



EFC

The Evangelical Fellowship
of Canada

**Recovering what was Lost: Recapturing the Integrity of the
Assisted Human Reproduction Act
Recommended Amendments for Legislative Reform**

A Submission to the Ministers of Justice and Health

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Executive Summary of Recommendations

1. Board Members of the AHRC Agency

- a. Former board members of the AHRC Agency should be retained in an advisory position to Health Canada.

2. Governing Reproductive Technologies under the Power of Peace, Order and Good Governance

- a. Rather than relying upon its criminal law power, Parliament may retain control of assisted human reproduction under its peace, order, and good government (POGG) power.

3. Revision of the Sections of the AHR Act

a. Section 10

- i. In order to preserve section 10 as valid criminal law, Parliament needs to clearly address the danger that section 10 was designed to prevent and outline the connection between that evil and the apprehended harm. To do this, the Government of Canada should review the cautions expressed in McLachlin C.J.C.'s decision, which draws from the *Proceed with Care* report.
- ii. In the alternative, Parliament is encouraged to prohibit everything listed in section 10 unless done in accordance with provincial regulations. These regulations would have to meet minimum standards stipulated by the federal government.

b. Section 11

- i. Parliament is encouraged to prohibit transgenic manipulation altogether by outlining the evil and the reasonable apprehension of harm this section was intended to avoid.
- ii. In the alternative, Parliament is encouraged to prohibit transgenic science unless carried out in accordance with provincial regulations. These regulations would have to meet minimum standards stipulated by the federal government.

c. Section 13

- i. In order to preserve section 13 as valid criminal law, Parliament needs to clearly address the danger that section 13 was designed to prevent and outline the connection between that evil and the apprehended harm. To do this, the Government of Canada is encouraged to examine the cautions expressed by McLachlin C.J.C. in her decision.
- ii. In the alternative, Parliament is encouraged to prohibit all activity relating to assisted human reproduction occurring outside of a facility licensed for that purpose by the province.

d. Sections 14-18

- i. Parliament may regulate access to information under its POGG power. This would address the moral, health and social concerns arising from donors and children born of reproductive technology who are seeking access to information about each other. It would also grant Health Canada access to national statistics to facilitate better development of this new area of law.
- ii. In the alternative, Parliament is encouraged to work in cooperation with provincial privacy legislation, creating guidelines to help provinces develop their response to access to information.

e. Sections 40(2), (3), (3.1), (4), (5), 44(2), 44(3)

- i. In order to preserve these sections, Parliament must clearly outline how and why these provisions are necessary to the rest of the Act. In doing so, the Government of Canada may reference the reasons of McLachlin C.J.C. in her decision.
- ii. In the alternative, Health Canada is encouraged to develop a set of guidelines to govern the administrative aspect of assisted human reproduction. These guidelines would help advise the provinces in their development of regulations and licensing procedures.

A. An Introduction to the Assisted Human Reproduction Act

1. A Brief History of the Assisted Human Reproduction Act

The *Assisted Human Reproduction Act* (the “AHRA”) was “one of the most comprehensive [legislative frameworks] in the world in the field of assisted human reproduction.”¹ It was passed in 2004 after fifteen years of research and development.²

This development process originated with the Royal Commission on New Reproductive Technologies (hereafter, the “Royal Commission”) in the late 1980s. Its mandate was to:

[E]xamine current and potential scientific and medical developments related to reproductive technologies, but also to go beyond them to consider: the impact of the technologies on society as a whole; their impact on identified groups in society, specifically women, children, and families; and the ethical, legal, social, economic, and health implications of these technologies.³

In 1993, the Royal Commission released *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*.⁴ *Proceed with Care* made two recommendations that were later implemented in the AHRA: first, that the federal government prohibit certain reproductive technologies under its criminal law jurisdiction, and second, that a national administrative body be created to regulate the field.⁵

For two years following the release of *Proceed with Care*, “the federal government consulted with the provinces, the territories and independent groups, including researchers, men and women dealing with infertility problems, persons with disabilities, religious denominations and physicians.”⁶ Following this research intensive period, a voluntary moratorium on certain human reproduction technologies was announced by the Minister of Health in 1995.⁷

In 1996, Bill C-47, *The Human Reproductive and Genetic Technologies Act*, was fashioned.⁸ A long development process ensued, which included “several incarnations, five health ministers, two parliamentary sessions and many stakeholder consultations.”⁹ Out of this resulted Bill C-6: *An Act Respecting Assisted Human Reproduction and Related Research* (the “AHRA”), which received Royal Assent on March 31, 2004.¹⁰

¹ Mavis Jones and Brian Salter, “Proceeding carefully: Assisted human reproduction policy in Canada” (2010) 13:4 Public Understand Sci 420 at 426 [Jones and Salter].

² *Ibid* at 421.

³ Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Canada Communications Group, 1993) at 2, cited in: Jones and Salter, *supra* note 1 at 423-424.

⁴ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 at para 5 [Reference].

⁵ Graeme G Mitchell, “Not a General Regulatory Power – A Comment on Reference re Assisted Human Reproduction Act” (2011) 54 SCLR (2d) 633 at 636-637 [Mitchell].

⁶ *Reference*, *supra* note 4 at para 6.

