

# Regulating A Revolution: The Extent of Reproductive Rights in Canada

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The most basic instinct of all creatures is to survive and propagate. The social concepts of love, family, community and mortality strengthen the biological drive for genetic procreation. Reproductive liberty is most often described as a negative right: a guaranteed right to be free from state interference in procreative choice.<sup>1</sup> Few theorists in the developed world would contradict the negative right to be free from state interference in procreation.<sup>2</sup> A fundamental distinction is made between negative rights and positive rights. Negative rights consist of the freedom to be left alone while positive rights, the right to something or to do something, require the provision of resources to fulfill the expression of the right.<sup>3</sup> The freedom to control one's fertility has become a widely recognized human right;<sup>4</sup> however, does this right by implication include a right to access the services necessary to procreate?<sup>5</sup>

Recent medical advances and genomic research breakthroughs have initiated a reproductive revolution.<sup>6</sup> In the context of this revolution, rising infertility rates have caused a new resort to medical intervention in procreation<sup>7</sup> through assisted reproductive technologies like *in vitro* fertilization (IVF).<sup>8</sup> The Canadian government is in the process of developing regulations for assisted reproductive technologies.<sup>9</sup> As the government has not yet enacted all-encompassing legislation in the area, the reproductive rights of Canadians are uncertain. A broad landscape of rights can be sketched out with reference to three sources: international law, the *Charter of Rights and Freedoms*, and Canadian jurisprudence.

The purpose of this paper is to examine sources of reproductive rights for Canadians and to establish the extent of the right to procreate by assisted means in Canada. Although the

variety of reproductive technologies is expanding at an incredible rate, this paper will focus on IVF as an established and widely practiced treatment that is not currently insured by the vast majority of provincial health care schemes.<sup>10</sup> To this end, the Nova Scotia Court of Appeal decision in *Cameron v. Nova Scotia*<sup>11</sup> will be dealt with in greater detail than the body of Canadian jurisprudence on reproductive rights. The issues of abortion, sterilization and cloning will not be dealt with directly by this paper as its focus is access to existing assisted reproductive technologies.<sup>12</sup>

## **The Right to Procreate**

### **International Law**

The international community has established several conventions detailing inalienable human rights. The means to achieve or avoid procreation are viewed as integral to concepts of human dignity, personal identity and community.<sup>13</sup> The significance of reproductive rights is evident in its entrenchment in international law under four broad health-related categories: the right to found a family; the right to decide the number and spacing of children; the right to family planning information and services; and the right to benefit from scientific advancement. The bundle of human rights provided in international law suggests a right to access assisted reproductive technologies.

### **Universal Declaration of Human Rights**

The first comprehensive elucidation of human rights by the United Nations was the General Assembly's declaration in



1948. The *Universal Declaration of Human Rights* includes the right to establish a family in Article 16:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. ... The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>14</sup>

The *UDHR* provides protection for families once formed, but has not been expanded to justify a positive right to procreate.<sup>15</sup> The right to found a family must be considered in the context of the other rights in the *UDHR*. The right to privacy or non-interference in Article 12 has been interpreted as protecting the individual's rights to determine the number and spacing of their children.<sup>16</sup> Articles 19, 25 and 26 set out the right to information, health and education rights, and they have been interpreted to give protection to the rights to family-planning information and services.<sup>17</sup> Reproductive technologies can be categorized as a component of family planning. Article 27 recognizes the right to benefit from the advancements of science.<sup>18</sup> Reproductive technologies, as a result of the advancement of science, can also fall under Article 27. Articles 12, 16, 19, 25, 26, and 27 of the *UDHR* taken together support access to assisted reproductive services.

## ***International Covenant on Civil and Political Rights***

Article 23 of the *International Covenant on Civil and Political Rights* provides protection for the right to found a family.<sup>19</sup> The Human Rights Committee, the adjudicative body for enforcement of the *ICCPR*, states that Article 23 should be interpreted not only to protect the right to cohabit and procreate, but also as a codification of national obligations to enact non-discriminatory family-planning policies.<sup>20</sup> Article 17(1) provides that no person shall be subject to illegal or arbitrary interference. The privacy provisions in Article 17(1) can be interpreted as protecting family autonomy and the right to decide on the number and spacing of children. Article 19(2) can be interpreted as protecting the rights to family planning information under the rubric of the freedoms of expression and information. The right to access family-planning services is not included in the *ICCPR*. The interpretation of Article 23 provided by the Human Rights Committee confirms a positive right to non-discriminatory access to reproductive technologies. The *ICCPR* highlights

the importance of personal autonomy and access to reproductive information as first stated in the *UDHR*. These rights were also affirmed by the *International Covenant on Economic, Social and Cultural Rights*.

