

ASSISTED REPRODUCTION POLICY IN FEDERAL STATES: WHAT CANADA SHOULD LEARN FROM AUSTRALIA*

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SUMMARY

Rapid advances in assisted reproductive technologies (ARTs) confront policymakers worldwide with dilemmas that touch on the fundamentals of human existence – life, death, and sexuality. Canada, following the lead of non-federal Britain, spent 15 years developing the comprehensive, national *Assisted Human Reproduction Act* (2004), only to have the Supreme Court strike much of it down in 2010 for invading provincial jurisdiction. As Canadians return to square one on many ART issues, they should seek inspiration from Australia, where the lead role of the states in this policy area has not prevented significant coordination on matters of broad consensus. Like their federal cousins down under, Canadians who wish to harmonize ART policy in a constitutionally acceptable manner must now rely more heavily on legislative modeling among provinces, intergovernmental agreements, and non-statutory (even non-governmental) guidelines.

* The authors wish to acknowledge the helpful comments of the anonymous referee.

COMMUNIQUÉ

In December 2010, the Supreme Court of Canada struck down much of the federal government's *Assisted Human Reproduction Act* (AHRA) for infringing provincial jurisdiction. Over two decades after the federal government began attempts at regulation (and six years after the AHRA's enactment), there suddenly existed no Canadian legislation in controversial areas such as *in vitro* fertilization, licensing of assisted human reproduction clinics, and research involving human and nonhuman reproductive material. Although criminal prohibitions remained, the federal government's capacity to regulate reproductive technologies had been gutted.

Early decisions by federal policymakers led Canada inexorably, and unnecessarily, towards the constitutionally risky strategy of comprehensive national legislation. Building off the 1993 Royal Commission on New Reproductive Technologies, which stressed a unitary approach, the federal government, in the face of considerable constitutional uncertainty, deliberately modeled its legislation on that of the United Kingdom, a unitary state. This gambit failed.

Following the Supreme Court decision, the responsibility for regulating many reproductive technologies now lies with the provincial governments. The critics of this new reality who fear an unregulated nightmare and bemoan the prospect of jurisdiction shopping should look down under for reassurance. The Australian experience shows that sub-national jurisdictions are more than capable of a coordinated response to the emerging field of reproductive technologies.

Largely because the criminal law power rests with Australian state governments, Australia's national government did not assume it had the primary responsibility to regulate reproductive technologies. Yet there is no evidence that Australia is any worse off for its decentralist policy framework. Indeed, reproductive technology policy is, and for many years has been, better regulated and coordinated in Australia than in Canada, where constitutional uncertainties prevented effective implementation of the AHRA.

Looking forward, Canadian policymakers should take three major points from the Australian experience. First, provinces can take leadership roles that influence other provinces and promote the emergence of best practices. Second, intergovernmental institutions can effectively facilitate harmonization, with or without federal involvement. Finally, national guidelines, even those without legal force, can help set standards and practices, particularly if provincial and medical stakeholders are involved in the creation of those guidelines. The federal government's role may have been diminished, but a degree of nationally harmonized policy on matters of significant consensus within areas of provincial jurisdiction remains possible.

INTRODUCTION

The rapid development of assisted reproductive technologies (ARTs) in recent decades has challenged policymakers around the world. Procedures such as *in vitro* fertilization, surrogacy, human cloning, and embryonic sex selection — previously the stuff of science fiction — have become possible and often commonplace.¹ While such technologies can provide benefits and new opportunities, especially for the infertile, they also raise concerns about the exploitation of women, the commodification of children, and the devaluation of human life. High profile events — e.g., the 1978 birth of Louise Brown, the world’s first “test tube” baby, or the 2009 “Octomom” fiasco² — have crystallized the issues and prompted controversy in many jurisdictions about whether, and to what extent, to prohibit and/or regulate ARTs. In federal states, these debates are further complicated by the question of which order of government gets to decide them. This paper focuses on the jurisdictional dimension of ART policy controversy in two federal states: Canada and Australia. Canada, whose ART policy has recently foundered on the shoals of federalism, has much to learn from Australia’s more successful experience.

Canada, generally considered the more decentralized of these two federations (but inspired in this case by non-federal Britain), spent many years developing national legislation, while the usually more centralized Australians chose to regulate ARTs mainly at the state level. In 2010, the Supreme Court of Canada, in a sharply divided judgment, struck down much of the federal *Assisted Human Reproduction Act* for invading provincial jurisdiction. We maintain that pursuing comprehensive national legislation was, constitutionally speaking, a high-risk strategy for addressing the ART phenomenon in Canada. True, the shift of a single judicial vote in the Supreme Court would have secured ultimate victory for this strategy, but the narrow division itself — and hence the considerable risk — should not have been surprising. In any case, whatever the comparative merits of centralized and decentralized approaches to ART policy might be in an ideal and unconstrained world, the Supreme Court ruling now forces Canada to take a more decentralized approach to ART policy.

As we in Canada reconsider our options, we should look to the decentralized model adopted in Australia, where the states took the lead on reproductive policy from an early stage, and where federal and intergovernmental institutions and standards have evolved to provide policy coordination on those issues over which broad consensus exists. Australia shows that Canadian arguments insisting on a centralized response³ — as opposed to one based on cooperative

¹ Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (New York: Farrar, Straus, and Giroux, 2002), 5.

² In January 2009, 34 year-old Nadya Suleman gained international attention when she gave birth to octuplets in California. It was soon revealed the octuplets — in addition to Suleman’s six previous children — were all conceived using *in vitro* fertilization, and that Suleman’s doctor had implanted 12 embryos into Suleman to during the procedure that led to their birth. The incident led to widespread calls for greater regulation of the fertility industry, and Suleman’s doctor had his medical license revoked in 2011. Alex Dobuzinskis, “‘Octomom’ Doctor Loses California Medical License,” Reuters, June 1, 2011, <http://www.reuters.com/article/2011/06/01/us-octomom-idUSTRE7507TL20110601>.

³ Canadian Medical Association Journal, “Patchwork Regulations Likely Outcome of Reproductive Technology Ruling,” Unsigned Editorial, March 8, 2011, www.cmaj.ca/cgi/reprint/183/4/E215.pdf; Toronto Star, “Supreme Court Ruling Muddies Issue,” Unsigned Editorial, December 23, 2010, A22.

federalism — are overblown, and that the despairing reactions of some commentators to the Supreme Court decision are overwrought. Ironically, Australia has adopted with respect to ARTs a perspective Canadians have pioneered and perfected in many other policy arenas, namely, that “for programs and policies to be national they need not be central.”⁴ Having been forced back to square one on much ART policy, it is time for Canadians to re-learn this lesson, guided by their federal cousins down under.

DEVELOPING CANADA’S CENTRALIZED ART POLICY

Although Canada has been actively engaged with ART issues for more than two decades, there is no end in sight. The policy process began in 1989, when Prime Minister Brian Mulroney struck a Royal Commission on New Reproductive Technologies (known as the Baird Commission, for its chairperson Patricia Baird). In 1993, after consulting over 15,000 Canadians and enduring internal disputes that led to the resignation of several of its members, the Commission issued a two-volume, 1,275-page report that recommended a mix of criminal prohibitions and regulations, all governed by a single national piece of legislation. The Commission borrowed this unified national approach from earlier British legislation. In many respects, the United Kingdom’s status as a world leader in assisted reproductive technology policy, as well as its system of parliamentary government, made it an ideal policy “lender.”⁵ However, as a unitary country, the United Kingdom did not have to concern itself with a constitutional division of powers. The fact that Canadian policymakers significantly underplayed the importance of jurisdictional issues, as we detail below, is explained in part by their reliance on the British model.

After the Commission’s 1993 report, it took another 11 years, and five legislative attempts, before Parliament passed the 2004 *Assisted Human Reproduction Act* (AHRA), widely considered one of the most comprehensive pieces of reproductive technology legislation in the world. Closely following the Royal Commission’s recommendations, the Act created a variety of prohibitions and regulations. It also created Assisted Human Reproduction Canada (AHRC), a federal agency with a broad power to introduce new regulations with respect to matters covered by the Act. Between the prohibitions, the regulations, and AHRC, the Assisted Human Reproduction Act addressed five of six major areas that constitute the typical policy space with respect to ARTs:

- **Embryonic research** policy addresses the creation, preservation, and manipulation of embryos for scientific research and medical treatment. This involves both the deliberate creation of embryos for the purposes of research, or the potential use of surplus embryos that remain following fertility treatment. Although the central focus is on *human* embryos, public policy sometimes addresses the creation of animal/human chimeras (usually by prohibiting them)

⁴ See Thomas J. Courchene, “The Economic Integration Continuum and the Canadian Securities Industry: In Praise of the Status Quo,” Institute for Research on Public Policy (October), http://www.irpp.org/miscpubs/archive/courchene_securities.pdf.

