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Transnational Trade in Human Eggs: Law, Policy, and (In)Action in Canada

*Jocelyn Downie and
Françoise Baylis*

In Canada (as elsewhere) there is a growing demand for human eggs for reproductive purposes¹ and currently demand exceeds supply. This is not surprising, as egg production and retrieval is onerous. It requires considerable time, effort, and energy and carries with it significant physical and psychological risks.² In very general terms, one cycle of egg production and retrieval involves an estimated total of 56 hours for interviews, counseling, and medical procedures³ (i.e., screening, hormonal stimulation, and egg retrieval). The screening carries risks of unanticipated findings with severe consequences for insurability (which can be catastrophic).⁴ The daily hormone injections can be painful and uncomfortable, causing cramping, abdominal pain, nausea, vomiting, bloating, mood changes, and irritability. More serious potential harms include rapid weight gain and respiratory difficulty, damage to the organs that are close to the ovaries (e.g., bladder, bowel, uterus), decreased fertility, infertility, and life-threatening hemorrhage, thromboembolism, and ovarian, breast, or colon cancer.⁵ Potential psychological harms include significant stress and its sequelae.⁶ It is one thing to incur these physical and psychological risks in pursuit of a personal reproductive project; it is quite another to do so for someone else's reproductive project. Indeed, given the time, inconvenience, and risks involved (of which we have listed but a few illustrative examples), few women are sufficiently motivated by altruism alone to provide eggs for others.⁷ Some women are willing to do so for financial benefit — but this is not a legal option in Canada, as payment for eggs is prohibited. Furthermore, reimbursement of expenses is restricted.⁸

Other jurisdictions do not prohibit the sale of human eggs,⁹ or they claim to prohibit the sale of human eggs but permit compensation well above the reimbursement of actual expenditures.¹⁰ Within this context of inconsistent regulatory frameworks, a global market for human eggs has emerged.¹¹ Not surprisingly, Canadians have been targeted as potential providers and recipients. What is surprising, however — given the legal prohibition on payment for human eggs and the constraints on reimbursement — is the active participation of Canadians in the transnational human egg trade.¹² More surprising still is the apparent failure of Canadian authorities to properly respond.¹³

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In this paper, we first provide as accurate a picture as possible of transnational trade in human eggs involving Canadians (as providers, recipients, intermediaries or health care professionals). Second, we explain the legal status in Canada of trade in human eggs as it has evolved since 2004. Finally, we reflect on what Canadian authorities should do with respect to this transnational trade. This project is obviously

ates, in whole or in part, a transaction between providers and recipients. For the purposes of this paper, we restrict our scope to federal domestic legislation¹⁵ relating to commercial transactions that involve one or more aspects of egg production and collection (i.e., screening, hormonal stimulation, and egg retrieval) for reproductive purposes and that happen in Canada and/or involve Canadians.

In this paper, we first provide as accurate a picture as possible of transnational trade in human eggs involving Canadians (as providers, recipients, intermediaries or health care professionals). Second, we explain the legal status in Canada of trade in human eggs as it has evolved since 2004. Finally, we reflect on what Canadian authorities should do with respect to this transnational trade. This project is obviously significant for Canada as it relates to the conduct of Canadians in an area the federal government decided warranted very serious legislative intervention.

significant for Canada as it relates to the conduct of Canadians in an area the federal government decided warranted very serious legislative intervention. However, it is also significant for other jurisdictions for at least two reasons: first, because when Canadians participate in the transnational human egg trade and Canadian authorities regulate transnational trade, individuals and organizations in other countries are also affected as providers, recipients, or intermediaries; and second, because some of the arguments that we make about the application of Canadian domestic law to conduct engaged in outside of Canada may be adaptable to other jurisdictions with sufficiently similar legal regimes.

Before proceeding further, we must define key terms and delineate the scope of the paper. In this paper, “trade” refers to the buying and selling of goods and services. “Providers” refers to the women who provide eggs for payment or as a gift. “Recipients” refers to both the women and men who receive eggs for reproductive use. The terms “providers” and “recipients” do not import assumptions about the nature of any transaction the parties engage in — whether commercial or altruistic. We do not use the terms “donor,” “donor eggs,” or “donation,” as these terms mask the financial nature of certain transactions and trade on the traditional ideals of femininity — selfless, caring, nurturing, and devoted to helping others have families.¹⁴ “Intermediary” refers to an individual (e.g., broker, concierge, or consultant) or an organization (e.g., fertility clinic or egg bank) that arranges or negoti-

Transnational Trade in Human Eggs

In the past couple of years, a number of studies have been published on transnational trade in reproductive tissues and services.¹⁶ Nonetheless, there is very little data on this evolving practice in Canada, and there is good reason to be concerned about the quality of what little data there is.¹⁷ That said, on the basis of the best available evidence (which includes empirical work, reports from investigative journalists, and information posted on intermediaries’ websites),¹⁸ we know that Canadians are going abroad to get human eggs, foreign nationals are coming to Canada to provide human eggs, and Canadians are importing human eggs from abroad (i.e., without going abroad themselves). Moreover, we know that the following financial transactions are taking place: payment for human eggs;¹⁹ payment for services in connection with the provision of human eggs; and reimbursement (both per se and above expenditures,²⁰ and both with and without receipts). What we do not know is how many Canadians are involved in such transactions, whether the practice is growing and, if so, at what rate. The paucity of Canadian data reflects both inadequate regulation of assisted human reproduction in Canada and the underground nature of the evolving practice (as a consequence of which, individuals participating in transnational trade may be reluctant to participate in research studies needed to generate reliable data).

Canadians Going Abroad to Purchase Human Eggs

In January 2009, Assisted Human Reproduction Canada (AHRC — the agency tasked with oversight of assisted human reproduction in Canada under the original *AHR Act*)²¹ hosted an international conference on the quality and safety aspects of transnational assisted human reproduction. In the lead up to the *First Invitational Forum on Cross-Border Reproductive Care: Quality and Safety*,²² the conference organizers noted the absence of data on access, treatments, and outcomes, and commissioned several studies including a patient survey by Eric Blyth and a clinic survey by Edward Hughes and Deirdre DeJean.

Blyth's 2008 online patient survey targeted both patients and potential patients ("individuals who have either experienced cross-border reproductive care, or have considered doing so").²³ The survey was posted on the websites of three patient organizations, one in Australia and two in Canada. There were 95 usable responses, of which 28 were from individuals who had participated in transnational travel for reproductive services. The most common reason given for transnational travel was availability of eggs and sperm (75%). Fifteen of the 28 patients (54%) had gone abroad to get eggs and two of the 28 patients (7%) had gone abroad for both eggs and sperm. Of the 28 who had participated in transnational travel, 21 provided information about their country of residence and 13 of these were Canadian. The destination countries for Canadians seeking eggs were India, Mexico, and the USA, and for combined eggs and sperm, the destination country was the Czech Republic.

Hughes and DeJean conducted a mail and online survey of Canadian and American fertility clinics.²⁴ There were 28 responses from 34 Canadian clinics, a response rate of 82%. The most common reason given for transnational travel (80%) was access to anonymous eggs. In response to the survey question, "How many patients per year does your clinic send out of country for ART services?", 59% of respondents provided estimates and 41% provided formal data. The aggregate response, as reported by the authors, is that 365 patients per year went abroad for anonymous eggs — 277 to the United States, 54 to Latin America, 1 to Europe, 2 to India/Asia, and 29 elsewhere. As well, 2 patients travelled to the US and 2 more to India for eggs from known providers. In the American part of the study, 125 responses were received from a total of 392 Society for Assisted Reproductive Technologies registered clinics, a response rate of 32%. In answer to the survey question, "How many patients per year does your clinic receive from outside of the United States for the fol-

lowing ART services?", these clinics reported receiving 83 Canadians for anonymous eggs and 18 for known eggs.

In 2008, Jessica Werb reported in the *Georgia Straight* on Canadian women travelling to the United States to participate in the transnational human egg trade. She noted that the UBC Centre for Reproductive Health estimated referring 50 to 100 patients a year outside of Canada for human eggs. The Genesis Fertility Centre estimated referring about 150 patients a year to Seattle for eggs. And the Pacific Centre for Reproductive Medicine estimated referring patients for eggs, two to three times a month, to the United States but also to Europe, Spain, and Mexico. On the receiving end, Bellingham IVF & Fertility Care estimated providing services to a total of 150 IVF patients a year, 25 of whom were Canadians using eggs from the clinic.²⁵

These data, while neither extensive nor robust, all support the conclusion that Canadians are going abroad to purchase human eggs.