## ***International Covenant on Economic, Social and Cultural Rights***

Article 12(1) of the *ICESCR* grants the “right to everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>21</sup> The right was expanded by subsection 2, which specifically includes the rights to treatment for maternal and infant mortality and the promotion of children's health within the rights to medical treatment for illness.<sup>22</sup> The right to decide the number and spacing of children and the right to access family-planning services has been found to exist in Article 12.<sup>23</sup> The right to education and personal development stated in Article 13(1) has been interpreted to contain rights to the provision of family planning information and education.<sup>24</sup> Article 15(1)(b) of the *ICESCR* states that all persons have the right “to enjoy the benefits of scientific progress and its applications.”<sup>25</sup> Article 15(3) lists a state's duty to “respect the freedom indispensable for scientific research”<sup>26</sup> to facilitate the development of technological advancements. The rights to health, education and scientific advancements can be jointly interpreted to form a claim to reproductive technologies because the technologies benefit health, require access to family-planning information and education, and are a benefit of scientific advancements in fertility treatments. The *Convention on the Elimination of All Forms of Discrimination Against Women* more specifically addresses women's reproductive health rights.

## ***The Convention on the Elimination of All Forms of Discrimination Against Women***

The *Convention on the Elimination of All Forms of Discrimination Against Women*,<sup>27</sup> adopted by the General Assembly in 1979, recognized the procreative rights of individuals to determine the nature and size of their families, and the necessity of providing medical care to ensure female reproductive health.<sup>28</sup> Article 16 implies the right to found a family, sets out protections for individuals to “freely and responsibly” determine the number and spacing of their



children, and obliges government to provide the requisite access to information and education for family planning. Access to family-planning services is addressed in Articles 12(1) and 14(2)(b), which set out the rights to adequate health care services and facilities. Essentially the *Women's Convention* supports a right of "reproductive self-determination".<sup>29</sup> Following on the *Women's Convention*, the Cairo Conference *Platform for Action* and the *Beijing Declaration and Platform for Action* speak to the importance of infertility treatment and reproductive health within a right to health.<sup>30</sup>

## **A Holistic Interpretation of International Human Rights Law**

Do the international human rights to plan and found a family imply a right to procreate?<sup>31</sup> The international conventions support the existence of comprehensive basic rights to personal autonomy and community participation. To fully realize the combined rights to marry and found a family<sup>32</sup> requires both negative and positive rights; the positive right to marry and cohabit as well as the negative right to be free from interference. Rights to privacy reinforce the rights to freely determine the nature and extent of family. The formation of a family is not, however, solely a matter of personal autonomy. The family — a unit larger than the couple — is a concept woven into the fabric of society. The rights to information, education and to benefit from scientific advancements are rights to participate fully in community and require positive obligations on the part of the state. The language of the international conventions and declarations confirms a negative right to be free from governmental interference with fertility and suggests that a positive right to procreate could be established.

International human rights law supports a limited positive right to access reproductive technologies found in a comprehensive reading of the *UDHR*, the *ICCPR*, the *ICESCR*, and the *Women's Convention*.<sup>33</sup> Canada has signed and ratified these international instruments and is bound by their provisions. The Supreme Court has stated that Canada's laws will be interpreted to meet its international obligations.<sup>34</sup> In *Auton (Guardian ad litem of) v. B.C.*<sup>35</sup>, the Court of Appeal, not only agreed with trial judge Madam Justice Allan that scarcity of financial resources was not a sufficient ground to justify denying early intensive behavioural treatment for autism, but also discussed the importance of meeting Canada's international obligations. Even though the allocation of resources within health care is a subject area within pro-

vincial constitutional competence, Canada's international commitments have a "moral force" relevant to the assessment of domestic legislation.<sup>36</sup> The Court of Appeal stated:

...the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a state party, should generally be indicative of a high degree of importance attached to that objective.<sup>37</sup>

The importance of reproductive rights at international law and the growing support for a positive right to procreate should be considered in the constitutional rights analysis applied to the right to procreate.