⁵ Mavis Jones and Brian Salter, “Learning to Regulate: Values, Actors, and Instruments in Developing Canada’s Assisted Human Reproduction Framework,” GBRG Working Paper 22 (July 2007); Lynn Hagger, “The Role of the Human Fertilisation and Embryology Authority,” *Medical Law International* 3.1 (1997): 1-22.

and the combination of animal and human reproductive material more generally. Relevant policy often includes prohibitions or regulations related to the cloning of human embryos for *non-reproductive* purposes (i.e., for research and medical reasons rather than creating a human being). Most embryonic research, including embryonic stem cell research, seeks not to produce the next generation of human beings but to improve the lives of this one. Within this category the AHRA prohibited animal-human chimeras and limited embryonic research to surplus embryos from assisted conception.

- **Reproductive human cloning** involves the (still theoretical) possibility of artificially creating a human being who is the duplicate of another human being. Reproductive human cloning is generally considered to be highly unethical, and the AHRA, like the laws of all nations that have legislated on the issue, enacted an absolute prohibition.
- **Assisted conception** uses technology to enhance the prospects of reproductive success for those who have difficulty conceiving. It includes fertility treatments, artificial insemination, egg and sperm donation, and *in vitro* fertilization (leading to implanted embryos). The AHRA subjected such activities, and the clinics that conduct them, to regulation and licensing, though it criminalized payment for eggs, sperm, and embryos. Regulations in this policy area often limit the number of *in vitro*-produced embryos that may be implanted in a woman (thereby preventing the Octomom phenomenon), set the maximum age at which a woman may engage in assisted conception procedures, and create databases to store patient and donor information. AHRC was expected to introduce such regulations, but because of the AHRA's short lifespan and the pending court decisions, they were never created.
- **Surrogacy** achieves assisted reproduction through a private social arrangement in which a woman gestates and bears a child to be raised by someone else. The surrogate mother may gestate a fetus based on the egg of the child-rearing or commissioning mother, in which case the latter is also the genetic mother. Alternatively, the surrogate may gestate a fetus based on donated egg and/or sperm. Occasionally, a surrogate may even donate her own egg (in which case she bears a genetic relation to the child). Policy debates with respect to surrogacy typically turn on the question whether to prohibit either or both of commercial surrogacy (in which the commissioning parent(s) pay more than the expenses of the surrogate) or altruistic surrogacy (in which the surrogate donates her gestational services, receiving reimbursement only for medical expenses). In keeping with the anti-commercialization spirit evident with respect to eggs, sperm, and embryos, the AHRA prohibited commercial but permitted altruistic surrogacy.
- **Offspring engineering** involves the application of new technologies to determine the attributes of children before they are born, whether those children were conceived naturally or via assisted conception. At issue are screening technologies that can be used to select against embryos with genetic diseases and for embryos with desirable traits (including sex selection). This category includes the theoretical possibility of germline engineering, which would involve the alteration of genetic cells to produce permanent genetic alterations, and transhumanism, a movement designed to use technologies to eliminate aging and radically enhance human physical and psychological capacities before birth. Public policy in this area typically involves regulating screening technologies and prohibiting certain enhancements. The AHRA bans both germline engineering and non-medical sex selection.

A sixth part of the typical ART policy complex — *parentage policy* — was left out of the AHRA. Parentage policy involves the procedures used to determine and transfer parental responsibility for children born through assisted reproduction. As noted above, surrogacy raises parentage issues in dramatic fashion. Similar or related issues are posed by egg and sperm donation, regardless of who gestates the fetus. Ottawa’s decision to steer clear of this policy area — which was included in the British model on which Canada otherwise relied — was the AHRA’s only significant concession to Canadian federalism.⁶ Parentage law (such as law governing adoption) differs from province to province due to longstanding provincial variation in common law and family law, and any attempt to set national regulations for assisted reproduction parentage seemed unlikely to withstand constitutional challenge.⁷ In this vein, while the Act created a criminal prohibition for commercial surrogacy, it contained no discussion of surrogacy *contracts*, which are considered provincial jurisdiction and are often decided on a case-by-case basis.⁸

That parentage was the AHRA’s only concession to federalism does not mean that the rest of the Act was free of constitutional doubts. Far from it! So significant and prominent were federalism-based doubts and challenges that neither the AHRA nor AHRC ever functioned coherently or effectively.⁹ As a single, comprehensive enactment (covering all of the relevant policy areas except for parentage) the AHRA embodied the Royal Commission’s view that given “the overarching nature, profound importance, and fundamental inter-relatedness of the issues involved, ... federal regulation of new reproductive technologies ... is clearly warranted.”¹⁰ But this view, which had been controversial from the outset, was authoritatively rejected in December 2010, when a narrowly divided Supreme Court, upholding a decision of the Quebec Court of Appeal, struck down most of the AHRA’s regulatory provisions as exceeding federal jurisdiction, while sustaining the Act’s prohibitory provisions as appropriate federal criminal law. Twenty-one years after the Royal Commission began work, Canadian policymakers found themselves back to square one on many of the issues addressed by the AHRA.

⁶ The Act did include a provision for equivalency agreements, whereby, following a federal-provincial agreement, the federal regulations could be suspended if the provinces enacted equivalent regulation. In Chenier’s words, provincial regulations had to be “substantially the same as, but not necessarily identical to” their federal counterparts. See Nancy Miller Chenier, “Intergovernmental Consultations on Health: Toward a National Framework on Reproductive Technologies,” Library of Parliament, Working Paper PRB 02-34E (2002), <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0234-e.pdf>, 4. This did not satisfy provincial critics because, as Justices LeBel and Deschamps noted in the Supreme Court decision described below, the equivalency agreements would be “dependent on the will of the federal government” (*Re Assisted Human Reproduction Act* [2010] 21 SCC 61, para. 255).

⁷ Indeed, a 2001 Standing Committee on Health report that considered a draft version of the AHRA noted that Newfoundland and Labrador, Quebec, Nova Scotia, and the Yukon Territory had already introduced laws excluding donors from parental responsibilities. Canada, *Assisted Human Reproduction: Building Families*, Report of the Standing Committee on Health (Ottawa: Public Works and Government Services Canada, 2001), 22.

⁸ Only Quebec has legislated concerning surrogacy contracts. Article 541 of the Quebec Civil Code states that surrogacy arrangements are null and void.

⁹ In its six years of existence, AHRC only issued one regulation, and was frequently criticized for inaction. In 2010, three board members resigned suddenly, but were unwilling to speak to the media about their reasons. Months later, Elinor Wilson, the head of AHRC, was criticized before a parliamentary committee for her excess travel costs. See Tom Blackwell, “‘Red Flag’ Raised at Fertility Agency,” *National Post*, April 21, 2010: A4; Tom Blackwell, “Fertility Law Leaves us in Limbo, Doctors Say,” *National Post*, April 30, 2010: A1; Christina Spencer, “Head of Reproductive Agency Defends Travel,” *CNews Politics*, June 15, 2010, <http://cnews.canoe.ca/CNEWS/Politics/2010/06/15/14400246.html>.

¹⁰ Canada, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993), 18-19.

AHRA AND CONSTITUTIONAL RISK

The AHRA contained both criminal prohibitions and regulations. The prohibitions — whether those concerning human cloning, embryo research, offspring engineering, or payment for surrogacy — might be controversial on policy grounds, but there was little doubt that they fell within the scope of Ottawa’s criminal law jurisdiction.¹¹ Any suggestion that the provinces would control the entire field of ART policy was impossible from the beginning. Certainly the criminal prohibitions in the AHRA aroused no opposition on jurisdictional grounds by critics during the AHRA’s development, and they were not challenged in the recent litigation before the Quebec Court of Appeal and the Supreme Court.

