other activities, directly and indirectly related to public health have been carried on unchallenged by the federal government with jurisdiction being implied from several of the enumerated heads of s.91. Subsection 91(6), "The Census and Statistics", one assumes, provides support for the federal government's undertaking of the Canadian Sickness Survey⁸ and the recently completed Nutrition Canada Survey.⁹ Five other enumerated heads give Parliament exclusive jurisdiction over classes of persons¹⁰ including therewith the responsibility for their health care. The Canada Shipping Act,¹¹ section 283(1) is an example of the exercise of that authority:¹²

Where the master of, or a seaman belonging to, a Canadian ship receives any hurt or injury in the service of the ship, or suffers from any illness, not being an illness due to his own wilful act or default or to his own misbehaviour, the expense of providing the necessary surgical and medical advice and attendance and medicine, and also the expenses of the maintenance of the master or seaman until he is cured, or dies, or is returned to a proper return port, and of his conveyance to the port, and in the case of death the expense, if any, of his burial, shall be defrayed by the owner of the ship, without any deduction on that account from his wages.

The federal government's obligation to the Indian people for health care will be discussed more fully later.¹³

The federal government's trade and commerce power,¹⁴ has been a ground upon which parties have sought to have provincial regulatory statutes declared *ultra vires* the legislature. In *Rex v. Ferries*¹⁵ the defendant was charged with selling medicine without being registered under the Saskatchewan Medical Professions Act.¹⁶ The accused did possess a federal license¹⁷ to sell medicine and contended successfully that the federal jurisdiction in matters of trade and commerce took precedence over the province's exercise of its property and civil rights

6. Subsection 92(16): "Generally all Matters of a merely local or private Nature in the Province."

7. Subsection 92(8): "Municipal Institutions in the Province."

8. Illness and Health Care in Canada, The Canadian Sickness Survey; Queens Printer, Ottawa, 1960.

9. Both surveys were conducted in co-operation with the provincial governments. The federal government perceived the role of its health department as a co-operative one from the outset. The Department of Health Act, 1919 by section 4(a) specified:

"Co-operation with the provincial, territorial, and other health authorities with a view to the co-ordination of the efforts proposed or made for preserving and improving the public health, the conservation of child life and the promotion of child welfare."

10. 91(7) "Militia, Military and Naval Service, and Defence"; 91(10) "Navigation and Shipping"; 91(24) "Indians, and Lands reserved for the Indians"; 91(25) "Naturalization and Aliens"; 91(28) "The Establishment, Maintenance, and Management of Penitentiaries". Also note overlapping jurisdiction with federal powers paramount in relation to immigration under section 95.

11. R.S.C. 1970, Chap. S-9.

12. Whereas Part V Sick Mariners and Marine Hospitals would be an exercise of the jurisdiction conferred upon Parliamentary expressly by 91(11) "Quarantine and the Establishment and Maintenance of Marine Hospitals."

13. See *infra*, p. 17.

14. Subsection 91(2).

15. (1910) 15 Western Law Reporter 331 (Saskatoon Dist. Ct.).

16. Statutes of Saskatchewan, 1906, ch. 28.

17. Issued under the Dominion Proprietary or Patent Medicine Act, 7 & 8 Edw. VII, ch. 56.

power.¹⁸ In *Re Shelly*¹⁹ the same contention was advanced in an application for *certiorari*. The applicant challenged a City of Calgary by-law²⁰ requiring merchants of bread to wrap their product. Walsh J., in chambers, held that on its face it was clearly a health by-law and just because it affected a business did not make it a trade and commerce item.

