

PANDEMICS AND PANDEMONIUM: CONSTITUTIONAL JURISDICTION OVER PUBLIC HEALTH

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ABSTRACT

It has long been accepted that the provinces have general jurisdiction over healthcare. But many aspects of public health – the branch concerned with the welfare of populations – can be argued to lend themselves to federal involvement. This was recently illustrated in 2003 when SARS, a previously unknown disease, arrived in Toronto and wreaked havoc on the local public health system. The epidemic highlighted numerous shortcomings within Ontario's system and caused us to question those of the other provinces. Not surprisingly, the federal government quickly came under heavy pressure to take leadership and action in respect of public health. In response, we received the Public Health Agency of Canada (PHAC). However, the agency's full mandate is unclear at the time of this paper, and as yet it is without an enabling statute.

This article is concerned with the extent, if any, of the constitutional jurisdiction for federal involvement in public health. It will use hypothetical federal legislation regarding infectious disease control to evaluate the possible heads of power for such involvement: Peace, Order and Good Government; Criminal Law; the Spending Power; and Quarantine and Marine Hospitals. The author will then review the long-held bases for provincial jurisdiction: Municipal Institutions; Hospitals; Property and Civil Rights; and Matters of a Local or Private Nature. Throughout the paper, the author makes reference to public health's constant struggle to balance

individual rights with the welfare of the larger community. The author observes that there is a great deal of variation among the provinces in how they have chosen to balance these interests, and suggests that this variation can be attributed to the societal and cultural differences among the provinces. The author concludes by asserting that when a subject matter not only implicates provincial heads of power but plays heavily upon local values, there is excellent reason to leave primary jurisdiction with the provinces in all but extreme cases, despite the arguments which could be made for federal jurisdiction.