By contrast, the Act’s regulatory provisions — almost all of which dealt with assisted conception — were often portrayed as infringing on provincial jurisdiction over health care. Three of the four opposition parties dissented on jurisdictional grounds from a 2001 Report by the House of Commons Standing Committee on Health (the Brown Report), which advocated a “single regulatory regime encompassing one set of standards and one set of penalties... with no exceptions.”¹² The Bloc Québécois urged coordination with the provinces, claiming “large sectors of the field of medically assisted reproduction are matters of provincial responsibility.” The Progressive Conservatives similarly maintained that “the provinces and territories should *have* to be involved” (emphasis in original). And the Canadian Alliance expressed concern that “attempted federal regulation of assisted human reproduction facilities may raise constitutional challenges.”¹³ Provinces also considered the AHRA to be “intrusive,” with regulatory aspects “interfering with the provincial authority with respect to social and medical aspects of fertility and intervention technologies.”¹⁴ Throughout the legislative process, the government of Quebec was particularly active in its opposition, frequently writing letters to the federal Health Minister insisting that the Act’s regulatory aspects would violate the division of powers.¹⁵

The Act’s proponents were often impatient with such constitutional niceties. Diane Marleau, the federal Minister of Health during much of the legislative drafting, acknowledged that assisted reproductive technologies “tended to be in provincial jurisdiction” but said she “didn’t care.” In her view, these were issues of “women’s health... [about which w]e had to do something, and the quicker the better.”¹⁶ And the urgent action had to take the form of centralized, national legislation.

¹¹ These provisions easily satisfied the Supreme Court’s “three requirements of valid criminal law: 1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose” (*Re Assisted Human Reproduction Act* para. 35; see also Reference re Firearms Act, [2000] 1 S.C.R. 783, para. 27). As stated by the Quebec Court of Appeal, “The Attorney General of Quebec acknowledges that genetic manipulation and the commercialization of human reproductive material, prohibited in sections 5 to 7 of the Act, are matters of criminal law and therefore fall within the exclusive jurisdiction of the federal Parliament” (*Attorney General of Quebec v. Attorney General of Canada* [2008], QCCA 1167, para. 25).

¹² Canada, *Building Families*, 23. The NDP also dissented from the Brown Report, but not on constitutional grounds.

¹³ *Ibid.*, 85, 93, 80.

¹⁴ Nancy Miller Chenier, “Intergovernmental Consultations on Health,” 16.

¹⁵ *Attorney General of Quebec v. Attorney General of Canada*, para. 17.

¹⁶ Jones and Salter, “Learning to Regulate,” 12.

The Royal Commission was more careful in its justification of proposed legislation. The Commission *did* care about constitutional niceties, but was convinced they supported a centralized enactment. “Recogniz[ing] that the constitution assigns wide legislative jurisdiction to the provinces in the field of health,” the Commission “reject[ed] the argument that new reproductive technologies ... should continue to be subdivided into component parts and left to provincial legislatures.” Provinces, in short, could not “*continue*” to freely exercise their acknowledged jurisdiction over these matters. In the Commission’s view, the new ART issues had attained such “profound importance” and exhibited such “inter-relatedness” that federal restriction of traditional provincial jurisdiction was justified. It was justified, moreover, not just as a matter of desirable policy but of constitutional law, which provided “a clear basis for seeking national action in this area. In particular,” the Commission continued, “Parliament has authority, under the national concern branch of the federal peace, order, and good government power, to regulate matters going beyond local or provincial interest that are of inherent concern to Canada as a whole.”¹⁷

The peace, order and good government (POGG) clause of the Constitution Act 1867 does indeed enable Ottawa to enact legislation that might otherwise come within provincial jurisdiction. It can do so temporarily (and very extensively) in order to respond to emergency situations.¹⁸ But the AHRA was clearly not designed to be temporary emergency legislation.¹⁹ Absent an emergency, Ottawa also has the authority to invoke POGG to justify permanent legislation in matters that *prima facie* implicate provincial jurisdiction if those matters have attained a sufficient “national dimension” or “national concern.”²⁰ The Commission claimed that ART policy satisfied this requirement. According to Jones and Salter, the success of feminist groups in persuading the Commission to frame reproductive technologies more as issues relating to exploitation and “commodification” of women and children than as issues relating to health probably helped highlight this national concern interpretation of the legislation.²¹

The national concern branch of POGG has always been controversial, however. To the extent that almost anything might become a matter of national concern, this branch of POGG must somehow be tamed lest it radically upset the federal balance (and the Supreme Court has been nothing if not a defender of “balanced federalism”²²). Thus, beginning with the 1976 *Reference*

¹⁷ Canada, *Proceed with Care*, 18-19.

¹⁸ *In re Board of Commerce Act* [1922] 1 A.C. 191; *Fort Frances Pulp & Power Co. v. Manitoba Free Press* [1923] A.C. 695; *Toronto Electric Commissioners v. Snider* [1925] A.C. 396.

¹⁹ *Attorney General of Quebec v. Attorney General of Canada*, para. 79.

²⁰ *In Re: Regulation and Control of Aeronautics in Canada* [1932] A.C. 54; *A.G. Ontario v. Canada Temperance Federation* [1946] A.C. 193; *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292; *Munro v. National Capital Commission* [1966] S.C.R. 663.

²¹ Jones and Salter, “Proceeding Carefully: Assisted Human Reproduction Policy in Canada,” *Public Understanding of Science* 19.4 (2010): 423-427.

²² Gilbert L’Ecuyer, *La cour supreme du Canada et le partage des competences 1949-1978*, (Quebec: Gouvernement du Quebec, Ministere des Affaires intergouvernementales, 1978); P.W. Hogg, “Is the Supreme Court of Canada Biased in Constitutional Cases?” *Canadian Bar Review* 57.4 (1979): 721-739; Peter H. Russell, “The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources,” *Canadian Public Policy* 11.2 (1985): 161-170. See also Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006), Chapter 5, for a more recent discussion of balanced federalism.

Re Anti-Inflation Act,²³ the Court has allowed national concern to justify federal legislation implicating provincial jurisdiction only in matters sufficiently “distinct” and limited in scope that the overall federal balance remains undisturbed — e.g., the creation of the National Capital Region.²⁴ It helps, moreover, if the distinct subject matter is relatively new. And, it is especially helpful if the provinces, working together, are unable to achieve the same purpose — the so-called “provincial inability” test of POGG’s national concern branch.²⁵

The Baird Commission suggested such provincial inability when it claimed that “[m]atters so important to women and children, in terms not only of their health but of their legal status and how they are viewed, cannot differ from province to province.”²⁶ Proponents of the AHRA (and opponents of the Supreme Court majority) have made similar claims, arguing that provinces cannot effectively offer protection for patients, or prevent inter-provincial “fertility tourism.”²⁷ Such arguments reflect the intuitive appeal of national concern as a support for the controversial regulatory components of AHRA. While the Act’s prohibitory components clearly fall within federal criminal law jurisdiction (which the Commission invoked as a secondary jurisdictional support for the legislation²⁸), its regulatory components are more readily understood as addressing matters of national concern.

However attractive national concern may have been to supporters of the AHRA, there was in fact no guarantee that the Act would actually be upheld on that basis. From the 1976 Anti-Inflation case²⁹ up to 1993 (when the Commission reported), the Court’s national concern jurisprudence had been ambiguous and conflicted.³⁰ The test had been used both to deny³¹ and to sustain³² federal jurisdiction, and decisions in either direction typically involved narrow majorities prevailing over substantial dissents.³³ A single, comprehensive, national policy on ART issues was thus constitutionally risky.³⁴ Nevertheless, the Commission clearly considered the risk worth taking, and it bet heavily on the national concern branch of POGG.

²³ Reference re Anti-Inflation Act [1976] 2 S.C.R. 373.

²⁴ See *Munro v. National Capital Commission*.

²⁵ See *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401; *Ontario Hydro v. Ontario (Labour Relations Board)* [1993] 3 S.C.R. 327. Gerald Baier has written an excellent review of the provincial inability cases; see Baier, *Courts and Federalism*, 128-142.

²⁶ *Canada, Proceed with Care*, xxvi. Because the AHRA did not, in the end, address parentage, the legal status of children born through assisted reproduction always varied somewhat from province to province.

²⁷ See *Canadian Medical Association Journal*, “Patchwork;” *Toronto Star*, “Muddies Issue.” Public criticism of the Court’s decision is analyzed further in the section of this paper entitled “An ‘Unregulated Nightmare?’”

²⁸ *Canada, Proceed with Care*, 18-19.

²⁹ Reference re Anti-Inflation Act [1976] 2 S.C.R. 373.

³⁰ See Baier, *Courts and Federalism*, chapter 5.

³¹ *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)* [1980] 1 S.C.R. 114.

³² *R. v. Wetmore* [1983] 2 S.C.R. 284; *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401.

³³ The decisions in the previous two footnotes were all divided, as was the foundational *Re Anti-Inflation Act*.

³⁴ Peter H. Russell points out that the Court’s concern for balance (see note 22 above) often leads it to act like a referee in sport, as it attempts to “even things up.” This makes Supreme Court jurisprudence somewhat unpredictable. This tends both to “encourage constitutional litigation” and to make that litigation a risky proposition. Russell, “Political Use of Legal Resources,” 164.

