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### Introduction to "Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction"

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# Introduction

Trudo Lemmens and Andrew Flavelle Martin

In 2004, more than a decade after a Royal Commission report urged the government to regulate the legal, ethical, and social issues associated with assisted human reproduction (AHR), the Parliament of Canada adopted the *Assisted Human Reproduction Act (AHRA)*.<sup>1</sup> The Act had four main components: a set of strict prohibitions; a regulatory framework surrounding specific AHR practices; privacy rules related to AHR; and provisions related to a new Assisted Human Reproduction Agency of Canada. The final scope of the prohibitions had changed considerably throughout the various drafting processes, in line with emerging technologies that were not yet developed at the time the Royal Commission tabled its report. The Act included strict prohibitions on activities such as cloning, the creation of embryos for research, and the creation of chimeras. Other activities were surrounded by both prohibitions and regulatory restrictions. The commercial sale of human reproductive materials and surrogacy, for example, was prohibited, while compensation for reasonable expenses incurred as part of these activities was to be regulated. The Act also created a framework for the development of further regulations and the licensing of virtually all AHR services. To implement this framework, the Act established the Assisted Human Reproduction Agency of Canada and mandated the agency to review and regulate a panoply of issues associated with the rapid changes in assisted human reproduction technology.

The Act faced criticism from the moment of its enactment. Commentators raised several concerns, particularly about the use of the criminal law and the strict prohibitions on some

activities. Criticism was especially strong from the research community with regard to the restrictions on research, such as the prohibition on the creation of chimeras. The original purpose of the Act had been primarily to regulate reproductive services; the debate around the use of the criminal law became primarily a debate about the alleged lack of flexibility of the criminal law in adjusting to scientific developments. Some criticized also the prohibition on the commercialization of gametes and surrogacy. The legislative scheme introduced in Canada was, however, not unique, as several countries had enacted legislation on AHR around the same time, with similarly combined prohibitions on some activities, strict regulation of others, and the establishment of a regulatory or review authority. The stark contrast between the Canadian regulatory approach and the largely unregulated market for assisted human reproduction in the United States generated additional pressure on the Canadian system. However, it was the traditional and limited question of federalism – the division of authority between the federal and provincial governments – that ultimately had the most significant impact on the future of the regulatory approach.

In 2008, the Province of Quebec challenged several provisions of the Act, in particular those related to the regulation of assisted human reproductive activities, as an inappropriate intrusion on provincial jurisdiction over the regulation of health services and facilities.<sup>2</sup> In 2010, the Supreme Court of Canada struck down key provisions of the Act as being outside federal jurisdiction, including those that restricted the manipulation and use of gametes and embryos to people and premises licensed by the Agency.<sup>3</sup> This decision hollowed out much of the regulatory apparatus in the Act and dramatically reduced the role of the Agency, which was later abolished. As a result, both the federal government and the provinces are back at the drawing board, having to reimagine how AHR could and should be regulated in Canada. The federal government's

response has been limited. It has abolished the regulatory agency that was supposed to be in charge of implementing the regulatory scheme, and it has not enacted any regulations, which it is still empowered to do under the provisions that have remained in place. AAAA

This book explores a range of legal, policy, and ethical issues in the aftermath of the Supreme Court's decision. Several of the chapters were presented in earlier versions at a conference at the University of Toronto Faculty of Law in October 2011. Leading Canadian and international scholars reflect not only on the decision itself but also on diverse issues such as the potential exploitation of surrogates; the impact on women's health of AHR and of the harvesting of eggs; the commodification of human life; the societal implications of market-oriented reproduction; the dignity of women, infertile couples, and offspring; and the role of law and policy in ensuring access to AHR without discrimination. Some chapters analyse the decision itself as a development in federalism, including the scope of the federal power over criminal law and provincial jurisdiction over health care. Other chapters consider unanswered questions about the legal impact of AHR on children and families, particularly in terms of legal parentage and gamete donor anonymity. Finally, some chapters consider the implications of the decision – and particularly the judges' differing views of the proper role for the criminal law – for the commercialization of human reproductive services, the commodification of human reproductive materials, and the allocation and availability of these services and materials. All of these chapters reflect in one way or another on the daunting challenge faced by legislatures and courts in responding to the often unforeseeable and at this point perhaps still unimaginable possibilities created by new technologies; the difficulty in reassessing previously accurate ideas and assumptions about the nature of the division of powers, parenthood, and reproduction itself; and the challenge in regulating activities where often very divergent ethical norms, social values, and

economic interests intersect. This challenge has been addressed wisely in some respects and poorly in others, and simply ignored in the rest.

