

Protecting Human Research Subjects: A Jurisdictional Analysis

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1. Introduction

The most recent speech from the throne contained a pledge from the federal government to “work with provinces to implement a national system for the governance of research involving humans, including national research ethics and standards.”¹ This commitment signals a desire on the part of the federal government to address concerns about the inadequacies of the current governance of health research involving humans [RIH]. To this end, Health Canada’s Ethics Division is currently exploring the ways in which such a national governance system for RIH might be implemented.² It is important for the federal government, as it moves toward making good on its Throne Speech pledge, to have clarity concerning the jurisdictional authority to legislate with regard to RIH. Specifically, it needs to be clear about whether the constitutional jurisdiction over RIH rests with the federal government, the provinces or whether it is divided or shared between them. The answer to this jurisdictional question will shape the federal government’s approach to any negotiations with the provinces concerning the creation and implementation of a national system of governance for RIH. Addressing the jurisdictional issues is an important precursor to any negotiation process for two reasons. First, the scope of federal and provincial power over RIH is key both to the design and implementation of a comprehensive national system of regulation over RIH. It is necessary to determine which sphere of government has the power to do what before deciding how to go about creating a national governance system. Second, knowing the extent and the scope of federal jurisdiction with respect to RIH might strengthen the negotiating position of the federal government vis a vis the provinces. It will provide clarity as to what the federal government could do in terms of regulating RIH if the provinces are unwilling to cooperate. In short, it will make clear whether, and to what extent, the

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¹ Canada, Governor General, *The Canada We Want: Speech From the Throne to Open the Second Session of the Thirty-Seventh Parliament of Canada – September 30, 2002* (Ottawa: Her Majesty the Queen in the Right of Canada, 2002) at 9.

² Canada, Health Canada, *A Canadian System of Oversight for the Governance of Research Involving Human Subjects*, (Ottawa: Science Advisory Board, 2002), online: Science Advisory Board <http://www.hc-sc.gc.ca/sab-ccs/feb2002_governance_subject_e.html>.

federal government needs provincial agreement to regulate RIH and what options are available to the federal government if such agreement is not attained.

This article takes up this preliminary issue of jurisdiction with respect to legislation concerning the regulation of RIH. In particular, it assesses the extent and scope of federal jurisdiction over RIH and considers its options from a jurisdictional point of view in securing a national system of governance of RIH. Thus, this article does not address the wisdom of a national system of regulation with respect to RIH.³ We do not here offer an answer to the question “*should* the federal government regulate RIH?” or “*should* there be a national system of regulation?” Rather, we are here concerned with the question of whether or not the federal government *can* legislate in this area or, perhaps more specifically, “*how can* the federal government fulfill its pledge to create and implement a national system of governance for RIH?” This article is thus intended to clarify the jurisdictional context⁴ in which negotiations over the governance of RIH will take place.

2. Overview of Constitutional Division of Powers Analysis

Before considering the specific constitutional jurisdiction over RIH, a brief overview of the analytical framework for assessing constitutional validity on jurisdictional grounds is necessary. The *Constitution Act, 1867*⁵ sets the basic ground rules in ascribing powers to the federal and provincial orders of government, with the courts acting as constitutional umpires. In doing so, courts proceed by way of a two-step process. First, the court must determine the subject matter of the impugned legislation. Courts then embark on an interpretation of the power-distributing provisions of the *Constitution* in order to determine whether the subject matter of the challenged law falls within the powers assigned to the enacting body. We will deal with each step in turn.

³This issue has, however, been addressed by others. See especially Law Commission of Canada, *The Governance of Health Research Involving Humans (HRIHS)*, (Ottawa: Law Commission of Canada, 2000) (Principal Investigator: Michael McDonald); Michael McDonald, “Canadian Governance of Health Research Involving Human Subjects: Is Anyone Minding the Store?” (2001) 9 Health L. J. 1; Alf Chaiton, Gilles Paquet & Chris Wilson, *Governance of the Ethical Process for Research Involving Humans* (Ottawa: Centre on Governance, University of Ottawa, 2000).

⁴It is important to be clear at the outset that this paper will only address one aspect of the constitutionality of potential legislation in this area – namely its jurisdictional validity. For a piece of legislation to pass constitutional muster it must be enacted by the level of government with jurisdiction over the subject matter and it must be consistent with the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [*Charter*]. The two constitutional requirements involve different questions and analysis. The federalism (jurisdictional) stage of inquiry asks: which level of government can legislate? Whereas at the *Charter* stage, the issue is whether legislation can be enacted at all. In the case of RIH there seems to be no obvious *Charter* impediment to legislation of this kind. Whether or not legislation can withstand *Charter* scrutiny will depend on the exact form of the legislation. Thus, the *Charter* aspect of constitutionality is better left to be considered in more detail at the development and drafting stage of legislation on RIH. The jurisdictional issue must therefore be resolved in order to determine who has the authority to legislate in this area before proceeding with a detailed consideration of the content of such legislation.

⁵(U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution*].

Cast in constitutional language, the first step involves courts asking “what is the legislation *in relation to*, or what is its *pith and substance*?”⁶ The aim, at this stage of the analysis, is to identify the dominant or most important characteristic of the law.⁷ It is important to note that this determination does not mean that a law cannot have other effects. It is permissible for legislation to have a central purpose related to a matter within the jurisdiction of one level of government and nonetheless have significant effects on a subject matter outside that level of government’s jurisdiction.⁸ So long as these effects are incidental to the purpose of the legislation they will not be determinative of jurisdiction. As the Supreme Court recently explained in the *Reference Re Firearms Act*:

The determination of which head of power a particular law falls under is not an exact science. In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree. As Dickson C.J. stated in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669, ‘overlap of legislation is to be expected and accommodated in a federal state’. Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have ‘incidental effects’ upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other.⁹

Courts will look at both the purpose and effect of the law in characterizing the subject matter of a law. To this end, it is helpful if the legislature makes the purpose of the law clear on the face of the statute, although courts are not bound to accept what is said at face value if there are grounds for assuming an ulterior motive. Courts will then look beyond the form of the law or its stated purpose to consider the substance of the law. The doctrine of colourability can be invoked in cases where a court finds that while the stated purpose or form of the law is within the jurisdiction of the enacting body, the actual substance of the law falls outside this jurisdiction.¹⁰

The second step in the courts’ discernment process, as to whether a law is *intra* or *ultra vires*, is the interpretation of the power-distributing provisions of the *Constitution* to determine whether the subject matter of the challenged law falls

⁶ Hogg traces this phrase to Lord Watson’s decision in *Union Colliery Co. v. Bryden*, [1899] A.C. 580 at 587 (P.C.) as cited in Peter Hogg, *Constitutional Law of Canada*, 2001 Student ed. (Toronto: Carswell, 2001) at s.15.5(a), n. 20.

⁷ *Ibid.* at s. 15.5(a).

⁸ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 [*City National Leasing*].

⁹ [2000] 1 S.C.R. 783 at para. 26 [*Firearms Reference*].

¹⁰ For a general discussion of the doctrine of colourability see Hogg, *supra* note 6 at s. 15.5(f).

within the powers assigned to the enacting body.¹¹ Generally, the answer to the characterization question in the first step is made mindful of this next step in that the language used to characterize the impugned law is often drawn from that used in the division of powers sections of the *Constitution*. The characterization of the challenged law is thus often determinative of the subsequent question as to where power over such a matter resides.¹²

The opening words of ss. 91 and 92 of the *Constitution* grant to each sphere of government exclusive power over the subject matters listed therein.¹³ The division of powers in the *Constitution* is intended to be exhaustive. This means that there is no subject matter that is not within the jurisdiction of either the provinces or the federal government. Further, in most cases, each level of government enjoys exclusive jurisdiction over the subject matters assigned to it. However, determining jurisdiction is not as simple as this explanation might suggest. It is complicated by the fact that some issues are not considered subject matters in and of themselves that can be assigned wholly to one level of the government or the other. As will be discussed in the next section of this paper, “health” is one such topic.

Jurisdictional determinations are also made more complex because a law can have more than one aspect, and thus each aspect might fall under different heads of jurisdiction. Thus it is possible to characterize two similar laws as concerned with two different subject matters, one within provincial jurisdiction and the other within federal. This is referred to as the double aspect doctrine.¹⁴ As the Supreme Court of Canada explains, this doctrine allows that:

...two relatively similar rules or sets of rules may validly be found, one in legislation within exclusive federal jurisdiction, and the other in legislation within exclusive provincial jurisdiction because they are enacted for different purposes and in different legislative contexts which give them distinct constitutional characterizations.¹⁵

¹¹ Contained primarily in ss. 91 and 92 of the *Constitution Act, 1867*, *supra* note 5. Section 91 details the powers of the Parliament of Canada and s. 92 lists the powers of the Provincial Legislatures. Additional provisions that address the allocation of jurisdiction include: s. 92A (“Non-Renewable Resources, Forestry Resources and Electrical Energy”); s. 93 (“Education”); s. 94A (“Old Age Pensions”); s. 95 (“Agricultural and Immigration”); and s. 96 (“Judicature”).

¹² Hogg, *supra* note 6 at s. 15.5(a).

¹³ *Constitution Act 1867*, *supra* note 5. The opening words of s. 91 provide:

...not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated...

Section 92 begins with a similar provision. It reads:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated....

¹⁴ This doctrine was first articulated by the Privy Council in *Hodge v. The Queen* (1883), 9 App. Cas. 117 at 130 (P.C.).

¹⁵ *Bell Canada v. Québec (Commission de santé de la sécurité du travail du Québec)*, [1988] 1 S.C.R. 749 at 765, Beetz J.

The Court does note, however, that the double aspect doctrine is not to be used without caution, thus suggesting that it is not intended as a means of avoiding jurisdictional decisions.¹⁶ Rather, it ought to be used only in cases where the provincial and federal aspects of a law are equal in importance.¹⁷

There are then four options with respect to jurisdiction over an issue:

- jurisdiction may rest exclusively with the provinces;
- jurisdiction may lie wholly with the federal government;
- jurisdiction may be divided between the federal and provincial government along their jurisdictional lines, each with control over certain aspects of the issue; or
- jurisdiction may be overlapping (concurrent) between the two levels of government, each with control over the whole of the matter barring a conflict.

