

Submission on Draft Legislation on Assisted Human Reproduction

*National Health Law and Family Law Sections
Canadian Bar Association*

Preface

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Health Law and Family Law Sections of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Health Law and Family Law Sections of the Canadian Bar Association.

I. Introduction

The National Health Law and Family Law Sections of the Canadian Bar Association (the Sections) welcome the opportunity to comment on draft legislation regarding assisted human reproduction. The Minister of Health tabled the draft legislation with the House of Commons Standing Committee on Health in May 2001.

The Canadian Bar Association has been involved in the issue of reproductive technology for some time. It made submissions to the Royal Commission on New Reproductive Technologies in 1990 and to Parliament on proposed Bill C-47, *Human Reproductive and Genetic Technologies Act*.

The Standing Committee has already heard from a wide variety of groups and individuals. Rather than review issues and material that have been well covered, we focus on the critical legal issues associated with the draft legislation.

II. Positive Aspects

The proposal is a positive step into an area that is in need of regulatory oversight. Canada remains one of the few Organization for Economic Co-operation and Development (OECD) countries that does not have a national policy in the area of reproductive technologies. We strongly support the creation of a strong oversight framework. The draft legislation would create a regulatory framework that would cover clinical and research activities in both the public and private spheres. This comprehensive coverage would be a tremendous improvement – particularly in the health research arena, where much of the privately funded work currently falls outside of existing regulatory mechanisms. The recommended licensing and reporting schemes would facilitate quality control and encourage the development of national standards.

The draft legislation builds on and emphasizes a number of important social values, such as the importance of the best interests of the child, the danger of commodifying reproductive tissue and the reproductive process, and the importance of free and informed consent.

III. Criminal Prohibitions

The Canadian Bar Association has frequently expressed concerns about the use of the criminal law. Criminal penalties represent the most serious sanctions in our legal system. They are a blunt instrument, which should be used sparingly and only when there is a serious impact on the welfare of Canadians. As we noted in our 1997 submission on Bill C-47,¹ criminal law is not the best nor most effective legal tool for regulating the area of reproductive technologies. While we appreciate that there are constitutional limitations placed on the federal government (discussed below), the use of criminal prohibitions remains

the biggest drawback with the draft legislation. This conclusion is based on the following:

- Criminal prohibitions are not sufficiently flexible to effectively regulate an area that is evolving as rapidly as reproductive technology. This field is characterised by rapid scientific and clinical developments. The regulatory scheme must be sufficiently responsive to meet emerging social concerns, new scientific advances and changing public attitudes;
- The Government appears sensitive to the pace of change in this area, given the proposed mandatory five-year review of the legislation (section 42). However, even this review period provides inadequate flexibility. Prohibitions should be reviewed more frequently than every five years;
- There remains no social consensus regarding most of the prohibitions, other than reproductive cloning. For example, surveys in Canada, the United States and the United Kingdom have demonstrated a degree of public support for the concept of “therapeutic cloning”. This law would make therapeutic cloning a criminal offence. Criminal law should be reserved for those areas where there is a high degree of social consensus.
- In the past, social attitudes toward reproductive technologies and biomedical procedures (such as *in-vitro* fertilization, sperm donation, transplantation technologies and research on cadavers) have shifted. In all likelihood, social concerns and public perception of the new technologies will also change. Ideally, the regulatory scheme should be able to accommodate this change.
- Banning specific technologies may further polarize the social debate and will do little to encourage an ongoing and constructive dialogue about the risks and benefits of reproductive technologies. There seems little doubt that this area will continue to evolve. Canadians should be encouraged to continue, rather than close off the debate.

Most of the activities listed in section 3 of the draft legislation should be addressed by means other than criminal prohibition. That said, there appears at the moment (and probably for the foreseeable future) to be a social consensus against reproductive cloning and commercialization of surrogacy. Reproductive cloning and commercialization of surrogacy should be prohibited in the legislation.

IV. Policy Justifications

Given its social significance and controversial subject matter, any legislation on assisted human reproduction must be based on sound and scientifically supportable rationales. The government needs to clarify and strengthen its policy justifications for many parts of the proposed scheme. This is particularly so for the criminal prohibitions in section 3. There should be a clearly stated rationale, perhaps in a purpose clause, for distinguishing between prohibited actions and regulated actions.

V. Regulatory Body

The draft legislation would create a regulatory body to oversee the operation of the statute and regulations. In our view, this body should have the authority to establish, amend and interpret a “prohibition list” of prohibited procedures and technologies other than those noted above. The regulatory body would have the power to amend the list from time to time as considered appropriate. This would allow the degree of flexibility necessary to meaningfully regulate this dynamic area.

This is not intended to create a more lenient regulatory scheme. Rather, the flexibility of the proposed scheme will allow for a more precise regulatory environment that can respond quickly to both scientific advances and emerging social concerns.