This book provides timely reflection on many of the issues both federal and provincial legislators will face. To inform the Canadian debate, several of the international commentators reflect on how other jurisdictions – such as the United States, the United Kingdom, and New Zealand – deal with some aspects of AHR regulation. In addition, the book pays special attention to the changing international context in which AHR services occur. Since the adoption of the Act, AHR has been developing at a very fast pace at a global scale, in a complex social, medical, and industrial context. The global context has brought new issues to the fore, with concerns about reproductive tourism and its social, ethical, and legal implications. Foreign surrogacy and AHR services involving foreign donated sperm and ova, for example, raise complex questions about the applicability of national rules related to family law and immigration. People travel to obtain access to gametes or to use surrogates in countries that allow the practice. Also, people from outside Canada are using Canadian clinics for AHR procedures on themselves or on surrogates. The commercial interests of AHR clinics, sperm and ova banks, and other industries with financial stakes in the promotion of AHR – many of them operating internationally – also create special challenges and conflicts of interest.

## **The *AHRA*, the *Reference*, and Subsequent Developments**

The *AHRA* was the fourth federal bill attempting to govern assisted human reproduction in the wake of the 1993 final report of the Royal Commission on New Reproductive

Technologies.<sup>4</sup> The bill was introduced in February 2004 and received Royal Assent in March of that year. Parts came into force in 2004, 2006, and 2007; other sections were never proclaimed.

As mentioned above, the Act prohibited many activities outright and allowed others subject to licensure and other limitations. The key prohibitions included those against creating and using embryos for research purposes, combining human and non-human cells, cloning, and sex selection; payment for surrogacy or gametes, and any surrogacy by persons under 21; using gametes or an embryo without the contributor's consent; and using the gametes of persons under eighteen for any purpose other than creating a child to be raised by those persons. The regulated activities included the creation or implantation of embryos, as well as the import, export, or transfer of gametes and embryos; the combination of human and non-human genetic material; and the reimbursement of expenses for gamete contributors or surrogates. Licences were required for the persons providing AHR services and the premises in which they did so. The act also established a specialized regime of privacy and access to information for assisted reproduction records and a specialized agency to perform the licensure and information functions.

The government of Quebec's legal challenge to parts of the *AHRA* began as a reference application to the Quebec Court of Appeal. Of the prohibitions, Quebec challenged only those on the use of gametes or embryos with the contributors' consent and the use of gametes from persons under eighteen to create a child for another person. Quebec challenged all of the provisions on regulated activities and privacy and access to information, as well as related ancillary sections of the *AHRA*. Quebec's argument was that these sections "regulate[d] the entire field of medicine relating to assisted procreation,"<sup>5</sup> which was a function for the provinces, given that they had jurisdiction over health care. Canada argued, unsuccessfully, that all of these

provisions were valid exercises of the federal power over criminal law. The Court of Appeal, in a unanimous decision by a panel of three judges, held that all of the sections challenged by the government of Quebec were *ultra vires* the Parliament of Canada; the court agreed that, aside from the outright prohibitions, “the Act constitutes a complete code governing all clinical and research activities relating to assisted reproduction.”<sup>6</sup>

The federal government appealed the judgment to the Supreme Court of Canada. Two provinces and various other groups intervened on the appeal. The nine judges who heard the appeal issued three sets of reasons: one by McLachlin CJ for a total of four judges, one by LeBel and Dechamps JJ for a total of four judges, and one by Cromwell J for himself alone. Chief Justice McLachlin held that the challenged provisions were aimed at preventing moral harm as well as public health ills and security issues and were thus properly criminal law within the jurisdiction of Parliament:

Assisted reproduction raises weighty moral concerns. The creation of human life and the processes by which it is altered and extinguished, as well as the impact this may have on affected parties, lie at the heart of morality. Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on persons like donors and mothers. Taken as a whole, the Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants. This is a valid criminal law purpose, grounded in issues that our society considers to be of fundamental importance.<sup>7</sup>

In contrast, LeBel and Deschamps JJ held that the provisions constituted regulation of health services, a provincial responsibility: “the purpose and the effects of the provisions in

question relate to the regulation of a specific type of health services provided in health-care institutions by health-care professionals to individuals who for pathological or physiological reasons need help to reproduce.”<sup>8</sup> They held that “[n]othing in the record suggests that the controlled activities should be regarded as conduct that is reprehensible or represents a serious risk to morality, safety or public health.”<sup>9</sup> Justice Cromwell broke the tie, agreeing largely but not entirely with Lebel and Deschamps JJ. His holding, and thus the result, was that some sections – most importantly, those on the licensure of professionals and premises for the delivery of AHR services and the privacy and information regime – were *ultra vires*, whereas others – particularly the prohibitions on using gametes or embryos without consent, the restriction on the use of minors’ gametes, and the provisions allowing reimbursement of expenses but not payment – were not.