⁷ Jones and Salter, *supra* note 1 at 425.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *Ibid* at 425-246.

The AHRA contained “a prohibition regime, supported by provisions designed to administer and enforce its prohibitions.”¹¹ It also paved the way for the federal regulatory agency, Assisted Human Reproduction Canada (“AHRC”), which was formed on January 12, 2006.¹²

2. The Constitutionality of the *Assisted Human Reproduction Act* Challenged before the Courts

Not long after the AHRA took effect, the legality of certain sections were called into question. In 2008, the Quebec Court of Appeal held that while certain prohibitions in the AHRA were valid criminal law, the rest of the Act went beyond a criminal purpose and was designed to regulate medical practice and research. As such, the impugned provisions were, in the opinion of the court, unconstitutional.¹³

The case was appealed to the Supreme Court of Canada (the “SCC”). Three issues were brought forward: the validity of the AHRA as a whole, the validity of the “controlled activities” prohibitions, and the validity of the administrative provisions under the ancillary powers doctrine.¹⁴ The SCC released its decision, *Reference re Assisted Human Reproduction Act*, at the end of 2010.¹⁵ The decision contained three judgments, one written by Chief Justice McLachlin (Binnie, Fish, and Charron JJ. concurring), the second written by Lebel and Deschamps JJ. (Abella and Rothstein JJ. concurring), and the third written by Cromwell J.¹⁶ McLachlin C.J.C. found that the AHRA in its entirety was within the federal jurisdiction over criminal law. Lebel and Deschamps JJ. held that the prohibited activities under the AHRA were constitutional, but that the regulatory provisions were not. Cromwell J. broke the tie, allowing the appeal in part. He found that ss. 10, 11, 13, 14-18, 40(2), (3), (3.1), (4), (5), 44(2), (3) were outside of federal jurisdiction and as such were unconstitutional. He found that ss. 8, 9, 12, 19, and 60 were within the federal authority over criminal law. Lastly, Cromwell J. found that ss. 40(1), (6), (7), 41-43, 44(1), (4), 45-53, 61, and 68 were constitutional “to the extent they relate to constitutionally valid provisions.”¹⁷

The SCC decision stripped much of the AHRC’s power. The Budget released on March 29, 2012, eliminated funding to the AHRC, and the agency is set to officially close by March 31, 2013.¹⁸ According to the AHRC website, “The winding down of the Agency responds to the 2010 ruling of the Supreme Court of Canada that significantly reduced the federal role in assisted human reproduction.”¹⁹

In addition to the SCC decision, Health Canada failed to “write crucial regulations under parts of the *Assisted Human Reproduction Act* the court left intact.”²⁰ This has resulted in little enforcement of the AHRA,²¹ and, to date, no charges have been laid under the Act.²²

¹¹ *Reference*, *supra* note 4 at para 7.

¹² Jones and Salter, *supra* note 1 at 426. Note: Health Canada had created the Assisted Human Reproduction Implementation Office to fill the gap until AHRC was established.

¹³ *Reference*, *supra* note 4 at para 8.

¹⁴ *Ibid* at para 15.

¹⁵ *Ibid*.

¹⁶ Mitchell, *supra* note 5 at 635.

¹⁷ *Reference*, *supra* note 4 at para 294.

¹⁸ “Welcome to AHRC,” online: Assisted Human Reproduction Canada <<http://www.ahrc-pac.gc.ca/v2/index-eng.php>> [AHRC].

¹⁹ *Ibid*.

²⁰ *Ibid*.

²¹ “Canadian women richly rewarded for donating eggs,” *CTV News* (27 March 2012), online: Sympatico.ca News <http://news.sympatico.ctv.ca/home/canadian_women_richly_rewarded_for_donating_eggs/4488c6e1>.

²² Tom Blackwell, “Fertility industry to lose its regulator” *Ottawa Citizen* (2 April 2012), online: *Ottawa Citizen*

Once the AHRC is closed, “Health Canada will take responsibility for any remaining federal functions such as compliance and enforcement, and outreach.”²³ This will likely be insufficient, however. In the words of former member of AHRC’s board, Francoise Baylis: “the whole debacle is shocking...There has been close to 30 years invested in terms of effort, energy and money (on the issue) and it’s all for naught.”²⁴ The following are the EFC’s recommendations for legislative reform.

B. Proposed Amendments or Policy Changes

1. Board Members of the AHRC

The Government of Canada is encouraged to retain former board members of the AHRC in an advisory position to Health Canada. The dismantling of the AHRC, while being a resourceful fiscal move, could result in an almost irreplaceable loss of valuable knowledge. Those appointed to the Agency’s board have experience in, and understanding of, this complex area of law. This will need to be capitalized on in the coming years as Canada continues to develop its approach to assisted human reproduction.