The Alberta decision does not carry much more weight than the Saskatchewan one but its reasoning is to be preferred. If, in a contest concerning a health matter, the only federal claim is based on its trade and commerce power then the provinces' jurisdiction under property and civil right should prevail. This opinion is based on three considerations. First, if the health of the public requires safeguarding, then that effort should not be entrusted to a department with a commercial orientation, as one exercising trade and commerce powers would undoubtedly possess; second, it is open to the court to place constraints on the exercise of the public health function if it amounts to a real infringement upon trade and commerce,²¹ and third, as shown below, if abuse of food or chemicals become grave in nature, they can be attacked by the federal government under its criminal law power.²²

In *Ex Parte Wakaboyashi*²³ the Opium and Narcotic Drug Act²⁴ was challenged as being *ultra vires* the Dominion. Macdonald, J. dismissed the contention that it was legislation licensing a particular trade,²⁵ preferring to view it as a act seeking to remedy an evil and creating a new crime. In *Belleau v. Minister of National Health and Welfare*²⁶ Angers, J.²⁷ followed *Ex Parte Wakaboyashi* and *Standard Sausage Co. Ltd. v. Lee*²⁸ in confirming that the Opium and Narcotic Drug Act (1929) was validly enacted by the Dominion Parliament.

In *Standard Sausage Co. Ltd. V. Lee* the British Columbia Court of Appeal was called upon to determine the validity of the federal Food and Drug Act.²⁹ In assessing Parliament's jurisdiction when the food adulterant is of a non-injurious nature the court considered the enumerated trade and commerce and criminal law powers and also the peace, order and good government clause in the preamble of section 91. The entire court rejected

18. McLorg, Dist. Ct. J. concluded at P. 336:

Now, the sole jurisdiction to regulate trade and commerce being vested in the Dominion Parliament, it does not seem to me competent for the province to legislate in the manner they have done respecting the furnishing of medicine: or, to put it in another way, that it is not competent for the province to prohibit the sale of that which the Dominion Parliament has given license to sell.

19. (1913) 4 W.W.R. 741 (Alta. S.C.).

20. City of Calgary by-law No. 1377 read in part: No person shall deliver bread to any person or at any place within the City of Calgary unless such bread before it leaves any bakery, shop or place has been completely and securely enclosed and is thereafter so kept enclosed until delivery in some enclosed envelope or covering of such material and in such manner as effectually to protect such bread from dirt, dust and flies . . .

21. **The Canadian Pacific Navigation Co. v. The City of Vancouver** (1892), 2 B.C.R. 193. The defendant's Medical Health Officer stopped an entire boatload of the plaintiff's passengers from disembarking at Vancouver. They had boarded in Victoria which was experiencing an outbreak of small-pox. Crease, J. held the municipal by-law empowering the M.H.O. to "stop, detain and examine every person . . . coming from a place infected . . . with an infectious disease" was *intra vires* the defendant but (from the headnote) that the stopping of all the passengers without examinations was not an exercise of the powers reposed in the Corporation by the by-law, and was *ultra vires*. The injunction ordered made such stopping "subject only to such detention, examination, and inspection as may be reasonably necessary".

22. Subsection 91(27).

23. (1928) 49 C.C.C. 392 (B.C.S.C.)

24. The accused were charged with unlawfully selling cocaine and morphine, without first obtaining a licence from the Minister contrary to the provisions of s.4(f), S.C. 1923, c.22 as am. by c.20 s.3 of the Statutes of Canada, 1925.

25. Thereby making such legislation exclusively competent to the Legislatures under section 92(9).

26. [1948] Ex. Ct. R. 288.

27. *Ibid.*, at 316.

28. [1934] 1 W.W.R. 81 (B.C.C.A.)

29. R.S.C. 1927 c. 76.

the trade and commerce ground. Macdonald, J.A., speaking for the majority, upheld the legislation solely on the criminal law power. Martin, J.A. concurred in the finding that s. 91(27) continued into the dominion the view of English law that food adulteration was a criminal matter and therefore took precedence over the property and civil rights jurisdiction. He went on further to support the legislation under the residual power of the federal government:

The somewhat unusual element herein is that the subject matter of public health is an "un-enumerated head", and is only indirectly and partly "covered" by both sections, and therefore, in my opinion, the "general powers . . . committed to the Dominion Parliament" may be invoked to fortify its position in the practical working out of the "interlacing" powers in the manner adumbrated by Lord Watson.³⁰

Lord Watson in *A. G. for Ont. v. A.G. for Can.* (local Prohibition Case) stated that:

Matters in their origin local and provincial might become such as to effect the body politic of the Dominion and to justify Parliamentary legislation.³¹

Three years after Martin's opinion, his view of the relevance of the peace, order and good government clause to the field of health care was obliquely placed before the Privy Council.³² The treatment it received there will be discussed following a consideration of the provincial jurisdiction in the field of public health.