Foreign Nationals Coming to Canada to Provide and Receive Human Eggs

The Blyth study (cited above) reported on one American egg provider travelling to Canada from the United States.²⁶ The Hughes and DeJean study (also cited above) reported on four persons being sent by American clinics to Canada to get anonymous eggs.²⁷

Alison Motluk, an investigative journalist, has also reported on the U.S.-Canada cross-border traffic in human eggs. Below are a few telling excerpts from her award-winning article in *The Walrus*:²⁸

Ruberto [a Canadian living in Florida]...says that last year Our Fairy Godmother [a company run out of Florida] coordinated about 135 [egg] donations in Canada, most of them in Ontario.... About a third of those donors were Canadian women.²⁹

[A] young woman named Sonja, who lives in Washington State, chronicles in detail her six egg donations, all in Canada, between March 2007 and June 2009....Each time,...she got to name her compensation, which started at \$3,000 and rose to \$6,000 by the end.³⁰

Another option which takes advantage of the open market for eggs in parts of the United States, has also gained favour. Instead of finding donors through Canadian clinics, many parents work with US-based agencies, which match them up with young women — mostly American but some Canadian — who fly in days before the retrieval, their ovaries already ripe with eggs.³¹

While anecdotal, these data are not inconsequential. Clearly, foreign nationals are coming to Canada to both provide and receive human eggs.

Canadians Importing Frozen Human Eggs

While considered experimental for a number of years, in 2012, the Practice Committee of the American Society for Reproductive Medicine issued a report which concluded that oocyte cryopreservation “should no longer be considered experimental.”³² Human egg freezing is now widely available and, in experienced labs, 70-90% of eggs survive the freeze-thaw process.³³ Egg freezing technology has expanded the global market in human eggs, which no longer need involve the cross-border movement of providers or recipients for the exchange of fresh human eggs. Instead, it is now possible, and eventually may be preferable, for frozen eggs to travel “alone” across borders. In a recent series of stories about the human egg trade, CBC News reported on the numbers of transnational egg transactions. According to Diana Thomas, president of the World Egg Bank in Phoenix:

We did about 100 eggs to Canada in the last six months...When I speak to doctors individually they really have no fear about the [Canadian] legislation. They just don't want to all of sudden be used as a test case when it hits the press.³⁴

A related news report included an interview with Dr. Matt Gysler at the ISIS Regional Fertility Centre in Oakville, Ontario, who said he “has a dozen pregnancies underway using frozen eggs from the U.S.”³⁵

These comments provide confirmation from both sides of the border that frozen eggs are being imported into Canada.

Canadian Law on Transnational Trade in Human Eggs

Canadian law relevant to trade in human eggs can be found in the *Assisted Human Reproduction Act* of 2004 as amended in 2012 (hereafter *AHR Act*),³⁶ and the 2010 Supreme Court of Canada's (SCC) *Reference re Assisted Human Reproduction Act* (hereafter *AHRA Reference*).³⁷ In brief, s. 7 of the *AHR Act* unquestionably prohibits purchasing, offering to purchase, and advertising for the purchase of eggs and, arguably, also prohibits purchasing, offering to purchase, and advertising for the purchase of egg production services. Section 8 prohibits the use of eggs for the purpose of creating an embryo unless the egg provider has given written consent in accordance with the regulations to its use for that purpose (the section and its regulations having come into force December 1, 2007). Section 10

(not yet in force) will prohibit the distribution, making use of, or importation of eggs for the purpose of reproduction unless various health and safety conditions as set out in regulations (not yet drafted) are met. Section 12 (not yet in force) will permit reimbursement of receipted expenditures if done in accordance with the regulations (not yet drafted).

The law with respect to transnational trade in human eggs can be found in the *AHR Act* itself as well as the law governing the application of Canadian laws to conduct engaged in, in whole or in part, in other countries. When all of the prohibited activities associated with the transnational trade in eggs take place in Canada, then the *AHR Act* applies directly (e.g., the egg provider comes to Canada for the egg retrieval). When the activities take place in whole or in part outside Canada (e.g., the egg retrieval happens in India), the *AHR Act* may nonetheless apply through the “qualified territorial application” of law where what is known as the *Libman* test is met.

Each of these areas of law is explained in greater detail below.

Purchasing, Offering to Purchase, Advertising for the Purchase

Section 7(1) of the *AHR Act* stipulates: “No person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor.” Section 7 came into force April 22, 2004. Upon conviction, under ss. 60 and 62, these activities are punishable by a fine of up to \$500,000 or imprisonment up to ten years or both, forfeiture and disposition of material or information by means of which the offence was committed, and an order not to engage in activity that might lead to the commission of an offence under the *AHR Act*.

Beyond the explicit prohibition on purchasing, offering to purchase, and advertising for the purchase of eggs, it can be argued that s. 7 also prohibits these same activities in relation to third party egg production services. In the *AHRA Reference*, Justice Cromwell characterized s. 12, which concerns reimbursement of expenditures incurred in the course of providing eggs, as carving out an exemption to, and defining the scope of, s. 7.³⁸ This logically means that without s. 12, reimbursement of receipted expenditures is captured under s. 7 and not permitted under the *AHR Act*. If, without s. 12, reimbursement of receipted expenditures constitutes “purchasing ova,” then it can be argued that, anything similarly related to purchasing ova but not explicitly exempted under s. 12 (such as the purchase of egg production services) constitutes “purchasing ova.” On this basis, it can be argued that s. 7 of the *AHR Act* which prohibits purchasing, offering

to purchase, and advertising for the purchase of eggs includes within its ambit egg production services.

This analysis notwithstanding, the conclusion is not incontrovertible. The other judges in the *AHRA Reference* did not describe the relationship between ss. 7 and 12 in the same way as Justice Cromwell. Rather, the four justices with whom he sided in upholding s. 12 characterized s. 12 as itself a prohibition subject to its own exceptions.³⁹ That said, the only way that s.

One can go as far as, albeit no further than, saying it can be argued that s. 7 prohibits both purchasing, offering to purchase, and advertising for the purchase of eggs and egg production services.

12 survived the constitutional challenge was through Justice Cromwell's conclusion that it was constitutionally valid and his conclusion about constitutionality hinged on his characterization of s. 12 as an exemption to s. 7. Thus, one can go as far as, albeit no further than, saying it can be argued that s. 7 prohibits both purchasing, offering to purchase, and advertising for the purchase of eggs and egg production services.

Consent

Section 8(1) of the *AHR Act* stipulates: "No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose." Section 8 came into force December 1, 2007 concurrent with the coming into force of the s. 8 regulations.⁴⁰ Upon conviction, under ss. 61 and 62, a violation of s. 8 is punishable by a fine of up to \$250,000 or imprisonment up to five years or both, forfeiture and disposition of material or information by means of which the offence was committed, and an order not to engage in activity that might lead to the commission of an offence under the *AHR Act*.⁴¹

Distribution, Making Use, and Importation

Section 10 of the *AHR Act*, as amended in 2012 (but not yet in force),⁴² stipulates:

- (1) The purpose of this section is to reduce the risks to human health and safety arising from the use of sperm or ova for the purpose of assisted human reproduction, including the risk of the transmission of disease.

(2) Subject to subsection (3), no person shall distribute, make use of or import any of the following for the purpose of assisted human reproduction:

...

(b) an ovum that has been obtained from a donor and that is meant for the use of a female person other than a spouse, common-law partner or sexual partner of the donor;

(c) an ovum that has been obtained from a donor and that is meant for the donor's use as a surrogate mother.

(3) Subsection (2) does not apply if

(a) tests have been conducted in respect of the...ovum in accordance with the regulations, and the...ovum has been obtained, prepared, preserved, quarantined, identified, labelled and stored and its quality assessed in accordance with the regulations; and

(b) the donor of the...ovum has been screened and tested, and the donor's suitability has been assessed, in accordance with the regulations.

(4) No person shall, except in accordance with the regulations, engage in any activity described in paragraph (3)(a) or (b) in respect of any of the following with the intention of distributing or making use of it for the purpose of assisted human reproduction:

...

- (b) an ovum described in paragraph (2)(b); or
- (c) an ovum described in paragraph (2)(c).

The original s. 10 came into force on April 22, 2004. This section was among those found to be unconstitutional in the *AHRA Reference*. It has since been revised and now includes an explicit statement of purpose ("to reduce the risks to human health and safety,...including the risk of transmission of disease") and contains specific limits on the distribution, use, and importation of eggs with significant potential implications for transnational trade in human eggs. Most significantly, it states: "no person shall distribute, make use of or import... for the purposes of human reproduction... an ovum that has been obtained from a donor and that is meant for the use of a female person other than a spouse, common-law partner or sexual partner of the donor" unless "tests have been conducted", the "ovum has been obtained, prepared, preserved, quarantined, identified, labeled and stored and its quality assessed", and the donor of the ovum "has been screened and tested", all in accordance with the regulations. As noted above, s. 10 is not yet in force and no regulations have yet been made. Once the section is in force and

regulations have been made, the distribution, making use, or importation of fresh eggs for reproductive purposes will be limited to those who are the spouse, common-law partner or sexual partner of the providers (as it is not possible to quarantine fresh eggs and still have them be useable). In effect, the distribution, making use, or importation of eggs for reproductive purposes will be limited to frozen eggs from sources and through processes that can meet the health and safety requirements.