2. Governing Reproductive Technologies under the Power of Peace, Order and Good Governance

The *Reference* decision created a murky area of law for both assisted human reproduction and division of powers. It “signals that at least a majority of the current justices has grown uneasy about an ever expanding regulatory capacity for the criminal law.”²⁵

In order to address the federal government’s scope of power with respect to its ability to establish criminal law, Parliament may retain control of assisted human reproduction using its peace, order, and good government (POGG) power. In *R. v. Schneider*, the SCC recognized federal health jurisdiction as a possible area of national concern under POGG.²⁶ Using POGG to manage health-related legislation has seemed restricted following the *RJR-MacDonald* and *Hydro-Quebec* cases; however, it remains a viable option.²⁷

In *R. v. Crown Zellerbach Canada Ltd*, Le Dain J argued that to fall under the national concern doctrine, the issue:

[M]ust 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.²⁸

To meet this standard, it must be shown that: a) temporary legislation would be ineffective; b) the matter did not exist at Confederation or is a matter of local or private nature which has since become a matter of national concern; c) the subject matter has a singleness, distinctiveness, and indivisibility that

<<http://www.ottawacitizen.com/news/todays-paper/Fertility%2Bindustry%2Blose%2Bregulator/6395155/story.html>> [Blackwell]. Note: The RCMP has just recently launched their first investigation under the AHRA; there may therefore be convictions in the near future.

²³ AHRC, *supra* note 18.

²⁴ Blackwell, *supra* note 22.

²⁵ Mitchell, *supra* note 5 at 633.

²⁶ Martha Jackman, “Constitutional Jurisdiction Over Health in Canada,” (2000) 8 Health Law Journal 95 at 103 [Jackman].

²⁷ *Ibid* at 104-105.

²⁸ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at para 33, [1988] SCJ No 23 [Zellerbach].

clearly distinguishes it from matters of provincial concern; and d) there is provincial inability. It must also be shown that there are ascertainable reasonable limits so the new power does not trample the division of powers.²⁹

Assisted human reproduction meets these criteria. First, temporary legislation would not be effective. Rather than being an issue that will decrease over time, reproductive technology will likely continue to expand its reach over time. Second, it is an issue that did not exist at Confederation and therefore was not considered when dividing power under sections 91 and 92. Third, it is a subject matter that has singleness, distinctiveness, and indivisibility. As the Chief Justice argued, it raises “important moral, religious and juridical questions.”³⁰ She likens it to “‘Playing God’ with genetic manipulation.”³¹ Lastly, a national law is needed, as the failure of one province to regulate in this field – the lowest standard – carries adverse consequences for the residents of other provinces.³² If Quebec, for example, chose to legislate assisted reproduction and Ontario did not, Quebec residents could cross the provincial border to engage in research and/or receive treatments that would be prohibited in Quebec.

Where issues might arise in regard to the use of POGG is the matter of “ascertainable reasonable limits.” This is the problem that arose in the *Reference* decision concerning the federal government’s use of its criminal law power. The next section highlights recommendations to reach these reasonable limits with respect to the sections of the AHRA that were found to be unconstitutional by the SCC.

3. Reasons to “Recover what was Lost”

A. General Principles

While this document is not a treatise on the moral, philosophical, or theological issues associated with reproductive technology, it is imperative to outline the foundation that propels the EFC on this position. The principles that guide our approach are as follows: Stewardship, Respect for Life, Respect for Human Dignity, Protection of the Vulnerable, and Protection of Family Integrity.

Stewardship

Stewardship of human and non-human creation is a responsibility to care for the earth, not the freedom to destroy or pillage it. This stewardship involves attention to the condition of the human and non-human creatures and the environment in which they live.

Respect for Life

Human life is protected throughout Canadian law. This principle is most obvious in *Criminal Code* prohibitions against murder, the taking of another person’s life. The Supreme Court of Canada has recognized that Canadian society is “based upon respect for the intrinsic value of human life and on the inherent dignity of every human being...”³³

Respect for Human Dignity

Respect for human dignity is evident in human rights laws. In biotechnology, the principle of respect for human dignity would promote the integrity of human life, ruling out such technologies as animal/human hybrids. Applying the principle of respect for human dignity would also lead to restrictions on

²⁹ *Ibid.*

³⁰ *Reference*, *supra* note 4 at para 4.

³¹ *Ibid* at para 74.

³² Jackman, *supra* note 26 at 104: This was the argument used by the Quebec Court of Appeal in *RJR MacDonald* even though the Supreme Court of Canada, in that case, did not examine tobacco advertising legislation under the POGG power.

³³ *Rodriguez v B.C. (Attorney General)* (B.C.L.R.) at 282.

experimentation on human life. Respect for human dignity involves treating human beings as human beings and not as objects to be bought, sold or bartered. This would preclude the commercialization of human reproduction and the patenting of human beings at any level.

Protection of the Vulnerable

Social policy such as welfare programs are intended to help those who are in financial difficulty and unable to provide for themselves. Protection of the vulnerable is also seen in requirements to provide the necessities of life to children and in child protection laws. Canada must protect those who cannot speak for themselves and those who are vulnerable to exploitation. This principle would prevent the commercialization of reproductive technology, as mentioned above, as well as prohibiting the exportation of harmful or potentially harmful technologies to developing countries. This principle also requires informed consent about the effects of biotechnology and biotechnology based products and services.

Protection of Family Integrity

Basic family relationships and responsibilities are found in legal definitions of spouse, of marriage, of parental support requirements. Child protection laws do not allow the state to intervene in families unless there is a breakdown in family function. Reproductive and genetic technologies create the potential for procreation to be deliberately shifted away from families and for family lines to be blurred.