The third and fourth options require some further clarification. Jurisdiction can be “shared” – meaning that both the federal and provincial governments have jurisdiction in relation to a particular topic in two senses. First, as in option three above, jurisdiction can be *divided* between the federal government and the provinces. Under this option neither level of government has exclusive jurisdiction over the whole of the matter (i.e., over RIH as a whole) rather, each will have authority over the topic in so far as it is otherwise within its jurisdiction. Divided jurisdiction arises when an issue has not been assigned as a subject matter within the exclusive jurisdiction of one level of government or the other. Where this is the case, jurisdiction over these matters is divided along existing jurisdictional lines. For example, with respect to research involving humans, jurisdiction might depend on which level of government has jurisdiction over the sphere in which such research takes place.

The second sense in which jurisdiction can also be thought of as shared is represented by option four of the options listed above. This involves situations where an issue has more than one aspect or can be characterized as falling under more than one matter (i.e., one coming within federal jurisdiction and one within the purview of the provinces); such situations are contemplated by the double aspect doctrine. Thus, the federal government and the provinces can assert jurisdiction concurrently over the issue and legislate in respect of it provided such legislation does not conflict. As we will discuss further below, when option four is considered

¹⁶ *Ibid.*

¹⁷ *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161 at 181 [*McCutcheon*]; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59 at 65.

in more detail, in the case of a conflict, the doctrine of paramountcy dictates that the federal law will trump the provincial.

The remainder of this paper will consider each of these options with respect to the subject of research involving humans.

3. Provincial Authority to Regulate RIH

“Health” is not mentioned in the lists of subject matters assigned under the *Constitution* exclusively to either the Parliament or the provinces.¹⁸ One might be tempted to think this was simply an oversight by the drafters or a result of the fact that, outside of emergency circumstances, health and healthcare were not traditional responsibilities of government. However, the courts have established that “health” is not a single subject matter amenable to exclusive assignment to one level of government or the other. Rather “health” is a complex, multifaceted and “amorphous” topic, jurisdiction over which is divided according to its connection with established heads of jurisdiction.¹⁹ Determining jurisdiction over health as a whole, then, is not possible. Instead, one must inquire into the purpose and effect of the health related law in order to ascertain where it fits within the jurisdiction granted to the different orders of government by the *Constitution*.

Although “health” is not a subject matter assigned by the division of powers, it is generally agreed that the *Constitution* affords the provinces broad legislative jurisdiction in health-related matters.²⁰ In *Schneider*, Dickson J. (as he then was) cited the findings of the 1940 Royal Commission on Dominion-Provincial Relations (the Rowell-Sirois Commission), in which the Commission concluded that:

Provincial responsibilities in health matters should be considered basic and residual. Dominion activities on the other hand should be considered exceptions to the general rule of provincial responsibility, and should be justified in each case on the merit of their performance by the Dominion rather than the province.²¹

As Dickson J. added:

¹⁸The only health related provisions are contained in s. 92(7) which gives provinces jurisdiction over hospitals and asylums and s. 91(11) granting power over quarantine and marine hospitals to the federal government.

¹⁹See *Schneider v. The Queen*, [1982] 2 S.C.R. 112 at 142, Estey J. [*Schneider*]; *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 32, LaForest J. [*RJR-MacDonald*]; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 24, LaForest J.

²⁰See Martha Jackman, “The Constitution and the Regulation of New Reproductive Technologies,” in Royal Commission on New Reproductive Technologies, *Overview of Legal Issues in New Reproductive Technologies* Ottawa: Supply and Services Canada, 1993) 1 at 14-15; R.T. McKall, “Jurisdiction over Public Health” (1975) 6 Man. L.J. 317 at 320-322; Hogg, *supra* note 6 at s. 18.4.

²¹ *Schneider*, *supra* note 19 at 136-137.

This view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the emergency power under peace, order and good government) has prevailed and is now not seriously questioned.²²

Initially, the provinces' general power over health matters was grounded in s. 92(16) which grants provincial jurisdiction over matters of "a merely local or private nature". However, as Martha Jackman notes, s. 92(13) (property and civil rights) "has largely supplanted section 92(16) as a residual category of provincial authority"²³ and, according to Jackman:

Section 92(13) also has been interpreted as providing the provinces with general jurisdiction over public-health matters. In conjunction with the provincial licencing power under section 92(9), this jurisdiction includes the power to regulate the medical profession, medical practices, and health services, as well as the power over health insurance. With section 93, which grants the provinces exclusive power to legislate in relation to education, section 92(13) also supports provincial regulation of medical and health education and training.²⁴

Provincial jurisdiction over property and civil rights has been broadly interpreted to include the power to regulate the civil rights of individuals resident within their borders.²⁵ Specifically, it is within the power of the provinces to affect rights between individuals generated by tort, contract, and property law. This means that legislation addressing or regulating research involving humans through tort, contract, or property law would come within the jurisdiction of the provinces. For example, restrictions might be placed on the right to contract in cases related to research involving human subjects. Also, any legislative scheme that sought to regulate RIH solely through the creation or alteration of civil causes of action or remedies would have to emanate from the provincial legislatures. As Bernard Dickens notes with reference to the regulation of research involving children:

Protection [of researchers] from civil liability, for instance for battery in invasive research, breach of fiduciary duty in management of medical records or conversion of available bodily tissues, would depend on provincial legislation.²⁶

²² *Ibid.* at 137.

²³ Jackman, *supra* note 20 at 14.

²⁴ *Ibid.* at 14-15.

²⁵ The Privy Council in *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 at 110 (P.C.) [*Citizens Insurance*], said of the term "civil rights" that "[t]he words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated subjects in sect. 91."

²⁶ Bernard Dickens, "The Legal Challenge of Health Research Involving Children" (1998) 6 Health L.J. 131 at 144. However, there is some room for Parliament to create civil remedies if they are incidental to

Jackman offers further insight into the potential for provincial jurisdiction over health matters in the context of her discussion of new reproductive technologies (NRTs). She argues that:

Provincial jurisdiction over public health under the property and civil rights clause, combined with the provincial jurisdiction over hospitals [under s. 92(7)], gives the provinces the *prima facie* authority with respect to NRTs as a health matter. Levels of new reproductive health and hospital services; health requirements relating to the research, development, and application of NRTs in hospital and non-medical settings; standards of medical ethics and practice; local public health information; and the insurability of NRTs under provincial health insurance plans would be matters of valid provincial concern.²⁷

Extrapolating from Jackman's comments, it is possible to argue that research involving humans, insofar as it represents a public health matter, could fall into the residual provincial health power. It also seems likely that such research would fall under provincial authority when it is conducted by medical professionals in a hospital or university setting since both hospitals and universities are within the jurisdiction of the provinces, under ss. 92(7) and 93 respectively. Further, regulation of professions, including the establishment of rules of conduct, is widely recognized as coming within the provincial sphere of jurisdiction under s. 92(13).²⁸ Thus, it would appear that in the absence of exclusive federal jurisdiction over the matter, provincial governments possess some constitutional authority to regulate the practice of health-related RIH that occurs within their borders.

It is important, however, to recognize the significance of the opening words of s.92 "[i]n each province" as a limitation on the scope of provincial jurisdiction.²⁹ The listed powers are granted to the provinces to exercise within their territory. This limit is intended not only to protect against provincial intrusion into the federal sphere of authority, but also to ensure that one province cannot trench on the powers of another province. Thus, provincial jurisdiction is territorially limited, that is, legislation will exceed provincial jurisdiction if it contemplates extra-territorial

a constitutionally valid federal legislative scheme, for example, under the criminal, or trade and commerce powers. See Hogg, *supra* note 6 at s. 20.3.

²⁷ Jackman, *supra* note 20 at 16.

²⁸ *Lafferty v. Lincoln* (1907), 38 S.C.R. 620. A minority of the Supreme Court held that standards for the practice of law fell within property and civil rights in the province. Although in the same case the majority implied that the regulation of medicine was within provincial jurisdiction under s. 92(13). Also see *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at para. 78; Iacobucci and Bastarache JJ., held that both Ontario and Manitoba were entitled to set their own qualifications for the exercise of a profession under s. 92(13) of the Constitution Act, 1867. The Supreme Court recently affirmed this position in *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 at para. 38.

²⁹ Similar words appear in the description of the listed powers in s. 92 and in the other sections conferring provincial jurisdiction.

application.³⁰ This limitation will not, however, be applied strictly, as the jurisprudence allows that laws can have extra-territorial effects so long as they are merely incidental to the valid provincial purpose of the law.³¹

This limitation on provincial jurisdiction may nevertheless affect provincial attempts to legislate in the area of RIH. At the very least, it would seem to require caution on the part of a province in structuring regulations so as to cover only those activities within its territory. This may pose significant difficulties in the context of RIH given the extent to which research projects are integrated and carried out simultaneously in locations in different provinces. It is generally necessary for research protocols to be consistent in all locations and thus the regulations of one province are bound to have effects on the conduct of researchers engaged in the same project in other provinces. Further, even in cases where the research is located within the boundaries of a single province, the results and effects of the research are not. The products of such research will reach those beyond the territory of the province. Whether or not such effects will be viewed as merely incidental will require a case-by-case analysis of the purposes of the provincial legislation at issue.³² It is clear, however, that designing provincial laws that do not trench on the jurisdiction of other provinces in the area of RIH represents an important challenge to those asserting provincial jurisdiction.

One can conclude from this overview that provincial jurisdiction over RIH is likely to be partial at best. There seems to be no obvious basis for asserting exclusive provincial jurisdiction over RIH. Rather, the authority to regulate such research would have to be predicated on existing provincial powers over specific areas, for example hospitals and education. Provincial jurisdiction over health is broad but not exclusive. It is clear that the provinces have a general power with respect to public health but courts have indicated exceptions to this residual provincial power within which Parliament can legislate with respect to health. Furthermore, the territorial limits placed on provincial jurisdiction may pose significant difficulties in the design of provincial governance of RIH. Given that the provinces do not appear to have a clear case for exclusive jurisdiction over RIH, it is necessary to consider the scope of federal jurisdiction over the matter to determine whether a claim for exclusive federal authority could be sustained or whether jurisdiction over this matter is divided or overlapping.

³⁰ See generally E. Edinger, "Territorial Limitations on Provincial Powers" (1982) 14 Ottawa L. Rev. 57; Ruth Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985) 7 Sup. Ct. L. Rev. 511.

³¹ See *Interprovincial Cooperatives v. The Queen* (1975), [1976] S.C.R. 477 and *Reference Re: Upper Churchill Water Rights Reversion Act 1980 (Newfoundland)*, [1984] 1 S.C.R. 297. In the latter case, the Supreme Court rejected the strict approach it had taken in early cases which would not allow extra-territorial effects of any significance regardless of the purpose of the law.