C. Provincial Jurisdiction:

Section 92, like s.91, enumerates only one matter directly related to health as being under the jurisdiction of the provinces; ss. 92(7), "The Establishment, Maintenance and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than Marine Hospitals." The authority of the province to detain persons in mental institutions³³ was upheld under this subsection "as being complementary to, and not in conflict with" the Criminal Code provisions³⁴ for such detention.³⁵

The lack of a more express attribution of legislative competence at the time of union did not prove to be difficult to the Quebec Court of Appeal in *Rinfret v. Pope*.³⁶ To combat an epidemic of small pox the Lieutenant Governor of the Province of Quebec proclaimed in force ch.38 of the Revised Statutes of Canada, "an act respecting the preservation of public health" and thereunder named a central Board of Health. The council of Quebec City did not comply with the provisions of that statute in appointing a local board. After the time prescribed by the proclamation had passed, the city nominated Rinfret to act as a member of a civic board of health authorized under a federal statute³⁷ which, it was alleged had repealed chapter 38. Pope, as a citizen of the city, challenged Rinfret's appointment.

30. [1934] 1 W.W.R. 81 at 98.

31. [1896] A.C. 348 at p. 361.

32. *Att. Gen. for Canada v. Att. Gen. for Ontario*, (Reference Re. Employment and Social Assistance Act) [1937] A.C. 355 (P.C.).

33. The Mental Hospitals Act, R.S.O. 1960, c.236, s.38.

34. Criminal Code, 1953-54 (Can.) s.524(1a) (enacted 1960-61, c.43, s.22).

35. *Fawcett v. Att. Gen. for Ontario and Att. Gen. for Canada*, [1964] S.C.R. 625.

36. (1886) 12 Q.L.R. 303 (C.A.).

37. Statutes of Canada 31 Vict. ch. 63, see 15.

In deciding that the nomination by the city council of Rinfret was null and void without effect, the court stated:

Considerant que le chapitre 38 des Statuts Réfondus du Canada contient des dispositions relatives au maintien de la santé publique dans la ci-devant province du Canada, maintenant les provinces d'Ontario et de Québec, et que toute législation sur la santé publique dans chaque Province, à l'exception des établissements de quarantaine et des hôpitaux de marine, tombe dans les attributions législatives de chaque province; Et considérant que le Parlement de la Puissance n'avait aucun pouvoir de rappeler les dispositions du dit chapitre 38 des Statuts Réfondus du Canada, et que le statut était encore en vigueur lors des divers procédés relatés dans les plaidoiries qui ont eu lieu sous l'autorité du dit acte: 38.

The statutory provisions supporting this finding however, are not enunciated. The public health power which resided in the province of Canada before Confederation is deemed by the court to reside in the separate provinces after confederation. This view of the transference of the public health power carried out by the Governor, as an official of the central government, to the newly created provinces is adapted in two Western Canadian decisions. In *A.G. for B.C. v. Milne*³⁹ the power granted to the Governor by the Health Ordinance of 1869 was held to be continued in the province by enactment of the Health Act,⁴⁰ thereby rendering valid the dismissal by the Lieutenant-in-Council of the defendant Medical Health Officer. Similarly in Alberta the Medical Professions Act,⁴¹ was found *intra vires* the province since s.16 of the Alberta Act,⁴² in creating the new province, provided for the continuance of North West Territories law unless changed.⁴³

The requirement that health professionals be registered is supported by the wide interpretation given to s. 92(9).⁴⁴ *Ex. Parte Fairbairn*⁴⁵ found as included in 'other licences' the registration of professionals.

