

Why Criminalizing Sex Selection Techniques is Unjust: An Argument Challenging Conventional Wisdom

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Introduction

The issue of sex selection is one that often invokes a great deal of controversy. In a society where we value equality between men and women should one be able to choose the sex of one's offspring? Would males be chosen over females, thus promoting continued inequality between the sexes? What about those whose culture and/or religion prefers that women bear a child of one sex over the other? What about those who just want an evenly balanced complement of children? These are important considerations to be taken into account when deciding how to regulate the use of sex selection techniques within society. However, the new legislation dealing with sex selection in the *Assisted Human Reproduction Act*¹ appears to have focused solely on the first two considerations, while paying no attention to the necessity of balancing these other valid concerns.

The *AHRA* was recently passed by the Parliament of Canada, after a more than a ten-year delay from the submission of the Royal Commission on New Reproductive Technology's Final Report² to the government, and after several earlier incarnations of it failed to become law.³ The *AHRA* is, according to many, overly restrictive in terms of the prohibitions and limitations on various procedures and techniques, as well as harsh in terms of penalties. The *Act* prohibits many

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¹ S.C. 2004, c. 2 [*AHRA*].

² Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Canada Communication Group Publishing, 1993) [RCNRT, *Proceed With Care*].

³ Bill C-47, *An Act respecting human reproductive technologies and commercial transactions relating to human reproduction*, 2d Sess., 35th Parl., 1996 was the first incarnation of the *AHRA*. It died on the order paper in 1997. Similar legislation was not introduced until 2002: Bill C-56, *An Act respecting assisted human reproduction*, 1st Sess., 37th Parl., 2002 which was prorogued at the end of the Parliamentary session. It was reintroduced as Bill C-13, *An Act respecting assisted human reproductive technologies and related research*, 2d Sess., 37th Parl., 2002 in substantially the same form. It was again prorogued at the end of the Parliamentary session. It was reintroduced as Bill C-6, *An Act respecting assisted human reproduction and related research*, 3d Sess., 37th Parl., 2004, which was the incarnation passed by Parliament. It received Royal Assent on March 29, 2004.

activities through criminalization, including therapeutic cloning⁴, payment for surrogacy and for the provision of gametes. Section 60 of the *AHRA* calls for a maximum penalty of 10 years imprisonment, a \$500,000 fine, or both for violation of any one of several provisions, including the use of certain sex selection techniques.⁵ While a good deal of the *AHRA* is fertile ground for critique, this paper will focus on the legal problems that the blanket prohibition and criminalization placed on the use of non-medical sex selection⁶ in s. 5(1)(e) of the *Act* has created. Specifically, it will be argued that this prohibition through criminalization is problematic for three reasons: first, that it fails to stop all methods that one could employ to select the sex of one's child; second, that the criminalization of the use of sex selection techniques legally moves Canada backwards from a position of protecting the health, welfare and human rights of its citizens to one of imposed morality; and third, that it is unconstitutional and cannot be justified under s. 1 of the *Charter*, and should, therefore, be struck out of the *AHRA*.

A. Background

The Science

While the generic term “sex selection technique” is often employed to encompass all methods by which one may select the sex of a child, there are several very different techniques that can be employed in order to select for the sex of a child. Some are more fraught with ethical dilemmas than others, given the invasiveness of and the particular methods employed to achieve the goal of selecting the sex of one's child. The most blatant and horrifying form of sex selection of children is that of infanticide, in which a child of the undesired sex is killed after birth. This is not a common practice in Canada and is not considered a “technique” to attempt to control the sex of a child for the purposes of this analysis, as it is performed after the birth of the child. However, infanticide has been and continues to be utilized in other countries. A study in India noted, in 1995, that approximately 300,000 female infants die each year due to “gender discrimination,” which

⁴For example, the ban on cloning humans in s. 5(1)(a) bans even therapeutic cloning, creating controversy for those engaged in research on the benefits of therapeutic cloning and stem cell research. For a broader discussion of this issue see *e.g.* Lori P. Knowles, “Science Policy and the Law: Reproductive and Therapeutic Cloning” (2000/2001) 4 N.Y.U. J. Legis. & Pub. Pol’y 13.

⁵The prohibitions and limitations that are subject to the penalty in s. 60 are in ss. 5-9 of the *AHRA*.

⁶For the purposes of this paper, unless otherwise noted, further references to “sex selection” will refer only to sex selection for non-medical purposes, where the goal of selecting for sex is to choose the biological sex of the fetus as an end in itself, and not to choose the biological sex of the child as a means to preventing some type of sex linked illness. The legislation does provide an exception that allows for sex selection in order to “prevent, diagnose or treat a sex-linked disorder or disease” (s. 5(1)(e)). While outside of the scope of the present analysis, it is noted that there are many valid concerns cited by disability scholars about whether sex selection techniques should be used to screen out those with a disability, thus, devaluing the lives and dignity of those living with disabilities. See *e.g.* Erik Parens & Adrienne Asch, eds., *Prenatal Testing and Disability Rights* (Washington, D.C.: Georgetown University Press, 2000).

includes both the willful killing of the child or neglect that causes death.⁷ If other forms of sex selection, as described below, are not made available to women who face difficult choices when it comes to giving birth to a child of a particular sex, then female infanticide may continue in some places unabated.

The first medical technique that can be used to select for sex is that of pre-natal diagnosis [PND] and abortion. To utilize this method, the pregnant woman must undergo some sort of prenatal testing, such as an amniocentesis, chorionic villus sampling or an ultrasound, which will allow the doctor to determine the sex of the child, among other things. Once the woman has the information about the child's sex, she can obtain an abortion if the fetus is not of the desired sex. The use of PND and abortion in order to select for sex sounds extreme, and indeed, as Edgar Dahl points out, it is not common for Westerners to utilize such a technique.

For example, a follow-up study of 578 patients having prenatal diagnosis at one Melbourne centre found that none of the women had a termination because of the sex of the fetus (Robinson *et al.*, 1991). Going through the traumatizing experience of an abortion is usually seen as too high a price to pay for a child of a particular sex.⁸

The second medical technique that can be used to select for sex is that of pre-implantation genetic diagnosis [PGD] with *in vitro* fertilization [IVF]. With this technique, the embryos are screened for sex prior to being implanted into the woman's uterus, thereby eliminating the need to later decide to terminate a pregnancy. PGD and IVF, however, are very invasive and potentially physically harmful, requiring the woman to go through at least one IVF cycle, which includes taking potent drugs to induce super-ovulation, extraction, fertilization and then testing and subsequent implantation of the embryos. Given the expense of IVF treatment cycles (according to IVF Canada in 2005 it cost \$5,500 for one cycle of IVF, not including drugs⁹ and, according to the same source, the drugs themselves can cost approximately \$3,000 for one cycle¹⁰), it would be highly unlikely that it would be used as a technique for sex selection alone. More likely, it could be used as a sex selection technique for those who are already undergoing IVF for other medical reasons.

The last medical technique that can be used to select for sex is sperm sorting. New technologies allow sperm to be sorted into those carrying X or Y chromosomes with varying degrees of accuracy. To date, the most successful way in which to sort sperm is flow cytometry, which has been branded as the MicroSort technique.¹¹ Sex

⁷Bonnie Steinbock, "Sex Selection: Not Obviously Wrong" (2002) 32:1 Hastings Center Report 23 at 26.

⁸Edgar Dahl, "Procreative Liberty: The Case for Preconception Sex Selection" (2003) 7 Reproductive BioMedicine 380 at 380.

⁹Online: IVF Canada <http://www.ivfcanada.com/services/fees/general_fee_schedule.cfm>.

¹⁰*Ibid.*

¹¹Steinbock, *supra* note 7 at 24.

selection using flow cytometry results from distinguishing between the identifiable differences between the X and Y chromosomes, as the X chromosome is larger than the Y. The sorted sperm is then used to artificially inseminate the woman. Studies have shown that the MicroSort technique is more effective in selecting for girls, a success rate of 91%, than for boys, with a success rate of only 76%.¹² Sperm sorting appears, then, to be the least invasive and least expensive (at about \$2,300US per cycle¹³) method of selecting for sex.

International Use of Sex Selection Techniques

To most people, the term “sex selection” connotes an almost immediate negative reaction. The most commonly known examples of the use of sex selection have been those of China, where a one-child policy was instituted, and India, where both culturally and religiously, boys are valued more than girls. Recent data suggests that in China approximately 117 boys are born for every 100 girls¹⁴ and that 108 boys are born for every 100 girls in India.¹⁵ In countries that make generous use of the various sex selection methods, there are different, often specific cultural and/or religious reasons why couples want to use them. For example, Hindu religious teachings state that a man who does not father a son cannot be “saved” and that only a son may perform funeral rites that are believed to ensure that the soul of the deceased is redeemed.¹⁶ In addition, Dahl cites serious economic reasons, in that for each daughter, a dowry equal to approximately three years salary must be paid upon her marriage, making daughters prohibitively expensive and sons potentially profitable.¹⁷ In China, the notorious one-child policy that has been in place for twenty-five years figures prominently in the use of sex selection techniques. Given that in many Asian cultures it is the male children who care for their aging parents, it is hardly surprising that Chinese couples would want to ensure the birth of a boy as opposed to that of a girl when allowed to have only one child in total.¹⁸

As a result of these cultural preferences the blatant sexism of the practice, generally, has been the subject of voluminous critique, given its inherent discrimination against girls and women and the overall decrease in their value as human

¹² U.K., Parliamentary Office of Science and Technology, “Sex Selection”, online (2003) 198 Postnote 2 <http://www.parliament.uk/parliamentary_offices/post/pubs2003.cfm> [Postnote].

¹³ *Ibid.*

¹⁴ Ted Plafker, “Sex Selection in China sees 117 Boys Born for Every 100 Girls” (2002) 324 *BMJ* (International Ed.) 1233.

¹⁵ Fred Arnold, Sunita Kishor & T.K. Roy, “Sex-selective Abortions in India” (2002) 28 *Population and Development Review* 759 at 761.

¹⁶ Dahl, *supra* note 8 at 383.

¹⁷ *Ibid.*

¹⁸ Sherry F. Colb, “China Announces That It Will Criminalize Sex-Selection Abortions: What, If Anything, Should the U.S. Do About the Practice in this Country?” (January 26, 2005), online: FindLaw <<http://writ.news.findlaw.com/colb/20050126.html>>.

beings worthy of the same dignity and respect as men.¹⁹ This kind of attitude promotes discrimination against girls and women in an already discriminatory society. One of the many ways to promote equality of women is to promote the value of female children and to encourage people to be happy with the birth of a female child. However, one cannot do so in a vacuum. While there are serious societal concerns about the impact that such discrimination has on women and girls, one cannot ignore the individual discrimination that women who do not bear sons have faced and will continue to face in some societies.