³² It is important to note, however, that this only becomes a constitutional issue if compliance with protocols is required. If it is simply a matter of voluntary compliance with the strictest protocol then there is no constitutional issue.

4. Federal Authority to Regulate RIH

As discussed in the previous section, the provinces may be able to legislate with respect to RIH in some areas as part and parcel of their jurisdiction under s. 92(13). However, it does not necessarily follow that the federal government is precluded from finding constitutional authority for its own legislative initiatives in this area. While the *Schneider* case was cited above for the proposition that health-related matters generally fall into the provincial sphere of authority, it should be noted that Dickson J.'s discussion in that case explicitly left room for Parliament to establish "a limited federal jurisdiction either ancillary to the express powers of s. 91 or the emergency power under peace, order and good government."³³ Significantly, Laskin C.J. and Estey J. wrote separate but concurring decisions in the same case underlining their concern that the ruling not preclude Parliament's ability to legislate with respect to matters of national public health. In the words of Laskin C.J., "[t]his conclusion must not be taken as excluding the Parliament of Canada from legislating in relation to public health, viewed as directed to the protection of the national welfare."³⁴ Estey J. offered a similar caution in his decision affirming that:

... '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.³⁵

Federal jurisdiction and the scope of such jurisdiction depends upon the extent to which it is possible to ground authority under one of the constitutional heads of power granted to Parliament. This section will explore several heads of power under which federal jurisdiction to regulate RIH might be supported. It will consider whether there is a basis for exclusive federal jurisdiction and, if not, the extent of federal jurisdiction over this area. The most promising bases upon which to ground federal legislation include the criminal law, trade and commerce, and peace, order and good government (POGG) powers. The POGG basis for jurisdiction will be examined after the other two because it is a residual power of the federal government. This means, as will be examined in more detail later in this section, that POGG can only be invoked if a subject matter does not fall within the enumerated grounds under the division of powers in the *Constitution*.

A) Criminal Law

Section 91(27) of the Constitution Act 1867 grants Parliament exclusive jurisdiction over criminal law. As a general rule, criminal law must meet three

³³ *Supra* note 19 at 137.

³⁴ *Ibid.* at 114.

³⁵ *Ibid.* at 142.

essential prerequisites: 1) a valid criminal law purpose, 2) backed by a prohibition, and 3) a penalty.³⁶ Courts have included within the ambit of valid criminal law purposes: public peace, order, security, health, morality and protection of the environment.³⁷

This power thus gives the federal Parliament significant latitude to prohibit a wide range of RIH on the grounds that such practices are injurious to public health, safety, and/or morality. In much the same way as the courts have found that only Parliament has the jurisdiction to criminalize (or conversely, decriminalize) abortion,³⁸ similar authority would exist it seems for the criminalization of such controversial practices as cloning, the creation of human/animal hybrids, use of fetal tissue and stem cells, etc. Given this clear federal jurisdiction, it is not surprising that many commentators suggest that the criminal law power provides the strongest constitutional justification for regulation of new reproductive technologies [NRTs] (and potentially by extension RIH).³⁹ It seems likely then that the criminal law power could be used as a basis for a limited federal jurisdiction over RIH – i.e. the power to prohibit outright certain RIH practices. The more interesting question is, however, whether this power can sustain a broader jurisdictional claim – the right to regulate those RIH practices that are not absolutely prohibited.

The case law is less clear when more complex regulatory modes of intervention are utilized. As Hogg explains:

A criminal law ordinarily consists of a prohibition which is to be self-applied by the persons to whom it is addressed. There is not normally any intervention by an administrative agency or official prior to the application of the law. The law is ‘administered’ by law enforcement officials and courts of criminal jurisdiction only in the sense that they can bring to bear the machinery of punishment after the prohibited conduct has occurred. Lord Atkin’s definition of criminal law [from the case of *Proprietary Articles Trade Association v. Attorney-General of Canada*⁴⁰] as prohibition coupled with a penalty suggested that these

³⁶ Affirmed in *Firearms Reference*, *supra* note 9 at para. 27. See also *RJR-MacDonald*, *supra* note 19, La Forest J.; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 [*Hydro-Québec*]; *Reference re Dairy Industry Act (Canada) s. 5(a)*, [1949] S.C.R. 1; *Canadian Federation of Agriculture v. A.-G. Que.*, [1951] A.C. 179 (P.C.).

³⁷ *Reference re Dairy Industry Act (Canada) s. 5(a)*, *ibid.*

³⁸ *R. v. Morgentaler*, [1976] 1 S.C.R. 616 at 627 [*Morgentaler*]; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 128; *R. v. Morgentaler*, [1993] 3 S.C.R. 463. See also Jackman, *supra* note 20 at 10.

³⁹ Patrick Healy, “Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada” (1995), 40 McGill L.J. 905 at 918; Timothy Caulfield, Marie Hirtle & Sonia Le Bris, “Regulating NRTs: Is Criminalization the Solution for Canada?” 18 Health L. Can. 3 at 4; Alison Harvison Young & Angela Wasunna, “Wrestling with the Limits of the Law: Regulating New Reproductive Technologies” (1998) 6 Health L.J. 239 at 255.

⁴⁰ [1931] A.C. 310 (P.C.).

formal characteristics were essential to any law which could be classified as criminal.⁴¹

Consequently, federal legislation that created administrative agencies to regulate business competition and insurance practices under the rubric of the criminal law power has been struck down in some cases as *ultra vires* Parliament.⁴² Furthermore, in *Nova Scotia Board of Censors v. McNeil*⁴³, the censorship of films via a provincial censorship board was held to be a valid exercise of provincial jurisdiction as regulation of property and civil rights, and was not deemed an infringement of the federal criminal law power.

This early case law seemed to seriously limit legislation involving regulatory schemes from the scope of the criminal law power. However, more recent cases seem to point to a wider scope for the federal criminal law power that would include some forms of administration that are regulatory in nature.⁴⁴ In *Hydro-Quebec*, the Court upheld a regulatory scheme as constitutional under the criminal law power in which an administrative agency determined which substances were toxic and created regulations as to how such substances were to be manufactured, stored, etc.⁴⁵ This scheme also allowed for exemptions for provinces with similar or equivalent regulations. The key factor for the majority was that the administrative procedure culminated in a prohibition enforced by penalty. The *Hydro-Quebec* reasoning was applied in the *Firearms Reference* in which the federal government's national gun registry scheme was upheld as a valid criminal law since the legislation ultimately provided a prohibition of unregistered guns coupled with penal sanctions in pursuance of a valid criminal law purpose, namely, public safety.⁴⁶ These cases suggest that the mere fact of regulation as part of a legislative scheme is not determinative as to whether it is a legitimate use of the criminal law power. Rather, it is the ultimate aim of legislation and the regulatory scheme that ought to be significant in coming to a determination as to jurisdiction under the criminal law power.

In the *Firearms Reference*, the Supreme Court provided some clear guidance on the distinction between regulation and criminal prohibition – specifically, it addressed the question of whether regulatory schemes are within federal jurisdiction under the criminal law power. The Court set out the following guidelines that are relevant to the question of federal jurisdiction over RIH.

⁴¹ Hogg, *supra* note 6 at s. 18.10.

⁴² *Ibid.*

⁴³ [1978] 2 S.C.R. 662.

⁴⁴ This door was first opened in *Morgentaler*, *supra* note 38. On the development of the scope of the criminal power in recent case law see *R. v. Furtney*, [1991] 3 S.C.R. 89 [*Furtney*] (regulation of lotteries); *R.J.R.*, *supra* note 19 (regulation of tobacco advertising); *Hydro-Québec*, *supra* note 36 (regulation of substances harmful to the environment); and the *Firearms Reference*, *supra* note 9 (regulation of firearms).

⁴⁵ *Hydro-Québec*, *ibid.*

⁴⁶ *Firearms Reference*, *supra* note 9.

1. The mere fact that a legislative scheme is complex does not take away from its criminal nature. On this point the Court pointed to the *Food and Drugs Act* and the *Canadian Environmental Protection Act* which have both been upheld as coming within the federal criminal law power.⁴⁷

2. The fact that an administrative officer is granted discretion is consistent with an exercise of the criminal law power so long as the discretion is not undue. The Court held that while it would be undue for an administrative body to be granted the power to define offences, this does not preclude the grant of discretion altogether.⁴⁸

3. The nature of the prohibitions and penalties themselves is significant. They must not be regulatory in nature – that is, they must not exist for the sole purpose of ensuring compliance with the regulatory scheme. Such prohibitions and penalties also must not be directed at revenue generation or the regulation of property. In order to come within the criminal law power such prohibitions and penalties must stand on their own and be directed at a valid criminal law purpose.⁴⁹

4. The criminal law does not require outright prohibition of an activity or item. Parliament is able to use indirect means to achieve its desired ends as decided by the Supreme Court in *RJR-MacDonald*.⁵⁰ In that case, a majority of the Supreme Court of Canada held that Parliament's purpose was to prevent the negative health effects of a certain practice (in that case, the use of tobacco) and the fact that it sought to achieve this purpose through indirect means (i.e. means other than an outright ban) did not remove the law from the valid ambit of the federal criminal law power. Thus, controls placed on the advertising and packaging of cigarettes were a valid exercise of the criminal law power and did not infringe provincial jurisdiction over property and civil rights under s. 92(13).

5. Exemptions from a prohibition do not preclude a finding that a law is criminal in nature.⁵¹

The broad scope of the criminal law power as cast in the recent Supreme Court jurisprudence might give pause to commentators like Jackman, Young and Wasunna who maintain that a regulatory approach to federal legislative initiatives in the area of NRTs is likely to result in a successful constitutional challenge based on the division of powers. Jackman, for example, writing in 1993 suggested that “while the federal government cannot rely on the criminal law power to support complex regulatory intervention in relation to NRTs, the criminal law power will support an array of prohibitions and sanctions in the area.”⁵²

⁴⁷ *Ibid.* at para. 37

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at para. 38.

⁵⁰ *Ibid.* at para. 39; *RJR-MacDonald*, *supra* note 19.

⁵¹ *Firearms Reference*, *ibid.*; *Furtney* *supra* note 44; *Morgentaler*, *supra* note 38; *Lord's Day Alliance of Canada v. British Columbia*, [1959] S.C.R. 497.

⁵² Jackman, *supra* note 20 at 11.

