

# Healthcare in Canada: cooperative or competitive federalism?



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# Is Canadian healthcare policy making up for cooperative or competitive federalism?

## Thoughts following the AHR Act and Insite cases

# Conflicts of jurisdiction: from the past to the future

- It has been a long time since we have witnessed such intense jurisdictional conflicts on healthcare in Canada
- The interesting thing is that those conflicts do not only stem from the division of powers as spelled out in the *Constitution Act, 1867*, s. 91-92.
- Charters also play a major role (*Elridge, 1997; Chaoulli, 2005*)

# Let's look into the present

Where do current conflicts come from?

**The federal government wants to establish national norms in health care, (of a different type than those from the CHA): 2 recent cases**

# *Re AHR Act (1)*

What is at stake: uniform regulation of the practice and research of assisted human reproduction

The Baird Commission wanted national norms for the controlled activities, which it assumed the federal government could impose based on POGG powers.

## ***Re AHR Act (2)***

J. LeBel & Deschamps: «Of particular interest to us in the case at bar is **federalism**.

According to this principle, the powers of different levels of government in a federation are **co-ordinate**, not **subordinate**, powers.»

The court of Appeal of Quebec said that the approach suggested by the Baird

Commission and endorsed by the Act: «*met en cause l'un des principes qui fondent le Canada: le fédéralisme*»

## ***Re AHR Act (3)***

***Para 137 (CA): «La pertinence d'une législation unique pour tout le Canada en vue de réglementer une activité admise et reconnue n'est pas un objectif attributif de compétence en droit criminel»***

# *Insite*

The federal government wants to prohibit supervised drug injection sites across Canada

«Insite was the product of cooperative federalism. Local, provincial and federal authorities combined their efforts to create it.» - para 19.

*A contrario*, putting an end to it rejects the very idea of cooperative federalism



# Cooperative federalism?

Foundational principle of Canadian federal regime:

**Reconcile diversity with unity** (*Re Secession of Qc*)

*Collaborative federalism's Motto!*

# Are national norms in healthcare always contrary to collaborative federalism?

No, sometimes they may also be a condition to cooperative federalism

Canada Health Act (CHA): 5 principles with major structuring impact on healthcare: based on spending powers

The use of spending powers to promote equivalent access to public services based on comparable tax burden is recognized at s. 36 *Constitution Act*, 1982.

# Unrecognized coordination between provinces

- *Chaoulli*
- J. Deschamps: Only 6 provinces out of 10 enacted a prohibition of duplicative private insurance; hence, she said, the rule cannot be that important for the regime. The absence of national norms becomes an indication to qualify the rule as superfluous
- However, those 6 provinces represented 90% of the potential private insurance market. Therefore, the excellent provincial coordination was totally ignored by the Supreme Court

## Conclusion (1)

National norms in healthcare may upset the foundational structure of federalism

### Exception: CHA

«No citizen would doubt that Canada, over many years, has established a robust posture in negotiating with the provinces towards establishing these shared-cost programme's which are intended to provide all Canadians with common national standards of services», *Winterhaven, CA Alberta, 1988*

## Conclusion (2)

The future may hold a reversal of attitudes we have seen in the past.

The federal government:

1. May back up from duties recognized by s. 36 *Constitution Act, 1982*
2. May push forward imposition of national norms based on moral judgment



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