There are two different ways of looking at the solution of banning all sex selection techniques as a way in which to enhance gender equality. The first way of looking at a total ban on the use of sex selection techniques is that it collectively seeks to enhance the status of women and girls, which is undoubtedly positive. In citing moral approbation against the preference of one sex over the other, society can help to elevate the status of women and girls in general. However, this overlooks the fact that a change in the law will not effect an immediate change in attitudes, beliefs or practices amongst the citizens over which the law governs. While it may be illegal to select a child for sex, it does nothing to stop the desire for a child of a particular sex or the underlying reasons for preferring one sex over the other.

Until society remedies its son preference, the prohibition of sex selection would seem predominantly to burden women's lives. If wives cannot resist their husbands', and family and religious demands that they deliver sons, they may have to bear successive pregnancies until they do.²⁰

Dickens' sentiment, in fact, is borne out by the evidence in India, which criminalized post-conception sex determination techniques, such as fetal ultrasound, through the *Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act [PNDT Act]* in 1994. While the aim of the original *PNDT Act*, as well as its antecedents in 1998 and 2003, was to curb the incidence of abortion of female fetuses, it has been largely unsuccessful. Loopholes in the legislation were easily found and exploited. In addition, the science progressed at a faster rate than the law. As the law originally only prohibited the use of post-conception techniques, the newer pre-conception technique of sperm sorting began to be used more widely.²¹ And while changes were made to the law in 2003 to criminalize sperm

¹⁹ See e.g. Elisabeth Boetzkes, "Sex Selection and the Charter" (1994) 7 Can. J.L. & Jur. 173; Jodi Danis, "Sexism and 'The Superfluous Female': Arguments for Regulating Pre-Implantation Sex Selection" (1995) 18 Harv. Women's L.J. 219.

²⁰ B. M. Dickens, "Can Sex Selection be Ethically Tolerated?" (2002) 28 Journal of Medical Ethics 335 at 336 [Dickens, "Sex Selection"]; see also B.M. Dickens *et al.* "Sex Selection: Treating Different Cases Differently" (2005) 90 International Journal of Gynecology & Obstetrics 171, which deals with this argument comprehensively.

²¹ India, *Pre-Natal Diagnostic Techniques Act (Regulation and Prevention of Misuse) Amendment Act, 2002*, Act No. 14 of 2003 [PNDT Act]; Vineet Chander, "'It's (Still) a Boy...': Making the Pre-natal Diagnostic Techniques Act an Effective Weapon in India's Struggle to Stamp Out Female Feticide" (2004) 36 Geo. Wash. Int'l L. Rev. 453 at 454.

sorting and other pre-conception sex selection techniques in addition to post-conception techniques²², it still remains that the law has largely been ineffectual as relatively few prosecutions or convictions have occurred.²³ The fact that such a law, a law that attracts harsh penalties, had little impact on curbing the sex preferences of those it governed suggests that the problem of child sex preferences is one that is predominantly social, and thus, cannot be remedied with legal solutions alone. Until societal attitudes are changed, a law banning sex selection practices will do little good in actually stopping them from taking place.

The second way of looking at a prohibition on the use of sex selection techniques is that, while it may aim to benefit women collectively, it unfairly burdens individual women, who still have to face the real life consequences of societal pressures. As Dickens noted, this may mean repeated pregnancies until a son is born, which is risky for women, who must bear the brunt of repeated pregnancies and the increased maternal mortality rates that go along with it. In turn, this also reinforces the negative worth of female children and could contribute to continued harm against them. "The risk to unplanned girl children is of early death due to infanticide, malnutrition, or neglect."²⁴ Studies of women in India have shown that these kinds of problems are the reality for women. In fact, because of these attitudes, one sees a strong son preference even among women in India. In addition, women often report harassment from both family and society at large when they have only daughters and no sons.²⁵ Prohibiting all forms of sex selection is, therefore, tantamount to making individual women responsible for the equality of women collectively as it is they, as the child bearers, who will ultimately suffer the direct consequences of any prohibition. As noted by Chander, the *PNDT Act*, in addition to punishing doctors and other medical professionals who engage in sex selection techniques, focuses on punishing the women who utilize sex selection techniques, women who often undergo such procedures due to familial and social pressure.²⁶ Women who utilize sex selection techniques are subject to the same term of imprisonment and monetary fine as doctors. He notes that this is tantamount to a "double penalization" of women.

²² *PNDT Act, ibid.*, s. 4.

²³ Ganapati Mudur states, "More than 300 doctors have been prosecuted in India for violating a 12 year old law that prohibits doctors from disclosing the sex of a fetus to parents, but only four have been convicted..." Ganapati Mudur, "Doctors in India Prosecuted for Sex Determination, but few Convicted" (2006) 332 *BMJ* (International Ed.) 257 at 257. This very small number of prosecutions and convictions (where only one doctor has ever been imprisoned as a result of being convicted) in a country with such alarming gender disparity, where estimates indicate that 10 million female fetuses may have been aborted in the past two decades, is evidence of the ineffectiveness of the law. See "India Sex Selection Doctor Jailed" *BBC News* (29 March 2006), online: [BBC News <http://news.bbc.co.uk/go/pr/ft/-/2/hi/south_asia/485682.stm>](http://news.bbc.co.uk/go/pr/ft/-/2/hi/south_asia/485682.stm).

²⁴ Dickens, "Sex Selection", *supra* note 20 at 336.

²⁵ Anna Winkvist & Humaira Zareen Akhtar, "God Should Give Daughters to Rich Families Only: Attitudes Towards Childbearing Among Low-income women in Punjab, Pakistan" (2000) 51:1 *Social Science & Medicine* 73.

²⁶ *PNDT Act, supra* note 21, s. 23(3).

A crucial failing of the PNDT Act is that it provides for punishing women who indulge in sex determinations. Some critics of the PNDT Act have declared this to be the “most offensive and misguided feature of the law.” This flaw in the PNDT Act reflects the erroneous reasoning that it will serve to deter women from acquiescing to sex determination. Such reasoning ignores the strong empirical evidence that most women in Indian society are forced to undergo these techniques under threat of social stigma, abandonment, or even physical harm and death.²⁷

Prohibiting sex selection, therefore, cannot be the only measure taken to stop the inequality that women and girl children face in our, or other societies. Nor is sex selection the reason that such inequality exists.

...a false belief in the inferiority of women is not a product of sex selection — sex selection is the product of that belief. Education and improving social and employment arrangements for women are more important in correcting these false beliefs than preventing sex selection.²⁸

Other authors have noted a similar lack of correlation between the prohibition, both through criminalization and through other legislative means, of sex selection techniques and the promotion of sexual equality in general. Steinbock notes, in likening the effect of a ban on the use sex selection techniques to the effects of prohibiting violent pornography on the rate of sexual violence in society:

Similarly, banning sex selection might do little to alleviate the oppression of women, if a sexist ideology is the source both of oppression of women and the practice of sex selection. In any event, one may be a little skeptical about the wisdom of banning a practice in the United States to keep it from spreading to other countries when it is not even clear that banning the practice in other countries would benefit women. In an ideal world, women would be valued as much as men, but I personally would prefer to permit people to prevent the birth of girls than to see the girls neglected and allowed to die of illness or malnutrition.²⁹

Julian Savulescu draws an analogy between sex selection and testing for medical conditions prior to birth. Even though disability scholars argue that disability is a social construct, and thus we should not test fetuses for disabilities prior to birth, it is still considered acceptable to test fetuses for medical conditions prior to birth. In his view, the same argument should hold for sex selection.

²⁷ Chander, *supra* note 21 at 464-465.

²⁸ Julian Savulescu, “Sex Selection: The Case For” (1999) 171 *Medical Journal of Australia* 373 at 375.

²⁹ Steinbock, *supra* note 7 at 27.

The community accepts that parents should be allowed to employ prenatal testing and selective termination to have a child without a disability, even if having a child with a disability would improve the plight of the disabled. By analogy, parents should be able to choose the sex of their child, even if not being able to choose the sex of their child would improve the plight of women.³⁰

Canadian Use of Sex Selection Techniques

In Canada, both the attitudes towards and use of sex selection are much different from those demonstrated internationally. While concerns about gender and sex discrimination are obviously still evident in Canada, it is clear that Canadians do not generally have a preference in favour of boys over girls when they decide to have children. The RCNRT conducted intensive research on the issue of the use of sex selection, as well as the attitudes of Canadians surrounding sex selection and the sex preferences in children generally in Canada. Contrary to the evidence in countries like China and India, the RCNRT found that there was no real preference for one sex or the other generally among Canadians.³¹ The RCNRT found:

[w]hen asked about their preferences with respect to future children, 71 percent of respondents wanted equal numbers of boys and girls, 14 percent wanted more daughters and 15 percent wanted more sons. For respondents who did not yet have children, the numbers were even more striking — 82 percent wanted an equal number of boys and girls, 10 percent preferred more sons and 8 percent preferred more daughters.³²

Even more, there was little evidence to show that Canadians preferred sons as their firstborn child. Even where such a preference was stated, it was rated of low importance.

Our survey showed that for respondents who did not yet have children, the majority of respondents had no preference regarding the sex of their first child, while 26 percent preferred their first-born to be a son and 21 percent preferred their first-born to be a daughter.³³

In fact, the data collected by the RCNRT on the sex preferences of Canadians indicates that such preferences are on the decline.

³⁰ Savulescu, *supra* note 28 at 375.

³¹ RCNRT, *Proceed With Care*, *supra* note 2 at 889.

³² *Ibid.*

³³ *Ibid.* at 889-890.

In 1999, Janette McDougall, David J. DeWitt, and G. Edward Ebanks published a study of similar preferences from data collected in 1984, from the Canadian Fertility Survey. Their analysis concluded that the majority of women do not have a strong preference on the sex of their children, no matter what stage they are at in their own family development.³⁴ Of women who already had one child, 51.7% of those who had a boy preferred their next child to be a girl, while 44.7% of those who had a girl preferred their next child to be a boy. Meanwhile, 40.4% of those who had a boy and 47.4% of those who had a girl had no preference about the sex of their next child. Of women who already had two or more boys, 76.5% of women wanted a girl for their next child and of women who already had two or more girls, 41.7% wanted a boy for their next child.³⁵ McDougall, DeWitt and Ebanks stated, “[i]n summary, the primary sex preference indicated by this attitudinal measure is for at least one child of each sex.”³⁶ They further went on to state that their data indicated that the prevalence of sex preference was, at the time their data was collected in 1984, decreasing.