Upon conviction, under ss. 61 and 62, a violation of s. 10 will be punishable by a fine of up to \$250,000 or imprisonment up to five years or both, forfeiture and disposition of material or information by means of which the offence was committed, and an order not to engage in activity that might lead to the commission of an offence under the *AHR Act*.

Reimbursement

Section 12(1) of the *AHR Act* stipulates that: “No person shall, except in accordance with the regulations (a) reimburse a donor for an expenditure incurred in the course of donating sperm or an ovum;... (2) No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.” Upon conviction, under ss. 61 and 62, the activity will be punishable by a fine of up to \$250,000 or imprisonment up to five years or both, forfeiture and disposition of material or information by means of which the offence was committed, and an order not to engage in activity that might lead to the commission of an offence under the *AHR Act*.

At the time of writing, no regulations have been made under this section of the *AHR Act* and s. 12 is not yet in force. In the absence of regulations for s. 12, there has been debate about the scope of legitimate payments for reimbursable expenses. It has been suggested (and it seems to have occurred in some circumstances) that “reimbursements” can include compensation for the labour involved in providing eggs (which is sometimes referred to as the time, inconvenience and discomfort involved in egg production).⁴³ However, we would argue that s. 12 will only permit a narrower range of payments. In support of this claim, we note that while reimbursement for receipted expenditures is explicitly set out for eggs and for contract pregnancy (i.e., surrogacy), reimbursement for loss of work-related income is only explicitly set out for surrogacy.⁴⁴ It follows that one should interpret the *AHR Act* as not permitting reimbursement for loss of work-related income for egg providers.

The absence of regulations for s. 12, and the fact that s. 12 is not yet in force, also raise a question about the current legal status of reimbursements (with or with-

out receipts). Health Canada and AHRC have stated⁴⁵ (and others have repeated the claim⁴⁶) that, under the *AHR Act* with s. 12 not yet in force, reimbursement is permitted in Canada. In our view, however, this is not a compelling interpretation of the law. If reimbursement is an exemption to the s. 7 prohibition (as described by Justice Cromwell) then, arguably, the exemption does not come into force until the section is in force. In other words, if s. 12 “defines the scope of the prohibitions”, then the scope of s. 7 is not limited until s. 12 is in force — meaning all payments (including reimbursements of receipted expenditures) are prohibited until that time. As before, it must be noted here that Justice Cromwell was writing for himself alone. However, again as before, the constitutionality of s. 12 hinged on Justice Cromwell and his finding of constitutionality hinged on this characterization of s. 12. That said, one can go as far as, albeit no further than, saying it can be argued that reimbursement is not permitted under the *AHR Act* until s. 12 and its regulations come into force.

It should also be noted here that AHRC has stated that “[d]onors, those maintaining and transporting in vitro embryos, and surrogate mothers are currently allowed to be reimbursed for actual expenses they may incur.”⁴⁷ However, this statement is incomprehensible. If it is assumed that reimbursements are permitted because s. 12 is not yet in force (as AHRC is assuming), then how can there be any restrictions on reimbursements (i.e., how can they be limited to “actual expenses they may incur”)?

Transnational Application of Canadian Law

The *AHR Act* clearly regulates transnational trade in human eggs. First, inasmuch as all (or almost all) of the activities associated with the trade in human eggs take place in Canada, the *AHR Act* applies directly. That is, ss. 7 and 8 (and ss. 10 and 12 once in force) of the law apply incontrovertibly where a provider comes to Canada from another country for egg retrieval, the eggs are provided to a person in Canada, and payment is made to the provider or an intermediary in Canada. Second, s. 8 governs the use of sperm, eggs, and embryos in Canada “regardless of where the material or in vitro embryos were originally obtained.”⁴⁸ Third, s. 10 addresses the importation of eggs — clearly contemplating transnational activity — and, so, once in force, will expand the scope of regulated activities.

Beyond this, it is possible for Canadian law to apply to conduct engaged in, in part or in whole, outside of Canada. One path to the application of laws beyond Canada’s borders is through an explicit statement in the legislation that the laws are intended to apply even

where the conduct takes place abroad. This has been done, for example, through the *Criminal Code* to combat child sex tourism⁴⁹ and human trafficking.⁵⁰ However, there are no provisions in the *AHR Act* to establish extraterritorial application of any part of the *AHR Act*. Therefore, if all aspects of the trade in human eggs take place entirely in another country, Canadian authorities cannot intervene.

However, this is not the end of the story, as there is another path to the application of Canadian laws beyond Canada's borders — through what is known as the two-part *Libman* test.⁵¹ What is commonly referred to as “qualified territorial application,” provides for application beyond borders when: (1) there is a “real and substantial link” between Canada and the offence; and (2) if so, prosecution would not offend against “international comity.”⁵² Justice La Forest set out the test re: qualified territorial application in *Libman v. The Queen*:

As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a “real and substantial link” between an offence and this country, a test well-known in public and private international law...⁵³

The rationale for the test is as follows:

... the criminal law is undoubtedly intended for the protection of the public, it does not do so solely by the simple expedient of directly protecting the public from harm. Rather, in conformity with its major purpose, it attempts to underline the fundamental values of our society: see the Law Reform Commission of Canada, Report 3, *Our Criminal Law* (1979). In doing so, it reinforces the law-abiding sentiments in society. Walsh J. in *Shulman v. The King*, *supra*, caught the essence of this when, after noting that “there is more to a...[criminal offence] than its successful culmination”, he added: “Its preparation and evolution, even in the case of failure, is reprehensible”. It would be a sad commentary on our law if it was limited to underlining society's values by the prosecution of minor offenders while permitting more seasoned practitioners to operate on a world-wide scale from a Canadian base by the simple manipulation of a technicality of the law's own making. What would be underlined in the public's mind by allowing criminals to go free simply because their operations have grown to international proportions, I shall not attempt to expound.⁵⁴

There is no specific criteria for applying the test. However, based on a review of the cases in which qualified territorial application has been assessed, Robert Currie has summarized the legal analysis that the court would engage in as follows:

The “real and substantial connection” inquiry is broad and requires assessment of all of the facts related to the alleged offence, including but not limited to (1) where some or all of the elements took place; (2) where the offence was initiated; (3) where the offence was prepared or formulated; (4) where harm or injury resulting from the offence occurred, including the location of the victims; or (5) where proceeds of the offence were brought.⁵⁵

On this analysis, it is plausible to suggest that there is the potential for qualified territorial application of the *AHR Act* in circumstances such as the following: a substantial amount of the conduct takes place in Canada; an advertisement in Canada leads to or facilitates the conduct in another country; the scheme for the conduct is devised in Canada but carried out in another country; or the benefits of the conduct will be realized in, or brought back to, Canada.⁵⁶

With respect to the trade in human eggs, it is not clear when the nexus between the conduct and Canada would be sufficient to trigger qualified territorial application of the *AHR Act*. Is ovarian stimulation in Canada (followed by travel to another country for egg retrieval) sufficient to trigger application of the law? Is e-mail or telephone communication from an intermediary in California to a woman in Canada seeking human eggs sufficient to trigger application of the law? Has the law been broken if a company in California arranges a contract between a couple in Canada, an egg provider in the Czech Republic, and a fertility clinic in India and the couple goes to India and receives IVF using the Czech woman's eggs? Is it legal for a Canadian company to advertise on the internet for women in India to become egg providers for reproductive purposes? Is a woman in Canada legally permitted to arrange to pay an egg bank in the U.S. to send frozen eggs to Canada for reproductive purposes? Does the following text from a U.S. clinic website describe something illegal?

Because a large proportion of CHR's [Center for Human Reproduction] patients are long-distance patients from outside the larger New York City area (both from within the United States, Canada and overseas), we know how to manage the logistics and stress of such long-

distance relationships. Most of your preparatory steps will, under our supervision, be arranged at an IVF center near your home. You will have to come to New York City just once, and only for a few short days for the entire egg donor IVF cycle.⁵⁷

Based on case law, it is reasonable to conclude that there is room for some qualified territorial application of law in the context of transnational trade in human eggs. For example, a woman in Toronto ordering fro-

ing, notably, preservation and quarantine as well as provider screening and testing). Finally, until s. 12 comes into force, we would argue that it is illegal to reimburse expenditures (receipted or not) incurred in the course of providing eggs. Even when s. 12 is in force, legal reimbursements arguably will not include compensation for lost wages or payment for services (e.g., time, inconvenience, and discomfort) in relation to the provision of eggs.