Similarly Young and Wasunna suggest that proposed forms of NRT legislation can be seen as falling along a continuum between “simple” prohibitions coupled with penalties at one end and “complex” regulatory schemes at the other. Thus, “[a]s the scheme becomes more complex and elaborate, the likelihood that it will be upheld under the criminal law power seems to diminish.”⁵³ Furthermore, Young and Wasunna apply the decision handed down in the *Hydro-Quebec* case to suggest that NRTs may not be amenable to regulation under the criminal law power. First, they note that while in *Hydro Quebec* the federal environmental legislation was upheld as constitutionally valid, the court was split 5-4 on the issue. Both majority and dissent found that environmental protection was a valid public purpose under the criminal law power. They diverged, however, on the emphasis given to the criminal law requirement of a prohibition with penal consequences, and specifically on whether the provisions in question were primarily regulatory or prohibitory in nature.⁵⁴

According to Young and Wasunna, the majority seemed to avoid any analysis of this latter issue by characterizing the question as being merely one of “colourability”; i.e. whether the act in question was coloured to resemble criminal law when in fact it sought to regulate civil and property rights in the province. Once it was established that Parliament had a genuine criminal law purpose behind its legislative scheme (which both the majority and dissent agreed it had), the majority appeared willing to accept Parliament’s chosen means of achieving that purpose, even if it was largely regulatory in nature.⁵⁵ The dissent, on the other hand, placed much more emphasis on the form of the legislative scheme; although they accepted the fact that Parliament was pursuing a valid public purpose, to be constitutionally valid the legislation had to be of primarily prohibitory form rather than regulatory. To this end, the dissent considered whether the regulatory portions of the scheme were ancillary to the prohibitions or vice versa. Finding that the prohibitions contained in the impugned provisions were secondary to the regulatory aspects, the dissent found the legislation *ultra vires* of the federal criminal law power.

Young and Wasunna suggest that changes to the composition of the Court subsequent to the decision in *Hydro-Quebec*, as well as anticipated departures due to retirement,⁵⁶ point to the possibility that the dissent’s “clear emphasis on the distinction between regulation and prohibition might be employed in future cases to strike down more flexible and elaborate regulatory schemes.”⁵⁷ In addition, they note that whereas in *Hydro-Quebec* the public purpose at the heart of the impugned

⁵³ Young & Wasunna, *supra* note 39 at 258.

⁵⁴ *Hydro-Quebec*, *supra* note 36 at paras. 49, 151.

⁵⁵ *Ibid.* at para. 151.

⁵⁶ At present, two justices from the majority in the *Hydro-Québec* decision (LaForest J. and Cory J.) and two from the dissent (Lamer C.J. and Sopinka J.) have left the bench. Since Young and Wasunna wrote their article, a third member from the majority has retired (L’Heureux-Dubé J.).

⁵⁷ Young & Wasunna, *supra* note 39 at 261. However, it should be noted that the subsequent decision in the *Firearms Reference*, *supra* note 9, saw a unanimous court applying *Hydro-Québec* so as to uphold the constitutionality of the federal government’s national gun registry under the criminal law power.

legislation (i.e. the prevention of environmental degradation) was found to be one of “superordinate importance” to Canadian society, it was not clear that the subject of NRTs in general (and by analogy perhaps, RIH) represented a similarly important threat to Canadian public health or morality.⁵⁸

While it is impossible to predict the effect that future changes of the composition of the Court might have on its jurisprudence, the predictions of Young and Wasunna do not appear to have been borne out in the *Firearms Reference*, the most recent Supreme Court consideration of the criminal law power. The Court was unanimous in its decision in that case, and clearly supported the majority view in *Hydro-Quebec* emphasizing the purpose of regulations and their connection to prohibitions and penalties over the strict “form over function” approach. The jurisprudence also makes clear that the existence of exceptions to prohibitions that admit room for the activities in question to be regulated will not be fatal to a claim of criminal law jurisdiction. Healy’s characterization of the situation seems more apt than that of Young and Wasunna. He suggests that:

...the form of criminal prohibitions can include regulatory aspects, but, it would seem, the measures must be characterized by an underlying criminal purpose. To the extent that the regulatory structure appears only to put conditions on otherwise lawful conduct, it is improbable that the courts will characterize the matter of the legislation as being in relation to a criminal purpose. It is not solely a question of the complexity of the regulatory scheme: it is also whether the dominant purpose of the legislation is to define unlawful conduct or to define the conditions under which lawful conduct may be pursued.⁵⁹

It seems, then, that much will depend on the details of a national governance scheme for RIH as to whether it can be upheld under the federal criminal law power. However, the recent jurisprudence seems to lend support to the position that the federal government’s jurisdiction over criminal law might support fairly complex and extensive regulatory schemes provided that they are for the purpose of pursuing a valid criminal law purpose backed by a prohibition and a penalty.

It is also interesting to note that the federal government’s proposal to regulate NRTs contains a significant regulatory component. The federal government is thus clearly of the view that it has the power to regulate as part of its criminal law power. For example, in accompanying material on the Health Canada website, answers are given to “frequently asked questions”.⁶⁰ Among these questions is the following:

⁵⁸ Young & Wasunna, *supra* note 40 at 262.

⁵⁹ Healy, *supra* note 39 at 928.

⁶⁰ Health Canada, News Release, “Information: Assisted human reproduction – Frequently asked questions” (3 May 2001), online: Health Canada <http://www.hc-sc.gc.ca/english/media/releases/2001/2001_44ebk3.htm>.

“Why is the federal government legislating in this area – isn’t it an area where the provinces have control?” The answer offered is instructive:

The draft legislation is founded upon the federal responsibility for criminal law, as is other federal health protection legislation such as the Food and Drugs Act and the Tobacco Act. In Canada, the courts have affirmed that the criminal law power will support the creation of prohibitions which serve a public purpose, including public peace, order, security, health and morality. The draft legislation on assisted human reproduction contains prohibitions pertaining to a number of unacceptable activities including cloning and commercial surrogacy. The proposal that is now before the Standing Committee on Health is the result of consultations with the provinces and territories, as well as with numerous stakeholder groups and concerned members of the public. A consensus exists that the Government of Canada should provide leadership by putting in place a legislative framework that would ensure consistency of measures governing assisted human reproduction.⁶¹

Given that this proposed legislation contains a significant and complex regulatory scheme, it is possible that the federal government might invoke its criminal law power in a similar manner to regulate RIH.

B) Trade and Commerce

Section 91(2) of the *Constitution* gives Parliament the authority to regulate matters relating to trade and commerce. There are two “branches” of the federal trade and commerce power: the regulation of interprovincial and international trade and commerce, and a “general” trade and commerce power.⁶² The first branch of the power allows Parliament to regulate commercial activity where there is movement of goods or services across provincial or international boundaries. This power may cover the regulation of transactions that are completely intra-provincial in nature if such regulation is incidental to some extra-provincial trade or commercial policy.⁶³ To the extent RIH involves international and/or interprovincial commercial activity, this branch of the trade and commerce power may support federal regulation of RIH in limited areas. As Jackman notes in reference to NRTs:

Parliament can regulate the international and interprovincial commercial aspects of NRTs, including the interprovincial or international activities of commercial bodies engaged in the research, development, and application of NRT-related products or services. In particular, the federal government could regulate the import, export, interprovincial

⁶¹ *Ibid.*

⁶² The federal trade and commerce power was first explained in *Citizens Insurance*, *supra* note 25 at 113.

⁶³ See *Caloil v. Canada (Attorney General)*, [1971] S.C.R. 543 [*Caloil*].

trade, and marketing of gametes, fertility drugs, and other new reproductive products, equipment, and services. The federal government could also regulate international and interprovincial commercial information registries.⁶⁴

Applied to RIH, this might mean that practices such as the formation of databases of genetic information for licenced commercial use in other provinces or countries might be the subject of valid federal legislation under the first branch of the trade and commerce power. This branch might also support the regulation of the research and development of drugs that are sold interprovincially.⁶⁵

The second branch of the trade and commerce power – referred to as the “general” branch – relates to the regulation of trade in general (as opposed to specific industries) that affects the country as a whole. The Supreme Court, in *City National Leasing*,⁶⁶ set out a five-part test to determine whether a law is validly enacted pursuant to this power. The steps of the test are intended to be approached flexibly and inquire whether a law,

- (i) includes the presence of a “general regulatory scheme”;
- (ii) is overseen by a regulatory agency;
- (iii) is concerned with trade as a whole rather than focused on a particular industry;
- (iv) is of such a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
- (v) relates to a situation where the failure to include one province or locality in the legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

The general trade and commerce power thus permits federal regulation of commercial activity even where there is no interprovincial or international movement. It is difficult to see, however, how federal legislation could be focussed specifically enough to be useful for the purposes of regulating RIH and still be concerned with trade as a whole and not with a specific industry. In *City National Leasing*, the legislation upheld under the general power was a competition law that applied across the board to all commercial activities and industries. Other regulations that sought to control the use of labels and standards in the beer industry were struck

⁶⁴ Jackman, *supra* note 20 at 12.

⁶⁵ Although it is still unclear exactly what will be included within this branch of trade and commerce the decision in *Caloil*, *supra* note 63 opens the door for the federal government to extend its authority under this head of power to include transactions otherwise wholly within the province where such transactions are incident to the administration of an extra-provincial trade policy.

⁶⁶ *City National Leasing*, *supra* note 8.

down as being directed at a specific industry and therefore infringing on the provincial jurisdiction over property and civil rights, even though the industry was dominated by three large producers operating on a national scale.⁶⁷

Thus, while Jackman suggests that “[d]epending on the form and scope of the legislation, the federal government could attempt to support comprehensive NRT legislation under the general branch of the trade and commerce power,” it might be difficult to structure legislation in such a way that it could be said to concern “trade as a whole.” It would be equally challenging for the federal government to gain general jurisdiction over RIH under the trade and commerce power. However, the general trade and commerce power might well provide justification for federal legislation regulating the commercial aspects of RIH. For example, competition laws would apply to any commercial entities conducting RIH.

C) Peace, Order and Good Government (POGG)

The opening sentence of s. 91 gives the federal government 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...

This power is often referred to as the POGG power. It is residual in nature, as is clear from the wording of the provision; the POGG power can only be used to ground jurisdiction over subject matters not coming within the provincial sphere of power. The POGG power has been interpreted as including three branches⁶⁸: “gap”, “national concern” and “emergency.” Of these, the gap and emergency branches offer little support for federal legislative action regulating research involving humans. The national concern branch is the most promising branch of POGG with respect to federal jurisdiction over RIH.

i) Gap

The gap branch, as articulated by Peter Hogg, reflects the residual nature of the POGG power. POGG reserves for the federal Parliament those matters not expressly included in the enumerated heads of power of the provinces. If this were the end of the story, as Hogg explains, the gap branch could have potentially limitless application given the fact that “[i]t is of course always possible to classify a law by labelling its ‘matter’ or ‘pith and substance’ with a name which does not appear to come within any of the enumerated heads of power.”⁶⁹ The gap branch

⁶⁷ *Labatt Brewing Co. v. Canada (Attorney General)*, [1980] 1 S.C.R. 914.