The findings of this study demonstrate that sex preferences, and particularly son preference, are of less importance than they have been in earlier studies of the United States and Canada. Both the attitudinal and the behavioural measure support the hypothesis that the primary sex preference would be for at least one child of each sex. However, this preference is not as strong as anticipated. A sizeable percentage of women at every parity report that they have no sex preference regardless of whether they have yet achieved a balanced sex composition. This is especially true for women without any sons.³⁷

In addition to the preferences of Canadians with respect to the sex of their children, one must also account for the actual use of sex selection techniques to select for either a boy or a girl. Studies have indicated that while people may have a preference for a boy or a girl; especially where they already have a child of the opposite sex; that very few people would actually employ a sex selection technique to bring about such a result. The RCNRT’s study indicated that less than 2% of people would want to use sperm sorting to select the sex of their first child. After the birth of one child, the number who would be willing to use such a technique increased to somewhere between 6% and 9%, which are still relatively low numbers.³⁸ The number of people who would consider using sex-selective abortion are even lower, 0% for those with no children and 4% for those with at least one child.³⁹

³⁴ Janette McDougall, David J. DeWitt & G. Edward Ebanks, “Parental Preferences for Sex of Children in Canada” (1999) 41 *Sex Roles* 615 ¶ 21.

³⁵ *Ibid.* ¶ 18-20.

³⁶ *Ibid.*

³⁷ *Ibid.* ¶ 21.

³⁸ RCNRT, *Proceed With Care*, *supra* note 2 at 891.

³⁹ *Ibid.*

Dahl's study of sex selection preferences in Germany yielded similar results. When asked whether they would take advantage of the MicroSort technique, which involves providing a sperm sample, the sorting process and an average of three to five artificial inseminations, at a cost of approximately €2000 per cycle, only 6% of respondents would be willing to use the technique. An overwhelming 92% said that they would not use the technique, despite the fact that during earlier questioning 30% of the respondents stated that they wished to have equal numbers of girls and boys.⁴⁰ Dahl concluded, given this evidence, that even if sperm sorting techniques were available, they would not be widely used and therefore, would have little overall societal impact.⁴¹

Ethical Considerations

The use of sex selection techniques raises a host of ethical concerns. As noted above, there are concerns about whether the use of sex selection promotes inequality. In addition, there are concerns that continued use of the practice will negatively impact the population, in that the sex ratio will be skewed in favour of males.⁴² However, it is now generally acknowledged, at least in the context of Western society, that such a concern is overstated, as most people in Western countries would use sex selection mainly as a method of achieving a balanced family.⁴³ There are also concerns about the use of sex selection techniques being a gateway for more problematic types of genetic selection, such as selection for certain physical criteria, such as height, eye/hair colour or physical prowess, or other desirable traits, such as intelligence.⁴⁴ Many authors have noted that this is a "slippery slope" argument, and that eugenic fears about the use of sex selection techniques are vastly overstated. David McCarthy states:

(a') selecting sex is not enhancing ability; (b') the child won't be able to complain that it wasn't made the opposite sex because had its parents selected the opposite sex it would not exist; (c') boys and girls are approximately equally valued, and the evidence is that most sex selection would be to achieve a balanced family.⁴⁵

While all of the medical techniques for selecting a child based on sex have the same goal, to have a child of one sex as opposed to the other, some of the techniques used are more ethically problematic than others, as was noted by the RCNRT in its Final Report. The use of PND and abortion for reasons of sex

⁴⁰ Dahl, *supra* note 8 at 381.

⁴¹ *Ibid.* at 382.

⁴² Postnote, *supra* note 12 at 3-4.

⁴³ U.K., Human Fertilisation & Embryology Authority, *Sex Selection: Options for Regulation* (2004) ¶ 29, online: Human Fertilisation & Embryology Authority <http://www.hfea.gov.uk/cps/rde/xbcr/SID-3F57D79B-F2225A53/hfea/Final_sex_selection_main_report.pdf>.

⁴⁴ Postnote, *supra* note 12 at 4.

⁴⁵ David McCarthy, "Why Sex Selection Should be Legal" (2001) 27 *Journal of Medical Ethics* 302 at 306.

selection was found to be unethical, as it offends the principle of respect for human life and dignity by deliberately terminating a pregnancy already in progress that, except for reasons of sex, likely would have resulted in the birth of a child.⁴⁶ At the time of the Commission's report, the practice amongst geneticists and obstetrician/gynaecologists in Canada was to not perform PND for the sole purposes of determining the sex of the fetus and this practice remains in place today.⁴⁷ Such a stance is justified by the RCNRT as sex is not a disease.

...the use of PND to determine fetal sex contradicts the very purpose and role of these procedures within the health care system — namely, to determine whether serious genetic diseases or congenital anomalies are present. Sex is not a disease, so the sex of the fetus is not medically relevant except in cases where a disease or anomaly is sex-linked.⁴⁸

Further, the RCNRT was against the provision of PND to women from cultures where sons are valued over daughters, as respect for human life and dignity, protection of the vulnerable and sexual equality were found to be more pressing issues.⁴⁹ As a result, the RCNRT affirmed the Society of Obstetricians and Gynaecologists of Canada's [SOGC] practice guideline against PND for determination of sex. It further recommended that all practitioners who subsequently provide any sort of PND be licensed by the (yet to be formed) National Reproductive Technologies Commission, that adherence to the SOGC guideline against PND be adhered to as part of such a license and that information about fetal sex not be made available to patients prior to the third trimester.⁵⁰ This step was taken as it was seen as inevitable that PND would soon be available in other forms and the Commission wanted to ensure that such practices would be monitored so that their use would not proliferate outside of the medical profession proper.⁵¹ It is interesting to note that the RCNRT here focused solely on the PND aspect of this sex selection technique and not on the abortion part of the technique, even though it found that abortion of a fetus solely on the basis of its sex is an unethical practice. This is likely due to the strong abortion rights that women possess in Canada since the decision of *R. v. Morgentaler*⁵² in 1988. A woman's right to obtain an abortion is constitutionally protected, therefore forcing the RCNRT and legislators to focus on regulating the PND of the fetus rather than on the abortion procedure itself.

⁴⁶ RCNRT, *Proceed With Care*, *supra* note 2 at 896.

⁴⁷ Canadian College of Medical Geneticists and the Society of Obstetricians and Gynaecologists of Canada, "Canadian Guidelines for Prenatal Diagnosis of Genetic Disorders: An Update" (1993) 15 (Supp.) *Journal of the Society of Obstetricians and Gynaecologists of Canada* 38.

⁴⁸ RCNRT, *Proceed With Care*, *supra* note 2 at 896-897.

⁴⁹ *Ibid.* at 898. See the arguments below that deal with the converse of this proposition.

⁵⁰ *Ibid.* at 900, 906.

⁵¹ *Ibid.* at 900-901.

⁵² [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [*Morgentaler*].

The Commission also noted ethical difficulties with the second medical sex selection technique, PGD and IVF, as it is both an expensive and a very invasive process when used for the sole purpose of selecting a child for reasons of sex. First, it noted that using PGD and IVF for sex selection purposes is a misuse of resources.⁵³ As noted above, IVF is a very expensive treatment. Second, the RCNRT noted that the procedure is risky for the women who undergo it.⁵⁴ Women must be treated with potent fertility drugs and undergo the invasive egg retrieval process. In the case of using PGD and IVF for the sole purpose of sex selection, the risks to the woman were seen to outweigh the potential benefits. Third, PGD and IVF was seen to be disrespectful of the zygotes involved in the process.

As we discuss in Chapter 22, zygotes do not have the same moral status as embryos or fetuses; they do not have a fixed and individual identity or a central nervous system, and the probability that they will result in a live born individual is low — perhaps one in five in those situations where both partners are likely to be fertile. Nonetheless, zygotes are not just human tissue; the potential they embody means that refusing to transfer a zygote solely on the basis of its sex is inconsistent with the respect owed to it.⁵⁵

As a result, the RCNRT recommended that the use of PGD and IVF be prohibited for sex selection purposes.⁵⁶

The last medical technique, sex selective insemination or sperm sorting, was found to be different, ethically speaking. As the technique is used prior to fertilization, the RCNRT notes that it does not raise issues about respect for human life, as there is no abortion of a fetus or discarding of a zygote that is already in existence.⁵⁷ However, the RCNRT found that sex selective insemination raises the larger issue of sexual equality in some cases.

For reasons discussed earlier, [the] Commissioners find it unacceptable for sex-selective insemination to be used in a way that undermines or jeopardizes equality — that is, to select first born sons, to select families with more sons than daughters, or to perpetuate the cultural devaluation of women.⁵⁸

However, as discussed below, in the Canadian context, sex selection insemination is unlikely to be used in such a manner, but rather as a mechanism to achieve family balancing, meaning having at least one child of each sex, with no general preference

⁵³ RCNRT, *Proceed With Care*, *supra* note 2 at 906.

⁵⁴ *Ibid.* at 906-907.

⁵⁵ *Ibid.* at 907.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 909-910.

⁵⁸ *Ibid.* at 910.

for boys or girls. In fact, the RCNRT found that when used in this manner, that sex selective insemination does not impede sexual equality.⁵⁹ Despite this evidence, the RCNRT found that it could not endorse the use of sex selective insemination, even in cases of family balancing, as it would promote the idea that there is an “ideal” family prototype, in which there are children of both sexes, which would have the effect of diminishing the value of those families in which there were children of only one sex.⁶⁰ As a result, the Commission recommended that sex selective insemination be used only in cases where there is a clear sex linked medical disorder underlying the request, but did not recommend that the its use be criminalized outright, as it has been in the *AHRA*.⁶¹

Why People Want to Select for Sex in Canada

As discussed above, in Canada, the use of sex selection technologies to ensure the birth of one sex (male) over the other (female) is unlikely. If the technologies were to be used, they would be used overwhelmingly by those who want to balance their families by having at least one child of each sex. In addition, the studies have shown that most people would only use sex selection technologies where they already had at least one child of the opposite sex that they were seeking. This is not to say, however, that sex selection technologies could not be used in Canada in cases where prospective parents desire a son and do not want a daughter for either religious and/or cultural reasons, as we live in a multicultural society. In fact, one of the concerns to be addressed in this paper is the situation of those women who may wish to utilize sex selection techniques for religious and/or cultural purposes, as the current state of the law burdens these women more than women who may not feel the same pressure to employ sex selection techniques. As will be shown below, the current state of the law makes sex selection more dangerous for women than ever before.

B. Analysis

1. The Prohibition of Sex Selection Fails To Prohibit All Sex Selection Methods

The *AHRA* provision prohibiting sex selection does not explicitly define which procedures it attempts to limit. It states:

5. (1) No person shall knowingly

(e) for the purpose of creating a human being, perform any procedure or provide, prescribe or administer any thing that would ensure or increase the probability that an embryo will be of a particular sex, or

⁵⁹ *Ibid.* at 911.

⁶⁰ *Ibid.* at 913.

⁶¹ *Ibid.* at 915.

that would identify the sex of an *in vitro* embryo, except to prevent, diagnose or treat a sex-linked disorder or disease;⁶²

Upon reading this section it is clear that any kind of *in vitro* sex determination and subsequent implantation would be prohibited. In addition, techniques that involve the sorting of sperm to determine which were carriers of the X chromosome (for a female) and which were carriers of the Y chromosome (for a male) and then artificially inseminating only those sperm that were carriers of the desired chromosome would be caught by the provision. Both of these techniques would be procedures that would ensure or at least increase the chances that an embryo would be of a certain sex as mandated by the provision.