The law as just described applies in the context of transnational trade in human eggs as long as there is

Illegal transnational trade in human eggs is (and has been) occurring. Yet there have been no charges laid or prosecutions of individuals for violations of the law. This is an indefensible state of affairs that requires urgent remedial measures. Regulatory authorities should take action. First, they should complete the law by making the missing regulations and bringing the relevant sections of the Act fully into force. In so doing, they should be guided by the relevant principles underlying the legislation and applied by the SCC. Second, as they are making the regulations, they should communicate very clearly and accurately with fertility service providers and recipients about the legal status of the various activities governed by the law (both before and after the sections and regulations come into force). Third, they should enforce the law. Finally, they should promote national self-sufficiency.

zen eggs over the phone from an egg bank in Florida, providing her Canadian credit card to pay for the eggs, having them shipped to her clinic in Toronto and used to create an embryo using her partner's sperm would surely be captured by the *AHR Act*. How much one could amend the scenario before the nexus to Canada would become insufficient to meet the *Libman* test is unclear. What is clear is that some of what is currently going on meets the test.

Summary

In Canada, under s. 7 of the *AHR Act*, it is illegal to purchase, offer to purchase, and advertise for the purchase of eggs (and, arguably, for egg production services). Under s. 8, it is also illegal to make use of eggs for reproductive purposes in Canada unless the written consent to such use was given by the provider in accordance with the regulations (regardless of the country of origin of the eggs). Once s. 10 comes into force, it will be illegal to distribute, make use of, or import eggs (not from a spouse or partner of recipient) for reproductive purposes unless the eggs have met a series of health and safety requirements (includ-

a "real and substantial connection" between the violation and Canada. That is, as long as there is a sufficient nexus between the conduct (arranging for or carrying out the stimulation, retrieval, or transfer of the eggs) and Canada.

Canadian Authorities and Transnational Trade in Human Eggs

Based on the preceding two sections, we can conclude that illegal transnational trade in human eggs is (and has been) occurring. Yet there have been no charges laid or prosecutions of individuals for violations of the law.⁵⁸ This is an indefensible state of affairs that requires urgent remedial measures. Regulatory authorities should take action. First, they should complete the law by making the missing regulations and bringing the relevant sections of the Act fully into force.⁵⁹ In so doing, they should be guided by the relevant principles underlying the legislation and applied by the SCC. Second, as they are making the regulations, they should communicate very clearly and accurately with fertility service providers and recipients about the legal status of the various activities gov-

erned by the law (both before and after the sections and regulations come into force). Third, they should enforce the law. Finally, they should promote national self-sufficiency. The reasons for each of these steps are spelled out below.

Complete the Law

The *AHR Act* received Royal Assent on March 29, 2004, at which time roughly 30 regulations were required for the law to take full effect. Following the *AHRA Reference*, as a result of which much of the *AHR Act* was found to be unconstitutional, considerably fewer regulations were and continue to be required to bring the law into effect. Since 2004, however, only one set of regulations has been made — the Consent to Use regulations for s. 8.

In explaining the lack of activity since the introduction of the *AHR Act*, Health Canada posted on its website the following answer to the question “Why is it taking so long to develop the regulations under the *Assisted Human Reproduction Act*?”:

Health Canada must follow the Cabinet Directive on Streamlining Regulation in developing options and recommendations for Assisted Human Reproduction. The Directive is designed to protect and advance the public interest by working with Canadians and other governments to ensure that its regulatory activities result in the greatest overall benefit to current and future generations of Canadians. The Directive includes clear requirements for the development, implementation, evaluation and review of regulations. The Government must weigh the benefits of alternatives to regulations — and of alternative regulations — against their cost, and focus resources where they can do the most good.⁶⁰

A later web posting on another part of the Health Canada website suggests a different rationale for delays in making the requisite regulations:

Out of respect for the authority of the Supreme Court of Canada in matters of constitutional law, and pending its opinion, Health Canada will not pre-publish additional regulations until the question before the Court has been resolved. Health Canada continues to develop policy in this area.⁶¹

As regards this second explanation, it is worth noting that the SCC issued its ruling on the constitutionality of the *AHR Act* on December 22, 2010. Since then, Health Canada has had 18 months in which to draft

missing regulations based on the work that supposedly continued unabated. With respect to the issue at hand, as at the time of writing, regulations are still required for ss. 10 and 12. Such regulations should be drafted expeditiously.

It is wrong to leave people vulnerable to the harms of unregulated trade in human eggs (whether intra or transnational) — these harms, as identified in the *AHR Act*, include: the commercialization and commodification of reproduction⁶² and the exploitation of children, women, and men (hence, the prohibition on the sale of eggs and restrictions on reimbursements); violations of autonomy (hence, the consent requirements); and risks to human health and safety including the risk of transmission of disease (hence, the controls on distribution, use, and importation). The federal government passed the *AHR Act* and defended it against vigorous attack in the courts in the *AHRA Reference*. In turn, the SCC recognized the risks of harm as the basis for upholding the provisions of the *AHR Act* that were saved in the *AHRA Reference*. Leaving the law incomplete by not making the necessary regulations leaves children, women, and men vulnerable to the harms of unregulated trade in human eggs. Those with stewardship of the law (most notably Parliament, the Minister of Health, and Health Canada) should therefore meet their obligations through the making of regulations for ss. 10 and 12 (and in doing so be guided by the principles set out in the *AHR Act* and reiterated by the SCC in the *AHRA Reference*).

Communicate Clearly and Accurately about the Law

Over the years, there has been considerable confusion over the meaning and force of the law, particularly as it relates to s. 12 of the *AHR Act* — for example, whether compensation for lost wages (or time, inconvenience, and discomfort) is permitted, and whether reimbursement without receipts is permitted in the absence of the s. 12 regulations. In part, the confusion results from AHRC and Health Canada refusing to comment on the force of s. 12. The following anecdote, reported by Alison Motluk, illustrates this point quite forcefully:

Sherry Levitan, [a lawyer who specializes in “third party reproductive law”] recalls that at the 2008 annual meeting of the Canadian Fertility and Andrology Society, during what was supposed to be an educational session led by AHRC and Health Canada, both bodies declined to answer a direct question from Dr. Librach [the director of the clinic CReATe Fertility Centre] about whether or not receipts were necessary for reimbursement of egg donors. Representatives

from the two agencies passed the question back and forth, and no one answered clearly....Later in the meeting, Elinor Wilson, the president of AHRC, told Dr. Librach she'd answer "offline."⁶³

It is difficult to understand why AHRC and Health Canada would have declined to publicly answer the question. Surely helping those governed by the legislation to better understand what is required for compliance with the law would be a minimum step in the direction of enforcing the legislation.

It is wrong to leave people vulnerable to the harms of uncertainty in the law. If there are harms that one is trying to prevent through legislation (as is the case in the context of the regulation of intra or transnational

in conjunction with law enforcement and disciplinary authorities where warranted.⁶⁴

Notwithstanding the above claim about transparency, we could find no official records detailing any action taken to investigate or trigger an investigation (through the AHRC, Health Canada Inspectorate, the RCMP, or any other law enforcement agency)⁶⁵ into allegations of non-compliance with ss. 7, 8, 10, or 12 of the *AHR Act*.⁶⁶

We do know, thanks to the efforts of an investigative journalist, however, of one official allegation of non-compliance with the *AHR Act* involving a Canadian provider and a Canadian clinic. Heather Cox received a \$7,000 payment for eggs without providing

As Health Canada moves forward with the drafting of regulations, it should communicate clearly and accurately with all interested parties. It should also be proactive and offer clear statements about the meaning and force of law where there is any indication that individuals or organizations do not properly understand the law. Past practice is not defensible and should not be allowed to continue.

trade in human eggs, as explained above), then uncertainty that results in some of the harmful conduct taking place (not through intentional flouting of the law (as will be discussed below), but rather as a result of not knowing what the law permits or prohibits) is surely to be avoided.

As Health Canada moves forward with the drafting of regulations, it should communicate clearly and accurately with all interested parties. It should also be proactive and offer clear statements about the meaning and force of law where there is any indication that individuals or organizations do not properly understand the law. Past practice is not defensible and should not be allowed to continue.

Enforce the Law

According to the AHRC 2010-11 Annual Report, over the years, allegations of non-compliance with the *AHR Act* were investigated and dealt with:

Similar to previous years, AHRC received allegations of violations of the *AHR Act*, particularly with respect to the prohibitions on payment for gametes and surrogacy services. These allegations were assessed on the facts, and resolved through a transparent and standardized process in accordance with the guiding principles of the AHRC Compliance and Enforcement Policy, and

any receipts for expenses. Her mother called to inform AHRC of the trade and AHRC passed the complaint over to the RCMP. Alison Motluk reported on this case that,

[a]ccording to records obtained through the *Access to Information Act*, the RCMP was already investigating the same clinic over similar allegations. Heather Cox was interviewed in a videotaped interview, she provided them with a cheque for \$7,000, made out to her by CREATe and dated the day of her retrieval. (The cheque was original but had been accidentally given to her without a signature; she had already deposited the signed replacement into her account.) The RCMP also interviewed her cousin. But records show that in October 2008, the RCMP decided not to pursue the case at that time. In June, the Quebec Court of Appeal had ruled that parts of the *AHR Act* were unconstitutional because health is a provincial matter. The constitutional challenge did not affect the ban on purchasing eggs but did call into question the penalties. The Crown prosecutors involved in Cox's complaint felt that the case would not go forward until the Supreme Court had ruled in the matter. (As *The Walrus* went to press, the court had not yet rendered its decision.)⁶⁷

To our knowledge, no further action has been taken in this case, despite the fact that the Supreme Court of Canada decision in the *AHRA Reference* removed the stated obstruction to prosecution.