In *Re Stinson and College of Physicians and Surgeons of Ontario*⁴⁶ a medical doctor, who had been acquitted on a charge of conducting an illegal abortion, challenged the authority of the Medical Council to conduct its own inquiry. One ground of his challenge was that this inquiry was of a criminal nature and *ultra vires* the provincially appointed body. Riddell, J. was affirmed by the Ontario Court of Appeal in his finding that only the civil right of the physician to practise his profession was being affected and that such an inquiry was therefore within the jurisdiction of the province. The jurisdiction to appoint the members of such boards or councils was challenged in *Re Hayward*.⁴⁷ The Board of Examiners appointed under the

38. 12 Q.L.R. 303 at 315. Translation:
CONSIDERING that Chapter 38 of the Revised Statutes of Canada contains dispositions relating to the maintenance of public health in the above mentioned province of Canada, now the provinces of Ontario and Quebec, and that all legislation dealing with public health in each province, with the exception of quarantine facilities and marine hospitals, falls within the legislative jurisdiction of each province:

AND CONSIDERING that the Parliament in power (Parlement de la Puissance) did not have the power to repeal the dispositions of the said chapter 38 of the Revised Statutes of Canada, and that the statute was still in force at the time of the various proceedings referred to in the pleadings which took place under the authority of the said act.

39. (1892) 2 B.C.R. 196 (Divisional Ct.).

40. Can. Stat. B.C. 1888 cap. 55.

41. 6 Edw. VII (1906) ch. 28 (Alta.)

42. 4 & 5 Edw. VII (1905), ch. 3 (Can.).

43. *Laferty v. Lincoln* (1907), 38 S.C.R. 620.

44. "Shop Saloon, Tavern, Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes."

45. (1877) 18 N.B.R. 4 (C.A.)

46. (1911) 22 O.L.R. 627 (C.A.)

47. [1934] O.R. 133 (Weekly Ct. Tor.)

Optometry Act⁴⁸ had revoked the registration of several optometrists who had been convicted of fraud and misrepresentation and found incompetent. It was contended that the powers exercised by the examiners constituted them "judges of the Superior District, (or) County Courts" and as such their appointment was reserved by s.96 to the Governor General. Kingston, J. rejected that argument and based his finding on the following grounds; first, the operative section of the Optometry Act concerned civil rights; second, the province has jurisdiction over civil rights; and third, s.92(14)⁴⁹ encompassed the function of the Board of Examiners, s.96 was not applicable. In *Landers v. New Brunswick Dental Society and A.G. of New Brunswick*⁵⁰ a similar professional Act⁵¹ was held to be *intra vires* the province within subsection 92(13), while the provisions for penalties for infractions of the Act were a valid exercise of the power conferred by s.92(15).⁵²

The province's jurisdiction over education by s.93 permits it to exercise control over "medical diplomas, certificates" and the tests administered to determine competency to practise in the health professions.⁵³

D. Contentious Jurisdictional Issues:

D.1. *The Health Insurance Question.* The most striking feature of health care in Canada today is the universal hospital and medical insurance programs. The two major expenses an individual incurs during illness, the hospital bill and the doctor's fee, are paid for out of the health insurance scheme. The constitutional jurisdiction over health insurance is not exclusively assigned to one level of government.

The first step towards such a scheme was enacted as Part IV of the Employment and Social Insurance Act.⁵⁴ This Act was one of eight "New Deal" statutes referred to the Supreme Court of Canada to determine whether it was valid federal legislation. The question of health insurance would be decided upon the same merits as the main component of the legislation which enacted a national unemployment insurance program:

The other parts of the Act are so inextricably mixed up with the insurance provisions

48. R.S.O. 127 Ch. 215 as am. 1931, 21 Geo. V ch.45, sec.3. The section challenged as *ultra vires* of the Ontario Legislature was section 8. Section 8(1) reads:

"Where the Board is satisfied that any person, who is the holder of a certificate under this Act, has been guilty of illegal practices, incompetency, inebriety, fraud or misrepresentation, the Board may prohibit such person from practising or carrying on business as an optometrist or optician and may revoke any certificate granted to him, but before the issue of such prohibition or the revocation of such certificate, the person charged shall be given notice in writing of the charge or charges against him and shall have an opportunity of being publicly heard and producing testimony on his own behalf."

49. "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organisation of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

50. (1957) 7 D.L.R. (2d) 583 (N.B.C.A.).

51. New Brunswick Dental Act, 1953, (N.B.) c.30.

52. "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section."