In 2012, Parliament passed a series of amendments to the *AHRA*.<sup>10</sup> These repealed several sections, primarily those held to be *ultra vires*, and abolished the Agency and the licensure apparatus. Also, a new section was added that established safety standards for sperm and ova.<sup>11</sup>

Since the Supreme Court judgment, some other important legal developments have taken place in the context of AHR, which relate to a lively topic of discussion at the conference, and which are further developed in this book. Between 2008 and 2012, around the same time as the *AHRA Reference* and subsequent amendments, the case of *Pratten v British Columbia (Attorney General)* was winding its way through the courts.<sup>12</sup> Olivia Pratten argued that persons born through AHR had a constitutional right to information about their progenitors under the *Canadian Charter of Rights and Freedoms*.<sup>13</sup> She argued that such a right had been created both through section 7 (which recognizes the right to not be deprived of life, liberty, or security of the

person except in accordance with the principles of fundamental justice) and section 15 (which protects against discrimination). More specifically, she claimed that the lack of information violated her liberty and security by endangering her health and undermining her very identity, and that it was discriminatory to provide similar information to adopted persons but not to persons born through gamete donation. Pratten was successful in 2011 at first instance on the section 15 claim, but the Court of Appeal overturned the trial judge in 2012, and the Supreme Court of Canada in 2013 refused leave to appeal. At the time of the conference, the Court of Appeal's *Pratten* decision had not yet come out. One of the most intense moments of the conference occurred in the context of this debate, when we showed Canadian filmmaker Barry Stevens's documentary film *Biodad*, and followed it with a conversation between the filmmaker and the audience.<sup>14</sup> The movie documents Stevens's search for the identity of his biological father. Stevens was one of the first persons to be created through AHR, at a time when the technology was entirely unregulated and concerns about the desire to know one's "biological identity" and the privacy implications of gamete donation were not on anyone's radar. The debate in the wake of the *Pratten* decision highlights in an interesting way how new concerns may arise in relation to AHR that were not imagined at the time the technology was introduced. A detailed discussion of the *Pratten* decision seemed key to this book.

Another important regulatory development relates to the funding of AHR. In late 2014, the Government of Quebec introduced a bill that, among other things, would eliminate IVF funding in the health care system and prohibit women younger than eighteen and older than forty-two from undergoing IVF.<sup>15</sup> Some of our chapters refer to these developments and discuss the implications of funding decisions related to AHR in terms of the right to access the technology.

## Law's Struggle with the Possibilities Created by New Technology

The heart of the *Reference* and a unifying theme among the various chapters in this collection is how the law – both legislatures and courts – strives to understand and respond to the legal, ethical, and social ramifications of technological advancements. Assisted reproductive technologies, from artificial insemination to *in vitro* fertilization (IVF), surrogacy, and cloning, create situations that challenge basic assumptions about human relationships and that call into question the role of government regulation and the purpose of the health professions. When powers were first divided between the federal and provincial governments in 1867 – and for many years thereafter – there could be no meaningful consideration given to who should regulate technologies that were fantasy if not unimaginable. Similarly, it was once necessarily true that a newborn baby was the child of the woman who delivered it and a man who was sexually active with her nine months or somewhat less before, with adoption being the only situation where parent–child relations could be created outside the context of sexual relations. New reproductive technologies based on IVF created new opportunities for couples who could not naturally conceive, but it also created new challenges related to identity within a framework of parentage and privacy laws that remain founded on the assumption of natural reproduction. Most fundamentally, while all technology creates new possibilities, assisted reproductive technologies enable the creation of human life. In so doing, these technologies often harness the biology of existing humans, whether as sources of sperm and ova or as gestational carriers. This poses questions about participation in, access to, and the funding of AHR services. Particularly because of the costs of the technology and the considerable financial interests that have developed around

a booming commercial AHR industry – interests that include commercial sperm and ova banks, commercial surrogacy, consultancy firms, legal practitioners, and *in vitro* laboratories – AHR also raises questions about the commodification and commercialization of human life, in a way that few medical advancements have done before.

The specific dispute that gave rise to the reference is, at one level, about federalism and the respective powers of the provincial and federal governments. At a more fundamental level, however, this constitutional question and the other legal issues turn on what exactly AHR is. Is it a fundamentally new activity, one that can give rise to evils that ought to be criminalized, or is it merely one more service that modern medicine can offer? If it is just part of the many other medical services that exist, can some of its challenges be regulated like any other medical activity? Does the fact that it touches on questions of personhood and identity, related to the importance and nature of biological origin and the importance of kinship relation, make it something unique in the context of medical practice? Are the concerns about potential exploitation and commodification special because AHR involves reproduction and future human beings? If so, is this a reason to develop firmer regulatory control? If regulatory control is required, is a unique, stricter regulatory system the way to go? If it is just a medical service, should it be considered a luxury or a basic medical need? Are regulation and perhaps even criminal law appropriate tools for imposing restraints on a technology that may offer boundless new applications?

Like many stories of law reform, the history of AHR in Canada, and of the *AHRA* and the *Reference* in particular, is largely a story of delay and inaction. As with any issue, one option open to governments is to do nothing. This points to a peculiar limitation of federalism cases – the courts' determination that one level of government has exceeded its jurisdiction and that only

another level of government can legislate in an area is no guarantee that those governments will actually do so. Such a determination does not *compel* them. The responsibility for this delay and inaction can be attributed, albeit unequally, to all branches of government at all levels.