More recently, two other investigative journalists enquired about the enforcement of the *AHR Act*, this time with respect to allegations of transnational trade involving the importation of frozen eggs into Canada from the United States. They reported that according to AHRC, “The *AHR Act* does not regulate the import of eggs.”⁶⁸ While this answer was accurate at

intentionally flouting the law resulting in harms that the legislation was intended to prevent. Furthermore, increasing disregard and disrespect for the law threatens our democracy and the rule of law.

Promote National Self-Sufficiency

We recognize that enforcing the *AHR Act* will likely reduce the supply of human eggs in Canada and could increase the demand for transnational travel to procure human eggs wholly outside Canada (to escape both the territorial and qualified territorial reach

Those responsible for the enforcement of the *AHR Act* appear to have failed to meet their obligations under the *AHR Act*. Even though there is law governing the practice of assisted human reproduction, the situation has been accurately described as the “Wild West.” Failure to enforce the law has resulted in significant disregard of, and disrespect for, the law. This may lead to more people intentionally flouting the law resulting in harms that the legislation was intended to prevent. Furthermore, increasing disregard and disrespect for the law threatens our democracy and the rule of law.

the moment it was uttered (as the original s. 10 was struck down by the SCC in the *AHRA Reference* and the revised s. 10 is not yet in force), it was not true from March 29, 2004 to December 22, 2010. Prior to the *AHRA Reference*, s. 10 was in force and did regulate the importation of eggs for the purpose of creating an embryo. Furthermore, the statement by AHRC was not adequate, as the *AHR Act*, even after the *AHRA Reference*, regulated the purchase of eggs (regardless of whether they were sourced in Canada or abroad) and required that the consent regulations be followed even if the eggs came from another country for use in Canada. For its part, Health Canada told the reporter, “We don’t have any jurisdiction over the eggs.”⁶⁹ This answer, of course, failed to acknowledge that Health Canada had, and continues to have, responsibility for enforcement of the *AHR Act* and the *AHR Act* regulates the purchase of eggs for reproductive purposes as well as consent to the provision of eggs for the purpose of creating an embryo.

In sum, and quite simply, those responsible for the enforcement of the *AHR Act* appear to have failed to meet their obligations under the *AHR Act*. Even though there is law governing the practice of assisted human reproduction, the situation has been accurately described as the “Wild West.”⁷⁰ Failure to enforce the law has resulted in significant disregard of, and disrespect for, the law.⁷¹ This may lead to more people

of the law). This prompts us to argue that Canadian authorities should promote national self-sufficiency in an effort to contain (if not decrease) the demand for transnational trade in human eggs. As described by Gillian Crozier and Dominique Martin, “The pursuit of self-sufficiency with respect to particular materials refers to the adoption of policies designed to achieve a supply of such materials sufficient to meet community needs using domestic resources.”⁷²

In very general terms, national self-sufficiency is predicated upon the development and implementation of a range of policies that together would reduce the domestic demand for eggs and increase the domestic supply of eggs, thereby preventing, or at least reducing interest in, transnational trade. First, there could be a range of public health initiatives aimed at preventing and treating infertility. For example, provincial or territorial governments could enable women to avoid delaying reproduction through the introduction of sound public policies on parental leave and childcare services. In addition, provincial and territorial governments could “ensure that alternative opportunities to create families and raise children are made more readily available to all, such as adoption and fostering.”⁷³ Second, the federal government could promote clarity regarding s. 12 of the *AHR Act* on reimbursement for direct, receipted expenses (including such things as travel, accommodation, and childcare and exclud-

ing such things as “time, inconvenience, and discomfort associated with screening, ovarian stimulation, and oocyte retrieval.”⁷⁴) Women who wish to gift their eggs should know what (if any) costs they may have to incur. Third, other policy initiatives (including regulatory facilitation and educational campaigns) could be introduced to promote altruistic donation of excess frozen eggs originally created for a personal reproductive project.⁷⁵ As the technology for freezing eggs improves and becomes more accessible (both physically and financially) to more women, there likely will be an increase in the number of frozen eggs that are no longer needed for their original reproductive purpose. Donating these eggs for reproductive use could increase the egg supply without risking the harms of producing eggs specifically for use by others.⁷⁶

Conclusion

The preceding arguments lead us to some very specific calls for action.

First, Health Canada should immediately issue clarifying statements as regards the state of the law during the process of the making of regulations under the *AHR Act*. For example, at a minimum, Health Canada should make it clear that, under the *AHR Act*, reimbursement of actual expenditures is the only possible exception to the prohibition on payments (i.e., payments for services (sometimes described as time, inconvenience, and discomfort) and compensation for lost wages are not permitted). It should also make it clear that, as we have argued, no reimbursements are permitted until the regulations governing reimbursements are in force. Alternatively, if Health Canada disagrees with this interpretation of the law, it should explain and defend its own interpretation.

Second, Health Canada should draft the necessary regulations in a timely manner. The Minister of Health should then lay the regulations before Parliament and Parliament should refer the regulations to the appropriate committees in each House, the committees should review and report on the regulations, and the Governor in Council should make the regulations and bring the regulations and the relevant sections of the *AHR Act* into force.

Third, the Minister of Health should take the necessary steps to ensure the enforcement of the law to prevent or mitigate the effects of illegal transnational trade in human eggs (the commercialization and commodification of reproduction, the exploitation of children, women, and men, and risks to human health and safety including the risk of transmission of disease).⁷⁷

Fourth, the Minister of Health should work together with the Attorney General of Canada and the Attorneys General of the provinces and territories to pro-

vide guidance with respect to the qualified territorial application of the *AHR Act* to those who engage in transnational trade in human eggs.

Finally, in pursuit of national self-sufficiency, Health Canada should work with the provinces and territories to introduce social programs to reduce infertility and to facilitate donation of excess frozen eggs.

It is long past time for the federal government (Parliament, the Minister of Health, and Health Canada) to step up and regulate the transnational trade in human eggs in a manner consistent with the division of powers and directed by the principles of its own legislation and the values and norms of our system. We call upon the federal government to do so now.

Disclaimer

Françoise Baylis was a member of the Board of Directors of Assisted Human Reproduction Canada from December 2006 to March 2010, at which time she resigned on the grounds that the Board was unable to fulfill its legislated mandate.

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References

1. There is also a substantial and growing demand for eggs for research on reproduction, reproductive and genetic technologies, and regenerative medicine (e.g., embryonic stem cell research). However, the scope of this paper is limited to the use of eggs for reproductive purposes.
2. K. N. Maxwell, I. N. Chost, and Z. Rosenwaks, “The Incidence of Both Serious and Minor Complications in Young Women Undergoing Oocyte Donation,” *Fertility and Sterility* 90, no. 6 (2008): 2165-2171; A. Girolami, R. Scandellari, F. Tezza, D. Paternoster, and B. Girolami, “Arterial Thrombosis in Young Women After Ovarian Stimulation: Case Report and Review of the Literature,” *Journal of Thrombosis and Thrombolysis* 24, no. 2 (2007): 169-174; H. Pearson, “Health Effects of Egg Donation May Take Decades to Emerge,” *Nature* 442, no. 7103 (2006): 607-608. D. Beeson and A. Lippman, “Egg Harvesting for Stem Cell Research: Medical Risks and Ethical Problems,” *Reproductive Biomedicine Online* 13, no. 4 (2006): 573-579.
3. Ethics Committee of the American Society for Reproductive Medicine. “Financial Incentives in Recruitment of Oocyte Donors,” *Fertility and Sterility* 82, Supp. 1 (2004): S240-S244.
4. Pre-existing conditions and identified risks of developing certain conditions can affect whether an insurer will provide insurance and, if so, at what premium. It is possible that a risk or condition could be detected on screening that would result in an individual being unable to purchase (at an affordable rate or at all) life insurance, travel insurance or supplemental health insurance. If the risk manifests or the condition requires expensive medical treatment, the individual without insurance could then face financially ruinous bills. Possible incidental findings (without ancillary benefit to the individual) from screening in conjunction with egg production and retrieval include abnormal lab values of no clinical significance (e.g., elevated prolactin) and the identification of ovarian cysts. For an explanation of the risks to insurability posed by incidental findings, see V. Apold and J. Downie, “Bad News about Bad News: The Disclosure of Risks to Insurability