In addition, the regulatory body should also have an interpretive role – perhaps by the ongoing provision of regular “interpretation bulletins” concerning the application of the legislation. These bulletins should be informed by the latest scientific, ethical, legal and social information and would thus provide certainty regarding the application of existing prohibited and regulated activities. They could also educate and inform the public and the scientific community of emerging controversies that could impact regulatory policy.

A good deal of thought would need to be given to the structure and composition of this regulatory body. The following elements should be included:

- it should be composed of individuals from a wide variety of relevant disciplines, including law, medicine, science and ethics;
- it should include both Members of Parliament and representatives of the public;
- it should have as much independence from Health Canada as is practical;

- its decision making process should be as transparent as possible;
- it should be required to engage in an interdisciplinary and public consultation process prior to amending the prohibition list; and
- it should also have a public and professional education function.

It is critically important for the government to support and facilitate an ongoing, highly informed, interdisciplinary debate on the social and scientific issues associated with reproductive and genetic technologies. The use of the criminal law to ban an activity will not resolve the social debate on these important issues. Instead, it may further polarize views and make constructive dialogue more difficult.

Canada has the opportunity to create a unique regulatory body that can serve as an example for other countries struggling with the same issues. We believe the proposed regulatory scheme is the best alternative.

A. Weaknesses of Our Proposed Regulatory Scheme

Despite the practical benefits of adopting a regulatory approach, we acknowledge that it raises legal and political issues. These are addressed below.

Constitutional Issues

The federal government is understandably concerned that it may not have clear jurisdiction to legislate in this area unless criminal prohibitions are used. We acknowledge that this is an uncertain area of constitutional law. However, for at least two reasons, it may not be problematic. First, the courts have tended to liberally interpret the criminal law power under section 91(27) of the *Constitution Act, 1867*.² As long as the regulatory scheme has criminal prohibitions and is aimed at a legitimate public health concern, the federal government arguably has jurisdiction. In our proposed scheme, the criminal prohibition would be triggered if an individual engaged in a procedure or activity on the prohibition list. Second, the retention of human reproductive cloning and commercial surrogacy as prohibited offences in the legislation explicitly retains the federal government's constitutional anchor.

Loss of Democratic Accountability

Another criticism of our proposed regulatory approach might be that it will remove decisions on socially important

issues from democratic oversight. This concern can be addressed in a number of ways. First, the mandatory consultation process, referred to above, would ensure public participation in the decision-making process. Second, the presence of Members of Parliament on the regulatory body would ensure the voice of our representatives is heard. At the same time, we should make sure that the presence of legislators does not jeopardize the independence of the regulatory body. Third, Parliamentary oversight could be ensured by using a "negative resolution" process, where regulations proposed by the body would come into effect unless rejected by resolution of the House of Commons and Senate.³ Such a process would have only minimal impact on the responsiveness and flexibility of the proposed regulatory scheme. Fourth, public accountability would also be encouraged by ensuring the regulatory body has a high degree of transparency in its decision-making. For example, the regulatory body could be required to prominently publish notices of its proposed amendments to the list and to provide meaningful public hearings.

Loss of Symbolic Force of Criminal Law

Some believe that criminal prohibitions provide symbolic weight to the subject matter of legislation. We sympathize with this view. However, a regulatory approach would not necessarily reduce the impact of government action in this area. On the contrary, by having an ongoing role in the public discussions surrounding reproductive technologies, the regulatory body would have an ongoing high profile. The pursuit of government policy through regulatory, as opposed to criminal, means does not necessarily lessen the "weightiness" of the subject matter – the important work of the Canadian Human Rights Commission is an example of this. In addition, we believe that the adoption of our proposal will be viewed positively by the international community.

VI. Surrogacy

The Canadian Bar Association supports a co-operative approach between the federal, provincial and territorial governments to implement legislation pertaining to reproductive and genetic technology.⁴

We must develop a common approach across Canada to surrogacy and the increasingly complex family law issues arising from surrogacy arrangements. Legislation must protect the status, best interests and rights of children. There must be clear and consistent rules throughout the country regarding parentage, custody, and financial responsibility for children born as a result of surrogacy arrangements.

Otherwise, we will create an incentive for people to “shop” for the most advantageous province or territory to enter such arrangements. The federal government must take a leadership role, as it has done through its review of child custody, access and support.

A. Reasonable Expenses of the Surrogate Mother

Sections 4(1) and 10(d) of the draft legislation could prevent a surrogate mother from being reimbursed for reasonable expenses related to the pregnancy. For example, a surrogate mother could lose income if she is unable to continue her employment as a result of the pregnancy. The legislation should allow a surrogate mother to receive her reasonable expenses. Reasonableness could be determined, for example, with reference to her lifestyle prior to pregnancy.