Interestingly, the constitutional challenge to the *AHRA* may even have provided the federal government at the time with an excuse not to move forward and implement the most basic regulatory structure, though it was legally able to do so. By not acting, the federal government may very well have given perfect ammunition to the critics of a strict regulatory approach for the demise of the legislative model it continues to publicly defend.

## **Background to the *Reference re: Assisted Human Reproduction Act* and Constitutional Law and Federalism Perspectives**

The first part of this book introduces the context surrounding the Canadian Supreme Court reference and the *Assisted Human Reproduction Act*, as well as the key constitutional and federalism issues raised by the case. Bernard M. Dickens provides a historical introduction to the Supreme Court's decision and the *AHRA* itself. He details the referral of the legal issues raised by AHR to the Ontario Law Reform Commission in 1982; traces the work of the Commission alongside contemporary examinations in Australia and Britain; and notes the relative silence that greeted the release of the Commission's report in 1985. Dickens then turns to the Royal Commission on New Reproductive Technologies, from its establishment by the Government of Canada in 1989 to the publication of its final report in 1993. By situating political and legal responses in the context of the developments as they happened, Dickens illuminates the

trepidation and controversy that these new realities invoked among the general public and the human context in which legislatures and courts operated. His account of these visceral public reactions and concerns over the implications of AHR provide a hint of the moral dimensions that dominated the reasons of McLachlin CJ in the *AHRA Reference*.

The next three chapters explore the impact of the *Reference* on constitutional law at three different levels: the scope of the criminal law power, the implications of that scope for constitutional norms, and the boundaries of the federal government's jurisdiction over health. In particular, they explore how AHR fits into and changes the historical division of powers between the federal and provincial governments. Ian B. Lee argues that the reasons in the *AHRA Reference* obscure the fundamental disagreement between the Chief Justice and Justices Lebel and Deschamps about what regulatory tools Parliament can validly employ to regulate various components of an activity that may only loosely be connected to an area of federal jurisdiction. He suggests that the decision is better understood as being not about the purpose of the impugned provisions, as the reasons nominally state, but instead about the means used to achieve that purpose. Interpreting the *Reference* in the context of previous decisions about the criminal law power, he argues that these provisions fell outside of that power because they included a licensure regime for a wide variety of activities related to AHR. He suggests that the repeal of the licensing elements by the 2012 amendments to the *AHRA* should therefore make these provisions a proper exercise of the criminal law power.

Hoi L. Kong analyses the disagreements between the Chief Justice and Justices Lebel and Deschamps as they relate to the role of provincial autonomy. His focus is on how these two main sets of reasons understand the breath of the criminal law power and the scope of, and role for, the double aspect doctrine and the paramountcy doctrine. He identifies what he terms the norm of

non-suppression – that is, that there are several recognized federalism-related values, and that none of these values should be suppressed by courts. In contrast to the reasons of Justices Lebel and Deschamps, those of the Chief Justice violate this norm by suppressing the value of provincial autonomy in applying a criminal law power that is so broad as to remove any certainty over when the federal government will intervene in matters of provincial jurisdiction.

Glenn Rivard evaluates the impact of the Supreme Court’s decision on the federal and provincial governments’ jurisdiction around health. As context for his analysis, he identifies the primary sources of federal powers related to health and the major legislation that draws on those sources. He emphasizes the federal government’s accepted role in product safety health risks via the criminal law power – risks such as those related to food, drugs, cosmetics, medical devices, human cell tissues and organs, and semen – and contrasts this with the accepted provincial role in regulating health professionals, services, and facilities. In this context, Rivard analyses the three sets of reasons in the *AHRA Reference*. He explains that Justices Lebel and Deschamps appear to narrow the established scope of the criminal law power in holding that public health risks are only an acceptable criminal law purpose where the thing being regulated – in this case, AHR – is an “evil” to be “suppressed.” He argues that although this narrowing could conceivably challenge long-standing and widely accepted federal control over product safety health risks, such an outcome is unlikely because those statutes have a more limited impact on provincial jurisdiction over health; indeed, the 2012 amendments to the *AHRA* make that Act more like those other statutes.

Together, these four chapters comprise a reflection not only on the scope of the federal criminal law power, but also on the legitimate dimensions of government regulation against moral harms and the role of public outcry as a motivator for lawmaking. They also demonstrate

the challenge of situating AHR, a development with truly transformative impacts, in the context of previous and largely more mundane jurisdictional disputes between the federal and provincial levels of government.