B. Potential “Evils”

Although some aspects of innovative reproductive technology are warmly welcomed, it is necessary to be aware of its negative potential. According to Don Hutchinson, Vice President and General Legal Counsel for the EFC, the revision of the AHRA creates immeasurable risk. “The court has created confusion and a virtual open season now exists in regard to certain aspects of human-animal genome experimentation and embryo importing, exporting, research and destruction by deeming unconstitutional sections 10 and 11 of the Act along with much of section 40.”³⁴

In *Harvard College v. Canada* (the *Harvard Mouse* case), the SCC found that the commodification of human beings was not only intrinsically undesirable, it may also engender a number of troubling consequences such as designer babies, sex selection, “saviour” babies, improper screening based on genetic testing, and so on. There was an obvious public interest in preventing human life being reconceptualized as simply genetic information.³⁵

Another important consideration for the court in the *Harvard Mouse* case was that patenting of human body parts raised this issue: the increasingly blurred line between human beings and other higher life forms. In the new field of xenotransplantation human genes are introduced into mammals such as pigs to make animals’ organs more acceptable to the human body for the purpose of organ transplantation, thus blurring the line between what is human and what is animal.³⁶

Based on the serious moral and ethical concerns identified and accepted by the court in *Harvard Mouse* and given the uncertain legal status of the child in the womb or child before the womb, there is no doubt that it is in the public interest not only to protect the health and safety of the individuals involved in assisted reproduction along with the resulting children, but to prohibit through criminal prohibition the commodification, commercialization and objectification of human beings at all stages of development including their reproductive and genetic material.

³⁴ Evangelical Fellowship of Canada, Media Release, “Supreme Court Renders Mixed Decision on Assisted Human Reproduction Act” (22 December 2010) online: <<http://www.evangelicalfellowship.ca/Page.aspx?pid=7539>>.

³⁵ *Harvard College v. Canada (Commissioner of Patents)* [2002] S.C.J. No. 77 at 176.

³⁶ *Ibid* at para 180.

C. Conclusion

The implications of the AHRA affect not only individuals immediately involved in reproductive procedures, but the Canadian society as a whole; it will influence social values and norms. The AHRA sets out Canada's position on the creation of human and non-human life, whether human reproductive material can be altered, fertilized, implanted, purchased or destroyed. It will also shape and perhaps alter relationships between citizens - parents, children, siblings and spouses.

4. Revision of the Sections of the AHRA

Whether Parliament chooses to use its POGG power or to continue under its criminal law authority, it is called on to revise the AHRA in the best interests of Canadians, particularly the sections found unconstitutional by the SCC. This vast area of law has been largely unregulated following the *Reference* decision, leaving both safety and moral concerns unanswered. What follows is an examination of the sections of the AHRA that were deemed unconstitutional by the SCC and the EFC's recommendations to ameliorate the problems associated with each.

A. Section 10

Issues

McLachlin C.J.C. wrote that "Section 10 of the Act is the most problematic of the impugned provisions."³⁷ It prohibits actions, in relation to human reproductive material or *in vitro* embryos, for certain purposes, unless carried out in accordance with regulations and a license.³⁸ It states:

- 10. (1) No person shall, except in accordance with the regulations and a licence, alter, manipulate or treat any human reproductive material for the purpose of creating an embryo.
- (2) No person shall, except in accordance with the regulations and a licence, alter, manipulate, treat or make any use of an in vitro embryo.
- (3) No person shall, except in accordance with the regulations and a licence, obtain, store, transfer, destroy, import or export
 - (a) a sperm or ovum, or any part of one, for the purpose of creating an embryo; or
 - (b) an in vitro embryo, for any purpose.³⁹

One of the majority's concerns was that the regulations discussed in section 10 had not yet been written. Given the broad wording of the section, these federal regulations could potentially extend to a wide variety of practices.

Writing for the minority, McLachlin C.J.C. stated, "If the federal government were to implement regulations enacting a complete code of conduct for doctors, and regulating every component of the delivery of fertility services, the regulations would be *ultra vires*."⁴⁰ She found, however, that this did not make the provision itself unconstitutional. McLachlin C.J.C. argued that if future provisions were overbroad, they would be *ultra vires* on their own.⁴¹

McLachlin C.J.C. noted that since Parliament could have prohibited the actions listed in section 10 altogether, it was within their jurisdiction to impose selective prohibitions.⁴² She also argued that in the

³⁷ *Reference*, *supra* note 4 at para 95.

³⁸ *Ibid* at para 93.

³⁹ *Assisted Human Reproduction Act*, SC 2004, c 2, s 10 [AHRA].

⁴⁰ *Reference*, *supra* note 4 at para 95.

⁴¹ *Ibid*.

⁴² *Ibid* at para 101.