## **Canadian Law**

### **Government Services and the Charter**

The health rights of Canadians are protected by the *Canadian Charter of Rights and Freedoms*.<sup>38</sup> These health rights potentially include a right to reproduce. Government actions that infringe *Charter* rights can be saved under s. 1 if the restriction is prescribed by law and reasonable in a free and democratic society. The impugned law must address a pressing and substantial concern, the objective of the law must be rationally connected to the mischief, the law can impair the right only minimally, and there must be proportionality between the impairment and the goal of the legislation.<sup>39</sup>

### **Personal Autonomy — Life, Liberty and Security of the Person**

Section 7 of the *Charter* provides:

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.

Section 7 of the *Charter* recognizes the rights to life, liberty and security of the person. These rights can only be infringed in accordance with the principles of fundamental justice. The Law Reform Commission of Canada stated in 1993: "it seems likely that either liberty or security of the person, or both, will be found in a future case to include the right to procreate."<sup>40</sup> Section 7 provides rights to personal autonomy, bodily integrity and procedural fairness.



## Right To Be Free From Interference

Decisions concerning health care and reproductive issues are usually personal and private choices.<sup>41</sup> In examining the position of reproductive rights it is necessary to look at both the private and public aspects, the negative and positive rights, associated with health and reproductive decisions. The personal autonomy rights repeatedly affirmed at international law have been incorporated into Canadian jurisprudence, yet they have been essentially ignored in the debate surrounding the access to and the regulation of reproductive technologies.<sup>42</sup> The importance of individual autonomy in medical decisions has been underscored by the Canadian judiciary at the highest levels.<sup>43</sup> In *R. v. Morgentaler* the majority of the Supreme Court found that the criminal provisions limiting access to abortion violated pregnant women's s. 7 rights by interfering with bodily integrity and subjecting women to serious psychological stress.<sup>44</sup> The psychological stresses of infertility have been well documented and result in sexual dysfunction, marital breakdown and depression.<sup>45</sup> Although *Morgentaler* is a criminal case, the reasoning is important to this debate because of its recognition of the psychological stresses involved with reproductive decisions.

In *E. (Mrs.) v. Eve*,<sup>46</sup> the Court found that a woman could not be deprived of the "privilege of giving life"<sup>47</sup> through forced sterilization on the grounds that others "may suffer inconvenience or hardship"<sup>48</sup> due to the procreation. La Forest J. stated that Canadian jurisprudence has recognized a growing fundamental right to procreate.<sup>49</sup> *Eve* supports the existence of a negative right to not have one's procreative abilities interfered with by the state.<sup>50</sup>

The importance of reproductive autonomy was reaffirmed by the Supreme Court in *Winnipeg Child and Family Services v. G.(D.F.)*.<sup>51</sup> Not only did the majority of the Court find that the government of Manitoba had no existing authority to restrict the liberty of the respondent, it also stated that any laws passed by the Manitoba legislature creating authority in this area would be unlikely to pass *Charter* scrutiny.<sup>52</sup>

Reproductive rights found in the rights to liberty and security of the person have not been examined outside the criminal sanction context.<sup>53</sup> Section 7 may not provide protection further than preventing government from using criminal prohibitions to restrict access to individual's reproductive decision-making and a clear right to non-interference.<sup>54</sup> The guarantees of fundamental justice found in s. 7, however, would also impact on the regulation of access to reproduc-

tive technologies and ensure procedural fairness.<sup>55</sup> In this sense, although s. 7 may not provide a positive right to funded treatment, it would provide a positive right to fair access to available treatments. Fair access has also been upheld under the equality provisions of s. 15.

## Equality

Section 15(1) of the *Charter* provides:

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.