## **Family Law and Children's Rights Perspectives**

The next part of the book focuses on the family law implications of assisted human reproduction and children's rights. The first part grappled with how AHR impacts long-standing legal concepts around the federal and provincial division of powers; this next part addresses AHR's challenge to the basic social and legal concepts of parent and child. Fundamentally, these are questions about the relationships and responsibilities among children born through AHR, the persons providing gametes or surrogacy, and the persons who intend to raise the children. Which of these persons are parents, with all the implications that that legal status brings, and which – if any – have informational obligations to the child? Can adoption law provide a template to address these issues, or is AHR ultimately too different? Among the unproclaimed provisions struck down in the *AHRA Reference* and subsequently repealed were those on the collection, disclosure, and use of health information in the context of AHR. It now falls to the provincial legislatures, or potentially the courts, to fill this legal gap, whether by replicating the policy choices made by Parliament or by rejecting them. A particularly serious question is whether, and under what circumstances and conditions, donor-conceived offspring will have access to knowledge of and information about their origins. A related challenge at the provincial level is to address the role of gamete donors and surrogates in parentage law. This second part of the book approaches these issues from a variety of perspectives.

Carol Rogerson considers an urgent legislative challenge facing provincial governments: the need to modernize parentage laws to explicitly address parenthood where children are born using gamete donation or surrogacy. She argues that while tools such as social parenthood (recognizing persons standing in the place of a parent, i.e., *in loco parentis*), birth registration, and adoption may give some level of recognition to intended parents, these are not substitutes for the certainty and stability of established legal status as parents from birth. Moreover, she illustrates how the statutory emphasis on biological and genetic parenthood may indeed give gamete donors or surrogates unplanned and/or unwanted parental status. Rogerson concludes by assessing the Uniform Law Conference of Canada's *Uniform Child Status Act, 2010* and related legislation in British Columbia as precedents for future provincial action in this area.

Michelle Giroux and Cheryl Milne illustrate another need for provincial legislation with a critique of *Pratten v British Columbia (Attorney General)*, in which the BC Court of Appeal rejected arguments for donor-conceived offspring's right to know their genetic origins under sections 7 and 15 of the *Charter*. Giroux and Milne illustrate the negative implications of the court's holding that the section 15(1) violation – that donor-conceived offspring are discriminated against as compared to adopted children, who can access information about their biological parents – was saved by the ameliorative-purpose exception in section 15(2). They also argue that the court was overly dismissive of the section 7 claim, given the physical and mental health implications for the liberty and security of the person of donor offspring, as recognized by the trial judge's findings of fact. In particular, they argue that the court erred in rejecting the persuasiveness of related decisions applying the European Convention on Human Rights and in suggesting that the UN *Convention on the Rights of the Child* does not impact provincial

governments because they are not directly parties to it. Given the holdings in *Pratten*, Giroux and Milne conclude that these issues will require legislation by the provinces.

Vanessa Gruben explores in more detail the potential for donor-conceived offspring to successfully claim a right to knowledge of their genetic origins under section 7 of the *Charter*, despite the rejection of such a claim in *Pratten*. She acknowledges that a right to know one's origin would be a positive right and that no positive rights have yet been recognized under section 7. She explains several potential interpretations of a right to know, including access to a donor's identity and personal health information, and how such a right would raise complex privacy issues for donors, donor-conceived offspring, and others. While she argues that donor anonymity should be abolished and that donor-conceived offspring should have access to donor information, like Giroux and Milne she concludes that those changes are more likely to be made by legislatures than by courts.

If legislatures are the appropriate vehicle for determining the scope of access to information for children born through AHR, the next question must be what form that legislation should take. The remaining three chapters in this part examine this question from various perspectives. Juliet R. Guichon explores the suitability of provincial and territorial adoption legislation as a model. She begins by assessing the health impacts of secrecy and donor anonymity for donor-conceived offspring, drawing on recent new research to establish the pronounced psychological and psychosocial effects. In this context, she considers the various adoption regimes used across Canada, evaluating the strengths and weaknesses of their access-to-information provisions and how those provisions could be applied to the context of donor conception. She identifies a mutual consent registry – in which identifying information is released to offspring only if the donor consents – as the minimum appropriate response.

Jeanne Snelling argues that New Zealand law provides a desirable model for Canadian provinces to legislate access to donor identity and other information by donor-conceived offspring. She notes that while the *AHRA* and the corresponding New Zealand legislation share similar principles and histories, the former facilitated anonymity while the latter provides donor-conceived offspring (or their guardians) with both non-identifying and identifying information about their donors. However, she also acknowledges several weaknesses in New Zealand law – in particular, because there are no provisions to annotate birth certificates to indicate donor conception, some offspring may not know they are donor-conceived at all.