What the Commission could not know was that after 1993, the Court would begin avoiding POGG (including the national concern branch) as a potential support for controversial federal legislation. According to Gerald Baier, the national concern test, even when constrained by such criteria as provincial inability, came to be seen as too much of a threat to the Court's project of balanced federalism, leading the judges to rely more heavily on such specific grants of federal power as criminal law.³⁵ Indeed, criminal law became one of the Court's favoured alternatives to POGG as a justification for federal legislation. "When the court has been faced with the opportunity to choose between criminal law and the POGG power," writes Baier, "it has increasingly opted for the former."³⁶ This trend was well entrenched by the time the AHRA was enacted in 2004, meaning that what the Baird Commission had considered a secondary constitutional justification for the Act had likely become the only justification.

This contraction of available constitutional support made the AHRA an even riskier proposition. True, the Court has sometimes given the criminal law power an interpretation sufficiently generous to make it seem "a proxy for national concern," but as Baier notes, "[p]resumably, there is a more restricted scope available under the criminal law power than there would be under an increasingly expanding national concern doctrine."³⁷

Despite the growing constitutional risk for the AHRA's regulatory components, the die had been well and truly cast in favour of comprehensive national legislation by the late 2000s. The Commission's 1993 report had been tabled at a time when the policy slate in this emerging area was relatively clean and Canadian policymakers had their eye mainly on the leading model from the United Kingdom, a unitary state. It was a time of great uncertainty with respect to ART issues, and the report was arguably a critical juncture, one of those early decisions in the policy process that can have a lasting and almost irreversible path-dependent impact on the final outcome.³⁸ In any case, by the time the national concern test had faded into the background of constitutional jurisprudence,³⁹ the federal government had accepted and implemented the critical-juncture advice it received from the Commission and was too far down the path of national legislation to turn back of its own accord. A Supreme Court ruling against it might force a change of direction, but the government would not backtrack without a courtroom battle. However, the government was well aware that its arsenal of constitutional weapons had been depleted. In its legal defense of the law, Ottawa did not bother to invoke POGG and relied entirely on its criminal law power.⁴⁰

³⁵ Baier, *Courts and Federalism*, 138-141.

³⁶ *Ibid.*, 142; see *RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3 S.C.R. 199; *R. v. Hydro-Québec* [1997] 3 S.C.R. 213; *R. v. Malmö-Levine*; *R. v. Caine* [2003] 3 S.C.R. 571, 2003 SCC 74.

³⁷ Baier, *Courts and Federalism*, 141.

³⁸ See Paul Pierson, "Increasing Returns Path Dependence, and the Study of Politics," *American Political Science Review* 94.2 (2000): 251-261, for a broader discussion of critical junctures and path-dependence.

³⁹ See note 35.

⁴⁰ Despite Ottawa not relying on POGG at all, the Quebec Court of Appeal took the opportunity to address and reject possible POGG arguments (*Attorney General of Quebec v. Attorney General of Canada*, paras. 78-79). The Supreme Court did not address POGG.

Is there enough scope in the criminal law power to justify the regulatory provisions in the AHRA? When the Court considered a law with both criminal prohibitions and regulatory provisions in the 2000 *Reference re Firearms Act* (the long gun registry), its judgment distinguished between regulations with only “incidental” effect on provincial jurisdiction and those with a more “substantial” effect.⁴¹ The former would not upset the balance of federalism⁴² and could be upheld as “secondary”⁴³ to the law’s primary criminal law purpose. The latter — which *would* upset the federal balance — would be struck down as falling “in pith and substance” within provincial jurisdiction.⁴⁴ In the *Firearms Reference*, the Court was unanimous in upholding that law’s regulations as secondary to the criminal law purpose of public safety. In the AHRA case, by contrast, the Court would be seriously split on whether the regulations were similarly ancillary to a criminal law purpose or whether they were in pith and substance regulations of health.

INTO THE COURTS

To defend the AHRA as valid criminal law, the federal government’s legal submissions characterized it as being essentially negative, a number of prohibitions supported by a few secondary or incidental regulations, rather than a vast regulatory regime containing the odd prohibition. Ottawa’s claim, as summarized by the Supreme Court, was “that the dominant purpose and effect of the legislative scheme is to prohibit practices that would undercut moral values, produce public health evils, and threaten the security of donors, donees, and persons conceived by assisted reproduction.”⁴⁵ From this perspective, the *Act* essentially sought to prohibit an evil rather than regulate a good, and its regulatory provisions were both ancillary to the prohibitive purpose and necessary to its achievement. At the Supreme Court, Justice McLachlin (writing on behalf of Binnie, Fish, and Charron) accepted this view. This group of four justices voted to uphold the Act in its entirety.

Justices LeBel and Deschamps (joined by Abella and Rothstein) read the law quite differently. For this group, the regulatory provisions of the AHRA did not concern “an evil needing to be suppressed [but] a burgeoning field of medical practices and research that ... brings benefits to many Canadians.”⁴⁶ The Quebec Court of Appeal panel had earlier (and unanimously) come to the same conclusion, arguing the law’s purpose was “not to prohibit wrongful acts but to ensure that ... desired and encouraged activity is carried out properly.”⁴⁷ From this perspective,

⁴¹ Re Firearms Act, para. 49.

⁴² Ibid., para. 48.

⁴³ Ibid., para. 4.

⁴⁴ Ibid., para. 49.

⁴⁵ Re Assisted Human Reproduction Act, para. 255.

⁴⁶ Ibid., para. 251.

⁴⁷ Attorney General of Quebec v. Attorney General of Canada, para. 128.

the regulation of benefits could not be seen as a necessary incident to the legitimate criminal prohibitions in the Act. “[T]he scheme established by the prohibitory provisions,” wrote LeBel and Deschamps, “does not depend on the existence of the regulatory scheme.”⁴⁸ To the contrary, “the prohibitory provisions ... stand alone and ... could apply regardless of whether a scheme regulating other activities existed,” just as “the regulation of activities associated with assisted human reproduction [does] not depend on other activities being prohibited completely.”⁴⁹ In other words, there is a federal division of labour with respect to the evils (federal) and the benefits (provincial) that come with new ARTs, and ample room for cooperative federalism. This second group of four justices voted to strike down the Act’s regulatory provisions.

The 4-4 tie was broken by Justice Cromwell, who generally agreed with LeBel and Deschamps that the challenged regulatory provisions fell under provincial jurisdiction rather than the criminal law. “The impugned provisions as I read them,” wrote Cromwell, “permit minute regulation of every aspect of research and clinical practice and do not simply prohibit ‘negative practices’.”⁵⁰ However, he thought that three of the regulations that the LeBel/Deschamps group voted to invalidate — those concerning donor consent, the age of consent, and reimbursement for medical surrogacy expenses — were sufficiently criminal in nature to come “within traditional boundaries of criminal law.”⁵¹ While Cromwell sided with aspects of both of the four-judge groupings, his decision was, overall, much more aligned with the reasons offered by LeBel and Deschamps, and his vote led to the invalidation of most of the Act’s regulatory provisions.

This result leaves a regulatory void to be filled by the provinces in many areas of assisted reproductive technology, particularly with respect to assisted conception. The courts have found that the provinces have jurisdiction over the storage and transfer of human reproductive material, some (non-prohibited) research combining human and nonhuman material, and the oversight of reproductive clinics with respect to *in vitro* fertilization and embryo transplant. Provinces and provincial colleges of physicians and surgeons will also be responsible for licensing and maintaining patient databases. Assisted Human Reproduction Canada’s scope has been curbed considerably, as it is no longer permitted to inspect clinics with respect to these regulations.⁵²

⁴⁸ Re Assisted Human Reproduction Act, para. 276.

⁴⁹ *Ibid.*, para. 277.

⁵⁰ *Ibid.*, para. 286.

⁵¹ *Ibid.*, para. 289. These regulations were contained in sections 8, 9, and 12 of the Act. Cromwell claims sections 8 and 9 (consent) were effectively prohibitions, while section 12 (reimbursement for surrogacy-related expenses) simply “defines the scope” of the commercial surrogacy prohibition (para. 290). Cromwell also upheld sections 19, 40(1), (6) and (7), 41 to 43, 44(1) and (4), 45 to 53, 60, 61, and 68, but only insofar as they related to those constitutional provisions contained in sections 8, 9, and 12. This is discussed further in Section Four.

⁵² Carl A. Laskin, “The Supreme Court Judgment,” Canadian Fertility and Andrology Society, December 23, 2010, http://www.cfas.ca/index.php?option=com_content&view=article&id=1061:supreme-court-judgment&catid=3:newsflash; Canadian Medical Association Journal, “Patchwork”; Sharon Kirkey and Janice Tibbetts, “Ruling Creates Regulation Gap,” Edmonton Journal, December 23, 2010, A3.