53. **Metherell v. The Medical Council of British Columbia** (1892) 2 B.C.R. 186. In the case at hand the plaintiff was a duly registered physician under the Imperial Medical Acts. Begie, C.J. held the laws of the Imperial Parliament were sovereign to both the Dominion Parliament and the Provincial Legislature. The province's supremacy in relation to education under the B.N.A. Act arose only between the Dominion and the province. The learned Judge averred to the defendant's sense of propriety in his finding: "I hope that the Council will, with all due speed, make rules and orders adapted to this contingency which will apply to future cases; but they must, and probably will without further litigation, admit the plaintiff at once. (However) if they do not, a *mandamus* must issue."

54. 25-26 Geo. V, c.38. The National Health part of the Act contained only 3 sections. The directions given by this Part to the Commission included: s.40(a) to assemble reports, publications, information and data; s.40(b) to analyse the assembled information; s.40(c) to examine and report on any proposed scheme.

of Part III that it is impossible to sever them. It seems obvious, also, that in its truncated form, apart from Part III the act would never have come into existence.⁵⁵

In "The Judicial Review of Prime Minister Bennett's 'New Deal' "⁵⁶ W. H. McConnell sets out the constitutional problem:

The constitutional problem presented by the statute was whether unemployment insurance was like any other type of insurance and thus a matter of contract falling under section 92(13), or whether as "social insurance", it was an insurance *sui generis* not subject to classification with commercial insurance contracts. In the latter case, it might be argued that (despite the precedents conferring jurisdiction over commercial contracts on the provinces) nation-wide social need would enable the government to enact the *new* species of social insurance under the residuary clause. The answer to this question could well depend on the extent to which the judiciary were willing to consider sociological factors, in addition to strictly legal ones, before rendering their judgments.⁵⁷

The reference however was dealt with by the court as a legal problem. The federal government argued in support of the Act's validity as federal legislation under the "peace, order, and good government" clause,⁵⁸ the trade and commerce power and the taxing and spending power enumerated under s.91(3) and 91(1).⁵⁹ Each of the provisions relied upon by the federal government were attacked by the provincial governments as being an encroachment of the provinces' property and civil rights power. Ontario rejected all the federal grounds except that based on the residuary power:

Counsel for Ontario acknowledged the need for the legislation, conceded that the Dominion was the only law-making authority which could achieve the desired purpose on a nation-wide scale and sought the upholding of the legislation under the residuary clause.⁶⁰

The legislation was ruled *ultra vires* the Dominion by the Supreme Court and that finding was affirmed by the Privy Council. Mr. Justice Rinfret spoke for the majority of the Supreme Court:

Insurance of all sorts, including insurance against unemployment and health insurance, have always been recognized as being exclusively provincial matters under the head "Property and Civil Rights" or under the head "matters of a merely local and private nature in the Province."⁶¹

Lord Atkin delivered the opinion of the Judicial Committee:

There can be no doubt that, *prima facie*, provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of

55. (1937) A.C. 355 at 367.

56. (1968) 6 Osgoode Hall L.J. 39.

57. *Ibid.* at pp. 43-44.

58. See *supra* p. 7, per Martin, J.A.

59. 91(3) "The raising of money by any mode or system of taxation."; 91(1) "The Public Debt and Property" (re-numbered 1A by the B.N.A. Act (No. 2), 1949, 13 Geo. VI, c.81(U.K.)).

60. (1968) 6 Osgoode Hall L. J. 39 at 66.

61. [1936] S.C.R. 427 at 451. McConnell at p. 67 criticizes the breadth of Mr. Justice Rinfret's considerations:

"Rinfret's sweeping generalization that insurance as a category belonged to provincial jurisdiction might have been more effectively questioned had counsel for the Dominion drawn a sharper distinction between the ordinary classes of commercial insurance and the proposed unemployment insurance measure which belonged, surely, to a newer category of social insurance. Ordinary commercial insurance, whether it guarded against fire, theft, loss of life or property was essentially a contract of indemnity protecting contracting individuals against stipulated risks upon the voluntary payment of a premium. Unemployment insurance, on the other hand, was designed to protect a large segment of the entire labouring force from a social evil which had faced them with increasing severity since 1929, by compulsorily levying a tax which everyone within the specified class had to pay. There was a comprehensiveness and a broad social purpose in unemployment insurance which ordinary commercial insurance lacked. To draw an analogy between the two, as Rinfret did for the purpose of asserting jurisdiction over the whole class of insurance, was dubious."