AHRA, Parliament had recognized the “need for cooperation and coordination between the federal and provincial authorities.”⁴³ Under section 68 of the Act, if the province had equivalent legislation, the AHRA would not apply.⁴⁴

On the other side of the debate, the Attorney General of Quebec argued that instead of regulating the area themselves, Parliament should prohibit fertility services unless they were in accordance with provincial regulations. The provincial regulations would have to meet minimum standards required by the federal government.⁴⁵ McLachlin C.J.C. did not agree with this approach. She wrote that “it would be inappropriate to prohibit all fertility treatment until the Provinces are able to act.”⁴⁶ Further, she argued that this is a “developing field” to which Parliament may need to add further criminal legislation.⁴⁷

Recommendations

LeBel and Deschamps JJ. wrote that a valid criminal law must address more than a moral concern of fundamental importance.⁴⁸ They would require, instead, “a real evil and a reasonable apprehension of harm[.]”⁴⁹ In response to this, the EFC recommends that Parliament clearly address the “evil” that section 10 was designed to prevent. In addition, it must stipulate the connection between that evil and the apprehended harm. In this manner, section 10 would be preserved as valid criminal law.

The evils which Parliament might focus on are spelled out in decision of McLachlin C.J.C., which she takes from *Proceed with Care*. She lists:

The “commodification of women and children”; sex-selective abortions; cross -species hybrids; ectogenesis with the potential to “dehumanize motherhood”; “baby farms”; saviour siblings (a child whose primary purpose is to cure another child suffering from a genetic disorder); devaluation of persons with disabilities; discrimination based on ethnicity or genetic status; and exploitation of the vulnerable.⁵⁰

In the alternative, the EFC recommends that Parliament follow the suggestions of the Attorney General of Quebec to prohibit everything in section 10 unless done in accordance with established provincial regulations. Considering the way in which the law now stands, everything in section 10 is legal until the provinces regulate it. This is a great danger.

Parliament may ensure through discussion with the provinces that they will be agreeable to the enactment of regulations within a certain time period. In addition, having provincial regulations would not preclude Parliament from later criminalizing a particular area if required, and criminalizing an area until there are provincial regulations would not preclude provincial health care mechanisms from being engaged as appropriate. Under the paramountcy rule, the provincial regulation would be rendered inoperative if the federal government legislated an absolute criminal prohibition in that area. Otherwise, the prohibition in the absence of provincial regulation will encourage provincial action, with Parliament having established a minimum standard.

⁴³ *Ibid* at para 102.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* at para 103. This would be similar to the way in which gambling is dealt with in Canada. Parliament currently “prohibits lotteries unless they are conducted in accordance with provincial regulations.”

⁴⁶ *Ibid* at para 104.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at para 238.

⁴⁹ *Ibid* at para 240.

⁵⁰ *Reference, supra* note 4 at para 100.

B. Section 11

Issues

Section 11 “uses a selective prohibition to broaden the absolute prohibitions in s. 5(1)(h), (i), and (j) on the creation of chimeras and hybrid entities.”⁵¹ It states:

11. (1) No person shall, except in accordance with the regulations and a licence, combine any part or any proportion of the human genome specified in the regulations with any part of the genome of a species specified in the regulations.

(2) The following definitions apply in this section.

“human genome” means the totality of the deoxyribonucleic acid sequence of the human species.

“species” means any taxonomic classification of non-human life.⁵²

The Attorney General of Quebec recognized that the federal government “has a valid moral interest in banning the harms caught by s. 5(1)(h), (i) and (j).”⁵³ As McLachlin C.J.C. stated, “It is difficult to argue that s. 11’s broader focus on transgenic manipulation does not invoke the same moral concerns.”⁵⁴ The issue with section 11 is that, similar to section 10, it requires a person to obtain a licence from the AHRC Agency and to operate within federal regulations.⁵⁵

Recommendations

The EFC recommends either of two steps for Parliament to take in relation to section 11.

First, Parliament is encouraged to prohibit transgenic manipulation altogether. It entails “profound ethical and moral implications,” as it can be used to develop genes with “both human and animal characteristics.”⁵⁶ Transgenic manipulation has also been linked with “human cloning and the commodification of reproductive materials.”⁵⁷ These are sufficient reasons to justify criminalizing this area completely. If Parliament chose to do this, it would have to clearly stipulate the evil and the apprehended harm it is trying to prevent.

Second, if Parliament does not prohibit these activities completely, it could do as the EFC has recommended for section 10. It could prohibit transgenic science unless it is carried out in accordance with provincial regulations. These regulations would be subject to a minimum standard created by Parliament.

C. Section 13

Issues

Section 13 prohibits “any activities relating to the artificial production of human life” from occurring in unlicensed premises.⁵⁸ It states as follows:

13. No person who is licensed to undertake a controlled activity shall undertake it in any premises except in accordance with a licence permitting the use of the premises for that controlled activity.⁵⁹

⁵¹ *Ibid* at para 108.

⁵² AHRA, *supra* note 35 at s 11.

⁵³ *Reference*, *supra* note 4 at para 108.

⁵⁴ *Ibid*.

⁵⁵ *Ibid* at para 221.

⁵⁶ *Ibid* at para 107.

⁵⁷ *Ibid*.

⁵⁸ *Reference*, *supra* note 4 at para 114.