In spite of Justice Cromwell splitting the difference between the other two Supreme Court opinions, there can be little doubt that the victor here was the province of Quebec and, by extension, its nine provincial partners. Quebec Health and Social Services Minister Yves Bolduc summed this up when he said, “We’re happy with the decision and we respect the decision of the Supreme Court.”⁵³ Others, including many interest groups involved closely with the fertility industry, were less pleased.

AN “UNREGULATED NIGHTMARE”?

The legal decisions by the Quebec Court of Appeal and the Supreme Court of Canada outraged many policy experts and media commentators. Some likened the situation to an “unregulated nightmare,”⁵⁴ with one newspaper op-ed claiming that attempts to regulate the fertility industry have “collapsed in ruins.”⁵⁵ Timothy Caulfield, a health law expert at the University of Alberta, suggested that a national framework in areas such as pre-implantation genetic testing would have “led to a higher quality of care,”⁵⁶ while Vanessa Gruben, law professor at the University of Ottawa, worried that provinces would now be incapable of protecting women.⁵⁷ Patricia Baird, the chair of the Royal Commission, thought the decision will “lead to a patchwork of clinical standards,”⁵⁸ a fear shared by Diane Allen, Executive Director of the Infertility Network.⁵⁹ The concern over inter-provincial “fertility tourism” was especially pronounced, with the Toronto Star editorialists claiming the prospects for would-be parents “now depend on where they live or how easily they can get to a province with a more lax regime,”⁶⁰ while the Canadian Medical Association Journal suggested that women “may opt to travel to a province that permits multiple implantations” for *in vitro* fertilization.⁶¹ On this issue, even Roger Pierson, a spokesman for the Canadian Fertility and Andrology Society, who was generally positive about the decision, said “we are going to be talking about reproductive tourism for years.”⁶² As with the Royal Commission before them, these commentators believed the absence of a uniform national policy meant that Canada could not effectively regulate reproductive technologies — essentially that there was provincial inability.

⁵³ Kirkey and Tibbetts, “Regulation Gap,” A3.

⁵⁴ Juliet Guichon, Michelle Giroux, and Ian Mitchell, “Once More, an Unregulated Nightmare,” *The Globe and Mail*, June 24, 2008, <http://www.theglobeandmail.com/news/opinions/article693776.ece>. This article was in response to the initial Quebec Court of Appeal decision, but lead author Juliet Guichon has elsewhere expressed the same disagreement with the Supreme Court decision; see Matt McClure, “Alberta Fertility Industry to Remain Unregulated,” *Calgary Herald*, December 23, 2010: A3.

⁵⁵ *Victoria Times-Colonist*, “Law Needed for High-Tech Births,” Unsigned Editorial, January 9, 2011: C2.

⁵⁶ *Canadian Medical Association Journal*, “Patchwork.”

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Tom Blackwell, “Observers Divided on Fertility Ruling,” *National Post*, December 23, 2010, A1.

⁶⁰ *Toronto Star*, “Muddies Issue.”

⁶¹ *Canadian Medical Association Journal*, “Patchwork.”

⁶² Blackwell, “Observers Divided.”

Such fears are exaggerated. The assumption that the ruling will somehow result in a patchwork of unmanageable differences that could harm or commodify women misunderstands both the core components of the Supreme Court ruling and the current practice of Canadian health care. First, as already noted (and contrary to some claims⁶³), the Supreme Court did not invalidate the criminal prohibitions contained in the *Assisted Human Reproduction Act*. All the prohibitions — including those concerning human cloning, payment for surrogacy or gametes, non-medical sex selection, and obtaining gametes from an underage donor — are still in force. Health Canada maintains the authority to investigate and enforce compliance with these prohibitions, while Justice Cromwell’s decision ensures that rules governing reimbursement for out-of-pocket expenses by egg donors, sperm donors, and surrogates also remain under federal control.⁶⁴ Moreover, Ottawa retains the ability to create new criminal prohibitions, even in areas where it may no longer regulate. True, if Ottawa tried to turn all of the regulatory provisions into criminal prohibitions, it would no doubt run afoul of the constitutional injunction against doing indirectly what one cannot do directly, but some additional criminal prohibitions might well withstand judicial scrutiny. For example, although the provinces now have authority to create age-related guidelines for *in vitro* fertilization, nothing in the Supreme Court decision clearly prevents the federal government from creating a criminal prohibition against implanting an embryo in, say, women over the age of 60.⁶⁵ Of course, such prohibitions (and their administration) cannot run afoul of the *Canadian Charter of Rights and Freedoms*,⁶⁶ as demonstrated by the Supreme Court’s recent decision to allow Vancouver’s safe injection site (Insite) to stay open on Charter grounds, even as it confirmed the jurisdictional validity of the relevant federal criminal prohibition.⁶⁷ Nevertheless, there will be no patchwork with respect to practices the federal government has criminally proscribed or might *constitutionally* proscribe in the future.

Second, the claim that the Supreme Court ruling created a new regulatory void is exaggerated because Assisted Human Reproduction Canada did virtually nothing in the way of monitoring or regulation.⁶⁸ Certainly, AHRC’s inactivity may be explained in part by anticipation of the Supreme Court decision. Still, the void already existed and the Supreme Court decision changed nothing in the short run.

⁶³ In one particularly errant reading of the case, the editorial board at the *Victoria Times-Colonist* (“Law Needed for High-Tech Births”) claimed that sex selection might be legal in Canada, in spite of the fact that the case did not even challenge the ban contained in the AHRA. Likewise, the *Times-Colonist*’s insinuation that fertility clinic operators will now find it easier to impregnate female patients with their own sperm is factually incorrect and utterly ludicrous.

⁶⁴ Laskin, “Supreme Court Judgment”; Kirkey and Tibbetts, “Regulation Gap.” In the 2012 budget, the federal government announced it would phase out Assisted Human Reproduction Canada by March 2013 and transfer to Health Canada its remaining functions related to investigation, compliance, and regulation.

⁶⁵ Similarly, if the federal government sought to criminalize the implantation of more than a given number of embryos during *in vitro* fertilization in order to prevent an “Octomom” scenario, it likely has the jurisdiction to do so.

⁶⁶ Thus, Chief Justice McLachlin’s AHRA opinion hinted that valid criminal prohibitions on assisted reproductive technologies could be suspect to Charter scrutiny in the future (Re Assisted Human Reproduction Act, para. 50).

⁶⁷ In *Canada (Attorney General) v. PHS Community Services Society*, [2011] SCC 44, a unanimous Supreme Court, finding the federal government’s decision to close down Insite to be a valid use of the criminal law power but a violation of the Charter’s s. 7 right to “life, liberty, and security of the person,” ordered that Insite remain open.

⁶⁸ Kirkey and Tibbetts, “Regulation Gap.” As mentioned in note 9, AHRC issued only a single regulation in six years.

Nor is it clear that the absence of federal policy in the invalidated areas has caused (or is likely to cause) an unregulated nightmare. In related areas under provincial health jurisdiction, different provincial policies have not led to a black market in organ donation, and provincial variation in adoption policies has not led to baby-selling.⁶⁹ As they do with other health-related practices, provincial colleges of surgeons and physicians have already implemented internal regulatory practices for reproductive technologies, including record keeping and accreditation.⁷⁰

Fears about fertility tourism may be similarly misplaced. Here, we need to distinguish between the simple travel sometimes required to access procedures and jurisdiction shopping to access more desirable procedures. Uneven access to the procedures enacted by a single jurisdiction can certainly be an issue of policy and constitutional concern — indeed, it was a major reason for the Supreme Court’s invalidation of Canada’s abortion legislation in the 1998 *Morgentaler* decision.⁷¹ However, those worried about fertility tourism are focused mainly on the phenomenon of jurisdiction shopping — i.e., exploiting provincial regulatory variation by travelling to jurisdictions that provide individuals with more liberal procedures than they could access in their home jurisdiction. For example, if British Columbia permitted two embryos to be implanted during *in vitro* fertilization, and Alberta permitted only one, Alberta residents would be able to go to British Columbia for the service of their choice. So long as the enacted regulation is not considered unethical — in which case, the federal government could always enact a criminal ban, as in the above example concerning age-based access to *in vitro* fertilization — this is an unavoidable consequence (for good or ill) of the Supreme Court’s decision. It is worth noting that Canadians must live with such discrepancies in many other areas of Canadian health care, such as prescription drug coverage and sexual reassignment surgery, as provincial governments decide how best to allocate scarce resources.⁷² In the words of Justices LeBel and Deschamps, “neither a desire for uniformity nor the very novelty of a medical technology can serve as the basis for an exercise of the federal criminal law power.”⁷³

Indeed, defenders of provincial regulatory variation often emphasize the potentially positive policy effects of “competitive federalism.”⁷⁴ In this view, provincial variation can create policy competition and the emergence of best practices, while intergovernmental cooperation can emerge to harmonize policy in areas over which a consensus exists. From this perspective, the Supreme Court is helping Canadian policymakers to remember with respect to ART policy a valuable lesson that Thomas Courchene maintains they have taken to heart in many other

⁶⁹ The most extreme form of liberalized adoption policies could hypothetically allow birth mothers to sell their child to the highest bidder. However, provincial variation has not led to such commercialization. There is thus no reason to expect provincial jurisdiction over assisted reproduction policy will create commercialization, particularly given the continued existence of criminal prohibitions in the AHRA.