- in Research Consent Processes," *Accountability in Research* 18, no. 1 (2011): 31-44.
5. R. Calderon-Margalit, Y. Friedlander, R. Yanetz, K. Kleinhaus, M.C. Perrin, O. Manor, S. Harlap, and O. Paltiel, "Cancer Risk after Exposure to Treatments for Ovulation Induction," *American Journal of Epidemiology* 169, no. 3, (2008): 365-375; J. Schneider, "Fatal Colon Cancer in a Young Egg Donor: A Physician Mother's Call for Follow-Up and Research on the Long-Term Risk of Ovarian Stimulation," *Fertility and Sterility* 90, no. 5 (2008): 2016.e1-2016.e5; A. Mahdavi, T. Pejovic, and F. Nezhat, "Induction of Ovulation and Ovarian Cancer: A Critical Review of the Literature," *Fertility and Sterility* 85, no. 4 (2006): 819-826; M. Salhab, W. Al Sarakbi, and K. Mokbel, "In Vitro Fertilization and Breast Cancer Risk: A Review," *International Journal of Fertility and Women's Medicine* 50, no. 6 (2005): 259-266; L. A. Brinton, K. S. Moghissi, B. Scoccia, C. L. Westhoff, and E. J. Lamb, "Ovulation Induction and Cancer Risk," *Fertility and Sterility* 83, no. 2 (2005): 261-274; L. A. Brinton, E. J. Lamb, K. S. Moghissi, B. Scoccia, M. D. Althuis, J. E. Mabie, and C. L. Westhoff, "Ovarian Cancer Risk after the Use of Ovulation Stimulating Drugs," *Obstetrics and Gynecology* 103, no. 6 (2004): 1194-1203; K. K. Ahuja and E. G. Simons, "Cancer of the Colon in an Egg Donor: Policy Repercussions for Donor Recruitment," *Human Reproduction* 13, no. 1 (1998): 227-231. For a discussion of maternal deaths, see S. Semba, T. Moriya, E. M. Youssef, and H. Sasano, "An Autopsy Case of Ovarian Hyperstimulation Syndrome with Massive Pulmonary Edema and Pleural Effusion," *Pathology International* 50, no. 7 (2000): 549-552; G. Lewis, ed., "Saving Mothers' Lives: Reviewing Maternal Deaths to Make Motherhood Safer - 2003-2005," *The Seventh Report on Confidential Enquiries into Maternal Deaths in the United Kingdom. The Confidential Enquiry into Maternal and Child Health* (London: CEMACH, 2007): at 25.
 6. T. M. Cousineau and A. D. Domar, "Psychological Impact of Infertility," *Best Practice and Research: Clinical Obstetrics and Gynaecology* 21, no. 2 (2007): 293-308.
 7. R. Almeling, *Sex Cells: The Medical Market in Eggs and Sperm* (Berkeley: The University of California Press, 2011): at 110.
 8. *Assisted Human Reproduction Act* S.C. 2004, c. 2, s. 7 [hereinafter cited as *AHR Act*].
 9. For example, the United States does not prohibit the sale of eggs.
 10. For a discussion of how bans on the commercialization of human tissue are not as strict as they may first appear, see C. Lenk and K. Beier, "Is the Commercialisation of Human Tissue and Body Material Forbidden in the Countries of the European Union?" *Journal of Medical Ethics* 38, no. 6 (2012): 342-346; For example, in Spain, "donors receive some financial compensation. Law 14/2006 of 26 May 2006 makes gamete and embryo donation a free contract, formal and confidential between the donor and the clinic: 'The donation will always be non-profit and not commercial. The financial compensation can be set to only compensate strictly physical discomfort, travel and loss of earnings that may arise from the donation and must not involve economic incentives.' The amount of this compensation may vary from clinic to clinic. But the guidance given by the National Commission on Assisted Human Reproduction is that the overall figure for compensation should be about 900 Euros (775 pounds). While in a few other European countries (e.g., Cyprus and the Czech Republic) similar levels of compensation are paid, this is a much higher figure than in most countries." Y. Garcia-Ruiz and D. Guerra-Diaz, "Gamete and Embryo Donation: A Legal View from Spain," in M. Richard, G. Pennings, and J. Appleby, eds., *Reproductive Donation: Practice, Policy, and Bioethics* (Cambridge: Cambridge University Press, 2012): 112-129, at 115.
 11. Various authors have attempted to catalogue the legal regulation of various aspects of assisted human reproduction throughout the world. See, for example, International Federation of Fertility Societies, (General Editors: H. Jones, I. Cooke, R. Kempers, P. Brinsden, and D. Saunders), "International Federation of Fertility Societies Surveillance 2010" Special Contribution, *Fertility and Sterility* 95, no. 2 (2011): 491.
 12. There is evidence that Canadian women and couples travel to other countries to provide and to receive eggs; some also import frozen eggs into Canada. As well, Canadian health professionals retrieve and use the eggs of women visiting Canada for the express purpose of providing eggs. Alongside fertility consultants (and brokers), health professionals also facilitate the transfer of eggs across borders. This evidence is summarized later in the paper.
 13. A. Motluk, "The Human Egg Trade: How Canada's Fertility Laws Are Failing Donors, Doctors, and Patients," *The Walrus* (April 2010): 30-37, available at <<http://walrusmagazine.com/articles/2010.04-health-the-human-egg-trade/>> (last visited February 20, 2013); CTVNews.ca Staff, "Canadian Women Flout Laws to Donate Eggs," March 27, 2012, available at <<http://www.ctv.ca/CTVNews/Health/20120327/egg-donors-compensation-fertility-120327/>> (last visited February 20, 2013).
 14. R. Almeling, *Sex Cells: The Medical Market in Eggs and Sperm* (Berkeley: The University of California Press, 2011): at 10.
 15. Although there is not space to go into any detail in this paper, we note that all provinces and territories have legislation regarding human tissue donation and transplantation. Five provinces explicitly exclude eggs from the operation of this legislation (Ontario, Nova Scotia, PEI, Manitoba, and Alberta). Five other jurisdictions do not explicitly exclude eggs from their legislation and these four provinces and territory prohibit the buying, selling, or otherwise dealing in, directly or indirectly, for a valuable consideration of any tissue, where eggs would fit within their definition of "tissue" (British Columbia, Saskatchewan, Yukon, Newfoundland, and New Brunswick). The Northwest Territories and Nunavut legislation only deal with post mortem donation and, with respect to live donation, Quebec only addresses consent to the use of tissue for research purposes. Three of the five jurisdictions that do not exclude eggs explicitly state that "any dealing prohibited... is invalid as against public policy." (British Columbia, Saskatchewan, and Yukon). One could reasonably argue that the buying, selling, and otherwise dealing in eggs, for a valuable consideration, is illegal in these jurisdictions. See, for example, *Human Tissue Gift Act*, RSBC 1996, c 211; *Human Tissue Gift Act*, RSS 1978, c H-15; *Human Tissue Gift Act*, RSY 2002, c 117.
 16. E. Blyth, "Fertility Patients' Experiences of Cross-Border Reproductive Care," *Fertility and Sterility* 94, no. 1 (2010): e11-e15; E. Hughes and D. DeJean, "Cross-border Fertility Services in North America: A Survey of Canadian and American Providers," *Fertility and Sterility* 94, no. 1 (2010): e16-e19; M. C. Inhorn and P. Patrizio, "Rethinking Reproductive 'Tourism' as Reproductive 'Exile,'" *Fertility and Sterility* 92, no. 3 (2009): 904-906. K. Nygren, D. Adamson, F. Zegers-Hochschild, and J. De Mouzon, "Cross-Border Fertility Care - International Committee Monitoring Assisted Reproductive Technologies Global Survey: 2006 Data and Estimates," *Fertility and Sterility* 94, no. 1 (2010): e4-e10. G. Pennings, G. de Wert, F. Shenfield, J. Cohen, B. Tarlatzis, and P. Devoey, "ESHRE Task Force on Ethics and Law 15: Cross-Border Reproductive Care," *Human Reproduction* 23, no. 10 (2008): 2182-2184. F. Shenfield, J. de Mouzon, G. Pennings, A. P. Ferraretti, A. Nyboe Andersen, G. de Wert, and V. Goossens, "The ESHRE Taskforce on Cross-Border Reproductive Care, 2010. Cross-Border Reproductive Care in Six European Countries," *Human Reproduction* 25, no. 6 (2010): 1361-1368. E. Smith, J. Behrmann, C. Martin, and B. Williams-Jones, "Reproductive Tourism in Argentina: Clinic Accreditation and Its Implications for Consumers, Health Professionals and Policy Makers," *Developing World Bioethics* 10, no. 2 (2010): 59-69. A. Whittaker, "Global Technologies and Transnational Reproduction in Thailand," *Asian Studies Review* 33, no. 3 (2009): 319-332.
 17. K. Nygren, D. Adamson, F. Zegers-Hochschild, and J. de Mouzon, International Committee Monitoring Assisted Reproductive Technologies, "Cross-Border Fertility Care - International