The Attorney General of Quebec argued that the provinces should decide where “medical procedures are performed.”⁶⁰ In contrast, McLachlin C.J.C. found that “serious health risks” could arise from creating “human life in clandestine facilities.”⁶¹ She was also concerned about immoral activities occurring in secret. She cited the hypothetical example of infants, created by artificial reproduction technologies, dying due to ill-equipped facilities.⁶²

McLachlin C.J.C. went on to say that preventing certain activities in unlicensed facilities does not “usurp the provinces’ role in regulating hospitals and research centres.”⁶³ Under the equivalency agreement contained in section 68, a province could take full responsibility for licensing under section 13.⁶⁴

Recommendations

If Parliament chooses to keep section 13 the way it stands, it needs to specify the “evil” and the “apprehended harm” it addresses. This could be done by reference to the serious health risks that McLachlin C.J.C. discusses. She stated: “Inadequate equipment, unsterilized facilities, unqualified staff, inappropriate emergency protocols – all of these factors and more may pose grave risks to the health of donors, mothers, and the future human beings who are the object of the exercise.”⁶⁵ She also addressed the moral concern of assisted reproduction taking place in secret, as addressed above.⁶⁶

In the alternative, the EFC recommends that Parliament prohibit all activity relating to assisted human reproduction from occurring outside of a facility licensed by the province. The Chief Justice’s concerns with respect to moral and health concerns of activities occurring in “clandestine facilities” are present with any medical practice. It is up to the provinces to regulate which health care facilities are approved and which are not.⁶⁷ It would be the same for assisted human reproduction; however the federal government could establish a minimum standard for licensing in this area.

D. Sections 14-18

Issues

Sections 14-18 deal with access to information regarding assisted human reproductive activities (see Appendix A). Chief Justice McLachlin found that these sections “intrude directly on provincial powers.”⁶⁸ She held, however, that these “ancillary provisions constitute a minor incursion on provincial jurisdiction.”⁶⁹ In completing the rational and functional connection test, McLachlin C.J.C. found that these provisions “are closely tied to the valid criminal prohibitions in ss. 5 to 13.”⁷⁰ She wrote that the

⁵⁹ AHRA, *supra* note 35 at s 13.

⁶⁰ *Reference*, *supra* note 4 at para 115.

⁶¹ *Ibid* at para 118.

⁶² *Ibid* at para 119.

⁶³ *Ibid* at para 120.

⁶⁴ *Ibid*.

⁶⁵ *Ibid* at para 118.

⁶⁶ *Ibid* at para 119.

⁶⁷ *Reference*, *supra* note 4 at para 221; In Quebec, the legislation already in place is: the *Act respecting health services and social services* and the *Act respecting medical laboratories, organ, tissue, gamete and embryo conservation, and the disposal of human bodies*.

⁶⁸ *Ibid* at para 133.

⁶⁹ *Ibid* at para 137.

⁷⁰ *Ibid* at para 146.

“collection of information will help to ensure that the Act’s prohibitions are respected and, if defied, that such conduct will be effectively prosecuted.”⁷¹

LeBel and Deschamps JJ., on the other hand, argued that Quebec already legislated in the area of medical and health information.⁷² Federal regulation in this area, they felt, is unnecessary and a large infringement on provincial jurisdiction.

Recommendations

The EFC recommends two options.

First, Parliament is encouraged to regulate access to information under its POGG power. The moral, health, and social concerns arising from donors and children born of reproductive technology having access to information about each other is a new situation where temporary legislation may be ineffective. It is important for the government to establish a national standard for access to information in regard to reproductive technologies so that the rights of resulting children are identified and the best interests of those children protected. Children born as a result of the use of reproductive technology should be entitled to have knowledge of their heritage, especially with reference to genetic/medical history, even if not the specific identity of genetic parents. There is significant potential for a variety of technical, medical, personal and legal problems if there is not a unified approach across the country. It is to be noted that “donors” may live in a different province from where the procedure or procedures in issue take place, and the resulting child and his/her parents may live in yet another province. Which province’s policy of access to information would govern? In addition, considering that this is still such a new area of law and practice, having national statistics would be very beneficial. Gathering of such information would be greatly enhanced if there was a unified federal approach. The federal government might also legislate under its POGG power that Health Canada be entitled to certain information, specifically particular statistics, to enable development of better and more appropriate treatment of such a new area of law.

Second, Parliament could work in cooperation with provincial privacy legislation to develop guidelines for dealing with information about assisted human reproduction. While it is unlikely that the provinces could be required to follow these guidelines,⁷³ these guidelines would aid the provinces in developing their response to access to information concerns with respect to assisted human reproduction.

⁷¹ *Ibid* at para 145.

⁷² *Ibid* at para 222.

⁷³ See para 272 of the *Reference* decision where LeBel and Deschamps state: “However, we wish to point out that the constitutional defects are not remedied by s. 68 of the *AHR Act*, which authorizes the Governor in Council to declare certain provisions inapplicable if the federal minister and the government of a province so agree. The jurisdictional overflow remains just as great as long as regulation of the activities in question remains dependent on the will of the federal government. As we mentioned above, federal and provincial powers are co-ordinate and not subordinate. In s. 68, Parliament has given the federal government a legal tool to impose its own standards on the regulation of assisted human reproduction. Provincial regulatory action will be tolerated only if the provinces in question adhere to the federal scheme. The federal government alone is to determine whether the two schemes are consistent. Subordinating the statutes and regulations in question in this way would be possible only if the federal legislation were itself valid because it was anchored in a specific federal power.”