⁷⁰ Matt McClure, “Alberta Fertility Industry,” A3.

⁷¹ *R. v. Morgentaler* [1988] 1 S.C.R. 30. The 5-2 decision struck down the federal government’s criminalization of all abortions that had not been approved by a “therapeutic abortion committee” (TAC), in part because TACs were not uniformly implemented and because those that were applied vague legal standards differently.

⁷² Gerard W. Boychuk, “Public Health Care Provision in the Canadian Provinces and the American States,” *Canadian Public Administration* 45.2 (2002): 217-238.

⁷³ *Re Assisted Human Reproduction Act*, para. 255.

⁷⁴ Courchene, “Economic Integration Continuum.”

policy arenas, namely, that “for programs and policies to be national they need not be central.”⁷⁵ Even those critics of the Supreme Court’s decision who would prefer centralized ART policy must now (barring judicial change-of-mind or constitutional amendment) fall back on Courchene’s perspective as a second-best approach to achieving national standards. Either way, those who seek guidance on how decentralized ART policy might nevertheless be national should look to Australia.

LESSONS FROM AUSTRALIA

Australia, which is typically considered a more centralized federation than Canada, is formally more decentralized with respect to ART policy. In Australia all of the major levers relevant to reproductive technology policy — health regulation, parentage law, and criminal prohibition — fall within state jurisdiction, while in Canada criminal prohibition is Ottawa’s responsibility. In other words, the road to policy uniformity on ART issues (where such uniformity is deemed desirable) is even more littered with constitutional obstacles in Australia than it is in Canada after the Supreme Court’s AHRA judgment. Yet the primacy of state jurisdiction has not precluded harmonization. Indeed, in all five of the ART policy areas covered by Canada’s AHRA — embryonic research, human reproduction, assisted conception, surrogacy, and offspring engineering — Australia has achieved substantial harmonization. Moreover, while parentage policy, as in Canada, has seen the least harmonization, Australian efforts to harmonize surrogacy have had spillover effects with respect to parentage as well.

Part of Australian harmonization has come through states modeling and copying each other’s legislation — in other words, through the process of competitive federalism. This process began with the state of Victoria — home to the city of Melbourne — which, responding to its jurisdictional primacy in this policy area, became an early world leader with assisted reproduction. In 1982, as the number of babies born through *in vitro* fertilization increased, Victoria called on its Law Reform Commission to suggest legislation. In 1984, following the Commission’s recommendations, Victoria became the first Australian state (and one of the first jurisdictions in the world) to produce legislation governing assisted reproduction.⁷⁶ Years before Canada had begun to consider its options, Victoria had already developed a set of prohibitions, regulations, and licensing procedures. Victoria’s regime itself has proven flexible — it was substantially revised in 1995 and 2008, with the latter revision including updates to regulations concerning consent, surrogacy, gamete use, and licensing⁷⁷ — and it continues to be a world leader in assisted reproduction policy. Other states, including South Australia and Western Australia, built off the Victorian experience and introduced their own legislation, often

⁷⁵ *Ibid.*, 10.

⁷⁶ The legislation, known as the Infertility (Medical Procedures) Act (1984), officially came into force in 1988. It included regulations with respect to artificial insemination, *in vitro* fertilization, counseling, and reimbursement of expenses.

⁷⁷ The latest iteration is called the Assisted Reproductive Treatment Act (2008).

(though not always) adopting Victorian provisions and approaches.⁷⁸ Competitive federalism has also contributed to policy adjustment over time. For example, while states originally tended to copy Victoria's prohibition of both altruistic and commercial surrogacy, there has more recently been a trend (begun by the Australian Capital Territory) to create legislation that permits altruistic surrogacy.

A similar process of competitive federalism may well emerge in Canada with respect to those matters found to lie within provincial jurisdiction by the Supreme Court. The Government of Quebec already has several Civil Code provisions concerning assisted reproduction, has included *in vitro* fertilization under provincial health coverage since 2010, and has introduced regulations in response to the Supreme Court decision.⁷⁹ Other provinces would do well to pay close attention to these regulations to see if they fit their needs.

In Australia, more formal devices of intergovernmental negotiation and agreement have supplemented competitive federalism as a route to some level of policy harmonization. Through two intergovernmental arrangements — the Council of Australian Governments (COAG) and the Standing Committee of the Attorneys General (SCAG) — Australian first ministers and Australian Attorneys General⁸⁰ meet several times a year to agree on shared purposes and, where possible, to create proposals for harmonization.

For example, SCAG, the more state-driven of the two intergovernmental organizations, works to achieve consensus and harmony in state-based Australian criminal law. Most broadly, SCAG drafted a Model Criminal Code in 1992, although there has been only partial state implementation of its provisions.⁸¹ More recently, SCAG has worked, with greater success, toward consensus on certain aspects of reproductive technology. In particular, SCAG has contributed to the above-mentioned trend to liberalize surrogacy law. SCAG meetings generated state consensus on a draft set of principles that assume the legitimacy of at least altruistic surrogacy,⁸² and this led the two states that until then had still banned all forms of surrogacy — Queensland and Tasmania — to bring their law into line with the national trend. Queensland passed its *Surrogacy Act* in 2010 and, as we write, Tasmania's draft *Surrogacy Bill*

⁷⁸ South Australia originally passed the Reproductive Technology (Clinical Practices) Act in 1988, and amended it in 2009. Both followed closely after similar Victorian initiatives. Western Australia passed the Human Reproductive Technology Act in 1991, and passed surrogacy legislation in 2008.

⁷⁹ In addition to various Civil Code provisions (particularly articles 11-25 and 541), other Quebec legislation that addresses reproductive technologies includes the An Act respecting Clinical and Research Activities relating to Assisted Procreation (2009), the Medical Act, the Code of ethics of physicians, and its health care legislation, the AHSSSS (Attorney General of Quebec v. Attorney General of Canada, para. 30; Re Assisted Human Reproduction Act, paras. 222-224). Quebec also offers substantial coverage for certain infertility treatments. See Québec, "Assisted Procreation," Ministère de la Santé des Services Sociaux (2011), <http://www.msss.gouv.qc.ca/en/sujets/santepub/assisted-procreation.php>.

⁸⁰ The New Zealand Attorney General often participates at SCAG meetings as well.

⁸¹ C.R. Snyman, "Codifying the Criminal Law — The Australian Experience," *South African Journal of Criminal Justice* 13 (2000): 214-222. See also, Dennis Baker, "Federalism and the Criminal law Power: Comparative Constitutional Design and Its Consequences," Paper Presented to the Association of Criminal Justice Sciences, Toronto, March 2, 2011. Cited with author's permission.

⁸² These principles are available at: [http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Draft_SCAG_Surrogacy_Principles.pdf/\\$file/SCAG_Draft_SCAG_Surrogacy_Principles.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Draft_SCAG_Surrogacy_Principles.pdf/$file/SCAG_Draft_SCAG_Surrogacy_Principles.pdf)

is working its way through the state legislature. In addition, New South Wales, which passed a *Surrogacy Act* for the first time in 2010, followed the same model. With these three states on board, all six states and the Australian Capital Territory will have the essentially the same surrogacy provisions in their criminal law.⁸³ Only the Northern Territory now lacks surrogacy regulations.

