

Assisted Reproduction Technologies

Prepared for: Legal Education Society of Alberta

Beyond Blended Families

Presented by:

Alex MacNab

Moe Hannah LLP

Calgary, Alberta

Co-Authored by:

Ellen K. Embury

Dunphy Best Blocksom LLP

Calgary, Alberta

For presentation in:

Edmonton, Alberta – February 20, 2018

Calgary, Alberta – February 28, 2018

HISTORY OF THE ASSISTED HUMAN REPRODUCTION ACT

In 1989 the Federal government of Canada identified a need to study advancements in assisted human reproduction. The Royal Commission on New Reproductive Technologies, headed by Dr. Patricia Baird and thus nicknamed the Baird Commission, was established to examine this emerging field. In 1993 the Commission released their final report which contained 293 recommendations in two main headings. The first heading called for criminal laws to prohibit many acts related to assisted human reproduction including selling human materials, advertising or paying for surrogacy, using embryos in certain types of research and unwanted medical treatment or other interference with the physical autonomy of pregnant women. The second heading of recommendations called for the creation of a national commission to assume federal regulatory responsibility and to oversee and monitor reproductive technologies and practices¹. In the 23 years since the Commission issued their recommendations Canadian law has attempted to accommodate both headings with varying degrees of success and criticism.

The Commission's final report served as the basis for the creation of the Act respecting assisted human reproduction and related research which was to be known by the official short title: the Assisted Human Reproduction Act (the "AHRA"). After consultation with the provinces, the AHRA was introduced to Parliament and passed in 2004. The Supreme Court of Canada would later describe the Act as "a series of prohibitions, followed by a set of subsidiary provisions for their administration"² and it did read as such. The first part of the Act was brought into force in April 2004 including Sections 5, 6, 7 and 9 which list prohibited acts related to creation, maintenance and purchase of activities related to assisted human reproduction. This helped satisfy the Commission's first heading of recommendations by outlining prohibited activities and offences. Section 8 of the Act which pertains to prohibitions on the use of sperm, eggs or in vitro embryos without 'consent to use' came into force in December, 2007. In 2006 provisions were brought into force to create the Assisted Human Reproduction Agency of Canada and thus fulfilling the Commission's second heading of recommendations. The Agency had two main objectives in relation to assisted human reproduction: to protect and promote the health, safety and dignity of Canadians and to foster the application of ethical principles related to assisted reproduction³.

¹ <http://publications.gc.ca/Collection-R/LopBdp/mr124-e.htm>

² Reference re Assisted Human Reproduction Act, 2010 SCC 61. <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7905/index.do>

³ AHRA s.22 - Repealed 2012

The AHRA was certainly not without controversy and the very notion that Parliament could create law in this area was challenged in 2008. The Court of Appeal in Quebec was asked by the government of that province to examine if certain sections of the Act were outside the power of the Parliament as granted in section 91(27) of the Constitution Act 1867. That section of the Constitution Act allows the Federal government to enact criminal law. Quebec's argument was that the AHRA did not further a valid criminal law purpose but, rather, "impermissibly invaded exclusive provincial legislative jurisdiction in relation to health, hospitals, medical facilities and the medical profession"⁴. The matter was referred to the Supreme Court of Canada in 2010 along with intervenors including the Attorney General of New Brunswick, Saskatchewan, Alberta, Dr. Micheal Awad⁵, the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada. The result in Canada's highest court was an uncommon 4-4-1 split decision: McLachlin C.J.C. wrote for herself and Binnie, Fish and Charron JJ to find the AHRA filled an entirely valid criminal law purpose. LeBel and Deschamps wrote a decision for Abella and Rothstein JJ to find that the sections outlining prohibited activities were permissible but the sections attempting to create regulatory responsibility were ultra vires. Justice Cromwell acted as tie breaker writing his own decision which was largely in agreement with LeBel and Deschamps. It was ultimately held that, besides the sections related to absolute prohibitions, the AHRA intruded so significantly into areas of provincial legislative jurisdiction it could not be sustained under the ancillary powers doctrine⁶ – the regulatory sections were unconstitutional.

The Federal government responded to the Supreme Court's decision in 2012. The Budget for that year, given the optimistic title of 'Jobs, Growth and Long-term Prosperity Act'⁷, contained provisions repealing the majority of the AHRA including almost all of the sections under the heading Responsibility of the Minister. Sections 40 to 43, which fell under the heading of Administration and Enforcement and related to licensing requirements for those who may undertake controlled activities as specified in the Act, were repealed without ever being brought into force. The Jobs, Growth and Long-Term Prosperity Act even provided statutory guidance for the dismantling of the Assisted Human Reproduction Agency of Canada. The effect of the 2012 Budget as it related to the AHRA was to revoke most of the regulatory power granted in the Act and to, effectively, defeat that second heading of recommendations from the Baird Commission. There is no longer a special federal

4 "Not a General Regulatory Power – A Comment on Reference re Assisted Human Reproduction Act" Mitchell, Graeme G.,(2011) 54 SCLR (2d) pg. 634

5 A medical doctor who was unable to practice in the area as he was unable to obtain a license under the AHRA pursuant to regulations that did not exist. His intervention was not mentioned by the majority in the decision.

6 Mitchell, pg. 647

7 S.C. 2012, c. 19

regulatory power to oversee and monitor reproductive technologies and practices. Any regulatory power that remains in the AHRA is administered in general by Health Canada.

It may be that this lack of specialized oversight has stalled the much needed progression of the law surrounding Assisted Human Reproduction in Canada. Those who attempt to operate under the law outlined in the AHRA have long found that it fails to create a legal framework that allows donors, intended parents, surrogates and other users to access assisted human reproduction in a practical way. The proper regulations required to define the Act have not been enacted.

POTENTIAL REGULATIONS TO THE ACT

One oft criticized area of the AHRA relates to the reimbursement of expenses for donors and surrogates. This has been a source of frustration for those attempting to operate under the Act as it creates a grey area of law which may ultimately limit access to these services. Section 6(1) of the AHRA clearly states that no person shall pay consideration to a female person to be a surrogate mother and section 7(1) prohibits the purchase of sperm and ova. This is an example of a strict prohibition which was found to serve a valid criminal law purpose by the Supreme Court of Canada and is, thus, still in force. Section 12 qualifies these strict prohibitions and allows for reimbursement of expenses for surrogacy and donation in accordance with the regulations. Section 12 has not yet been brought into force by Parliament perhaps because the regulations which ultimately may guide reimbursement had not been available until very recently. In July, 2015 draft regulations were released for comment with the title “Tissues for assisted reproduction (Proposed Amendments)” hereinafter referred to as the draft Annex. The introduction to the draft Annex firmly establishes that the regulations are meant to err on the side of protection and promoting the health and safety of donors and surrogates. Additionally, perhaps in reference to the Supreme Court’s 2010 decision, the introduction mentioned that the Annex is in keeping with the principles of the authority have jurisdiction.

The draft Annex goes on to define the categories of potential recipients of reimbursement as donors of ova, sperm, in vitro embryos and those who act as surrogates. In general, it states that all expenditures that can be reimbursed shall be reasonable, receiptable, and related to donation or surrogacy. In addition to a receipt, the draft Annex states a declaration must be signed for the expense to confirm that that the expenditure will not otherwise be reimbursed. The draft Annex specifically outlines the allowable expenditure for reimbursement for each category of potential recipient.