⁶⁸ Courts have generally recognized two branches: emergency and national concern. The gap branch is Peter Hogg’s categorization, however it is a helpful one in terms of understanding the scope of the POGG power. See Hogg, *supra* note 6 at s. 17.2.

⁶⁹ *Ibid.*

has, however, been restricted in its application to those situations where it is logically required; that is, where a gap in the division of powers exists and needs to be filled. For example, in the face of the grant of power to the provinces in s. 92(11) relating to “the incorporation of companies with provincial objects,” and the lack of any corresponding enumerated federal power of incorporation, the courts found that the power to incorporate companies with objects other than provincial must be a federal one under the gap branch of POGG.⁷⁰ There is no similar logical gap with respect to RIH’s that would justify federal legislation in this area under this branch of POGG.

The gap power does apply to cases where the subject matter is new or one not dealt with in the division of powers. However, the residual nature of POGG does not automatically entail the assignment of novel subject matters to the federal government. Rather, as Hogg notes:

...[i]n most cases a ‘new’ or hitherto unrecognized kind of law does not have any necessary or logical claim to come within p.o.g.g. It might come within property or civil rights in the province (s. 92(13)) or matters of a merely local or private nature in the province (s.92(16)). Which head of power is appropriate depends on the nature of the ‘new’ matter, and the scope which is attributed to the various competing heads of power of which p.o.g.g. is only one.⁷¹

Thus, while it may be that much of the subject matter at issue in RIH is “new” in the sense that it relates to technologies and practices that could not have been contemplated at the time of Confederation, this is not sufficient to ground federal jurisdiction under POGG.

ii) *Emergency*

The emergency branch of the POGG power is also not a promising source for federal jurisdiction over RIH.⁷² In order to be justified under the emergency branch of the federal POGG power, legislation must, as the name of the branch suggests, deal with an emergency. This has generally been interpreted to include occurrences like war, insurrection and economic crisis. The emergency branch might thus serve as a basis for federal jurisdiction over a health related issue, for example, in the case of an epidemic. However, it would not likely be able to ground a general federal jurisdiction over health. It is important to note that courts will not require factual proof that an emergency exists. Rather, all that is required is a rational basis for the

⁷⁰ *Citizens Insurance*, *supra* note 25.

⁷¹ Hogg, *supra* note 6 at s. 17.2.

⁷² The emergency test for POGG was first articulated by the Privy Council in *In re The Board of Commerce Act and the Combines and Fair Prices Act*, [1922] 1 A.C. 191 (P.C.). It was further clarified and affirmed most recently in *Reference Re Anti-Inflation Act (Canada)*, [1976] 2 S.C.R. 373 [*Re Anti-Inflation Act*].

finding that an emergency exists.⁷³ The federal government's power to invoke this branch of POGG may be further strengthened by the fact that the burden may rest with those challenging the law to show that no such rational basis exists for finding that there is an emergency.⁷⁴ It is a fairly difficult task to show that there is no rational basis for finding an emergency situation. As a result, it appears as if "the federal Parliament can use its emergency power almost at will."⁷⁵

There is, however, one significant limitation upon Parliament's use of the emergency branch of POGG: it can only justify temporary legislative measures.⁷⁶ The rationale for the emergency branch of POGG is that an unusual and extraordinary situation requires a grant of power to the federal government so that it can deal with a temporary situation. The presumption is that once the emergency is dealt with, the federal government no longer requires these powers and the regular division of powers should have effect again. Thus, the emergency branch of POGG cannot serve as a basis for permanent federal jurisdiction over a subject matter otherwise not within its jurisdiction. Although the Court has indicated that the Government will receive a great deal of deference on the issue of whether an emergency and the need for the legislation passed in response to it has ended, the ultimate limitation to temporary measures is a very significant one.⁷⁷

It is clear, then, why the federal government cannot ground a jurisdictional claim over RIH on the emergency branch of POGG. First, the unregulated state of health research in Canada does not represent an emergency of the kind for which the emergency POGG power is typically invoked (i.e. war, insurrection, economic crisis); and, second, the regulation of health research implies an ongoing legislative response to a permanent situation, and is not amenable to the sort of temporary response allowable under the emergency branch of POGG.

iii) National Concern

While the gap and emergency branches of the POGG power are insufficient to ground federal regulation of health research, the national concern branch is a much more promising source of jurisdiction for the federal government in this area. One of the leading cases on the national concern branch of the POGG power is *R. v. Crown Zellerbach Canada Ltd.*⁷⁸ In *Crown Zellerbach*, the majority of the Supreme Court of Canada outlined "firmly established" guidelines for determining whether a national concern exists such that the federal Parliament can assert jurisdiction.

⁷³ *Re Anti-Inflation Act*, *ibid.* at 425.

⁷⁴ *Ibid.* at 439. The Court was split on this issue.

⁷⁵ Hogg, *supra* note 6 at s. 17.4(d).

⁷⁶ *Re Anti-Inflation Act*, *supra* note 72 at 427, 437, 461, 467; *R. v. Crown Zellerbach Ltd.*, [1988] 1 S.C.R. 401 at 432 [*Crown Zellerbach*].

⁷⁷ *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*, [1923] A.C. 695 (P.C.).

⁷⁸ *Crown Zellerbach*, *supra* note 76.

First, the Court explained that the national concern doctrine can be used as a basis to grant federal jurisdiction over new matters. As explained earlier, when faced with a new matter not contemplated at the time of Confederation, courts must look at the existing heads of power to determine where the new power ought to be assigned. One possibility is the national concern branch of POGG if the new matter is one of national scope. The national concern branch can, however, also be used to grant federal jurisdiction over matters that were originally assigned to the provinces. The Supreme Court recognized the possibility that matters that were originally ones of a local or private nature in a province might *become* matters of national concern. Note that this change does not require the existence of a national emergency and there is no indication that this change must be temporary. The national concern branch thus has more far reaching effects than the emergency branch of POGG, as it can effect a permanent reassignment of jurisdiction from that originally contained in the division of powers.

The Supreme Court set out the following requirements for a matter to be one of national concern:

...it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

...

In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.⁷⁹

The national concern branch of POGG can thus only grant jurisdiction over areas that are relatively narrow. This reflects the concern that this branch not be used to trench significantly into the provincial sphere. A subject matter claimed to be a national concern must be contained and specific so that granting jurisdiction over it will not result in a wide federal jurisdiction over provincial areas. One way of checking that the federal power would not trench too seriously on that of the provinces is to look for evidence of what has been referred to as inter-jurisdictional spillovers – that is, where the failure of one province to adequately deal with an issue will have negative consequences outside the province. Essentially the court asks “what would happen if this were left to the provinces and one of them failed to regulate adequately?” If the effect would extend beyond the borders of the province, the Court views this as evidence that the matter is one of national concern – one that cannot be left to the provinces to regulate independently. Further, the existence of inter-jurisdictional effects provides a reason for federal involvement

⁷⁹ *Ibid.* at 432.

in what has traditionally been a provincial sphere. If the purpose is to prevent harmful effects outside the province, the federal government cannot be said to be unduly trenching on provincial powers and the issue is clearly one of national concern.

As with the emergency branch of POGG, it is important to assess the evidentiary burden placed on the government with respect to showing a national concern. Specifically, must the government prove negative inter-jurisdictional effects in order to establish a matter of national concern? Requiring the federal government to show these negative effects might pose a significant problem in the context of RIH given that the issue has only recently received close attention and its long term effects are not yet known, and, further, the private nature of much of the research means that the harmful effects are seldom tracked or recorded and made public. Often only anecdotal evidence is available with respect to the effects of RIH. Thus, at best, arguments about the inter-jurisdictional harmful effects will amount to educated opinions. Is this a sufficient basis to support a federal claim for jurisdiction under national concern?⁸⁰

The doctrine of presumption of constitutionality⁸¹ is helpful in this respect. The presumption of constitutionality places the burden of proof in jurisdictional cases on the party seeking to challenge the law. In the context of federal regulation of RIH, this means that the individuals or organizations seeking to challenge jurisdiction must show that the federal government lacks jurisdiction. This presumption has three significant effects⁸²:

- If the subject matter of a law can be characterized in more than one way, all things being equal the characterization that is consistent with the constitution (the characterization under which the law would be valid) should be preferred.⁸³
- If the validity of a law depends upon a finding of fact, the government should not be held to a strict standard of proof but rather there need only be a rational basis for the finding.

⁸⁰ See *The Governance of Health Research Involving Humans*, *supra* note 3 at 299, where McDonald points out that, as it is, there exists insufficient access to the information necessary to enable Research Ethics Boards [REBs] to complete cycles of good governance. For the most part, McDonald writes, REBs have little knowledge of what happens to research subjects after protocols have been approved. McDonald argues the need for research on the effects of research on its human subjects, both for quality assurance and quality improvement goals.

⁸¹ *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 662 at 687-688. See also generally Joseph E. Magnet, "The Presumption of Constitutionality" (1980) 18 Osgoode Hall L.J. 87.

⁸² Hogg, *supra* note 6 at s. 15.5 (h).

⁸³ This was recently affirmed by the Supreme Court of Canada in the *Firearms Reference*, *supra* note 9 at para. 25

- If a law is open to both a narrow and broad interpretation and it would be valid under the narrow and not the broad, the law should be read down in order to save the law.

The presumption of constitutionality is generally helpful to those seeking to make the case for federal jurisdiction in the area of RIH. Once the federal government enacts legislation on this issue, the burden will be on those seeking to challenge its jurisdiction to do so. Furthermore, the presumption of constitutionality would seem to suggest that there need not be concrete evidence of negative inter-jurisdictional effects resulting from provincial failure to regulate. Instead, all that must be shown is that a rational basis for such a finding exists. Indeed, given that the onus rests on those challenging federal jurisdiction, as with the emergency branch, it would seem to be incumbent upon the challengers to show that such a rational basis does not exist. Thus, the lack of substantial evidence of harm should not present an insurmountable problem for finding RIH to be a matter of national concern.