- Committee Monitoring Assisted Reproductive Technologies Global Survey: 2006 Data and Estimates," *Fertility and Sterility* 94, no. 1 (2010): Special Contribution e4-e10. N. Hudson, L. Culley, E. Blyth, W. Norton, F. Rapport, and A. Pacey, "Cross-Border Reproductive Care: A Review of the Literature," *Reproductive BioMedicine Online* 22, no. 7 (2011): 673-685.
18. See, for example, "Egg Donor, Surrogate Mother, Surrogacy India," available at <<http://www.youtube.com/watch?v=aKiSL8RpxAs&feature=related>> (last visited February 20, 2013). See also, Center for Human Reproduction (CHR) in New York City, "Donor Eggs for Canadians in New York City," available at <http://www.centerforhumanreprod.com/donor_eggs_canada.html> (last visited February 20, 2013): "Egg donor program in New York City offers a quick, anonymous alternative to donor IVF in Canada. A markedly increased number of Canadian patients have contacted the Center for Human Reproduction (CHR) in New York City in recent years, because of its unique egg donation program. CHR's program is a unique egg donor program in the US, offering, likely, the largest and most diverse egg donor pool anywhere in the world. The program is, however, especially relevant to Canadian patients because legal circumstances in the U.S. differ significantly from those in Canada, and, therefore, allow us to offer not only great choice of donor eggs for Canadians but also immediate access to an excellent donor."
 19. When prospective recipients choose egg providers on the basis of their genetic traits, it is illogical to characterize any payments made to these providers solely as payments for services rendered. If the payments were solely for services, the genetic features of the provider would be irrelevant.
 20. Payment is clearly above expenditures when the description of the payment is, for example, "\$5,000 plus expenses."
 21. See ss. 22 and 24 of the original *AHR Act* for details of the Agency's objectives and powers. The AHRC was abolished through s. 722 of *An Act to implement certain provisions of the Budget Tabled in Parliament on March 29, 2012 and other measures*, S.C. 2012, c. 19 [hereinafter cited as the *Jobs, Growth and Long-term Prosperity Act*]. See also F. Baylis, "The Demise of Assisted Human Reproduction Canada," *Journal of Obstetrics and Gynaecology Canada* 34, no. 6 (2012): 511-513.
 22. In this paper, we do not use the value-laden term "cross-border reproductive care" in part because of the false image that "care" conveys. As Eric Blyth reports, care "is not always present in the experiences of patients seeking fertility services in a country other than their own." E. Blyth, P. Thorn, and T. Wischmann, "CBRC and Psychosocial Counseling: Assessing Needs and Developing an Ethical Framework for Practice," *Reproductive BioMedicine Online* 23, no. 5 (2011): 642-651.
 23. E. Blyth, "Fertility Patients' Experiences of Cross-Border Reproductive Care," *Fertility and Sterility* 94, no. 1 (2010): e11-e15.
 24. E. Hughes and D. DeJean, "Cross-Border Fertility Services in North America: A Survey of Canadian and American Providers," *Fertility and Sterility* 94, no. 1 (2010): e16-19.
 25. J. Werb, "A Good Egg Is Hard to Find," *Georgia Straight*, May 15, 2008, available at <<http://www.straight.com/article-145554/a-good-egg-hard-find>> (last visited February 20, 2013).
 26. E. Blyth, "Fertility Patients' Experiences of Cross-Border Reproductive Care," *Fertility and Sterility* 94, no.1 (2010): e11-e15.
 27. E. Hughes and D. DeJean, "Cross-Border Fertility Services in North America: A Survey of Canadian and American Providers" *Fertility and Sterility* 94, no. 1 (2010): e16-e19.
 28. In 2011, Alison Motluk won silver for investigative reporting at the 34th annual National Magazine Awards for her article, "The Human Egg Trade: How Canada's Fertility Laws are Failing Donors, Doctors, and Patients," cited in *supra* note 13. She also received an honourable mention in the SOGC Journalism Awards for Excellence in Women's Health Reporting (print category).
 29. *Id.*
 30. *Id.*
 31. *Id.*
 32. The Practice Committees of the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology, "Mature Oocyte Cryopreservation: A Guideline," *Fertility and Sterility* 99, no. 1 (2012): 37-43.
 33. J. A. Grifo and N. Noyes, "Delivery Rate Using Cryopreserved Oocytes is Comparable to Conventional *In Vitro* Fertilization Using Fresh Oocytes: Potential Fertility Preservation for Female Cancer Patients," *Fertility and Sterility* 93, no. 2 (2010): 391-396. I. Virant-Klun, L. Bacer-Kermavner, T. Tomazevic, and E. Vrtačnik-Bokal, "Slow Oocyte Freezing and Thawing in Couples with No Sperm or an Insufficient Number of Sperm on the Day of *In Vitro* Fertilization," *Reproductive Biology and Endocrinology* 9, no. 19 (2011): 19.
 34. "Frozen Human Egg Buyers May Face Prosecution," CBC News, April 23, 2012, available at <<http://www.cbc.ca/news/health/story/2012/04/23/eggs-frozen-trade.html>> (last visited February 20, 2013).
 35. "Infertile Canadians Buy Frozen Human Eggs from US," CBC News, April 22, 2012, available at <<http://www.cbc.ca/news/health/story/2012/04/20/eggs-frozen-fertility.html>> (last visited February 20, 2013).
 36. *AHR Act* as amended by the *Jobs, Growth and Long-term Prosperity Act* S.C. 2012, c.19. The *Jobs, Growth and Long-term Prosperity Act* was introduced nominally to implement provisions announced in the 2012 federal budget. In the budget, the government had announced that it would be winding down the AHRC. The *Jobs, Growth and Long-term Prosperity Act* also introduced a number of other reforms to the original *AHR Act* (a subset of which were in response to the SCC decision in the *AHRA Reference*).
 37. *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, 3 SCR 457 [hereinafter cited as *AHRA Reference*]. The Quebec government challenged ss. 8 to 19, 40 to 53, 60, 61 and 68 of the *AHR Act* as *ultra vires* the federal government.
 38. *AHRA Reference*, at para 290 (*per* Justice Cromwell): "s. 12 is a form of exemption from the strictness of the regime which they impose and, to some extent, defines the scope of the prohibitions provided for in those sections."
 39. *Id.*, at para 26 *per* Chief Justice McLachlin.
 40. *AHR Act*, s. 8 SI/2007-67 and *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137.
 41. *AHR Act*, s. 61.
 42. Section 753(1) of the *Jobs, Growth and Long-term Prosperity Act* S.C. 2012, c. 19 provides that "Sections 715 and 716, or any provision enacted by section 716 [i.e., s. 10 of the *AHR Act* as amended], come into force on a day or days to be fixed by order of the Governor in Council." No date has yet been fixed. It is worth noting here that s. 10 of the *AHR Act* as passed in 2004 was in force from the date of passage of the *Act* (unlike ss. 8 and 12). With the revisions to the *Act*, the government realized that it needed to hold off on the section coming into force until the regulations were drafted (and did so through s. 753(1) of the *Jobs, Growth and Long-term Prosperity Act*). This avoids the absurd situation, present from 2004 until s. 10 was struck down by the SCC in the *AHRA Reference* in 2010, which we would argue prohibited anyone from altering, manipulating or treating any human reproductive material for the purpose of creating an embryo and obtaining, storing, transferring, destroying, importing or exporting eggs. (These activities were prohibited, except when in accordance with the regulations and a licence. Yet, no regulations or licenses were ever issued. Therefore there was actually no way for anyone to engage in these activities without violating s. 10.) Some might argue, against this interpretation, that anyone who undertook any of the activities set out in s. 10 at least once between August 22, 2003 and April 22, 2004 was legally permitted to continue such activities because of s. 71, known as the "grandfathering clause." However, this argument fails to notice that the grandfathering clause cured the lack of a licensing scheme but not the lack of other regulations. Therefore, we would argue that,