E. Sections 40(2), (3), (3.1), (4), (5), 44(2), 44(3)

Issues

The last group of provisions to be found unconstitutional by the SCC are administrative.⁷⁴ They “endow the Agency with broad powers to grant licences that affect the: who, where, when and how of assisted reproduction.”⁷⁵ The impugned sections are as follows:

40(2) A licence authorizing the use of an in vitro embryo for the purpose of research may be issued only if the Agency is satisfied that the use is necessary for the purpose of the proposed research.⁷⁶

40(3) The number of licences that the Agency considers sufficient may be issued in respect of clinical trials of a controlled activity.⁷⁷

40(3.1) The Agency shall not issue a licence under subsection (1) for embryonic stem cell research unless it has received the written consent of the original gamete providers and the embryo provider in accordance with the *Human Pluripotent Stem Cell Research Guidelines* released by the Canadian Institutes of Health Research in March, 2002, as specified in the regulations.⁷⁸

40(4) If a person to whom a licence is issued is not an individual, the licence must designate an individual as the person responsible for compliance with this Act, but that designation does not affect the responsibility of the licensee or any other individual under this Act.⁷⁹

40(5) The Agency may, in accordance with the regulations, issue a licence to the owner or operator of any premises permitting the use of those premises for a controlled activity undertaken by persons to whom a licence has been issued under subsection (1).⁸⁰

44(2) For the purposes of taking measures referred to in subsection (1), the Agency may authorize an inspector designated under section 46 to enter the premises where the controlled activity is being undertaken and to assume the management of those premises and that activity.⁸¹

44(3) Any costs incurred by an inspector acting under this section shall be borne by the person who holds the licence in respect of the controlled activity or premises and, until paid, those costs are recoverable in any court of competent jurisdiction as a debt due to Her Majesty in right of Canada.⁸²

Chief Justice McLachlin held that while these sections “intrude directly on provincial powers,”⁸³ they are collateral to the purpose of “prohibiting harmful and immoral conduct, while excepting beneficial activity.”⁸⁴

The majority, however, found the opposite. Section 40 fell within Cromwell J’s list of provisions that “most vividly illustrated” the federal government’s attempt to regulate “virtually every aspect of research and clinical practice in relation to assisted human reproduction.”⁸⁵

⁷⁴ *Reference*, *supra* note 4 at para 147.

⁷⁵ *Ibid* at para 133.

⁷⁶ AHRA, *supra* note 35 at s 40(2).

⁷⁷ *Ibid* at s 40(3).

⁷⁸ *Ibid* at s 40(3.1).

⁷⁹ *Ibid* at s 40(4).

⁸⁰ *Ibid* at s 40(5).

⁸¹ *Ibid* at s 44(2).

⁸² *Ibid* at s 44(3).

⁸³ *Reference*, *supra* note 4 at para 133.

⁸⁴ *Ibid* at para 149.

⁸⁵ *Ibid* at para 285.

Recommendations

LeBel and Deschamps JJ. analyzed the extent of the overflow of the impugned provisions into provincial jurisdiction and found it to be serious. They then wrote that in order to be validly enacted pursuant to an ancillary power, the provisions must “have a relationship of necessity with the rest of the statute.”⁸⁶ They found that this was not the case.⁸⁷ In response to this, the EFC recommends that Parliament clearly outline how and why these provisions are necessary to the rest of the AHRA. One can use the words of McLachlin C.J.C. who wrote: “Licensing helps to ensure that selective prohibition targets morally reprehensible conduct, and does so in a flexible manner that can adapt to changing circumstances.”⁸⁸

In the alternative, the EFC recommends that the Government of Canada, through Health Canada, develop a set of guidelines to govern the administrative aspects of assisted human reproduction. As with access to information, it is unlikely that the provinces could be required to follow these guidelines.⁸⁹ Health Canada, however, is better positioned to consider the issues from a national perspective and these guidelines would assist the provinces in ensuring a consistent standard.

⁸⁶ *Reference*, *supra* note 4 at para 275.

⁸⁷ *Ibid* at para 276-280.

⁸⁸ *Ibid* at para 149.

⁸⁹ See footnote 69.

Schedule “A”: Sections 14-18 of the *Assisted Human Reproduction Act*

14. (1) A licensee shall not accept the donation of human reproductive material or an in vitro embryo from any person for the purpose of a controlled activity, and shall not perform a controlled activity on any person, unless the licensee has obtained from that person the health reporting information required to be collected under the regulations.

(2) Before accepting a donation of human reproductive material or of an in vitro embryo from a person or accepting health reporting information respecting a person, a licensee shall

(a) inform the person in writing of the requirements of this Act respecting, as the case may be,

(i) the retention, use, provision to other persons and destruction of the human reproductive material or in vitro embryo, or

(ii) the retention, use, disclosure and destruction of the health reporting information;

(b) to the extent required by the regulations, make counselling services available to the person and ensure that the person receives them;

(c) obtain the written consent of the person to the application of the requirements referred to in paragraph (a); and

(d) in accordance with the regulations, provide the person with the information that the Agency makes available to the public under paragraph 19(i).

15. (1) No licensee shall disclose health reporting information for any purpose except

(a) with the written consent of the person to whom the information relates allowing its disclosure for that purpose; or

(b) in accordance with subsections (2) to (5).