property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature.⁶²

The dissenting opinion of Chief Justice Duff in the Supreme Court would have upheld the federal jurisdiction upon the Dominion's taxing and spending power.⁶³ This strong dissent has been relied upon in support of the federal spending power.⁶⁴

This decision, by not recognizing the national dimensions (and potential public cost) of social insurance programs, has led to the difficult position that the level of government with the financial resources necessary to meet the costs of health care does not have the jurisdiction to affect directly the administration of public health programs.⁶⁵ The converse is also true; that the level of government responsible for providing the most costly of government services does not have the power to raise the reserves to meet those demands.

The public administration problems caused by the current constitutional arrangement is still not fully appreciated by the court. The recent case of *Mercer v. A.G. for Canada*⁶⁶ has served to entrench the jurisdictional dichotomy in health care. Dr. Mercer, a medical practitioner, applied from a judicial declaration that the Medical Care Act⁶⁷ was *ultra vires* the Parliament of Canada. At trial and upon appeal the plaintiff was held to be lacking the necessary status to seek such a declaration. In *obiter*, Lieberman J. commented on both grounds of the application. The first ground was that in 'pith and substance' it was legislation intended to regulate and control medical services and practice within the province:

A study of the Medical Care Act disclosed that it is legislation designed to confer upon those provinces enacting health insurance schemes embodying certain conditions set out in the said Act grants from the consolidated revenue fund of the government of Canada.⁶⁸

The second ground advanced was coercion by the federal government on the province to enact the Alberta Health Insurance Act.⁶⁹

In addition I am asked to infer coercion from the magnitude of the grants made to the Province of Alberta, namely, \$38,000,000 . . .⁷⁰

62 [1937] A.C. 355 at 365

63 [1936] S.C.R. 427 at 457

"Parliament, by property framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or to accept it subject to such conditions. As to the first point, it is also undoubted, I conceive, that Parliament, by property framed legislation may raise money by taxation, and this may be done either generally or for the specific purpose of providing the funds wherewith to make grants either before or after the conferring of the benefit."

The qualification placed on this principle by the Judicial Committee appears not to have deterred the federal government. Lord Atkin's restriction is at [1937] A.C. 355 at 366-7.

"But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion legislation."

It may still be legislation affecting the classes of subjects enumerated in S. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property (e.g. the Consolidated Revenue Fund), may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence."

64 **Federal-Provincial Grants and the Spending Power of Parliament**, Prime Minister's Office, Ottawa, 1969

65 **Health Care in Canada: A Commentary Background Study for the Science Council of Canada, Special Study No. 29**, August 1973 at p. 89

"The constitutional position makes it hard for the Federal Government to lead in these matters, it can only influence the provinces by indirect means, usually fiscal, which while powerful enough to effect great changes, as experience has shown, are fraught with difficulties."

66 [1972] 24 D.L.R. (3d) 658 (Alta. C.A.) affirming [1971] 3 W.W.R. 375 (Alta. S.C.)

67 1966-67 (Can.) c. 84 now R.S.C. 1970, chap. M-8

68 [1971] 3 W.W.R. 375 at 385

69 Statutes of Alberta 1969 ch. 43

70 [1971] 3 W.W.R. 375 at 384

Having found that coercion was not established by the plaintiff, the learned Judge states:

Even if the Medical Care Act were found to be coercive there is some doubt in my mind if that, in itself, would be sufficient ground for declaring it invalid. The Government of Alberta in passing the Alberta Health Care Insurance Act acted of its own free will; it was within its power to enact this legislation and so qualify for the contributions made pursuant to the Medical Care Act or to refuse to do so and thereby forego the contributions. It is still within its power to revoke or amend the Alberta Health Care Insurance Act, at the risk of losing the said contributions.⁷¹

Alberta would surely be exceptional among the provinces if it could absorb the entire costs of health care without cost sharing from the federal government.