What is clearly not prohibited by this provision, however, is the most common form of sex selection technique, PND of the sex of the fetus and abortion of a fetus of the undesired sex. Looking closely at the prohibition, it is clear that only those techniques that would ensure or increase the chances that an embryo was of a certain sex, or that would identify the sex of an embryo *in vitro* are prohibited. Embryo is defined by the *AHRA* as:

...a human organism during the first 56 days of its development following fertilization or creation, excluding any time during which its development has been suspended, and includes any cell derived from such an organism that is used for the purpose of creating a human being.⁶³

This means that identifying the sex of a human organism that is past the embryonic stage (into the fetal stage, past the 56th day) or an embryo that is not *in vitro* is permitted. In other words, the “traditional” sex selection technique (i.e. used before IVF and/or sperm sorting techniques came into existence), PND and abortion has been left out and can, thus, be considered legal. This lack of regulation is perhaps not too surprising, given the fact that the government could not legally deny a woman’s right to abortion in Canada.⁶⁴ It is surprising, though, that they failed to consider, or perhaps even ignored, the negative effect that banning pre-implantation sex selection techniques could have on the number of abortions being performed in Canada and that, conversely, other regulations may make it very difficult to actually utilize this so-called “legal” procedure. At the very least, as Julian Savulescu notes, the legislation creates an inconsistency that “...provide[s] couples with information from prenatal testing which allows them to select sex and not allow them to select sex by means which are more acceptable to them.”⁶⁵

⁶² *AHRA*, *supra* note 1, s. 5.

⁶³ *Ibid.* s. 3.

⁶⁴ See *Morgentaler*, *supra* note 52.

⁶⁵ Savulescu, *supra* note 28 at 373.

Leaving PND and abortion as the sole way to legally select a child on the basis of sex could result in many negative effects, arguably more than if there was no restriction at all. First, it could have the effect of increasing or at least stagnating the number of abortions for reasons of sex selection, when there are much less invasive means, both physically, mentally and ethically, that could be used to produce the same result; namely sperm sorting. As discussed above, sperm sorting is less ethically problematic as it is a pre-conception technique, which does not engage the sanctity of life or human dignity concerns that PND and abortion do. There is also considerable physical risk for the woman if PND and abortion is used when a safer method, i.e. sperm sorting, is medically available. Abortion is a surgical procedure, and as with any surgical procedure, it has inherent risks. Although properly performed abortions are safe, complications can occur. Some of the complications associated with abortion are hemorrhage, perforation of the uterus and infection.⁶⁶

If a woman will not consider an abortion and still wishes to have a child of a particular sex or to have a balanced family, she must endure multiple pregnancies and the inherent risks that go along with them. Even though Canada has an excellent obstetrical care system, complications in pregnancy are still common. Cook, Dickens and Fathalla note that approximately 15% of women worldwide will need some kind of medical care in order to avoid death or disability during their pregnancy.⁶⁷ In addition, if women endure pregnancy and childbirth until a child of the desired sex is born, this will create an additional financial burden upon the family, as there could be more children to care for. When the technology exists to help women in their quest to have a child of one sex over the other in a relatively risk free manner, it does not make sense to prohibit its use, especially when the only legal alternatives could potentially be more harmful to the health and well-being of the mother and her family.

Despite the purported legality of PND and abortion, many women who wish to use this avenue may find it very difficult to do so. While women, by law, may obtain abortions freely in Canada, there are a host of policies and guidelines that can affect how free such access is in actuality. There is no clear policy across Canada on the time limit with respect to obtaining an abortion, meaning that time limits will vary from clinic to clinic and from place to place. For example, in Alberta, the time limit varies from up to 12 weeks to up to 20 weeks. In Saskatchewan, it varies from up to 12 weeks to up to 14 weeks. In Ontario, five clinics will perform abortions over 20 weeks, but only in cases of severe fetal abnormality. New Brunswick will provide only first trimester abortions, while Nova Scotia will provide them up to 16 weeks. In the Northwest Territories, abortions will only be performed up to 13 weeks and in the Yukon, they will only be performed up to 12

⁶⁶ "Abortion: The Medical Procedure", online: Childbirth by Choice <http://www.cbctrust.com/medical_proc.html>.

⁶⁷ Rebecca J. Cook, Bernard M. Dickens & Mahmoud F. Fathalla, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford: Clarendon Press, 2003) at 395.

weeks.⁶⁸ In addition to these limits on the gestational age of the fetus, there are also often long waiting periods, which can complicate matters, for example, in Manitoba there is often a six week waiting list to obtain an abortion.

These time limits are further complicated by the Society of Obstetricians and Gynaecologists of Canada's Clinical Practice Guidelines on the use of ultrasound in the first trimester. The Guidelines state that fetal ultrasound should only be used in the first trimester (the first twelve weeks of pregnancy) in exceptional circumstances, such as pregnancies involving increased risk.⁶⁹ Therefore, PND may not be available to women before the period in which they could obtain an abortion has passed. Even if an abortion is still available in the second trimester, as the evidence presented in *Morgentaler* shows, abortion becomes riskier the further along the pregnancy is. "Anything that contributes to delay in performing abortions increases the complication rates by 15 to 30%, and the chance of dying by 50% for each week of delay."⁷⁰ Other PND techniques are also available, such as amniocentesis and chorionic villus sampling, however they, as with ultrasound, are not readily available for all who request them. SOGC guidelines generally only recommend such testing where the woman or couple has increased risk factors, such as advanced maternal age or history of illness.⁷¹

Section 5(1)(e) of the *AHRA*, while explicitly only prohibiting pre-conception or *in vitro* sex selection methods, has been shown to have two negative consequences. First, it leaves PND and abortion as the only legal method of sex selection in Canada, which is problematic both ethically and practically; ethically, as it leaves women to abort otherwise healthy pregnancies when they could have used sperm sorting, a pre-conception method and practically, as it forces women to undergo an invasive surgical procedure when a much less risky procedure is available. If the legislative aim is to stop sex selection from being performed, leaving certain methods unregulated does not further that aim. Second, somewhat paradoxically given the first consequence, while PND and abortion is still considered legal according to the legislation, it is practically unattainable, given the guidelines surrounding the provision of prenatal testing and abortion across the country, making it very difficult for women to obtain something that is not legally prohibited.

⁶⁸ Childbirth by Choice Trust, "Abortion in Canada Today: The Situation Province-by-Province" (June 2006), online: Childbirth by Choice Trust <<http://www.cbctrust.com/provincebyprovince.php>>.

⁶⁹ Society of Obstetricians and Gynaecologists of Canada, "The Use of First Trimester Ultrasound" (2003) 135 J. Ob. Gyn. Can. 1 at 4.

⁷⁰ *Morgentaler*, *supra* note 52 ¶ 26.

⁷¹ Society of Obstetricians and Gynaecologists of Canada, "Canadian Guidelines for Prenatal Diagnosis: Genetic Indications for Prenatal Diagnosis" (No. 105, June 2001), online: SOGC <<http://www.sogc.org/guidelines/public/105E-CPG1-June2001.pdf>>.

2. Prohibiting Sex Selection Through Criminal Sanction Is Regressive Policy

Rebecca Cook, Bernard Dickens and Mahmoud Fathalla in their book *Reproductive Health and Human Rights* have noted a general evolutionary trend in reproductive and sexual health law. They state that there are three stages: first, a state of morality, where criminal law governs areas of reproductive health and sexuality; second, a shift to health and welfare; and third, a shift from health and welfare to human rights.⁷² In speaking of the shift between these three stages they state: “[m]ovements in legal systems in this direction occur at different paces, but movement in the reverse direction is an international anomaly.”⁷³ In this case, Canada is certainly in the international minority and can be said to fit within this definition of ‘anomaly’ in its reversion to a stance of morality-based regulation rooted within the criminal law in the case of sex selection.⁷⁴ While Cook, Dickens and Fathalla note a trend of increasing recognition for human rights in laws surrounding reproductive and sexual health law, that includes increased protection for principles of privacy and freedom of choice of whether to employ reproductive technologies or not⁷⁵, with the severe criminal limits on the use of sex selection techniques, Canada has indeed reversed directions.

It should be noted generally that not all movements towards the criminal law will negatively impact upon the reproductive and sexual health rights of individuals. Indeed, the use of criminal law may sometimes be required in order to protect reproductive and sexual health rights that would otherwise be harmed by the status quo. For example, it is arguable from a feminist perspective (although not necessarily agreed with) that the provision of the *AHRA* that criminalizes payment for surrogacy is one that protects the reproductive rights of women against commodification. If commercial surrogacy agreements were legal, there would be potential for women to sell their reproductive capacity for profit. Usually, so the theory goes, marginalized women would be most affected by such commodification, as they would have a higher economic need than those who are economically better off. In addition, from an equality perspective, the law criminalizing commercial surrogacy

⁷² Cook, Dickens & Fathalla, *supra* note 67 at 102-107.

⁷³ *Ibid.* at 106-107 [footnote omitted].

⁷⁴ Bartha M. Knoppers and Rosario M. Isasi note in the context of the use of PGD and PND for non-medical purposes, criminal sanctions are in the minority. “Only a few countries have established sanctions for the violation of regulatory requirements regarding reproductive technologies in general, and genetic testing in particular.” Bartha M. Knoppers & Rosario M. Isasi, “Regulatory Approaches to Reproductive Genetic Testing” (2004) 19 *Human Reproduction* 2695 at 2700. With respect to sex selection for non-medical purposes generally, Edgar Dahl notes that only Germany and the Australian state of Victoria have implemented criminal sanctions within their regulatory schemes. Edgar Dahl, “Boy or Girl: Should Parents be Allowed to Choose the Sex of their Children?” (2005), online: Cardiff Centre for Ethics Law & Society <<http://www.ccels.cardiff.ac.uk/literature/publications/2005/dahlpaper.html>>.

⁷⁵ Cook, Dickens & Fathalla, *supra* note 67 at 105.

agreements promotes the general equal position of women in society, in that they are people and not merely wombs for hire. However, this is not the case with the prohibition on the use of sex selection techniques.

In legislating criminal prohibitions in the area of reproductive technologies, Parliament has included a wide gamut of activities, from sex selection, to cloning (both reproductive and therapeutic), to the creation of chimeras and the creation of human-animal hybrids.⁷⁶ It is arguable, from various different perspectives, that a number of the prohibitions in the *AHRA* should in fact be regulated through criminal sanctions, such as commercial surrogacy and the creation of chimeras and human-animal hybrids. Certainly, the creation of such entities would have a negligible impact on the reproductive or sexual health of individuals, and as stated above, commercial surrogacy agreements could be viewed as hindering a human rights approach to reproductive and sexual health generally. But this cannot be said for all of the sections of the *AHRA*, most notably for the purposes of this paper, the provision prohibiting sex selection techniques under the threat of criminal sanction. Part of the problem may be that the *AHRA* attempts to address too many different issues that affect different rights in just one piece of legislation. But this attempt to justify the criminal prohibition of all of these activities with one broad brush-stroke is erroneous and must be deconstructed to see if the justifications for the use of prohibitions and criminal sanctions as the preferred method of regulation in the *Act* as a whole can justify the prohibition and criminal sanction of sex selection techniques on its own.