Jennifer Speirs considers the impact of donor anonymity and corresponding legislation in the broader context of AHR regulation in the United Kingdom. Her focus is on the attitudes of past anonymous semen donors, including how they felt their attitudes had changed in the intervening years. She considers the role of payments for sperm donation and the ways in which that money potentially changes the relationships among donors, clinicians, and offspring. She also explores the mix of apprehension, curiosity, and ambivalence that donors feel when it comes to meeting their offspring. Using these issues as a base, Speirs then canvasses the key features of present-day legislative schemes in the UK that govern AHR – specifically, donor anonymity and payment for gametes. She concludes by reflecting on how approaches towards donor-conceived offspring's access to information about their genetic parents have been and may continue to be informed by UK adoption legislation.

Together, the chapters of this part illustrate the need for provincial legislative action to update and adapt existing family law concepts and regimes in light of the new realities created by AHR. In so doing, they also illustrate the functionality and limitations of the courts as a substitute vehicle to address these issues. By exploring analogous legislation not only from

Canadian jurisdictions but also from Australia, New Zealand, and the UK, these chapters provide a rich exploration of many approaches from which the provinces might choose. At the same time, they also provide a compelling reminder of the human impact of continued inaction.

## **Commodification and Commercialization of AHR, Access and Funding of AHR, and the Role of Law**

The final part of this book is devoted to issues around the provision of AHR services. These services challenge fundamental assumptions about the nature of disease and medical services, the proper distribution of public and private resources, and the appropriate role for domestic and global government regulation in combatting perceived harms. These chapters explore the dimensions of this challenge as it applies to commercialization and commodification, reproductive tourism, the role for the private sector in service delivery, access and discrimination, and public funding.

Lisa C. Ikemoto contrasts the Canadian and American experiences around the commercialization of assisted reproduction and the resulting implications for reproductive tourism. She traces the *AHRA*'s ban on payments for gametes and surrogacy to the Royal Commission's concerns about not only coercion and exploitation of vulnerable groups, but also the more general commodification of human life. She explains how these concerns have gained little traction among the American public and lawmakers in most states, and attributes this inattention to an emphasis on individual choice and free-market principles, combined with commercial providers' portrayal of themselves as compassionately facilitating the growth of

happy and complete families. In this context, she illustrates how some American states have become magnets for those reproductive tourists who are willing and able to pay, particularly those from jurisdictions – such as Canada – where there are strong restrictions or prohibitions on the industry.

Susan G. Drummond argues that provincial law should be amended to recognize the enforceability of gestational surrogacy contracts. She illustrates the continuing dominance of the traditional approach to maternal parentage, under which the mother is the woman who gives birth to the child, and details the variation among the provinces as to the likely legal impact of a surrogacy contract. She demonstrates how the absolute rule in the Uniform Law Conference of Canada's *Uniform Child Status Act, 2010* – that surrogacy contracts are explicitly unenforceable – can paradoxically create a range of uncertainties and potentially undesirable outcomes for both the carrier and the intended parents. In contrast, she claims that enforceable surrogacy contracts would provide a more desirable distribution of risk. Finally, she argues that the existing empirical evidence, including as it relates to commodification, psychological impacts on children, and exploitation of vulnerable carriers, does not support the policy concerns about enforceability. Her critique of the criminal prohibition on commercialization contrasts in an interesting way with Ikemoto's sketch of the moral hazards associated with the untrammelled commercialization that currently dominates AHR in the United States. One question to ask when reading these two chapters is whether we are really talking here about two opposing models. As pointed out earlier, the Canadian regulatory scheme has never really been reasonably implemented, and we may therefore not have a good picture of how a well-designed regulatory system could address some of the concerns of both Ikemoto and Drummond. Nevertheless, here an American scholar faced with untrammelled marketing in the American context is calling for

what looks like a more Canadian regulatory restriction on commercialization to tackle exploitation, whereas a Canadian scholar rejects the concerns about commercialization and commodification and is calling for a lifting of the Canadian restrictions, in part out of concerns for women's rights.

Stu Marvel and colleagues survey the special challenges facing LGBTQ people seeking access to assisted reproduction. They begin by noting that although the *AHRA* includes a principle of non-discrimination that specifically contemplates sexual orientation, the *AHRA Reference* itself refers to LGBTQ people only once. This inattention is particularly problematic because the current legal environment imposes barriers that disproportionately affect LGBTQ people. The supply of gametes is limited, due in part to the *AHRA*'s prohibition on gamete purchase. The use of known semen donors is more expensive and time-intensive than it may be for heterosexual couples, as there can be no exemption from the processing requirements if the donor is not the recipient's spouse or sexual partner; moreover, special authorization is required if the known donor is gay, and will be denied if he is HIV positive. The prohibition on paid surrogacy presents an analogous barrier, particularly for gay men. These legal barriers exist alongside institutional attitudes in fertility clinics that focus on the needs of infertile heterosexual families.