In Canada, of course, harmonization of the criminal law dimensions of ART policy is not an issue. The more general relevance of Australia's SCAG process concerns the capacity of inter-state or inter-provincial agreements to produce a degree of harmonization on matters within the sub-units' jurisdiction. This phenomenon certainly has its analogues in Canada. A prominent example is securities regulation, which has historically been dominated by the provinces. Responding to the needs of increasingly national and globalized markets, provincial securities commissions have over time developed an impressive and widely respected degree of integration, achieving an overall policy that is national without being centralized.⁸⁴ Whether the benefits of harmonization could be even more perfectly realized through a national securities regulator established under federal legislation has recently been a matter of considerable controversy and the subject of constitutional litigation before the Supreme Court.⁸⁵ In December 2011, the Court unanimously found the proposed federal legislation unconstitutional, emphasizing that it ran against the dominant tide of Canadian federalism. This "dominant tide," said the Court, "accommodates overlapping jurisdiction and encourages intergovernmental cooperation."⁸⁶ The Court conceded that there were important dimensions of securities regulation that might be most effectively addressed by national legislation and regulation, but denied that this permitted Ottawa to elbow the provinces out of a field they had long monopolized. Instead, the judges insisted on the availability of "a cooperative approach that permits a scheme that recognizes the essentially provincial nature of securities regulation while allowing Parliament to deal with genuinely national concerns."⁸⁷

⁸³ Victoria's Assisted Reproductive Treatment Act (2008), mentioned in note 77, removed that state's longstanding de facto prohibition of altruistic surrogacy, as did Western Australia's 2008 Surrogacy Act.

⁸⁴ Courchene, "Economic Integration Continuum;" Pierre Lortie, Securities Regulation in Canada at a Crossroads, University of Calgary, The School of Public Policy Research Paper 3.5 (October 2010), <http://policyschool.ucalgary.ca/?q=content/securities-regulation-canada-crossroads>.

⁸⁵ The previous footnote cites Lortie and Courchene as defenders of the existing provincial system. Lortie also provides a condensed version of his case in "Securities Regulation in Canada: The Case for Effectiveness," IRPP Study 19 (October 2011), http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no19.pdf. That publication is accompanied by a rebuttal, by Thomas Hockin, who favours a national regulator. Also siding with Ottawa in this dispute is Poonam Puri, "The Capital Markets Perspective on a National Securities Regulator," *Supreme Court Law Review*, 51.2 (2001): 603-623. For an overview of the constitutional issues, see Justin Dharamdial, "A Primer to the National Securities Regulator Reference," *The Court.CA*, November 11, 2011, <http://www.thecourt.ca/2011/11/11/a-primer-to-the-national-securities-regulator-reference>.

⁸⁶ Reference re Securities Act, [2011] SCC 66, para. 57. Jurisprudentially, the case concerned the federal "trade and commerce power" (section 91.2 of the Constitution Act, 1867), rather than the criminal law power, as in the AHRA reference.

⁸⁷ *Ibid.*, para. 130.

Not surprisingly, proponents of greater centralization and harmonization of Canadian securities regulation have mourned and criticized the outcome of this case.⁸⁸ However, they can take solace from the fact that the harmonization they desire, while perhaps not fully realized, is far from completely absent, having been significantly developed by the provinces acting in cooperation with each other. Moreover, the door has not been shut on additional cooperation with Ottawa. The analogous constitutional issue in the case of AHRA has also been settled in favour of the provinces, who, in addition to being influenced by competitive federalism, may pursue the more formal kind of inter-jurisdictional collaboration on ART policy exhibited by the SCAG process in Australia or the home-grown Canadian example of harmonized provincial securities regulation.

In Australia, the Commonwealth government has also played a part in intergovernmental agreements on ART policy. This has occurred most prominently through COAG, in which the Commonwealth plays a larger role than it does in SCAG.⁸⁹ COAG agreements led the Commonwealth to pass the *Prohibition of Human Cloning for Reproduction Act* and the *Research Involving Human Embryos Act* in 2002,⁹⁰ which were subsequently adopted in nearly all the States and Territories through a process called mirroring, in which one government (potentially including the Commonwealth) enacts legislation with the full expectation that other governments will pass identical legislation.⁹¹ Mirroring frequently occurs following COAG agreement, and often involves harmonization of criminal law, over which states have primary jurisdiction.

The *Prohibition of Human Cloning Act* and the *Research Involving Human Embryos Act* have facilitated near-uniform harmonization across Australia in three of the six areas of ART policy. State mirroring of the two pieces of legislation has criminalized much activity related to reproductive human cloning (which is banned), research involving human embryos (which contains both regulations and prohibitions, and was updated in 2007), and offspring engineering (the *Prohibition of Human Cloning Act* bans germline engineering).⁹² When one adds the SCAG-led initiatives regarding surrogacy bans, intergovernmental arrangements in Australia have covered four (i.e., two-thirds) of the major ART policy areas and have achieved more or less the same level of ART criminalization as exists in Canada.

⁸⁸ See Emmett Macfarlane, "The National Securities Regulator and Judicial Stockholm Syndrome," *Macleans*, December 22, 2011, <http://www2.macleans.ca/2011/12/22/the-national-securities-regulator-falls-victim-to-judicial-stockholm-syndrome/>; Patrick Monahan, "Securities Reform goes Back to the Drawing Board," *The Globe and Mail*, December 22, 2011, <http://www.theglobeandmail.com/news/opinions/opinion/securities-reform-goes-back-to-the-drawing-board/article2280939/>.

⁸⁹ The Commonwealth participates in SCAG but not in a leadership role.

⁹⁰ The Commonwealth does have some limited criminal jurisdiction, as demonstrated by the Crimes Act (1914) and the Criminal Code Act (1995). States have primary jurisdiction over criminal law, while the Commonwealth authority is more implicit, stemming primarily from the express incidental power in section 51(xxxix) of the Australian Constitution. Recent High Court of Australia cases have expanded Commonwealth authority to legislate in areas beyond its traditional jurisdiction, particularly those related to the external affairs power (section 51(xxix)). See *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁹¹ The two pieces of Commonwealth legislation were subsequently amended in 2006. All states and territories passed mirroring legislation for the Prohibition of Human Cloning for Reproduction Act, but neither Western Australia nor the Northern Territory passed mirroring legislation for the Research Involving Human Embryos Act. Western Australia has regulations pertaining to surplus embryo research in its 1991 Human Reproductive Technology Act (regulations that are stricter than the Commonwealth legislation), while all ART policy in the sparsely populated Northern Territory is guided by South Australian legislation and regulations.

⁹² Each jurisdiction bans compensation for sperm and other human tissues in various pieces of human tissue legislation, such as Victoria's 1982 Human Tissue Act.

The COAG approach to ART policy harmonization will not translate in any direct way to the Canadian situation. It is obviously unnecessary with respect to the criminal law dimensions of ART policy (where Ottawa retains jurisdiction); more to the point, we would hardly expect Canadian provinces to mirror federal legislative templates for those parts of ART policy that now clearly lie within provincial jurisdiction. Extreme vertical fiscal imbalance and fewer sub-national units make COAG-style policy harmonization easier in Australia than in Canada. This approach is made even less likely in Canada because intergovernmental meetings here are less institutionalized,⁹³ and because Quebec's singularity has always made national agreement difficult in areas of provincial jurisdiction.

That said, federal leadership in policy areas within provincial or shared jurisdiction is far from unknown in Canada. For example, Ottawa in the past has used the leverage of its spending power to influence provincial policy, including health policy. This approach to harmonization of health policy is on the decline, however,⁹⁴ and is in any case not well suited to the regulation of ARTs. A more plausible model is Ottawa's leadership in achieving Canada's *Agreement on Internal Trade* (AIT). Interestingly, the AIT process — in which Ottawa initiated negotiations but then came to be seen “as an equal party” rather than a “dominant senior partner in intergovernmental arrangements” — bears striking similarity to Australia's attempt to reduce internal trade barriers.⁹⁵ While subsequent trade policy harmonization in Canada has been driven more by provincial collaboration,⁹⁶ Ottawa deserves credit for getting the ball rolling. The dismantling of inter-provincial trade barriers is far from complete, of course, and proponents of a more thoroughly national market sometimes claim that Ottawa has — and should use — the jurisdiction to impose its will on recalcitrant provinces.⁹⁷ In the case of ART policy, however, it is now clear that Ottawa cannot impose its will outside of its criminal law jurisdiction, and, if it wishes to influence other aspects of ART policy, must rely on the softer power of intergovernmental negotiation and persuasion.

⁹³ COAG typically meets one to two times annually, while SCAG meets three times a year. Canadian meetings between heads of government tend to be far more ad hoc, and have declined in frequency since the constitutional debates in the 1980s and 1990s.

⁹⁴ Herman Bakvis, Gerald Baier, and Douglas Brown, *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Don Mills, ON: Oxford University Press, 2009), esp. chapter 8. The federal government's recent 10-year health-care funding announcement, which transfers health-care dollars to the provinces with no strings attached, is further evidence of this trend. See Ian Bailey and Bill Curry, “Flaherty's 10-Year Health Plan Divides Provinces,” *The Globe and Mail*, December 19, 2011, <http://www.theglobeandmail.com/news/politics/flahertys-10-year-health-care-plan-divides-provinces/article2277221/>.