To prove that government action has caused discrimination under the equality provisions of s. 15, a claimant must meet the three-step process set out by the Court in *Law v. Canada (Minister of Employment and Immigration)*.<sup>56</sup> Firstly, the claimant must establish that the legislation imposes differential treatment in purpose or effect.<sup>57</sup> Secondly, the claimant must show that the basis of the discrimination one or more enumerated or analogous grounds. Lastly, the claimant must show that the differential treatment is in purpose or result discriminatory, within the meaning of the equality guarantee.<sup>58</sup> The indicia of discrimination are historical disadvantage, stereotypical imagery, and vulnerability to prejudice.<sup>59</sup>

In *Korn v. Potter*,<sup>60</sup> the British Columbia Supreme Court, affirming the decision of a human rights tribunal, found that the defendant physician's actions in refusing access to artificial insemination to a lesbian couple was discrimination on the grounds of sexual orientation. The fertility treatments presently available must be accessible by all women who meet the medical standards required for the procedure. The Royal Commission on New Reproductive Technologies stated that "access to IVF treatment should be determined on the basis of legitimate medical criteria, without discrimination on the basis of factors such as marital status, sexual orientation or economic status."<sup>61</sup> Medical practitioners and facilities cannot restrict IVF to married or heterosexual couples on the grounds of best interests of the child.<sup>62</sup> Although the judgment in *Korn* does not provide an absolute positive right to funded access, it does protect the interests of patients, especially when considered with s. 7 rights to fundamental justice and fairness.



Justice Dickson concluded in the early s. 15 case, *Brooks v. Canada Safeway*,<sup>63</sup> that not only was the distinction made by Safeway in denying benefits to pregnant employees discrimination under s. 15, but that

...it would be difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.<sup>64</sup>

Although *Brooks* considered whether discrimination on the basis of pregnancy constituted sex discrimination, the Government of Canada has subsequently recognized the significant and differentiated impact of infertility on women.<sup>65</sup> The restriction of access to fertility treatments could be considered discrimination between fertile women and those who require assisted technologies, as it is a distinction made on the ability to become pregnant. The *Cameron* case goes further in discussing positive rights of access to reproductive technologies and governmental obligations.

## Cameron

The *Cameron* case<sup>66</sup> examined the rights of infertile couples under the *Health Services and Insurance Act* and *Charter* equality provisions<sup>67</sup> to IVF treatment.<sup>68</sup> The claimants were a childless couple seeking benefits under the Nova Scotia *Health Services and Insurance Act* for the medical costs associated with IVF. After being denied coverage, the appellants brought an action from the trial division in Nova Scotia to the Court of Appeal on the grounds that, first, the Nova Scotia *Health Services and Insurance Act* and Regulations covered IVF as a medically required service and, second, if the *Act* did not provide for IVF treatment, the policy was discriminatory against infertile persons and a breach of s. 15(1) of the *Charter*.<sup>69</sup>

The appellants provided evidence that IVF treatments were clinically indicated and medically required to treat their infertility. They also showed that IVF treatments were within the scope of the fertility treatments presently insured

in Nova Scotia.<sup>70</sup> The trial judge was persuaded that as IVF does not treat the underlying infertility condition, it was not a “medically necessary” procedure in the scheme of health care insurance legislation; however, this line of reasoning fell short with the majority of the Court of Appeal. They found that although IVF could be considered a medically necessary treatment, denying insurance for IVF was justified under s. 1 on the grounds of resource allocation within the health care system.<sup>71</sup>

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The majority of the Court of Appeal in *Cameron* found that Nova Scotia's failure to insure IVF denied equal benefit of the law to the appellants and that the denial of treatment was on the grounds of a physical disability: infertility. The majority of the Court also held that the ability to procreate has been held in high esteem throughout history and by most cultures; therefore, the denial of IVF was

based on a stereotype of the infertile as less deserving and fed by a historic disadvantage.<sup>72</sup>

Although the majority of the Court found that the claimants had made out a case of discrimination under s. 15, the impugned legislation was saved under s. 1. The objective of Nova Scotia policy was to provide the most complete, safe and effective health care coverage with limited resources. As IVF had not yet passed the peer-review standard to place it on par with other procedures that are funded, refusing to insure the treatment was rationally connected to the goals of the legislation. The policy does not limit funding to all infertility services, therefore it was minimally impairing. The exclusion of IVF from insured services affected a hardship on those individuals seeking IVF treatment; however, as many other services were provided there was proportionality between the effect of the exclusion and the objective of the Nova Scotia *Health Services and Insurance Act*.<sup>73</sup> *Cameron* was appealed to the Supreme Court of Canada; however, leave was denied.