(2) A licensee shall disclose health reporting information

(a) to the Agency, to the extent required by the regulations;

(b) to the extent required for the administration of a health care insurance plan within the meaning of the *Canada Health Act*;

(c) for the purpose of complying with a subpoena or warrant issued or order made by a court, body or person with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information; and

(d) to the extent required by the provisions of any federal or provincial law respecting health and safety that are specified in the regulations.

(3) A licensee that transfers human reproductive material or an in vitro embryo to another licensee shall disclose to the other licensee the health reporting information in its possession respecting the material or embryo, and respecting the person or persons to whom the material or embryo relates, but the identity of any person — or information that can reasonably be expected to be used in the identification of a person — shall not be disclosed except in the circumstances and to the extent provided by the regulations.

(3.1) A licensee who transfers an in vitro embryo to another licensee shall notify the Agency of the transfer in accordance with the regulations.

(4) Before performing an assisted reproduction procedure that makes use of human reproductive material or an in vitro embryo, a licensee shall disclose to the person undergoing the procedure the health reporting information in its possession respecting the donor, but the identity of the donor — or information that can reasonably be expected to be used in the identification of the donor — shall not be disclosed without the donor's written consent.

(5) A licensee may disclose health reporting information to an individual or organization for scientific research or statistical purposes, other than the identity of any person — or information that can reasonably be expected to be used in the identification of any person.

16. (1) A person shall be given, on request, access to any health reporting information about the person that is under the control of a licensee or other person who has obtained the information. The person is entitled to

(a) request the correction of the information if they believe there is an error or omission in that information;

(b) require that a notation be attached to that information reflecting any correction that was requested but was not made; and

(c) require that such a correction or notation be communicated to any person or body to whom that information was disclosed during the two years preceding the request for a correction.

(2) A licensee or any other person that has control of the health reporting information provided by a donor of human reproductive material or an in vitro embryo, by a person who has undergone an assisted reproduction procedure or by a person who was conceived by means of such a procedure shall, at the request of the donor or that person, as the case may be, destroy that information in the circumstances and to the extent provided by the regulations, and shall inform the donor or that person that the destruction has occurred.

(3) A licensee and any other person that has control of human reproductive material or an in vitro embryo shall destroy that material or embryo at the request of its donor in the circumstances and to the extent provided by the regulations, and shall inform the donor that the destruction has occurred.

(4) This section does not apply to

(a) government institutions subject to the *Privacy Act* or the *National Archives of Canada Act*; or

(b) a court, body or person referred to in paragraph 15(2)(c).

17. The Agency shall maintain a personal health information registry containing health reporting information about donors of human reproductive material and in vitro embryos, persons who undergo assisted reproduction procedures and persons conceived by means of those procedures.

18. (1) The Agency may use health reporting information, and information otherwise relating to the controlled activities undertaken by an applicant or licensee, for the purposes of the administration and enforcement of this Act or the identification of health and safety risks, potential and actual abuses of human rights, or ethical issues associated with assisted human reproduction technologies and the other matters to which this Act applies.

(2) Notwithstanding section 8 of the *Privacy Act* but subject to subsections (3) to (8), health reporting information under the control of the Agency relating to a donor of human reproductive material or an in vitro embryo, a person who has undergone an assisted reproduction procedure or a person who was conceived by means of such a

procedure is confidential and shall be disclosed only with the written consent of the donor or that person, as the case may be.

(3) The Agency shall, on request, disclose health reporting information relating to a donor of human reproductive material or of an in vitro embryo to a person undergoing an assisted reproduction procedure using that human reproductive material or embryo, to a person conceived by means of such a procedure and to descendants of a person so conceived, but the identity of the donor — or information that can reasonably be expected to be used in the identification of the donor — shall not be disclosed without the donor's written consent.

(4) On application in writing by any two individuals who have reason to believe that one or both were conceived by means of an assisted reproduction procedure using human reproductive material or an in vitro embryo from a donor, the Agency shall disclose to both of them whether it has information that they are genetically related and, if so, the nature of the relationship.

(5) The Agency shall disclose health reporting information

(a) for the purpose of complying with a subpoena or warrant issued or order made by a court, body or person with jurisdiction to compel the production of information, or for the purpose of complying with rules of court relating to the production of information; and

(b) to the extent required by provisions of any federal or provincial law respecting health and safety that are specified in the regulations.

(6) The Agency may disclose health reporting information

(a) for the purposes of the enforcement of this Act;

(b) to the extent required for the administration of a health care insurance plan within the meaning of the *Canada Health Act*; and

(c) for the purposes of disciplinary proceedings undertaken by any professional licensing or disciplinary body established under the laws of Canada or a province and specified in the regulations.

(7) The Agency may disclose the identity of a donor to a physician if, in the Agency's opinion, the disclosure is necessary to address a risk to the health or safety of a person who has undergone an assisted reproduction procedure, was conceived by means of such a procedure or is a descendant of a person so conceived. The physician may not disclose that identity.

(8) The Agency may disclose health reporting information to an individual or organization for scientific research or statistical purposes, other than the identity of any person — or information that can reasonably be expected to be used in the identification of any person.⁹⁰

⁹⁰ AHRA, *supra* note 35 at s 14-18.

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