The 1993 Royal Commission on New Reproductive Technologies argued that the national concern doctrine guidelines discussed above can be applied so as to provide constitutional justification for federal regulation of the research and application of NRTs.⁸⁴ Indeed, the national concern branch of the POGG power was put forward as the primary constitutional justification for the Commission's proposed federal legislative scheme for regulation of NRTs. The Commission's argument can be summarized as follows:

- (i) reproduction as a biological function is clearly distinguishable from other matters of human health, and has particular social, ethical, political, economic and legal significance not present in other health-related matters; therefore, NRTs have the required degree of "singleness, distinctiveness and indivisibility" from other areas of medical science, technology, research and health service⁸⁵;
- (ii) the interests sought to be protected by regulation of NRTs include those of the individuals involved, of particular societal groups such as women, of Canadian society as a whole (including future generations), and of those outside Canadian borders; since all of these interests are interconnected, to be effective the legislative response requires a degree of comprehensiveness only available at the national level⁸⁶;
- (iii) the subject matter of NRTs is beyond the ability of individual provinces to regulate; since interprovincial variations in standards, coupled with

⁸⁴ Canada, Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, vol. 1 (Ottawa: Supply and Services Canada, 1993) at 19-22.

⁸⁵ *Ibid.* at 19.

⁸⁶ *Ibid.* at 20.

the mobility of Canadian citizens, means that the detrimental effects of certain NRT practices occurring in one province are likely to be felt in other provinces, and there will be an increased incidence of “forum shopping” or “reproductive tourism”⁸⁷; and

- (iv) the national nature of the problem is illustrated by the fact that other countries have established nationally-based regulatory schemes regarding NRTs, including Britain, Australia, France and Denmark.⁸⁸

These arguments are supported by Jackman in her legal research report prepared for the Commission.⁸⁹ According to Jackman, the “national concern” nature of NRTs is represented by the very fact that there was sufficient concern on the part of the national public and their legislators to establish the Royal Commission. Furthermore, she argues:

National concern over the development and use of NRTs and their recent origins are significant factors for the purposes of constitutional classification. Like most subjects assigned by the courts to the federal POGG power, NRTs did not exist as a conceptually distinct matter at the time of Confederation. Clearly, they are of national rather than ‘merely local or private’ concern. In particular, they extend beyond the scope of local or provincial health as it is understood under s. 92(13) and are more properly characterised as ‘national welfare’⁹⁰

Jackman recognizes that, “on one level”, the subject matter of NRTs embraces a wide variety of component subjects, including public education, occupational and environmental safety, reproductive health and medical technology. Thus, it may be argued that the subject of NRTs lacks the “singleness, distinctiveness and indivisibility” required under the national concern branch of the POGG power, and that the component subjects should be identified and assigned to the provincial legislature for regulation on a province-by-province basis.⁹¹ However, like the Commission, Jackman argues that the “human reproductive health” aspect of NRTs gives them a conceptual and practical distinctness from other health matters, such that any federal legislative response would be limited and would not be overly intrusive upon provincial jurisdiction. Citing various Supreme Court cases dealing with the national concern branch of the POGG power, Jackman argues:

NRTs as a legislative matter are not ‘totally lacking in specificity’ or ‘so pervasive that it knows no bounds.’ Unlike ‘containment and reduction of inflation,’ which Justice Beetz characterized as a subject

⁸⁷ *Ibid.* at 20-21.

⁸⁸ *Ibid.* at 21-22.

⁸⁹ Jackman, *supra* note 20 at 4-7.

⁹⁰ *Ibid.* at 5.

⁹¹ *Ibid.* at 6.

too diffuse for federal jurisdiction under the POGG power in the Anti-Inflation Act Reference, NRTs possess practical, conceptual integrity and cohesiveness. Federal intervention in this area would be delimited in object and scope. Attributing jurisdiction over NRTs to the federal government under the POGG clause would not ‘radically alter the division of legislative powers in Canada’ or ‘render most provincial powers nugatory.’ As in other areas, valid general provincial legislation, for example relating to hospitals and local health, could have an incidental impact on NRTs as a federal matter.⁹²

Based on these arguments, Jackman posits that the federal POGG power provides a basis for the following matters becoming the subject of federal legislative intervention⁹³:

- (i) prevention of infertility, including the development of contraceptives and the prevention and treatment of STDs and other causes of infertility;
- (ii) research, data collection, medical practices, and public education;
- (iii) all aspects of assisted human reproduction, including IVF, embryo transfer, artificial insemination, surrogate motherhood and adoption;
- (iv) establishing public review mechanisms and impact-assessment processes;
- (v) licensing participants and facilities;
- (vi) creating a public-property regime in NRT research; and
- (vii) determining the legal status of the embryo and fetus for the purposes of federal law.

Many of the arguments made by Jackman and the Royal Commission regarding NRTs also appear to be relevant to the issue of health and RIH. Clearly, many of the types of RIH that would potentially be subject to regulation could not have been contemplated at the time of Confederation (e.g. NRTs, stem cell transfer, human genomics, cloning, etc.). Even though health research in and of itself is not an inherently new topic, its present practice as compared to that at the time of Confederation would appear to be so radically different as to be considered distinct. Furthermore, given the fact that a great deal of modern health research involves integrated networks of health care facilities, educational institutions, medical professionals and pharmaceutical companies that cross both provincial and international lines, a convincing argument could be made that the regulation of RIH can

⁹² *Ibid.* at 7.

⁹³ *Ibid.*

no longer be accurately described as dealing only with matters of a merely local and private nature, and has instead become a matter of national concern. The arguments of Jackman and the Commission regarding the problem of forum shopping would also seem to be germane to the issue of RIH, and would point to the inability of individual provinces to effectively regulate the subject matter on their own.

As mentioned above, establishing federal constitutional authority for the regulation of RIH under the POGG power requires more than simply that the subject be found to be of national concern. It must also be shown that the matter is one of such “singleness, distinctiveness and indivisibility” that it can be adequately delineated so as to prevent over-broad and/or indeterminate intrusion into the provincial sphere of jurisdiction. In some ways, the subject of RIH is both more *and* less encompassing than NRTs. On the one hand, whereas the topic of NRTs would include many different component subject matters, ranging from research to treatment to public education, and the control of adoption and surrogate motherhood (see the list above), RIH by definition involves only the research aspects of health. In that sense, RIH is a more “self-contained” subject matter than NRTs and thereby more amenable to regulation under the federal POGG power. On the other hand, one of the main factors cited by Jackman and the Commission as evidence of the fact that NRTs as a subject had the requisite “singleness, distinctiveness and indivisibility” was the fact that only matters of reproductive health were involved, to which specific legal, moral, political, economic and social considerations were attached that were not relevant with regards to other health and medical-related subjects. The argument they advance is that NRT can be carved out as a specific and isolated health issue.

It should be noted that the conclusions of Jackman and the Royal Commission as to the scope under the POGG power for the federal government to regulate NRTs has been the subject of extensive criticism. For example, Patrick Healy disputes whether such constitutional authority actually exists.⁹⁴ Citing the *Crown Zellerbach* case and Hogg, Healy notes that the Supreme Court has shown “considerable reluctance” to grant federal power over subject matter that is nominally part of the provincial sphere of power.⁹⁵ Responding to the arguments of Jackman and the Royal Commission that the subject matter of NRTs possesses the required degree of “singleness, distinctiveness and indivisibility,” Healy maintains that:

The argument that the many issues associated with human reproduction are interrelated is simply a description of a political and scientific reality. That description does not lead to a conclusion in law that “[n]ew reproductive technologies possess a conceptual and practical integrity and distinctiveness.’ It certainly does not allow the assertion that ‘reproduction is easily distinguishable from other matters of human

⁹⁴Healy, *supra* note 39 at 915-919.

⁹⁵*Ibid.* at 917.

health.’ Indeed, the observation that reproductive technologies are so tightly related with many areas of provincial concern is fully consistent with a conclusion that they have not emerged as a national concern in the strict sense required by the courts. There is no apparent evidence that the provinces have failed to act in relation to the matter or that they are unable to do so. Nor is there evidence to support a conclusion that material harm will result if the provinces fail to take uniform measures with respect to matters within their authority. There is no apparent vacuum in Canadian public policy on reproductive technologies that only the national governments can fill. Indeed, if it were arguable that reproductive technologies have become a matter of national concern warranting a breach of Canadian federalism in favour of uniform action by the national government it would lead easily to the surprising proposition that any matter of national concern is inconsistent with the basic tenets of federalism. Canadian courts have resisted arguments of this kind, and it is difficult to envisage a successful legal and factual basis on which to argue that reproductive technologies present a matter of ‘great and manifest necessity’ that cannot be addressed adequately by continued respect for the distribution of legislative competence. In short, the desire for a coherent national policy on reproductive technologies is not a case in law for allowing Parliament to assume sweeping legislative responsibility.⁹⁶

Healy’s doubts about whether the federal POGG power provides sufficient constitutional justification for regulation of NRTs seem to be shared by a number of other commentators.⁹⁷ In their discussion of Bill C-47, a 1996 initiative on the part of the federal government to regulate certain NRTs and genetic procedures, Young and Wasunna note that there is “little jurisprudential support” for the Royal Commission’s position that NRTs represent a “national concern”, and that “in fact, there is substantial authority holding that the POGG power is to be restrictively interpreted.”⁹⁸ In addition:

The POGG power has, in recent years, fallen into a certain amount of disuse and ... it was not at all as obvious as the Royal Commission seemed to believe, that in the event of a challenge, the Supreme Court of Canada would be inclined to invoke the POGG power to support

⁹⁶ *Ibid.* at 918.

⁹⁷ See Sanda Rodgers, “Judicial Interference with Gestation and Birth” in Royal Commission on New Reproductive Technologies, *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood* (Ottawa: Supply and Services Canada, 1993) 1 at 5; Sheilah Martin, “An Overview of the Legal System in Canada” in Royal Commission on New Reproductive Technologies, *Overview of Legal Issues in New Reproductive Technologies* (Ottawa: Supply and Services Canada, 1993) 85 at 108; Shirley Senoff, “Canada’s Fetal-Egg Use Policy, The Royal Commission’s Report on New Reproductive Technologies, and Bill C-47” (1997) 25 *Man. L.J.* 1 at 20-21; Young & Wasunna, *supra* note 39 at 255-256; Bernard Dickens, “Do Not Criminalize New Reproductive Technologies” (1996) 17 *Policy Options* 11 at 12.