Colleen M. Flood, Ryann Atkins, and Bryan Thomas critique the regulation of IVF facilities and services after the *AHRA Reference*. They argue that current legal regimes insufficiently address quality and safety issues as well as the potential for financial exploitation of IVF patients. These risks are exacerbated because IVF is largely offered by private for-profit facilities and is typically not covered by public or private health insurance. Flood and colleagues review the existing literature comparing health outcomes in for-profit and not-for-profit facilities

and argue that the potential weakness of for-profit care warrants careful consideration in the IVF context. They also explain how the commercial approach may create conflicts of interest that could result in financial exploitation. They compare the regulatory environment in Ontario, where IVF is regulated by the same general statutes and regulations that apply to health professions and other medical services, to the one in Quebec, which has adopted several additional legal tools specific to IVF. They argue that both regimes have significant deficiencies. Finally, they explore how the *AHRA*'s remaining prohibitions on payments for gametes and surrogacy, as well as the regulatory restrictions on embryo implantation in Quebec, tend to impede reproductive freedom.

Sarah Hudson assesses how a rights-based approach might support the funding of assisted reproduction under public health insurance. She explores the relationships among the concept of medical necessity under the *Canada Health Act*, the role of costs in determining health care priorities, and a narrow, illness-based concept of infertility that prioritizes the claims of heterosexual couples over those of singles and LGBTQ couples. In this context, she evaluates past and potential *Charter* claims for funding. She demonstrates that while claims to positive rights to reproductive autonomy or health care under section 7 would likely fail, discrimination claims under section 15 would have more promise, where some reproductive funding was already covered; however, much turns on the definition of infertility and the purpose of health care services. She concludes that anti-discrimination rights, as opposed to a free-standing right to reproductive assistance, have a major role to play in policy-making in this area.

Trudo Lemmens explores the arguments invoked in the debate over the commodification of human reproductive material. Building on Margaret Radin's market inalienability approach and referring also to the work of others who have emphasized the special issues raised in the

context of reproduction and the special nature of reproductive goods, Lemmens argues that criminal sanctions restricting the commercialization of gametes are legitimate and aim at confirming a richer concept of individual autonomy and at protecting human dignity. He suggests that regardless of changes in how we value AHR itself, reproductive goods should continue to be awarded special status and special protection outside the commercial market. Among the reasons for special treatment, Lemmens focuses in particular on the inherent relational nature of reproductive goods, the profound link to identity and personhood, and equity. The impact of commercialization on societal values associated with reproductive goods justifies, in his view, an approach that rejects untrammelled commercialization but allows for some level of state-organized compensation. Lemmens connects this discussion to a brief rebuttal of those who have argued that a prohibition on the sale of gametes violates *Charter* rights such as the right to life, liberty, and security of the person and the right to equality.

Together, the chapters in this part examine how value judgments embodied in law, specifically as they relate to the distribution and regulation of health resources, should be rethought in light of the challenges posed by AHR. These new technological possibilities place stress on the Canadian social consensus – to the extent that such consensus does indeed exist – as well as on health services with regard to the degree to which those services should be commercialized. As with the previous parts of the book, the focus here is on how AHR has pressured legislatures and courts to reconsider long-standing legal concepts, in this case about the inherent and commercial value of human life and its component prerequisites.

## **Appendix: Expert Reports**

As addenda, this book offers two expert opinion reports that were prepared in the context of the *AHRA Reference* decisions. The Quebec government commissioned an expert report to support its position on the *AHRA* at the Quebec Court of Appeal; the Canadian government did the same. These reports, which have not been published elsewhere, are valuable companions to the body of this book, as they reflect well the divergent opinions that exist in Canada with respect to the desirability of federal legislation in this area.

Françoise Baylis provides an excerpt of her report for the federal government. Her overarching message is that the need for national uniformity makes essential the federal regulation of AHR in the interests of public health and safety and public morality. Variation among the provinces would not only promote reproductive and research tourism to jurisdictions with laxer standards but also allow potential harm to Canadian social values through coercion, exploitation, and commodification. Moreover, she argues that regulation via a single specialized federal agency – Assisted Human Reproduction Canada – would minimize the shortcomings arising from regulatory collaboration by several existing bodies within each province. Finally, she emphasizes the appropriateness of the ethical principles underlying the *AHRA*, tracing them back to the parallel principles identified by the Commission on New Reproductive Technologies in its national consultations.

The report for the Government of Quebec by Bartha Maria Knoppers and Élodie Petit is reproduced in full in English translation. In contrast to Baylis, Knoppers and Petit do not focus on the differential impacts and effectiveness of federal versus provincial action around AHR; rather, they emphasize Quebec's long-standing and continuously evolving approach to regulating this area. They explain how and why this approach involves dynamic collaboration among the provincial government and government agencies, professional organizations, research ethics

committees, and the provincial agency that funds health research. They then detail how this approach has addressed some of the major issues raised by assisted human reproductive technologies, including consent, commercialization, and research oversight, and argue that this approach has made Quebec a leader both nationally and internationally. The foreword to the report, although brief, may be of particular interest. There, Knoppers draws on her experience as a member of the Royal Commission on New Reproductive Technologies to identify the limitations facing the Commission. She also emphasizes the irreconcilable conflicts among the Commission's members and the corresponding need for compromise in its work. These notes are illuminating, given the prominent role of the Commission's report for commentary about AHR and about portions of the reasons in the *AHRA Reference* itself.