B. Regulation of Surrogacy

In our April 1997 submission concerning Bill C-47, we made the following recommendations:

1. There should not be a specific ban on surrogacy arrangements.
2. Surrogacy arrangements should be rendered unenforceable.
3. These arrangements should be assimilated as far as possible into an adoption model, thereby allowing the birth mother at least ten days after birth to decide whether to proceed with the agreement.
4. There should be no money or consideration of any kind payable with respect to these arrangements. All payments for adoption should be deemed to be illegal.
5. A legislated exception should be made to the presumption of paternity provisions and to the consent to adoption provisions in the case of a surrogacy arrangement which the birth mother decides to respect, so that the intended social parents are the legal parents and other presumptive parents have no status.
6. The meaning of written agreement in the family law legislation as it pertains to custody matters should be amended to exclude surrogacy agreements, except as invoked by the birth mother. In all respects, the intended social parents in a surrogacy arrangement should be in no better position than other proposed adoptive parents.
7. The proposed adopting parents should have no rights of access if the birth mother chooses not to respect the agreement and does not relinquish custody.
8. If the birth mother chooses to respect the surrogacy agreement, offers to relinquish custody to the proposed

adopting parents, is turned down for any reason, and does not otherwise relinquish custody of the child, she should be entitled to claim maintenance on behalf of the child from the proposed adopting parents and their estate.

We repeat and endorse these recommendations with respect to the surrogacy portions of the draft legislation, although we would make paragraph d., above, subject to our comments regarding reimbursement for the surrogate mother’s reasonable expenses. We recognize that there may be federal/provincial/territorial constitutional considerations involved in some of these family law issues, however we believe that the federal government should take a leadership role in ensuring a common approach across the country.

As noted above, there should be a criminal prohibition on commercialization of surrogacy.

VII Privacy and Access to Information

Sections 18 to 21 of the draft legislation deal with privacy and access to information. We assume the purposes of these sections are:

- for licensees, to permit a free flow of information between licensees to promote continuity and quality of patient care;
- for the Minister, to undertake public health surveillance and to respond to legitimate requests for information from donors, patients who undergo assisted reproductive procedures, or individuals conceived by assisted reproductive procedures; and
- for individuals in these three classes, to have access to medically relevant family information.

It is difficult to predict the potential safety risks associated with assisted reproductive technologies. We therefore understand why the government would want to ensure that information is available to address such risks. We also agree that information about genetic and other familial medical history should be available and accessible to individuals who need that history for risk assessment, diagnosis or treatment purposes.

Legislators must strike a balance between these public interests and individuals’ interests in the privacy and confidentiality of this very sensitive personal information. The latter are recognized in the preamble of the draft legislation, which articulates the fundamental principles of individual dignity and free-and-informed consent. The draft legislation seeks to strike this balance by:



- requiring advance explanation of, and informed consent to, all legislative requirements relating to use, disclosure, retention and destruction of health reporting information (HRI) and human reproductive material (section 18(2));
- giving individuals a right of access and correction of HRI (section 20(1));
- restricting the purposes for which HRI may be disclosed by licensees (section 19(2)); and
- restricting the purposes for which HRI may be disclosed by the Minister (section 21(3)-(5)).

These are constructive steps towards achieving a reasonable balance. However, we have some persisting concerns and offer the following suggestions:

Firstly, the definition and scope of “health reporting information” should be clarified. The definition should incorporate the threshold principles that:

- only non-identifying information will be used or disclosed, unless identifying information is necessary for the intended purpose; and
- use and disclosure will be limited to the minimum amount of information necessary for the intended purpose.

These are the governing principles of privacy law, both in Canada and internationally. The collection, use and disclosure of health reporting information should be guided by the same principles.

Secondly, the federal government must be mindful of the above principles in developing the content of the regulations. Many of the rules relating to use and disclosure of health reporting information will be in regulations. For instance:

- the specific kinds of information that will be part of mandatory health reporting information (section 18(1));
- the scope of information reporting to the Minister that can be required without consent (section 18(2)(a));
- the laws requiring disclosure which will take precedence over the draft legislation (sections 18(2)(d), 29(5)(d) and 29(5)(e)); and
- the identifying information that can be transferred between licensees (section 18(3)).

The regulations will be critically important to ensuring a balance between the personal privacy of the individual donor or recipient and the public interest in fair access to information by individuals who are conceived via new procedures and by public health surveillance bodies.

VIII. Conclusion

We appreciate the opportunity to provide our views on these fundamental issues. We commend this government on its efforts to collect all relevant stakeholder input before tabling legislation. It is critical that Canada now move forward with legislative action.

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1. Canadian Bar Association, *Submission on Bill C-47, Human Reproductive and Genetic Technologies Act* (Ottawa: Canadian Bar Association, 1997).
2. See, for example, *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 and *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213.
3. See, S. Anand, (1999) 4 Crim L. Q. 485 at 499 (proposing this mechanism in relation to sentencing policy).
4. Canadian Bar Association Resolution 01-14-A, adopted at the August 2001 Annual Meeting in Saskatoon, Saskatchewan.