⁹⁸ Young & Wasunna, *ibid.* at 256-257.

this initiative. In the result, it appears that the federal government has wisely abandoned the POGG power as a peg for federal legislative jurisdiction in favour of the criminal law power.⁹⁹

Clearly, RIH in and of itself encompasses all forms of health research, from drug testing to experimental surgery to stem cell research. It even has the potential to include the testing of consumer products such as cosmetics and genetically modified food. This might lead one to conclude that RIH represents a much more indeterminate intrusion into provincial jurisdiction, and would therefore seem less appropriate for federal regulation under the POGG power. However, this conclusion is not inevitable. It is, as the academic criticism indicates, a debatable proposition that NRT represents a single isolated health matter that is distinct enough to qualify as a national concern. Even if it does, it is not necessary for all matters coming within the national concern aspect of the POGG power to exhibit singleness, distinctiveness and indivisibility in the same way.

RIH does indeed have a broad range of application in spheres within and outside federal jurisdiction. However, RIH is one very specific aspect of research that can be isolated and regulated without dictating or taking over other aspects of research controlled by the provinces or without a general federal assertion of control over the contexts in which such research takes place. For example, federal regulation of RIH would affect research conducted in hospitals which are clearly within provincial jurisdiction but it would not take control of hospitals out of provincial hands, nor would it dictate other aspects of research that are subject to provincial authority. In fact, regulation of RIH appears to exemplify the rationale at the heart of the national concern branch of POGG. Whether one thinks such research is a new issue not considered at Confederation or one thought to be a concern of a local and private nature at the time, it is an issue that through its development and proliferation has become a national concern. Further, given the extent to which the issue affects only a specific element of research, the case for its distinctiveness and singleness seems to rest on much firmer ground than simply a perceived need for regulation.

iv) Treaty Power

There is one other way in which federal RIH legislation might be defended under the POGG power. It has been suggested by some commentators, and has been the subject of some comment from the Supreme Court of Canada, that the federal government might claim a power over treaty implementation under POGG. However, as the following discussion makes clear, there is no enumerated federal treaty implementation power, nor has this power found root in POGG.

⁹⁹ *Ibid.* at 255. Bernard Dickens has also noted a more cautious approach taken by the federal government in regulating aspects of NRTs that would appear to fall within provincial jurisdiction. See Dickens, *supra* note 26 at 12.

As noted by Kathleen Glass, the issue of ethical standards in RIH has been the subject of international attention since the end of World War II and the Nuremberg trials.¹⁰⁰ Since that time, numerous international bodies of which Canada is a member, including the World Health Organization, have issued ethical guidelines for the conduct of RIH.¹⁰¹ The federal government under POGG clearly has the constitutional authority to enter into international treaties and agreements that are binding on Canada as a whole under international law.¹⁰² However, this authority has not yet been extended to confer on Parliament the ability to enact legislation required to implement its various international commitments where the subject matter of those commitments would normally fall under provincial jurisdiction. In the 1937 *Labour Conventions* case¹⁰³, the Privy Council struck down certain federal provisions that sought to implement labour standards that Canada had committed to as a member of the International Labour Organization. The Court held that the power to implement treaties domestically was divided between the federal and provincial governments by subject matter, as per the division of powers contained in ss. 91 and 92.¹⁰⁴ Thus, the federal government has no constitutional authority flowing from its treaty making power to legislate in areas that are normally within provincial jurisdiction. On this interpretation, the treaty making power would not appear to confer any independent authority on Parliament to regulate those aspects of RIH that would normally fall within provincial jurisdiction.

There is, however, some evidence to suggest that the precedent set by the *Labour Conventions* case may be open to revision by the Supreme Court of Canada. For example, in *MacDonald v. Vapor Canada Ltd.*¹⁰⁵, both the majority decision by Laskin C.J. and de Grandpré J.'s concurring decision suggest that the Court might be willing to reconsider the issue of an independent head of power for the federal government to implement treaties, although neither found it necessary to decide the issue in that case.¹⁰⁶ The potential that the position in the *Labour Conventions* case might be revised is also considered by Hogg¹⁰⁷ and Jackman.¹⁰⁸ Jackman, for example, suggests that the federal treaty power could be used to provide "ancillary support" for federal legislation implementing Canada's treaty obligations regarding NRTs (and, as argued earlier, this claim might be extended

¹⁰⁰ Kathleen Cranley Glass & Trudo Lemmens, "Research Involving Humans," in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds., *Canadian Health Law and Policy*, 2nd ed. (Toronto: Butterworths, 2002) 459 at 464.

¹⁰¹ Glass & Lemmens, *ibid.*

¹⁰² See Hogg, *supra* note 6 at s. 11.2. This is a power exercised by the federal executive (as opposed to Parliament), pursuant to the delegation of the royal treaty-making prerogative to the Governor-General via the Letters Patent of 1947. For a full discussion see generally Hugh M. Kindred ed., *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery, 2000) at 180-184.

¹⁰³ *A.-G. Canada v. A.-G. Ontario*, [1937] A.C. 326 (P.C.) [*Labour Conventions*].

¹⁰⁴ See Hogg, *supra* note 6 at s. 11.5(b).

¹⁰⁵ [1977] 2 S.C.R. 134 [*Vapour Canada*].

¹⁰⁶ *Ibid.* at 169, 176.

¹⁰⁷ Hogg, *supra* note 6, at s. 11.5(c).

¹⁰⁸ Jackman, *supra* note 20 at 14.

to include RIH), particularly where these obligations are aimed at protecting human rights.¹⁰⁹

Until such time as the Court has an opportunity to revisit this issue, however, the *Labour Convention* precedent stands and the federal government cannot ground its jurisdiction over RIH on a power over treaty interpretation.¹¹⁰

D) Other Federal Powers

While the heads of power discussed above represent the most likely constitutional justifications for broad federal regulation of RIH, several other possibilities exist for more limited federal jurisdiction. For example, sections 91(7) (the military), 91(11) (quarantines and marine hospitals), 91(22) (patents), 91(24) (Indians and lands reserved for Indians) and 91(28) (penitentiaries) might all support federal RIH regulation in very limited and context-specific settings. In addition, the federal taxing power might provide a means for the federal government to encourage or discourage certain RIH practices conducted by private researchers and private industry (e.g. through the use of tax incentives).¹¹¹ However, as these are all so limited in their potential scope, they will not be considered further here.

5. Joint Federal and Provincial Jurisdiction – Divided or Overlapping Jurisdiction over RIH

The preceding sections have considered the case for exclusive provincial or federal jurisdiction over RIH. At the outset of the paper, we outlined four basic possibilities with respect to jurisdiction over RIH. Jurisdiction can either rest exclusively with the federal or provincial governments, or it can be divided or overlapping. Based on the foregoing discussion, the strongest case for exclusive jurisdiction rests with the federal government under either the criminal law power or the POGG (national concern) power. Both of these heads of power provide a promising base from which the federal government might derive authority to institute a national governance system for RIH. Should such arguments fail, however, and the federal powers not be found comprehensive enough to include RIH in its totality, the federal government could still pursue a national governance system for RIH. In the absence of clear and exclusive jurisdiction over RIH, it seems clear that there would be joint jurisdiction and this would be either split or shared between the provincial and federal levels of government.

¹⁰⁹ *Ibid.*

¹¹⁰ In *Vapor Canada*, *supra* note 105 at 171, Laskin J. offered some guidance as to what might be required should such a power ever be recognized. Specifically, such legislation would have to state clearly that it was enacted in order to implement a specific treaty.

¹¹¹ See Jackman, *supra* note 20 at 13.

A. Divided Jurisdiction

Perhaps the most obvious scenario for joint jurisdiction is that each level of government would have authority over RIH when it occurred in a context within its jurisdiction. Thus, the provinces would have the power to regulate RIH when it is undertaken in hospitals and universities, whereas the federal government would have jurisdiction when it occurs in prisons or affects interprovincial or international trade and commerce. The division is, however, unlikely to be this neat. Divided jurisdiction in the case of RIH may prove difficult and complex given the integrated nature of the RIH issue. It is not easy to divide the topic along jurisdictional lines. For example, drug trials involving RIH are often carried out in universities or hospitals and yet are ultimately and intimately connected to the marketing and sale of drugs across provincial boundaries.

In addition, the division is likely to be unequal considering the fact that the federal government's power under criminal law to prohibit RIH practices in the interest of safety, health and morality could have a fairly significant, although incidental, effect on provincial regulation. It seems likely then, that the federal government, even in a divided jurisdiction scenario would have a greater scope of control over RIH. Finally, even in the face of a determination that jurisdiction over RIH is divided between the federal and provincial levels of government, the federal government will have at its disposal some significant constitutional mechanisms to encourage provincial cooperation and implement a national governance scheme for RIH. Before considering these mechanisms, however, it is important to explore the other option for joint federal provincial jurisdiction over RIH—overlapping jurisdiction.

B. Overlapping Jurisdiction

Shared jurisdiction in terms of overlapping jurisdiction is different from the divided shared jurisdiction scenario considered in the previous section. In the case of divided jurisdiction, each government has authority to legislate with respect to a topic when it is otherwise within its jurisdiction—thereby dividing the topic along the lines of the constitutional division of power. Where jurisdiction is overlapping, each sphere of government can legislate with respect to the whole of a topic, each gaining such authority because the topic can be characterized as a subject matter over which the legislator has exclusive jurisdiction. Overlapping jurisdiction is thus different than divided jurisdiction in that the topic, in this case RIH, can be dealt with as a whole by both the federal government and the provinces. Jurisdiction can only be shared in the sense of overlapping, however, if the topic at issue can be said to have a double aspect such that it can be characterized as concerning more than one subject matter falling in one respect within the provincial jurisdiction and in another within the federal authority. This scenario would require the application of the double aspect doctrine discussed earlier in the paper. Recall, this doctrine allows both levels of governments to pass legislation on a subject matter owing to the fact that different aspects of the subject matter are within the jurisdiction of each order of government. For example, in the *Schneider* case, the Supreme Court of Canada upheld provincial legislation providing for compulsory treatment of heroin addicts, despite the fact that federal criminal law also provided compulsory consequences

for the use of heroin (i.e. criminal sanctions). Despite the valid federal legislation already existing on the subject matter, the Court upheld the provincial legislation since it sought to regulate an aspect of heroin addiction and use (i.e. the medical treatment aspect) that was within the overall provincial jurisdiction over health described above.¹¹²

To use a well-worn constitutional analogy then, in overlapping jurisdiction both the federal government and the provinces can occupy the field of RIH whereas if jurisdiction is divided, each level of government will be confined to its own section of the field. With respect to RIH, one might make the case that jurisdiction is overlapping owing to the broad scope of the provincial powers over health and the federal authority under criminal law and POGG over RIH.