The choice made by Parliament to prohibit sex selection and sanction a violation of such a prohibition through the criminal law, along with other reproductive technologies, as opposed to choosing a different kind of regulatory option, such as an effective ban through the licensing of clinics that offer sex selection services without the attendant criminal sanctions for violation, is significant. The predecessor to the Law Commission of Canada, the Law Reform Commission of Canada, in its seminal work entitled *Our Criminal Law* stated: “criminal law must be an instrument of last resort. It must be used as little as possible.”⁷⁷ As noted by Angela Campbell in the specific context of reproductive technologies, when enacting criminal legislation, Parliament must ensure that it has justified its use of criminal legislation as a last resort by ensuring that the targeted activity is both wrongful and causes harm to others.⁷⁸ Specifically, she notes that the harm must be “serious in both nature and degree and if that harm is best dealt with through the mechanism of criminal law.”⁷⁹

⁷⁶ *AHRA*, *supra* note 1, s. 5(1).

⁷⁷ Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Law Reform Commission of Canada, 1976) at 27.

⁷⁸ Angela Campbell, “A Place for Criminal Law in the Regulation of Reproductive Technologies” (2002) 10 *Health L.J.* 77 at 94.

⁷⁹ *Ibid.* at 95.

In the context of reproductive technologies generally, most would likely agree that there is much potential for harm to be had from the use of these technologies, including, perhaps, sex selection itself. What is at issue for many commentators, however, is whether the harm that could result through misuse of reproductive technologies is best dealt with through the use of the criminal law as opposed to other regulatory options and how Parliament ultimately justifies its use of the criminal law in regulating reproductive technologies. There are other regulatory options available, other than prohibition through criminalization, which could be equally effective in curbing the use of these technologies, including sex selection. Although there have been several incarnations of the *AHRA*, the justification that Parliament has provided for the need for such prohibitions and harsh criminal sanctions in the area of reproductive technologies has been that there is broad social consensus on the need for both. In fact, the government stated in its discussion paper on Bill C-47:

...since there is widespread agreement among Canadians about prohibiting those aspects of NRGs that are the most problematic, the government has moved quickly to legislate in this area.⁸⁰

However, as legal commentators were quick to point out, this social consensus did not in fact exist.

In several influential papers, Timothy Caulfield has criticized Parliament for employing criminal sanctions as the basis for its legislative scheme in all of its attempts to legislate in this area.⁸¹ One of the main justifications employed by Parliament in upholding the strong criminal sanctions with respect to reproductive technologies is that of a general social consensus against their use.⁸² Caulfield forcefully argues that such a social consensus does not exist, at least in some areas, such as against the use of embryonic stem cells and therapeutic cloning, and therefore, the criminal sanctions are not justified.⁸³ He states:

[d]espite evidence to the contrary, social consensus remains one of the primary justifications for the use of criminal bans...But is there evidence that therapeutic cloning is a grave concern to Canadians? On the

⁸⁰ Canada, *New Reproductive and Genetic Technologies: Setting Boundaries, Enhancing Health* (Ottawa, Ont.: Government of Canada, 1996) at 9.

⁸¹ Timothy Caulfield, "Clones, Controversy and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction" (2001-2002) 39 *Alta. L. Rev.* 335; Timothy Caulfield, "Politics, Prohibitions and the Lost Public Perspective: A Comment on Bill C-56: The Assisted Human Reproduction Act" (2002-2003) 40 *Alta. L. Rev.* 451 [Caulfield, "Politics"]; Timothy Caulfield, Marie Hirtle & Sonia LeBris, "Regulating NRGs: Is Criminalization the Solution for Canada?" (1997) 18 *Health L. Can.* 3.

⁸² Caulfield, "Politics", *ibid.* at 458.

⁸³ *Ibid.* at 454.

contrary, available data suggests that the public supports the idea of therapeutic cloning.⁸⁴

Caulfield's criticism of the justification of the use of criminal sanctions in the *AHRA* applies with equal, if not more, force to the sex selection issue. In dealing with the issue of social consensus on the use of sex selection techniques, the RCNRT focused most of its energy on PND and abortion, citing that there is a broad social consensus that the practice is unacceptable to Canadians.⁸⁵ The public was not even asked whether or not sperm sorting was acceptable or not. Under the heading "Views of Canadians" in the chapter on non-medical sex selection, on the topic of sperm sorting, all that the RCNRT stated was:

There was less discussion of the other two methods of sex selection — sperm treatment methods and sex-selective zygote transfer — perhaps because there is much less public awareness of them.⁸⁶

If the views of the Canadian public were not even canvassed, there can hardly be said to be any social consensus on the issue of sperm sorting. In fact, the RCNRT did not even recommend prohibition of sex selection methods through the use of criminal sanctions, even after comprehensively studying the issue. This, along with the rate with which science progresses, re-ascertaining the views of Canadians would appear to be essential so that the criminal sanctions attached to sex selection techniques on the basis of social consensus could continue to be justified. Recall that the RCNRT's study began in 1989, more than fifteen years ago. For these reasons then, the government's justification for the prohibition of sex selection techniques through the use of criminal sanctions, which as noted in part one of this paper are only sperm sorting and PGD and implantation, falls flat.

Alison Harvison-Young and Angela Wasunna are equally critical of the existence of such a consensus in the area of reproductive technology.⁸⁷ And while they contest whether the matters on which the government has stated that there is social consensus about actually exist, they also draw attention to two other issues regarding consensus. First, they argue that the areas in which there is consensus have been framed too broadly, allowing the government the ability to legislate too widely. They state:

It is one thing to suggest that there is a broad social consensus opposing the commodification of reproduction. It is quite another to suggest, for example, that Canadians are generally opposed to the compensation of sperm donors, a practice that has been ongoing and uncontroversial in

⁸⁴ *Ibid.* at 458-459.

⁸⁵ RCNRT, *Proceed With Care*, *supra* note 2 at 888.

⁸⁶ *Ibid.* at 889.

⁸⁷ Alison Harvison-Young & Angela Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies" (1998) 6 *Health L.J.* 239.

this country for many years. Yet that is one of the inferences that flows from the inclusion of the prohibition of such compensation in Bill C-47, and the reference to ‘widespread agreement among Canadians’ noted above.”⁸⁸

In other words, is there actual consensus on each of the precise issues on which the government has legislated? Although there may be consensus that we should prohibit the commodification of life generally, as Harvison-Young and Wasunna point out, the same explanation can hardly be a justification for prohibiting the compensation of sperm donors through criminal sanction, as they involve substantially different things.

The issue of sex selection, in fact, demonstrates this point rather well. As shown above there was no consensus on the issues of sperm sorting or PGD and implantation, only on PND and abortion when the RCNRT completed its research. However, it appears that in legislating the criminal prohibition on both of these techniques that the government has applied the consensus that exists on the abortion issue to all sex selection techniques. This was the case even though the Commission was clear, at least in the case of sperm sorting, that the consensus among Canadians was that its use would not violate the principle of equality, as was the case with PND and abortion. It appears that Harvison-Young and Wasunna’s comment that:

...the testimony and surveys presented to the Commission have been treated since with a certain level of historical revisionism, with less and less recognition paid to the absence of consensus on specific provisions...⁸⁹

is disturbingly apt.

What is more is that on the RCNRT’s own view of the evidence a criminal prohibition of sex selection techniques was not warranted. As noted above, it would have been very difficult to recommend a criminal prohibition of PND and abortion, due to clear constitutional principles. Instead, the RCNRT opted to recommend that the SOGC adopt strict guidelines on PND for purposes of sex identification, that include not performing ultrasounds for sex selection unless medically indicated and not to examine for or volunteer information about the sex of the fetus until the third trimester, when abortion would no longer be an option.⁹⁰ In the case of PGD and

⁸⁸ *Ibid.* at 249.

⁸⁹ *Ibid.* at 250.

⁹⁰ RCNRT, *Proceed With Care*, *supra* note 2 at Recommendation 264 (The withholding of information by a physician until it is too late to procure a legal abortion may in fact be seen as a breach of the doctor/patient relationship, which is a fiduciary relationship of the highest order. As noted in *Reibl v. Hughes*, [1980] 2 S.C.R. 880 at 884, 114 D.L.R. (3d) 1 [*Reibl* cited to S.C.R.] it is part of a physician’s duty to disclose all relevant information to the patient so that the patient is free to make choices about his/her medical care).

IVF, the Commission recommended that determination of fetal sex be prohibited in licensed IVF clinics, however, no criminal sanctions for violation of such a regulation were suggested.⁹¹ In the case of sperm sorting, the Commission recommended that clinics only perform the technique where medically indicated as a condition of licensing.⁹² Again, no criminal sanctions were recommended. This is in stark contrast to other technologies, such as in commercial surrogacy⁹³ or cloning⁹⁴ where the Commission was adamant in their recommendation of the use of criminal law to sanction non-compliance.

Even if one was to argue that social consensus is not necessary in order to employ the criminal law in the area of reproductive technologies generally and on sex selection specifically, it is still arguable that such criminalization fails to comport with the social values of Canadians. Campbell argues that there are many activities prohibited by the *Criminal Code* on which there is no social consensus, such as assisted suicide and prostitution.⁹⁵ Such social consensus, she argues, is neither necessary nor even realistic in a society, such as Canada, where divergent opinions exist. What she does argue is necessary in criminalizing certain activities is comportment with the social values that we as a country and community hold.⁹⁶

While social views are relevant, social *values* have an even more important role to play. The ideals that we as a society espouse and consider fundamental to our ability to thrive both individually and collectively must always illuminate the legislature's decision-making process.⁹⁷

While, Campbell asserts, it is not always easy to determine what values are at play in deciding to criminalize a certain activity, general values of Canadians as a whole are reflected in the *Canadian Charter of Rights and Freedoms*.⁹⁸

While the *Charter* sets out the specific rights of individuals, its tone and content also illuminate the more general, overarching principles that constitute our legal and social bedrock. As such, the *Charter*, and the judiciary's interpretation of it, provide useful guidance for legislators and policy-makers attempting to discern what would or would not be a valid enactment of legislation, criminal or otherwise.⁹⁹

⁹¹ *Ibid.* at Recommendation 265.

⁹² *Ibid.* at Recommendation 266.

⁹³ *Ibid.* at Recommendation 199.

⁹⁴ *Ibid.* at Recommendation 184.

⁹⁵ Campbell, *supra* note 78 at 81.