## Conclusion

In the wake of the *AHRA Reference*, the Parliament of Canada and the provincial legislatures face myriad challenging decisions. With the federalism aspect settled by the Supreme Court, both levels of government have one less excuse for further inaction. The delay to date, both before and after the Supreme Court's decision, has created substantial uncertainty for people seeking to use or participate in AHR services and for those health professionals and entrepreneurs who are willing to provide them. As the chapters in this book demonstrate, the complexities involved span a huge range and pose a real danger of unintended consequences. What ties these challenges together is the dramatic extent to which they require re-examination and adaptation of existing legal norms and structures to address previously impossible circumstances. Governmental action in these areas must be prompt, but it must also be informed

and deliberate. The largest issues – the regulation of AHR services, the legal identity and rights of people conceived using these services, the rise of reproductive tourism, and the commercialization of reproduction itself – are the same ones facing politicians, policy-makers, and academics in many countries. While there may be room for a variety of reasonable responses to these issues, progress in any jurisdiction will continue to be undermined by inaction elsewhere. This book offers a rich reflection on these questions and will help create space for further discussion and deliberation among those involved in or being affected by the governance and practice of assisted human reproduction.

## Notes

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<sup>1</sup> *Assisted Human Reproduction Act*, SC 2004, c. 2.

<sup>2</sup> For a good discussion of the *AHRA* and the constitutional challenge, see Vanessa Gruben and Angela Cameron, “Quebec’s Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women’s Reproductive Autonomy?,” in *Fertile Ground: Exploring Reproduction in Canada*, ed. Stephanie Patterson, Francesca Scala, and Marlene K. Sokolon (Montreal and Kingston: McGill–Queen’s University Press, 2011), 125, esp. 130–40.

<sup>3</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 [*AHRA Reference*].

<sup>4</sup> For a brief history of legislative attempts in this area, see *In the matter of a Reference by the Government of Quebec pursuant to the Court of Appeal Reference Act, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 60, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c. 2*, 2008 QCCA 1167, [2008] RJQ 1551 at paras 4–17 [*Quebec AHRA Reference*].

<sup>5</sup> *Quebec AHRA Reference*, *ibid* at para 26 [translation]. The official text reads as follows: « le caractère véritable des dispositions attaquées consiste à réglementer tout le secteur de la pratique médicale liée à la procréation assistée ».

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<sup>6</sup> *Quebec AHRA Reference*, *ibid* at para 121 [translation]. The official text reads as follows: « la *Loi* constitue un code complet qui régit l'ensemble des activités cliniques ou de recherche en relation avec la procréation assistée ».

<sup>7</sup> *AHRA Reference*, *supra* note 3 at para 61. McLachlin CJ discusses public health at para 62 and security at para 63.

<sup>8</sup> *Ibid* at para 227.

<sup>9</sup> *Ibid* at para 251.

<sup>10</sup> *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c. 19, ss. 713–739.

<sup>11</sup> *Ibid*, s. 716 [not yet in force], adding a new section 10.

<sup>12</sup> *Pratten v British Columbia (Attorney General)*, 2011 BCSC 656, 99 RFL (6th) 290, rev'd 2012 BCCA 480, 25 RFL (7th) 58, leave to appeal to SCC refused, 35191 (30 May 2013), [2013] SCCA No 36.

<sup>13</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11 [*Charter*].

<sup>14</sup> Barry Stevens, *Bio-Dad* (2009), online: CBC <http://www.cbc.ca/player/Shows/Shows/Doc+Zone/2008-09/ID/2537059262>. See also Barry Stevens's reflections on his search for his biological identity in "Who I Came From" in Juliet R. Guichon, Ian Mitchell, and Michelle Giroux, *The Right to Know One's Origin: Assisted Human Reproduction and the Best Interests of Children* <city/publisher/year?> , 31–5.

<sup>15</sup> Bill 20, *An Act to enact the Act to promote access to family medicine and specialized medicine services and to amend various legislative provisions relating to assisted procreation*, 1st Sess, 41st Leg, Quebec, 2014, cl 3 (introduced by Hon Gaétan Barrette, Minister of Health and Social Services, 28 November 2014), adding s. 10.1 to *An Act respecting clinical and research activities relating to assisted procreation*, RSQ c. A-5.01: "No *in vitro* fertilization activities may be carried out on women under 18 or over 42 years of age." See Kelly Grant, "Quebec to cut in vitro fertilization insurance coverage," *Globe and Mail*, 28 November 2014, 2014 WLNR 33673554; and Kelly Grant, "Quebec moves to ban IVF for women over 42," *Globe and Mail*, 5 December 2014, 2014 WLNR 34345749.