D2. Responsibility for Indian Health: The Parliament of Canada was conferred exclusive jurisdiction under section 91(24), "Indians, and Lands reserved for Indians". Included therein, it was assumed, was the responsibility for the provision of health care.⁷² Under the Indian Act,⁷³ regulations⁷⁴ and by-laws⁷⁵ pertaining to health services and medical treatment have been passed. Also, the federal government's Treaty No. Six⁷⁶ contained the following clause:

That a medicine chest shall be kept at the house of each Indian agent for the use and benefit of the Indians at the direction of such agent. That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, or being satisfied and certified thereof by Her Indian Agent or Agents, will grant . . . assistance of such character on to such extent as the Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity . . . befallen them.

This assumption that responsibility rests with the federal government has recently been challenged by the federal government.⁷⁷

There are no Federal Statutes, including the Indian Act, which establish the right of Indians to free health services or to be provided with health services directly by the Federal Government.

and later:

It is therefore as a *matter of policy* rather than as a statutory or treaty obligation that the Federal Government has provided certain health services to Indians and has asked Parliament each year through appropriation Acts for the authority and the resources to provide these services.

The merely permissive view of federal responsibility reflects the finding of the Saskatchewan Court of Appeal in *Regina v. Swimmer*.⁷⁸ The respondent accused, being an Indian as defined under the Indian Act withheld his

71. *Ibid.* at 384-5: The learned judge appears to echo the view expressed by Duff C. J. on the spending power see note 63.

72. As with other classes of persons enumerated under section 91. See *supra*, p. 3, fn. 10.

73. R.S.C. 1970 Chap. 1-6.

74. Section 73(1) "The Governor General in Council may make regulations

(g) to provide medical treatment and health services for Indians.

(h) to provide compulsory hospitalization and treatment for infectious diseases among Indians."

75. Section 81. "The council of a band may make by-laws not inconsistent with this Act of with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely:

(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases."

76. Made between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with adhesions and concluded in 1876.

77. "Policy of the Federal Government concerning Indian Health Services", November, 1974.

78. [1971] 1 W.W.R. 756 (Sask. C.A.)

payment required under health insurance legislation passed by the provincial government. Culliton C.J.S. held:

As I have already stated, the terms of Treaty No. Six do not impose upon the Government of Canada the obligation of providing without cost, medical and hospital services to all Indians. Moreover, I know of no Act of Parliament that purports to do so. Under these circumstances, the respondent was subject to the provisions of The Saskatchewan Hospital Act and the Saskatchewan Medical Care Insurance Act, being laws of general application, and liable for the tax thereunder.⁷⁹

The federal government now contends that Indian health care is within the responsibility of the provinces. Section 88⁸⁰ of the Indian Act makes applicable to Indians all laws of general application within the province. In considering the scope of the Hospital Services Insurance Act,⁸¹ Smith, C.F.M. in *Manitoba Hospital Commission v. Klein and Spence*⁸² found that that Act applies to all residents, including Indians.⁸³ Thus it appears that the federal government has sweeping jurisdiction over matters affecting Indians but no legal responsibility for their health services.

Could such reasoning be applied to those classes of persons in the military or in penitentiaries? Would provincial health legislation expressly excluding Indians, the military and prisoners be valid? Since health care in general is now such a controversial topic, this hazing of jurisdictional responsibility may conceivably be utilized by governments to extricate themselves from the seemingly insoluble problem.

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79. *Ibid.* at 760. The meaning of the "medicine chest" clause was narrowly construed in the earlier case of *Regina v. Johnstone* (1966) 56 W.W.R. 566 (Sask. C.A.).

80. Section 88 reads:

"Subject to the terms of any treaty and any other Act of the Parliament of Canada, **all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province**, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act. (emphasis added)."

With respect to health care, all but the emphasized portion of the section seems now to carry a hollow sound.

81. Statutes of Manitoba, 1962 ch. 30.

82. (1969) 70 W.W.R. (Man. C.A.) aff'g 67 W.W.R. 440 (Q.B.)

83. *Ibid.* p. 79.