⁹⁶ *Ibid.* at 82.

⁹⁷ *Ibid.*

⁹⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (1982)* (U.K.), 1982, c. 11 [*Charter*].

⁹⁹ Campbell, *supra* note 78 at 82.

In the context of reproductive technologies she points to sections 7 and 15 of the *Charter* and their interpretation in the courts. The values of human dignity and equality, those enshrined in sections 7 and 15, she argues are values that should be taken into account when legislating on reproductive technologies.¹⁰⁰ While she argues that many of the activities subject to criminal prohibition by the *AHRA* should in fact be criminalized as they fail to comport with the social values of the *Charter*, such as human reproductive cloning¹⁰¹, the same justification cannot hold universally for the criminal prohibition on the use of sex selection techniques. As found by the RCNRT, sex selection, in the Canadian context, does not engage equality concerns, as people are generally not interested in sex selection for the purposes of favouring one sex over the other, but instead, to balance their families.¹⁰² Therefore, a justification of a criminal prohibition based on the social value of equality would not hold. In addition, allowing sperm sorting would not engage human life or dignity concerns as PND and abortion, the “legal” method, does. So how can the criminal prohibition against sex selection be justified on the basis of comportment with the value of human dignity? It cannot.

Related to Campbell’s argument that criminal prohibitions must be justified by social values is the second point made by Harvison-Young and Wasunna, that the values that the government, through the RCNRT, has emphasized in looking for social consensus have been collective and not individual values.¹⁰³ While there may be social consensus on the values as they affect society collectively, there may not be the same consensus on the values as they affect individuals. They point out that the RCNRT, in making its recommendations to the government for regulation, argued that the interests of collective society should be put ahead of the interests of the individual.¹⁰⁴ So while there may be consensus about a collective value reflected in the legislation, there is no discussion of any tension between this collective value with any corresponding individual values, or what the state of consensus is on any individual values. This favouring of collective values, while not an inherently problematic ideal in and of itself, has the direct effect of minimizing *Charter* values, which are liberal, individualistic values, and values that we hold dear in Canadian society. This aspect of the criminal prohibition of sex selection techniques, and the constitutional concerns that it raises will be further discussed in part three of this paper. However, in favouring the collective values of society at large on the issue of sex selection, Parliament is conveying a powerful message against individual equality and reproductive liberty. This harkens back to

¹⁰⁰ *Ibid.* at 84. It should be noted that Campbell also concludes that many of the activities criminalized by the *AHRA* should in fact be criminalized, as they are not in accordance with the values enshrined by the *Charter*. Her contention with Parliament is that they have stated that social consensus is the basis for the criminalization of such activities, when instead they could perhaps have justified some of the prohibitions on the basis of comportment with social values. I argue even further, that sex selection cannot be criminalized on the basis of conflict with social values.

¹⁰¹ *Ibid.*

¹⁰² RCNRT, *Proceed with Care*, *supra* note 2 at 910-913.

¹⁰³ Harvison-Young & Wasunna, *supra* note 87 at 247.

¹⁰⁴ *Ibid.*

the argument made in the first section of this paper, that banning sex selection techniques not only compromises the individual reproductive autonomy rights of women who may want to utilize them, but it also places the burden of collective equality squarely on their shoulders, even when they alone are not, and should not, be responsible for such a task.

In addition to requiring that activities that are the subject of criminal prohibitions be contrary to either social views or values and cause harm, Patrick Healy points out that there is another requirement that must be considered, whether criminal law is in fact the best method by which to regulate the activity.

While these rationales might be sufficient for the enactment of criminal law in general terms, it does not necessarily follow that either is sufficient for the enactment of the specific offences proposed by the Commission. Of equal importance, moreover, given the crude bluntness of the criminal law as an instrument of social control, is the principle of restraint.¹⁰⁵

As the criminal law is a blunt instrument that engages the most basic liberty interests of those it governs, it must be considered to be necessary to deploy it in the circumstances of the situation. It must also be judged to be an effective tool by which to regulate the activity in question.¹⁰⁶ In judging whether the use of the criminal law is the best regulatory avenue to follow, Healy notes that the magnitude of the harm must be taken into account.

The criminal law should be used only when the magnitude of the threatened harm justifies firm repression and when no other, and lesser, form of legal control can adequately achieve the same result.¹⁰⁷

On the basis of the principle of restraint as outlined by Healy above, it is difficult to imagine that the criminal prohibition of sex selection techniques could be justified. The magnitude of harm is not substantial. As discussed above, the RCNRT recognized that the number of people who would use sex selection techniques in Canada would be small.¹⁰⁸ This conclusion is further bolstered by the studies presented by Dahl in the first section of this paper.¹⁰⁹ Clearly, then, the magnitude of harm, in terms of the number of people who are being deterred by the prohibition is not significant. In addition, it is not clear that other forms of regulation would not have been effective in attempting to curb the use of sex selection

¹⁰⁵ Patrick Healy, "Statutory Prohibitions and the Regulation of New Reproductive Technologies Under Federal Law in Canada" (1994-1995) 40 McGill L.J. 905 at 920.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* at 923.

¹⁰⁸ RCNRT, *Proceed with Care*, *supra* note 2 at 889-890.

¹⁰⁹ See generally Dahl, *supra* note 8.

techniques. In fact, in the case of sex selection, it appears that Parliament did not even consider other forms of regulation.¹¹⁰

Other systems of regulation, besides criminal prohibition, are in fact in place in other countries; systems of regulation that effectively prohibit sex selection techniques without making such activities subject to criminal sanctions. For example, in the United Kingdom, prohibition of the use of sex selection techniques has been achieved through the licensing of clinics that offer new reproductive technologies. The *Human Fertilisation and Embryology Act 1990* [*HFE Act*] was enacted by the UK Parliament in 1990. The legislation set up a regulatory body, the Human Fertilisation and Embryology Authority to, among other things, license and monitor clinics that offer reproductive services such as IVF and PGD. Any clinics that wish to offer services covered by the legislation must be licensed by the HFEA. The HFEA is able to stipulate conditions in licensing, and in 1993, it stated that it would not grant licenses for the use of PGD or sex selection for non-medical purposes.¹¹¹ This approach has the same effect of prohibiting certain kinds of sex selection techniques for non-medical purposes, but does so without the threat of criminal penalties.¹¹² Clearly, this type of regulatory system, involving the licensing of clinics offering certain services could be as effective as a criminal prohibition in curbing sex selection from taking place. Indeed, Knoppers and Isasi, in the context of PGD, note that:

¹¹⁰The criminalization of sex selection techniques has been a constant through each incarnation of the *AHRA*.

¹¹¹*Human Fertilisation and Embryology Act 1990* (U.K.), 1990, c.37 [*HFE Act*]; Juliet Tizzard, "Sex Selection, Child Welfare and Risk: A Critique of the HFEA's Recommendations on Sex Selection" (2004) 12 *Health Care Analysis* 61 at 62 (One of the peculiarities of the legislation is that sperm sorting using fresh gametes was not captured, as it was not a well known technique at the time the *HFEA* was passed, thus clinics offering sex selection through sperm sorting have been free to open without first receiving a license from the HFEA). In 2002, the HFEA released a consultation paper on the issue of sex selection using sperm sorting and recommended that the legislation be amended to include fresh gametes, so that clinics offering sperm sorting techniques would require licenses from the HFEA and would thus need to comply with their Code of Practice, which prohibits the use of sex selection technology for non-medical purposes. In late March 2005, however, the U.K. House of Commons Science and Technology Advisory Committee released a report on the state of the *HFEA* in which it recommended that sex selection for non-medical reasons be freely available, for many of the same reasons provided in this paper. See U.K., House of Commons, Science and Technology Committee, Fifth Report of Session 2004-05, *Human Reproductive Technologies and the Law* (London: The Stationary Office, 2005) 130-145 [*Human Reproductive Technologies*]. Unfortunately, there has recently been renewed interest in this issue and the U.K. Health Minister has recently announced that the U.K. Parliament will seek to ban pre-implantation sex selection techniques in the near future. See Kristy Horsey, "UK Fertility Law to Drop 'Need for a Father'; Ban Sex Selection?" *BioNews* (17 July 2006), online: *BioNews* <<http://www.ivf.net/content/index.php?page=out&id=2149>>; "Baby Sex Selection 'To Be Banned'" *BBC News* (12 July 2006), online: *BBC News* <http://news.bbc.co.uk/2/hi/uk_news/politics/5172602.stm>. It is not clear whether such a ban will be sought through the use of criminalization within the *HFE Act* itself, or through licensing provisions now employed to curb PGD.

¹¹²*HFE Act*, *supra* note 106. The only criminal sanctions provided for within the *HFE Act* (s. 41) are for violations of the prohibitions contained within ss. 3 and 4 of the *HFE Act*, which are prohibitions such as that against the use of embryos after the appearance of the primitive streak, or the mixing of animal and human gametes. Sex selection techniques are not prohibited in either of these sections.

...even more than civil status or mandatory counseling, the imposition of accreditation through licensing as a condition of operation is the one procedural mechanism with the greatest impact on reproductive genetic testing. Such an oversight mechanism with its traditional requirements of certification, quality assurance, standard operating procedures, reporting procedures and ethics approval of the introduction of technologies or for research can effectively curtail the availability of reproductive genetic testing.¹¹³

Parliament should have considered such an option when deliberating on how to prohibit sex selection techniques before opting for a criminal prohibition.

Criminalization of activities may often be justified, however, Parliament must be careful not to be too quick to criminalize when the activity is not such that it conflicts with social views and/or values and other regulatory options that can have the same effect could be utilized. It is clear that in the case of sex selection that there is in fact no conflict with social views and/or values. It is even clearer that, even if sex selection did conflict with social views and/or values, that other, less punitive, regulatory options could have been used to achieve the same result. And by invoking a criminal prohibition on sex selection for non-medical purposes, then, Parliament is regressing with respect to its commitment to sexual and reproductive rights, as it focuses on the moral view of sex selection rather than on protecting the health and welfare of those who choose, for whatever reason, to use sex selection. The criminalization of sex selection forces women to subject themselves to more risk than necessary and it also imposes an ethnocentric morality upon those who choose to select for sex.

3. Banning Sex Selection Is Unconstitutional

The previous two sections have dealt with the practical arguments against the criminal prohibition on the use of sex selection techniques. Beyond these considerations there is a significant legal reason to question the criminal prohibition of sex selection techniques; that such a ban is unconstitutional. All laws in Canada must adhere to the *Charter* or run the risk of being declared of no force or effect in accordance with s. 52 of the *Constitution*.¹¹⁴ Section 5(1)(e) of the *AHRA* violates the *Constitution*, specifically, the *Charter* in at least two ways, which I will demonstrate below. First, the provision is inconsistent with a woman's s. 7 right to liberty, as there is potential for a jail sentence for violating s. 5(1)(e) of the *AHRA*. It further restricts the liberty of women by restricting their personal autonomy "...over important decisions intimately affecting their private lives."¹¹⁵ An argument could also be made that s. 5(1)(e) of the *AHRA* violates a woman's security

¹¹³ Knoppers & Isasi, *supra* note 74 at 2700.