⁹⁵ Douglas M. Brown, *Market Rules: Economic Union Reform and Intergovernmental Policy-Making in Australia and Canada* (Kingston: McGill-Queen's University Press, 2002), 153.

⁹⁶ Loleen Berdahl, “(Sub)National Economic Union: The Evolution of Internal Trade Policy in Canada,” Paper presented at the 2011 Prairie Political Science Association Annual Meeting, Lethbridge, Alberta, September 24, 2011. Cited with author's permission. The provincial agreements include Alberta and British Columbia's 2006 Trade, Investment, and Labour Mobility Agreement (TILMA), the 2006 Ontario-Quebec Protocol for Cooperation, and the 2009 Interim Agreement on Internal Trade in Agriculture and Food Goods, which was signed by British Columbia, Alberta, Saskatchewan, Manitoba, Prince Edward Island and the Yukon. In 2010, TILMA was expanded to include Saskatchewan, under a set of agreements called the New West Partnership.

⁹⁷ See Brian Lee Crowley, Robert Knox, and John Robson, “Citizen of One, Citizen of the Whole: How Ottawa can Strengthen Our Nation by Eliminating Trade Barriers with a Charter of Economic Rights,” *True North* (Macdonald-Laurier Institute 1.2 (June 2010)), <http://www.macdonaldlaurier.ca/citizenofone/>.

Government policy processes, including intergovernmental ones, are usually directed to *legal* enforcement and regulation. Australia's experience shows that there can also be effective *non-legal* ways of promoting and achieving some degree of ART policy harmonization. This has occurred in Australia through the National Health and Medical Research Council (NHMRC) *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*.⁹⁸ These guidelines, created in 1996 and updated in 2004 and 2007, came into being to fill perceived gaps in legislation addressed to reproductive technology, especially those caused by different and uneven state laws. While all states and territories have legislation related to parentage and most have some legislation related to surrogacy, not all have robust ART legislation. The NHMRC document lays out ethical objectives and guidelines for all facets of reproductive technology policy, from accreditation (all clinics must be accredited by the Reproductive Technology Accreditation Committee) to surrogacy (commercial surrogacy should be criminally prohibited) to research involving gametes (researchers must gain informed consent from gamete providers). With the exception of parentage policy, which is mentioned only briefly, the Guidelines address every area of ART policy. This means that even in a jurisdiction like the Northern Territory, which lacks any ART legislation, all ART procedures are in practice fully harmonized with states that have legislated the guidelines.

As already indicated, some of the goals of the NHMRC document — e.g., the recommended ban on commercial surrogacy — have been embodied in legislation, but many remain subject only to guidelines with no legal force, especially in states that do not have relatively comprehensive ART legislation. The non-statutory guidelines have nevertheless taken on a central role in the development of assisted reproduction policy in Australia. The Reproductive Technology Accreditation Committee (RTAC), a wing of the Fertility Society of Australia and a voluntary creation of the ART clinics across Australia, uses these guidelines to direct its government-delegated accreditation process. The RTAC denies accreditation to fertility clinics unless they comply with the NHMRC Ethical Guidelines. Neither RTAC nor the Fertility Society of Australia are government bodies, yet their acceptance of the Ethical Guidelines has given substance to this national initiative. Where there is no state legislation that covers particular components of assisted reproduction, clinicians use the guidelines for their research and clinical practice, as do state Health Ministries. Although states are free to pass contrary legislation, those with comprehensive ART legislation have deviated very little from the guidelines. Combined with competitive federalism and the COAG and SCAG initiatives, the guidelines have gone a considerable distance towards developing policy harmonization.

It is worth emphasizing that the NHMRC guidelines grew out of widespread concern and engagement by stakeholders with backgrounds in law, ethics, medicine, and health research. In many respects, the guidelines formalized standards already evident in self-regulation by doctors. The perceived lack of adequate legislation that led Australian stakeholders in this direction is even more pronounced in Canada since the Supreme Court's AHRA decision, and

⁹⁸ National Health and Medical Research Council, *Ethical Guidelines On the Use of Assisted Reproductive Technology in Clinical Practice and Research* (Canberra: Australian Government, 2007): http://www.nhmrc.gov.au/_files_nhmrc/file/publications/synopses/e78.pdf.

The NHMRC is similar to the Canadian Institutes of Health Research (CIHR).

calls for greater harmonization have come from such important Canadian organizations as the Canadian Fertility and Andrology Society (CFAS), which is the primary professional organization for assisted reproduction stakeholders, and the Canadian Medical Association (CMA).⁹⁹ The conditions for an NHMRC-like guidelines initiative are ripe in Canada, though it may have to be led by an organization other than the NHMRC's Canadian counterpart, the Canadian Institutes for Health Research (CIHR), which lacks the Australian organization's explicit mandate to create guidelines for clinical practice.

Overall, the NHMRC initiative demonstrates that non-statutory guidelines can have an enormous impact on policy outcomes, eventually affecting legislation. Particularly in the area of assisted conception — currently the greatest concern for Canadian policymakers worried about a regulatory vacuum — the NHMRC Guidelines have led to substantial harmonization of best practices, in spite of the fact that those guidelines lack statutory force. For those Canadian stakeholders frustrated with government inaction, the lesson is that not all government policy initially stems from government itself, and that significant harmonization can occur even in the absence of government policy.

CONCLUSION: WHAT CANADA SHOULD LEARN FROM AUSTRALIA

When Canada began the process of developing regulations concerning assisted reproductive technologies, it had a choice between policy centralization and decentralization. In large part due to recommendations of the Royal Commission on New Reproductive Technologies, it opted for the constitutionally risky strategy of fully centralized federal legislation, building off Britain's unitary strategy. This gamble has backfired, as the Supreme Court ruled that Canada should have taken — and must now take — a more decentralized approach. Not that the federal government's role has been extinguished. The criminal prohibitions contained in the *Assisted Human Reproduction Act* remain, and others may be possible. Nor is Ottawa excluded from participating, and in some cases even leading, intergovernmental efforts to achieve harmonization where consensus exists over those aspects of ART policy that have been found to lie within provincial jurisdiction. Though the demise of over 20 years of policy development with respect to these provincial ART matters is a source of frustration to some, Canada is now pushed to do what it might (and perhaps ought to) have done years ago: look to Australia's approach to assisted reproduction. In particular, Canada can learn three things from Australia.

First, competitive federalism can achieve some of the same uniformity ends as national legislation. Victoria's early legislation influenced neighbouring Australian states by providing a framework for best practices that were eventually duplicated. In Canada, Quebec has introduced ART regulations, which may be a good starting point for the legislative and regulatory efforts of other provinces.

⁹⁹ See notes 52-60.

Second, intergovernmental institutions can facilitate harmonization. Although First Ministers meetings occur more frequently in Australia than in Canada, COAG and SCAG nevertheless demonstrate that principles can be agreed upon to guide legislation. Canada is no stranger to such intergovernmental processes, as securities regulation and the Agreement on Internal Trade attest. Such initiatives will seem incomplete and imperfect to those who desire full harmonization, but they demonstrate that a degree of governmental harmonization is by no means precluded when comprehensive national legislation is constitutionally impossible.

Third, non-governmental guidelines can achieve considerable harmonization, even if they have no legal force. Because they were the result of widespread consultation with stakeholders and practitioners, Australia's NHMRC Ethical Guidelines have provided "a robust framework for the conduct of research or practice,"¹⁰⁰ especially as they interact with the relatively harmonized state legislation achieved through intergovernmental processes. The NHMRC model can guide provincial colleges of surgeons and physicians in Canada.

Those who desire full and comprehensive national uniformity will no doubt remain unsatisfied with these approaches. Given the Supreme Court ruling, however, national regulation in non-criminal areas of reproductive technology policy is no longer an option in Canada, meaning that those who desire harmonization have no choice but to seek inspiration from something like the Australian model. That model, of course, cannot provide a simple and directly transferable template. Comparative policy learning is never as simple as it sounds, and relevant differences between the Australian and Canadian contexts must be considered. Yet such differences do not mean that the Australian experience must be lost in translation. At a minimum the Australian model demonstrates that governmental and non-governmental stakeholders can cooperate to achieve policy coherence through both intergovernmental meetings and non-statutory guidelines. Canadian proponents of ART policy coherence and harmonization will find valuable guidance, if not precise prescriptions, in the Australian experience.

¹⁰⁰ National Health and Medical Research Council, Ethical Guidelines, 8.

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ISSN

1919-112x SPP Research Papers (Print)
1919-1138 SPP Research Papers (Online)

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April 2012

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