However, it is important to note that even if jurisdiction is found to be overlapping with regard to RIH, the federal government is in a stronger position vis a vis the provinces to govern RIH owing to the doctrine of paramountcy. In situations where jurisdiction is overlapping and the federal and provincial laws conflict, that is where the concurrent provincial legislation would interfere with or frustrate the federal legislation, the doctrine of “paramountcy” dictates that the federal law would trump and the provincial law would be found inoperative to the extent of the conflict.¹¹³ This federal advantage is, however, limited by the fact that “conflict” has generally been defined strictly so as to refer to situations where the two laws are “operationally incompatible” or where “compliance with one law necessarily requires breach of the other.”¹¹⁴ The mere fact that Parliament has “occupied the field” by legislating in an area is unlikely to exclude otherwise valid provincial jurisdiction.¹¹⁵ However, if the provincial law can be shown to frustrate the purpose of the federal legislation then a conflict will be found and the federal legislation will prevail.¹¹⁶

The continued possibility of provincial regulation in the area of RIH (provided it does not conflict with federal legislation on the issue) might prompt the federal government to use other means to secure provincial cooperation. Such cooperation will also be important to the success of a national governance system for RIH as mentioned in the previous section in that case of divided jurisdiction over RIH. Furthermore, even if RIH were found to be a single and complete subject matter within the federal POGG power, valid provincial legislation that incidentally affected RIH would still be a possibility. In fact, given the broad provincial jurisdiction over health-related matters it would seem highly likely that many provincial statutes will have an incidental application to the subject of RIH (for

¹¹² *Schneider*, *supra* note 19 at 138.

¹¹³ For further discussion see Hogg, *supra* note 6 at s. 16. As Hogg notes the Constitution is silent on this doctrine.

¹¹⁴ *Schneider*, *supra* note 19, at 140; *Ross v. Ontario (Registrar of Motor Vehicles)*, [1975] 1 S.C.R. 5 [Ross]; *McCutcheon*, *supra* note 17.

¹¹⁵ *Ross*, *ibid.*

¹¹⁶ *Bank of Montreal v. Hall* [1990] 1 S.C.R. 121.

example, provincial regulation of hospitals). Thus, via the double aspect and/or “incidental effects” doctrines, the possibility of concurrent federal and provincial jurisdiction in the area of RIH appears high. It is therefore important for the federal government in its bid to implement a national governance system for RIH to contemplate the mechanisms at its disposal to encourage and obtain provincial cooperation in such a scheme.

C. Federal and Provincial Cooperation in the Governance of RIH

Perhaps the most significant constitutional mechanism at the federal government’s disposal to encourage provincial cooperation and achieve a central regulatory scheme for RIH is the federal spending power. The federal spending power is not expressly provided for in the *Constitution* but is implied from the federal power over public property and the public debt under s. 91(1A), the federal taxing power under s. 91(3), and the federal appropriations power under s. 106.¹¹⁷ This power enables the use of conditional grants of federal money through which the federal government is able to exert influence over matters normally within the exclusive jurisdiction of the provinces. The most familiar use of this power is federal regulation of national standards for the provision of health care services via the *Canada Health Act*.¹¹⁸ Acceptance of these standards by the provinces is a prerequisite for the receipt of federal transfer payments. Regardless of the policy arguments for and against such federal intervention, there appears to be little doubt that the federal government’s use of its spending power in this way is constitutionally valid as confirmed by the Supreme Court of Canada in *Re Canada Assistance Plan*.¹¹⁹

It is thus open to the federal government to encourage/compel acceptance of and compliance with national guidelines relating to RIH through the use of its spending power. To a certain degree, RIH is currently regulated this way, since to be eligible for federal government funding, research must first be reviewed by research ethics boards (REBs), according to the policy statement established by the three national funding councils.¹²⁰ Furthermore, all institutions receiving council funding must certify compliance with this policy statement. This arrangement leaves all research not conducted at institutions receiving national council funding (or by researchers employed by such institutions) unregulated by the policy statement. The federal government could of course try to compel provinces to require all research within their borders to meet a set of national standards by making this a requirement for the receipt of federal transfer payments for the

¹¹⁷ See Jackman, *supra* note 20 at 8; and Hogg, *supra* note 6 at s. 6.8(a).

¹¹⁸ R.S.C. 1985, c. C-6.

¹¹⁹ [1991] 2 S.C.R. 525; see also Jackman, *supra* note 20 at 7-9.

¹²⁰ Tri-Council Working Group, *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* (Ottawa: Public Works and Government Services Canada, 1998) at i.1, I.2. The three funding councils are the Social Sciences and Humanities Research Council, the Natural Sciences and Engineering Research Council, and the Canadian Institutes of Health Research (replacing the former Medical Research Council).

provision of health or education services. Jackman suggests that Parliament could similarly control NRTs by authorizing federal spending under conditions set in new NRT legislation or under existing legislation such as the *Canada Health Act*.¹²¹ Of course, the effectiveness of such regulation is entirely dependent on the amount of money the federal government is willing to put on the table and the provincial need for funding. One of the weaknesses of this as a means of regulating RIH is that it is uncertain and can be without teeth. Should a province decide not to apply or enforce regulations, the only consequence is the withdrawal of funding. Thus, a province is not bound by its agreement, and could at any time decide to breach it and forego the funding. Furthermore, given the political nature of the arrangement, provinces might have considerable latitude in their level of cooperation and compliance before the federal government would take action.

Another option akin to the use of the spending power that would address this certainty concern is the use of contract. The federal power to contract is similar in scope to its power over spending. The federal government could thus contract with the provinces over the issue of the regulation of RIH, trading provincial compliance with federal regulation for government funds. The primary advantage of contracting versus using the spending power is that contracts are binding and enforceable by the courts. Thus, the agreement is likely to offer greater certainty. However, this is also one of its major drawbacks as a strategy for gaining provincial cooperation – namely, provinces must agree to contract and thus give over aspects of their jurisdiction in a more permanent way.

One of the concerns that might be raised with respect to shared jurisdiction and prompt the implementation of a cooperative approach is the complexity and expense involved in setting up multiple administrative schemes in the various provinces to deal with RIH regulation. Inter-delegation of provincial power over RIH matters might offer some alternative to the problems and costs inherent in the creation of multiple administrative bodies charged with the enforcement of RIH regulation. Inter-delegation, in the sense of provinces assigning legislative powers to the federal government, is not permitted under the *Constitution*. The Supreme Court of Canada has held that this would be tantamount to allowing provinces to alter the division of powers and such authority is not granted by the *Constitution*.¹²² However, while legislative inter-delegation is not an option, administrative inter-delegation has been found constitutional.¹²³ Under this option, provincial governments could assign their regulatory power to a federal administrative body essentially enabling the federal administrative body to discharge provincial authority according to the rules and regulations set out by the federal government.

Another option for coordination between the provincial and federal governments is incorporation by reference whereby the provincial legislation of RIH could

¹²¹ Jackman, *supra* note 20 at 9.

¹²² *Nova Scotia (Attorney General) v. Canada (Attorney General)*, [1951] S.C.R. 31.

¹²³ *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392.

adopt the federal regulations or a federal administrative board as its own. Finally, even if the federal government is able to establish exclusive authority over RIH they might still allow for provincial diversity of implementation through the use of an opt out clause. Such a clause would allow the provinces to opt out of the scheme provided that they have similar legislation. This approach has been utilized recently in the federal privacy legislation.¹²⁴

6. Conclusion

In conclusion, there seems to be no basis upon which to conclude that regulation of RIH would fall exclusively within provincial jurisdiction. Provincial jurisdiction over health is general but not exclusive and for the most part is focused on public health issues. Furthermore, the jurisprudence has made clear that there are exceptions to this general jurisdiction over health and thus room for the federal government to enter the field.

The case for exclusive federal jurisdiction appears stronger than the provincial case although it is far from certain. The federal government could make its claim for such jurisdiction under the national concern branch of the federal POGG power. While there has been some skepticism concerning the ability of this branch of POGG to sustain federal legislation in the area of assisted human reproductive technologies, the subject matter of research in humans may be sufficiently more defined and distinctive as to stand a better chance of meeting the requirements to constitute a national concern. If the federal government is able to gain jurisdiction on this basis it would have exclusive control over the regulation of RIH.

The other head of power that could be utilized to justify exclusive federal governance of RIH is the criminal law power. Recent jurisprudence suggests that this power could support a broad regulatory scheme provided it was undertaken for a valid criminal law purpose and included prohibitions backed by penalties. Given that the government's primary concern with RIH relates to health, safety and morality, it is likely that such legislation would be found to have a valid criminal law purpose. What will be determinative is the form the legislation takes. In order to be justifiable under the criminal law power, such legislation must ultimately be concerned with prohibition and penalty. This does not, however, preclude exceptions from prohibitions provided certain conditions are met, thus allowing for significant regulation within the ambit of the criminal law jurisdiction. This power could therefore support exclusive federal jurisdiction over RIH as any law that was in conflict with these provisions would be inoperative.

Even in the event that attempts to ground an exclusive or broad jurisdictional claim over RIH are unsuccessful, the federal government enjoys significant jurisdiction in this area. Absent the power to regulate, the criminal law power would nevertheless allow the federal government to significantly restrict RIH practices

¹²⁴ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

through outright prohibition. The federal government could also use its trade and commerce power to exercise jurisdiction over RIH practices as they are connected with or involve inter-provincial or international trade and commerce. Furthermore, the federal government would have jurisdiction over RIH in contexts under their authority, such as in prisons and military hospitals. Thus, even in a divided jurisdiction scenario, federal authority would be significant.

Furthermore, if jurisdiction over RIH is divided or overlapping, the federal government has at its disposal important constitutional mechanism that might strengthen its bid to govern in this area. First and foremost, the federal government might use its spending power to encourage provincial cooperation with its regulatory scheme (either through independent provincial action in line with federal guidelines or through more direct forms of cooperation including administrative inter-delegation or referential incorporation). In the alternative, the federal government might seek a more concrete agreement on the issue through the use of contractual agreements with the provinces.

In designing a national governance scheme for RIH, then, it seems that the federal government ought to pay close attention to both the form and the purposes of such legislation in order to succeed in defending its jurisdictional claim. In conclusion, it is interesting to note that much may depend on the nature of the challenge to federal legislation. Significantly, courts might be more compelled by a jurisdictional challenge if there is a genuine dispute between the provinces and the federal government than if the jurisdictional challenge comes from a third party. It is clear, then, that the easiest route to federal jurisdiction over RIH is to practice co-operative federalism and secure the support of the provinces. Absent such support, however, there exists a claim worth pursuing for substantial and perhaps exclusive federal jurisdiction in the area of RIH.