¹¹⁴ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution*].

¹¹⁵ *Morgentaler*, *supra* note 52 ¶ 238, Wilson J.

of the person by “[f]orcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations...”¹¹⁶ These restrictions on a woman’s liberty and security of the person are not in accord with the principles of fundamental justice.

Second, the provision is inconsistent with a woman’s right to equality under s. 15 of the *Charter*. The law could be seen to be discriminatory on a number of grounds. For example, it could be seen as discriminatory on the basis of religion, as it allows women to select for sex where they are willing to abort, however, those who do not believe in abortion for religious reasons would not be allowed to use any alternative of sex selection.

In order to show that s. 5(1)(e) of the *AHRA* is unconstitutional a two-step process must be utilized. First, it must be demonstrated that the legislation violates ss. 7 and 15 of the *Charter*. Second, if a violation is found, it must be shown that the provision is not otherwise an acceptable limit to *Charter* rights in a free and democratic society under s. 1 of the *Charter*. I will now turn to an analysis of s. 5(1)(e) of the *AHRA* under the *Charter*.

C. Section 7

Section 7 of the *Charter* states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.¹¹⁷

As stated above, in order to show that there has been a violation of s. 7 one must engage in a two-part test, as set down by the Supreme Court of Canada in s. 7 jurisprudence.¹¹⁸ First, one must show that there has been a deprivation of life, liberty or security of the person. Second, one must show that such a deprivation is not otherwise in accordance with the principles of the fundamental justice. This means that even if a violation of life, liberty or security of the person is found, it may be upheld if it is in accordance with the principles of fundamental justice.¹¹⁹

¹¹⁶ *Ibid.* ¶ 22, Dickson C.J.C.

¹¹⁷ *Charter*, *supra* note 98.

¹¹⁸ See *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422; *Reference re Motor Vehicle Act (British Columbia)* S94(2), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [*Re B.C. Motor Vehicle Act*].

¹¹⁹ *Morgentaler*, *supra* note 52 ¶ 13, Dickson C.J.C.

In the case of s. 5(1)(e), as there is a criminal penalty involved, the liberty right of a woman is automatically engaged.¹²⁰ Although the penalty contained in s. 60 relates to doctors, a woman who wished to engage a sex selection service in violation of s. 5(1)(e) of the *AHRA* could be seen as a party to the offence and thus, punishable under s. 21 of the *Criminal Code*.¹²¹ Clearly, then, her liberty interest is at stake in this section, which automatically engages s. 7.

In addition to her liberty right being engaged through the threat of criminal sanctions, her right to liberty is also engaged as the state is interfering with her reproductive autonomy, a principle that has been clearly established in Canadian law since the *Morgentaler* decision was delivered in 1988. Although only a concurring judgment, Wilson J. provided the basis for the right of reproductive autonomy for women in Canada in the *Morgentaler* decision. In that case, the legislation at issue was s. 251 of the *Criminal Code*, which criminalized abortion, except in accordance with a specified procedure, which included the consent of an abortion committee. While the majority of the court found a violation of s. 7 based on a violation of the right to security of the person, Wilson J. went further, showing how s. 251 violated a woman's right to liberty, the liberty of making her own choices related to her own body. In doing so, she drew upon the liberal democratic tradition, American jurisprudence, as well as previous s. 7 jurisprudence where liberty was characterized as a broad right that allowed people to be free from state interference in making decisions that are of fundamental importance to them.¹²² Applying this to the facts of the *Morgentaler* case, she found that whether or not to have an abortion is a decision of fundamental personal importance, and that s. 251, in making that decision subject to the consent of a committee, was a clear and fundamental violation of a woman's right to liberty under s. 7.¹²³

While Wilson J.'s judgment was not the majority decision in *Morgentaler*, the idea that liberty includes the right to make fundamental personal decisions without state interference has been adopted by many scholars, as well as in subsequent Supreme Court jurisprudence. For example, in *Tremblay v. Daigle*,¹²⁴ a case where a man attempted to enjoin a woman from aborting a fetus that he allegedly fathered, although the court did not explicitly rule on the matter, the court stated that the right of a fetus to life may conflict with a woman's right to reproductive autonomy.¹²⁵ Again, while not ruling explicitly on the issue, the Court again addressed the issue of reproductive autonomy in *Winnipeg Child and Family Services v. G. (D.F.)*.¹²⁶ In that case, Winnipeg Child and Family Services attempted to take a pregnant woman with substance abuse issues into custody in order to

¹²⁰ *Re B.C. Motor Vehicle Act*, *supra* note 118; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 68 Man. R. (2d) 1 [*Prostitution Reference*].

¹²¹ R.S.C. 1985, c. C-46.

¹²² *Morgentaler*, *supra* note 52 ¶ 228, Wilson J.

¹²³ *Ibid.* ¶ 238-241, Wilson J.

¹²⁴ [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634.

¹²⁵ *Ibid.* at 549-50.

¹²⁶ [1997] 3 S.C.R. 925, 152 D.L.R. (4th) 193 [*Winnipeg*].

protect the fetus. While the case was decided on the issue of the court's *parens patriae* power to protect the fetus, the S.C.C. carefully stated that should the legislature enact any legislation allowing a woman to be taken into custody in such circumstances, the legislation would have to conform with the *Charter*. Harvison-Young and Wasunna state that McLachlin J.'s judgment in this case speaks loudly with respect to the right of women to reproductive autonomy.¹²⁷

Since the *Winnipeg* case, the S.C.C. has formally endorsed and accepted Wilson J.'s conception of the liberty right contained within s. 7, as the right to make decisions of personal fundamental importance free from state interference. In *Blencoe v. British Columbia (Human Rights Commission)*¹²⁸ a former minister in the British Columbia cabinet was accused of sexually harassing a female employee. She had complained to the British Columbia Human Rights Commission. It took over 30 months for the complaint to be heard before the British Columbia Human Rights Tribunal. Blencoe argued that such a delay was inordinate and that it violated his rights under s. 7 of the *Charter*. While ultimately losing the appeal before the S.C.C., the court did agree that Blencoe's s. 7 right to liberty was engaged in this case. The Court cited Wilson J.'s reasons from *Morgentaler* approvingly and adopted them in the *Blencoe* decision itself.¹²⁹

Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom in the circumstances of this case, the state has not prevented the respondent from making any 'fundamental personal choices'.¹³⁰

Accepting Wilson J.'s conception of liberty as the freedom to make fundamental personal decisions free from state interference, one can easily see how s. 5(1)(e) of the *AHRA* is in violation of such a right. The make up of one's family is a very personal decision for either a person or a couple, just as the decision of whether or not to continue with a pregnancy is in the context of abortion. It directly engages the right of reproductive freedom as pronounced by Wilson J. in *Morgentaler*. Section 5(1)(e) explicitly takes the decision of whether to be able to choose to select the sex of one's child away from the family who is having the child. There are a myriad of reasons why a woman or a couple would choose to select the sex of a child, but by virtue of s. 5(1)(e), such reasons have been pronounced by Parliament as invalid and as a result, people are not free to make such decisions for themselves.

Turning to security of the person, it is also arguable that s. 5(1)(e) of the *AHRA* violates a woman's right to security of the person contained within s. 7 of

¹²⁷ Harvison-Young & Wasunna, *supra* note 87 at 265-266.

¹²⁸ [2000] 2 S.C.R. 307, 190 D.L.R. (4th) 513 [*Blencoe*].

¹²⁹ *Ibid.* ¶ 50.

¹³⁰ *Ibid.* ¶ 54.

the *Charter*. The majority in *Morgentaler* found that the right to security of the person in s. 7 is engaged when the state interferes with bodily integrity or when it imposes serious psychological stress.¹³¹

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person.¹³²

Clearly, on the basis of Dickson C.J.C.'s conception of security of the person, s. 5(1)(e) of the *AHRA* is in violation of s. 7 of the *Charter*. Section 5(1)(e) threatens a woman's bodily autonomy in a similar manner as in the abortion context. It does not allow her to submit to a generally safe procedure, sperm sorting, in concordance with her own priorities and aspirations, selecting a child of one sex or the other. It forces women who want to ultimately have a child of one sex or the other, or women who want to have balanced families, to either abort fetuses of the undesired sex or to continue to give birth and care for children until a child of the desired sex is born. This state of affairs is a clear violation of her bodily integrity and thus, a violation of her s. 7 right to security of the person.

Once it has been established that there is a violation of one's rights to life, liberty or security of the person, it must be shown that such violations are not in accordance with the principles of fundamental justice. "The section states clearly that those interests may only be impaired if the principles of fundamental justice are impaired."¹³³ The principles of fundamental justice have been described as the basic tenets of the legal system, and are not to be thought of as exhaustive.¹³⁴ In this particular case, s. 5(1)(e) is not in accordance with the principles of fundamental justice as it is arbitrary. In *Rodriguez*, McLachlin J. (as she then was) stated:

Without defining the entire content of the phrase "principles of fundamental justice", it is sufficient for the purposes of this case to note that a legislative scheme which limits the right of a person to deal with her body as she chooses may violate the principles of fundamental justice under s. 7 of the *Charter* if the limit is arbitrary. A particular limit will

¹³¹ *Morgentaler*, *supra* note 52 ¶ 20, Dickson C.J.C.

¹³² *Ibid.* ¶ 22.

¹³³ *Ibid.* ¶ 13.

¹³⁴ *Re B.C. Motor Vehicle Act*, *supra* note 118 at 503, Lamer J.

be arbitrary if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation.¹³⁵

In the case of s. 5(1)(e) of the *AHRA*, the legislation is clearly inconsistent with its objective. If the objective is to stop sex selection techniques for equality purposes, it has been shown in the first section of this paper that it fails to do that, as PND and abortion are still legally permissible. In addition, as was demonstrated above, there is not a problem with skewed sex preferences in Canada, so the promotion of equality would not be a valid objective to support s. 5(1)(e). On either of these grounds, then, s. 5(1)(e) is an arbitrary enactment not related to a valid objective and is therefore, not in accordance with the principles of fundamental justice.

It has been shown that s. 5(1)(e) of the *AHRA* violates a woman's s. 7 rights to both liberty and security of the person and that those violations are not in accord with the principles of fundamental justice. Specifically, it has been demonstrated that s. 5(1)(e) is arbitrary, in that it fails to accord with the objective of the legislation.

D. Section 15

Section 15 of the *Charter* states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.¹³⁶

The purpose of the equality guarantee contained within s. 15 of the *Charter* is to protect both individuals and specific groups from discrimination at the hands of the state.