- as no regulations were passed for the original s. 10 and yet the section was in force, the activities set out in the original s. 10 were illegal from 2004 (when the original *AHR Act* came into force) until 2010 (when the original s. 10 was struck down in the *AHRA Reference*).
43. See Motluk, *supra* note 13; “Canadian Women Flout Laws to Donate Eggs,” *available at* <<http://www.ctvnews.ca/canadian-women-flout-laws-to-donate-eggs-1.787923>> (last visited February 20, 2013); Victoria Fertility Centre, “Egg Donation and IVF,” *available at* <<http://www.victoriafertility.com/content/8/downloads/EggdonationandIVFwebsite.pdf>> (last visited February 20, 2013); T. Blackwell, “Canada’s Murky Legal World of Surrogate Consultants and Human Egg Buyers,” *National Post*, *available at* <<http://news.nationalpost.com/2012/03/09/canadas-murky-legal-world-of-surrogate-consultants-and-human-egg-buyers/>> (last visited February 20, 2013).
 44. *AHR Act*, s. 12(3).
 45. “As section 12 is not yet in force, reimbursement of expenditures relating to donation, surrogacy and the transportation or maintenance of *in vitro* embryos may presently occur without a licence.” Health Canada, “Public Consultation Document: Reimbursement of Expenditures Under the Assisted Human Reproduction Act,” undated document (although the consultation period itself ended September 14, 2007), *available at* <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/public/_funds-frais/index-eng.php> (last visited February 20, 2013). Similarly, AHRC states: “Donors, those maintaining and transporting *in vitro* embryos, and surrogate mothers are currently allowed to be reimbursed for actual expenses they may incur,” *available at* <<http://www.ahrc-pac.gc.ca/v2/aaa-app/wvr-qnr/ahra-alpa/prohibited-interdit-eng.php>> (last visited February 20, 2013). However, neither document provides any explanation or defense of this claim. We would argue that it is simply incorrect; just saying something doesn’t make it so.
 46. See, for example, the claim being made in the media at <<http://www.cbc.ca/news/health/story/2012/04/23/eggs-frozen-trade.html>> (last visited February 20, 2013) and the claim being made on a fertility clinic website, *available at* <http://www.mcgillivf.com/qConsole/content/2_0/common/sitemedial/egg%20donor%20booklet%20April%2008%20for%20website.pdf> (last visited February 20, 2013).
 47. Assisted Human Reproduction Canada, “Prohibited Activities,” *available at* <<http://www.ahrc-pac.gc.ca/v2/aaa-app/wvr-qnr/ahra-alpa/prohibited-interdit-eng.php>> (last visited February 20, 2013).
 48. Assisted Human Reproduction Canada, “Consent to Use Regulations: Frequently Asked Questions,” *available at* <<http://www.ahrc-pac.gc.ca/v2/faq/consentFAQ-consentementFAQ-eng.php#q8>> (last visited February 20, 2013).
 49. *Criminal Code*, R.S.C. 1985, c. C-46, s. 7(4.1). [hereinafter cited as *Criminal Code*].
 50. For example, *Criminal Code*, ss. 7(3), 7(3.1) with 279.01 and 279.011.
 51. *Libman v. The Queen* [1985] 2 SCR 178.
 52. It is unlikely that the international comity element of the *Libman* rule would pose a problem in the context of this paper. Given what we know of current transnational trade, we are assuming that the trade is occurring in a jurisdiction within which such conduct is either not illegal or, if illegal, not subject to prosecution. Therefore, we will not explain or explore this element here.
 53. *Libman v The Queen* [1985] 2 SCR 178 at para 74.
 54. *Id.*, at para 72.
 55. R. Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law, 2010): at 424.
 56. For a full explanation of transnational application of law, see R. Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law, 2010): at 412-424.
 57. Center for Human Reproduction (CHR) in New York City. “Donor Eggs for Canadians in New York City,” *available at* <http://www.centerforhumanreprod.com/donor_eggs_canada.html> (last visited February 20, 2013).
 58. As this paper was going to press, there was a news report that 27 charges had been laid against Leia Picard and her fertility consulting company (Canadian Fertility Consultants) including charges for “buying or offering to buy sperm or eggs.” T. Blackwell, “Illegal Purchase of Sperm, Eggs and Surrogacy Services Leads to 27 Charges against Canadian Fertility Company and CEO,” *National Post*, February 2013, *available at* <<http://news.nationalpost.com/2013/02/15/illegal-purchase-of-sperm-eggs-and-surrogacy-services-leads-to-27-charges-against-canadian-fertility-company-and-ceo/>> (last visited February 25, 2013). No details of the charges (including whether they include any transnational activity) are available yet.
 59. Sections 66-67 set out the process which must be followed for the making of regulations under the *AHR Act* (e.g., with some exceptions, they must be laid before Parliament and referred to the appropriate committee of each House).
 60. Health Canada, “Frequently Asked Questions,” *available at* <<http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/faq/index-eng.php#q2>> (last visited February 20, 2013).
 61. Health Canada, “Publication of Proposed Assisted Human Reproduction Regulations Delayed Until Supreme Court Appeal is Decided,” *available at* <<http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/legislation/delay-interruption-eng.php>> (last visited February 20, 2013).
 62. The principle of non-commercialization and non-commodification is set out in s. 2(f) of the *AHR Act* and affirmed in the *AHRA Reference* by Chief Justice McLachlin. Section 2(f) states that: “Trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raises health and ethical concerns that justify their prohibition.” Commercialization and commodification are also clearly recognized as harms by Chief Justice McLachlin where she describes s. 12 as follows: “Section 12 addresses the related issue of permitted expenses. It seeks to ensure that credited expenses are confined to actual outlays, and do not cross the line into commercialized reproductive activities. This is the line that prohibits that which is considered inappropriate commodification, and permits that which is considered acceptable reimbursement.” *AHRA Reference* at para 111.
 63. See Motluk, *supra* note 13.
 64. Assisted Human Reproduction Canada, “Making a Difference: AHRC Annual Report 2010-2011,” *available at* <<http://www.ahrc-pac.gc.ca/v2/pubs/ar-ra-2010-2011-eng.php>> (last visited February 20, 2013).
 65. AHRC had a Memorandum of Understanding with Health Canada’s Health Products and Food Branch Inspectorate. Under its terms, Health Canada was to provide inspection, compliance and enforcement services for the *AHR Act* under the direction of AHRC. There was also an agreement with the RCMP, but this agreement was not made public. Rather, it was referred to in AHRC documents as follows: “AHRC and the Royal Canadian Mounted Police (RCMP) have established roles and responsibilities in relation to the enforcement of the *AHR Act* and its Regulations. Where there is accurate and reliable information that an offence may have been committed, AHRC may, at its discretion and under the appropriate circumstances, refer matters to a law enforcement agency, including the RCMP, for investigation.” AHRC, “Assisted Human Reproduction Canada. Compliance and Enforcement Policy,” July 30, 2010, at 4, *available at* <<http://www.ahrc-pac.gc.ca/v2/aaa-app/alt-formats/pdf/wvd-qnf/C-E-Policy-eng.pdf>> (last visited February 20, 2013).
 66. See Blackwell, *supra* note 58.
 67. See Motluk, *supra* note 13.
 68. “Infertile Canadians Buy Frozen Human Eggs from US,” CBC News, April 22, 2012, *available at* <<http://www.cbc.ca/news/health/story/2012/04/20/eggs-frozen-fertility.html>> (last visited February 20, 2013).
 69. “Infertile Canadians Buy Frozen Human Eggs from US,” CBC News, April 22, 2012, *available at* <<http://www.cbc.ca/news/health/story/2012/04/20/eggs-frozen-fertility.html>> (last visited February 20, 2013).

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70. D. Gutnick, "May 8 Human Egg Donations," In the Field, CBC Radio, *available at* <<http://www.cbc.ca/inthefield/2012/05/08/may-8-human-egg-donations/>> (last visited February 20, 2013).
71. Of course, it is not the case that all instances of possible violations of law should be prosecuted. The concept and practice of prosecutorial discretion exists precisely to allow for some non-prosecution. However, the exercise of prosecutorial discretion is bounded. Unfortunately, as there has been no meaningful transparency in the enforcement of the *AHR Act*, there is no evidence that the non-prosecution of violations of ss. 7 and 8 and s. 10 (before the recent changes) was actually the result of legitimate exercises of prosecutorial discretion.
72. G. K. Crozier and D. Martin, "How to Address the Ethics of Reproductive Travel to Developing Countries: A Comparison of National Self-sufficiency and Regulated Market Approaches," *Bioethics* 12, no. 1 (2012): 45-54, at 48.
73. *Id.*, at 49.
74. The Ethics Committee of the American Society for Reproductive Medicine, "Financial Compensation of Oocyte Donors," *Fertility and Sterility* 88, no. 2 (2007): 305-309, at 305.
75. See, for example, a contract recently tendered by the UK Department of Health for the promotion of gamete donation (not limited to excess frozen eggs). http://england.unitedkingdom-tenders.co.uk/35909_The_Department_of_Health_currently_supports_the_promotion_of_gamete_donation_and_a_voluntary_2013_London (last visited February 25, 2013).
75. We do not advocate an education and facilitation campaign directed at healthy volunteers (i.e., women who would not otherwise be undergoing egg retrieval and freezing). Rather, the focus here is on women who have frozen eggs they no longer intend to use for their own reproductive purposes, who can choose to have them destroyed or, alternatively, to donate them for reproductive or research use. The education and facilitation campaign would promote donation over destruction.
76. *AHR Act*, as amended, ss. 44 and 58. Under s. 44 of the *AHR Act*, the responsibility for enforcement is given to the Minister of Health. Under s. 58, the Minister "may enter into agreements with any department or agency of the government of Canada or of a province or with any law enforcement agency with respect to the administration and enforcement of this Act."
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