What is the purpose of the s. 15(1) guarantee? There is a great continuity of this Court on this issue. In *Andrews*, supra, all judges who wrote advanced largely the same view. McIntyre J. stated, at p. 171, that the purpose of s. 15 is to promote 'a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration'. The provision is a guarantee against the evil of oppression, he explained at pp. 180-81, designed to remedy the imposition of unfair limitations upon

¹³⁵ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 619, 107 D.L.R. (4th) 342, McLachlin J. (as she then was) [*Rodriguez* cited to S.C.R.].

¹³⁶ *Charter*, supra note 98, s. 15.

opportunities, particularly for those persons or groups who have been subject to historical disadvantage, prejudice, and stereotyping.¹³⁷

In order to show that there has been violation of one's rights under s. 15 of the *Charter*, one needs to show that a law discriminates on the basis of an enumerated or analogous ground of the *Charter* in a purposive and substantive manner, not just merely in a formal manner.¹³⁸ The Supreme Court of Canada in *Law* established a three-part test in order to determine whether there is discrimination under s. 15(1). First it must be shown that the law in question, in this case s. 5(1)(e) of the *AHRA*, treats the claimant differently than others under the law. Second, the differentiation must be shown to be based on one or more of the enumerated or analogous grounds in s. 15(1). Third, it must be shown that the differentiation negatively affects the dignity of the claimant.¹³⁹

In the case of s. 5(1)(e) of the *AHRA*, there are likely numerous discrimination claims that can be made. As an example of the type of claim that could be made, it can be shown that the sex selection prohibition discriminates against women on the basis of their religion. Assume that a woman is a Catholic and is against abortion for religious reasons, but wishes to have a balanced family, meaning at least one child of each sex. In order to show that this woman is the subject of discrimination, it must first be shown that s. 5(1)(e) differentiates between her and a group comparable to her.¹⁴⁰ In this case we can compare (1) women who want a child of a specific sex for family balancing purposes whose religion does not oppose abortion, or who are not religious; and (2) women who want a child of a specific sex for family balancing purposes who are Catholic (or another religion) and for religious reasons oppose abortion. When we compare these two groups, we find that they are treated differently by s. 5(1)(e). The group that has no religious objection to using abortion are free to legally select the sex of their child by employing PND and abortion if they so choose.¹⁴¹ The women who oppose abortion for religious reasons have no legal option to select for sex, as s. 5(1)(e) has prohibited all of the other methods. This is differential treatment for the purposes of s. 15(1).

The next step in the analysis is to show that the distinction between the treatment of one group and the other is based on an enumerated (or analogous) ground contained in s. 15(1) of the *Charter*. The reason for the different treatment of the two groups is based on the religious beliefs, or lack thereof, held by the two groups. Religion is one of the enumerated grounds of s. 15(1), therefore, the second part of the test has been met.

¹³⁷ *Law v. Canada*, [1999] 1 S.C.R. 497 ¶ 42, 170 D.L.R. (4th) 1, Iacobucci J. [*Law* cited to S.C.R.].

¹³⁸ *Ibid.* ¶ 38.

¹³⁹ *Ibid.* ¶ 88.

¹⁴⁰ *Ibid.* ¶ 58.

¹⁴¹ This is not to say that this would be the preferable option in any way. This example is merely being used to show how s. 5(1)(e) of the *AHRA* fails to meet the requirements of s. 15(1) of the *Charter*.

The third part of the discrimination analysis is the most difficult to prove. It must be shown that a reasonable person, knowing the facts of the case, regards the impugned law as having a discriminatory effect. The Court in *Law* outlined four important contextual factors that should be considered, although it was clear to state that not all of the contextual factors must be satisfied in order to prove that the law creates a discriminatory effect.¹⁴² First, one must look to see whether there is any pre-existing disadvantage. If there is a pre-existing disadvantage, then the differential treatment would likely perpetuate a stereotype that the individual was “less capable or less worthy as a human being.”¹⁴³ Second, in order to prove discrimination the law may fail to take into account the individual needs, capacities and circumstances of the individual. Third, even if the legislation has an ameliorative purpose, if it is under-inclusive of a historically disadvantaged group, and the individual is not in a more advantaged position than others affected by the law, it will likely be discriminatory. Finally, if the excluded group is “severe and localized” it is more likely to be regarded as discriminatory.¹⁴⁴

In the case of s. 5(1)(e) the fourth contextual factor appears to be the most relevant. As stated by Iacobucci J. in *Law*, “[m]oreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects ‘a basic aspect of full membership in Canadian society’, or ‘constitute[s] a complete non-recognition of a particular group’.”¹⁴⁵ In this case, women who for religious reasons oppose abortion are being denied a basic aspect of membership in Canadian society, that of reproductive autonomy and the ability to make fundamental personal decisions free from interference of the state, as discussed in s. 7 above. Denying women who oppose abortion such a fundamental right, while clearly allowing others with differing beliefs to maintain such a right, is clearly disrespectful of their human dignity and shows that s. 5(1)(e) is discriminatory within the meaning of s. 15(1) of the *Charter*.

E. Section 1

Having shown that there has been a violation of a potential claimant’s right to life, liberty and security of the person and equality, it must be shown that the law is not otherwise in accordance with the principles of a free and democratic society under s. 1 of the *Charter*. If the limitations on the rights imposed by the legislation are in accordance with such principles, then the limitation will be justified and allowed to stand. Section 1 of the *Charter* states:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits

¹⁴² *Law*, *supra* note 137 ¶ 62.

¹⁴³ *Ibid.* ¶ 88.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* ¶ 74.

prescribed by law as can be demonstrably justified in a free and democratic society.¹⁴⁶

In order to show that the *Charter* violations in s. 5(1)(e) of the *AHRA* are not otherwise reasonable limits in a free and democratic society, one must engage in the well known four-part test as set down by the Supreme Court of Canada in *R. v. Oakes*.¹⁴⁷

First, it must be shown that there is a pressing and substantial objective. In this case, it is difficult to know what the objective is with respect to sex selection. No objective was explicitly stated in the legislation itself with respect to the explicit section regarding sex selection, and no objective specific to this section could be found in any legislative background document. One can argue that it was perhaps to promote equality amongst men and women, however, the RCNRT research has shown that sex selection in Canada will not be used in unequal ways, as there is no general preference for one sex over the other.¹⁴⁸ Therefore, while it might be a noble objective, it is hardly one that is pressing and substantial, given that the evil it is intended to decrease has been shown not to exist.

The second part of the *Oakes* test is the rational connection test. It must be shown that the legislation is actually rationally connected to the objective. One would only need to resort to the rational connection test, if it was shown that there was actually a pressing and substantial objective. It has been demonstrated above that there is no pressing and substantial objective in this case, however, for the sake of completeness, the entire *Oakes* analysis will be considered. If the objective of promoting equality was found in fact to be pressing and substantial, s. 5(1)(e) would not be rationally connected to that objective as the law fails to prohibit all methods of sex selection. The legislation still allows PND and abortion as a method by which to select the sex of a child. It only prohibits PGD, IVF and sperm sorting. Given that at least one method of sex selection is still permitted, it cannot be considered rational to prohibit the least ethically problematic, invasive and risky method, while only allowing the most ethically problematic, invasive and physically risky method to be used.

The third part of the *Oakes* test is that of the least drastic means. This means that Parliament must have selected the least intrusive means by which to accomplish the objective; in this case, Parliament chose criminalization. Clearly, criminalization is not the least drastic method of regulating sex selection. Parliament, in fact, chose the most intrusive method by which to accomplish its objective. As demonstrated above, criminalization is the most severe form of regulation, as the liberty of those who run afoul of such a law is at stake. Part 2 of this paper above shows that the U.K. has adopted a much less intrusive method of regulation in order to

¹⁴⁶ *Charter*, *supra* note 98, s. 1.

¹⁴⁷ [1986] 1 S.C.R. 103 ¶¶ 69-71, 26 D.L.R. (4th) 200 [*Oakes* cited to S.C.R.].

¹⁴⁸ See Part 1 of this paper above.

accomplish a similar objective, that of licensing without criminal sanctions attached.

The last branch of the *Oakes* test asks one to balance the salutary benefits of the law with any deleterious effects. It is doubtful that there are any salutary benefits to this s. 5(1)(e), given that it was shown by the RCNRT that there is not really a problem with respect to sex preferences of children in Canada. The deleterious effects of s. 5(1)(e), however, are numerous. Any woman who wishes to select for sex, as the act of selecting for sex in and of itself is not prohibited, only several methods of selecting for sex, must put herself at considerably more risk than is necessary under the circumstances. The prohibition of the use of only certain sex selection techniques could have the effect on women of certain cultures/religions, or who wish to have a certain complement of children, being forced to continually bear children until a child of the desired sex is born. This places a lot of physical and emotional stress, not only on the women who must bear the burden of multiple pregnancies, births and the responsibility of caring for many children, but also on the family unit itself, as it increase family sizes and places serious economic strains on families.

It has been demonstrated that s. 5(1)(e) could not be saved under s. 1, as it fails to pass any part of the *Oakes* test. By virtue of the violations of s. 7 and s. 15, then, s. 5(1)(e), pursuant to s. 52(1), should be declared of no force and effect. Although Parliament could attempt to re-draft the legislation so that it would be in accordance with the *Charter*, it is difficult to imagine how that could be accomplished while continuing to criminalize only certain sex selection methods. Instead, they could attempt to regulate the activity as the British have done through a system of regulation through licensing without criminal sanctions, however, even in that case, it could still be argued that as there is not really much of a problem with sex preference in Canada, that there would be no pressing and substantial objective should constitutional arguments be made on any lesser kinds of restrictions. Therefore, the position put forth by the U.K. House of Commons Committee on Science and Technology in favour of repealing the prohibition against sex selection and in favour of greater reproductive liberty is favourable.¹⁴⁹

F. Conclusion

While widespread use of sex selection techniques is most likely not something that we as Canadians would promote widely, at least to the extent that one sex would be consistently preferred over the other, it is a practice that does have validity in certain circumstances. In prohibiting certain methods of sex selection through the use of the criminal law, however, the Canadian Parliament has gone too far in their attempt to put an end to the practice in Canada. As has been demonstrated above, leaving the only legal method of sex selection as PND and abortion, which is the most ethically problematic, invasive and risky is a stark

¹⁴⁹ *Human Reproductive Technologies*, *supra* note 111.

inconsistency that cannot be reconciled with the legislation. It is also questionable as to whether a criminal prohibition under these circumstances is warranted, as there is no consensus on either social views or values and it is clear that less insidious methods of regulation, such as the system currently employed by the U.K., could have been employed to achieve the same result. What is more is that given that it has been clearly demonstrated that there is not an equality problem in Canada with respect to sex preference, it is doubtful that any form of regulation of sex selection practices would ever stand in light of the *Charter*, especially if the Supreme Court makes clear that there is a right to reproductive autonomy under s. 7. Instead, Parliament should rethink the criminal prohibition, as well as any general prohibition of sex selection methods altogether.