The courts will give deference to policy-makers in the allocation of resources to competing interests in an environment of extreme scarcity unless a clear failure to balance *Charter* rights is evident. The Supreme Court has stated that Parliament is allowed greater latitude in areas where the allocation of scarce government resources demands difficult economic



and social choices.<sup>74</sup> Economic considerations are the most significant consideration in the debate surrounding the insuring IVF treatment<sup>75</sup> while the safety and efficacy of the treatment are a secondary issue<sup>76</sup>.

The appellants' secondary argument was that failing to insure IVF was discrimination on the basis of access to comparable sets of services as set out in s. 15 of the *Charter*.<sup>77</sup> Persons who are able to conceive without medical intervention receive coverage for all treatment associated with the gestation and birth of their children; infertile persons do not receive the same comprehensive coverage. This argument finds support in the unanimous Supreme Court decision in *Eldridge v. B.C.* that determined that all patient groups must have access to a comparable set of services.<sup>78</sup> In *Eldridge* the Court found that B.C.'s failure to provide interpreters for deaf patients denied those patients access to essential services.<sup>79</sup>

In *Auton*<sup>80</sup>, B.C.'s failure to insure early intensive behavioural treatment for autism was found to be a violation of the patients' rights to medically necessary treatments even though other treatments for autism were provided at a later age.<sup>81</sup>

Madam Justice Allan drew two major conclusions in her s. 15 considerations: that the appropriate comparator groups were non-autistic children or mentally-disabled adults, and that in comparison to both groups, discriminatory differential treatment of the infant petitioners had been established on the enumerated ground of mental disability.<sup>82</sup>

Madam Justice Allan ordered that the government was to provide early intensive behavioural intervention services.

The Court of Appeal in *Auton* differentiated *Cameron* with the following statement:

...the Nova Scotia Court of Appeal concluded that denial of funding for specialized form of in vitro fertilization infringed s.15 equality rights, but was justified under s.1 of the Charter. In *Cameron*, however, the claimants had already

received some government supported treatment for infertility, whereas in the case at bar no government supported treatment had been provided – indeed there is no known effective treatment for autism or ASD except early intensive behavioural intervention, for which financial help was refused.<sup>83</sup>

This reasoning suggests that where an infertile patient did not have access to any fertility services an unjustified violation of s. 15 would be found. *Auton* requires access to a level of services, but not to a specific service, therefore, although a patient would not have a positive right to ARTs in particular, he or she would have a positive right to fertility services in general.

*Cameron*, *Eldridge*, and *Auton* support the rights of patients to comparable sets of services and to specific treatments if found to be medically necessary. IVF is one of a set of reproductive services available to the infertile and was found to be a medically necessary treatment for infertility by the majority of the Court in *Cameron*.<sup>84</sup> A second ground of support in *Eldridge* and *Auton*, not argued in *Cameron*, was that of access to basic sets of services. In *Eldridge* and *Auton* the claimants argued that the service they requested was necessary to enable their access to basic health care services.<sup>85</sup> Deaf patients require interpreters to receive safe and meaningful medical attention. Autistic children who do not receive adequate treatment are unable to communicate with the outside world and, therefore, would also be unable to access safe and meaningful care. Infertile patients who do not receive adequate fertility treatment, resulting in pregnancy, cannot access the sets of basic services available to all fertile patients.

Although the literature on infertility treatments reports socio-ethical concerns that range from the objectification, exploitation and commodification of women and children, to the reduction in the demand for hard-to-adopt children and concerns regarding overpopulation, human dignity, parental unfitness, and the undermining the nuclear family<sup>86</sup> — the real limiting factors considered by the judiciary is governmental resources to provide health services and medical effectiveness of services.<sup>87</sup> If the acceptability, safety

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and efficacy of IVF grow over time the arguments of the Crown supporting the rationality of its exclusion will diminish. The reasoning in the Court of Appeal's decision in *Auton* suggests that as a s. 15 right to equality was found on the grounds of disability, and the restriction of access to fertility treatments was not justified by s. 1 analysis, a broader order for the insurance of fertility services, not necessary IVF, would be the result.

## Civil Support

The right to procreate through assisted means has also been established in the area of personal injury law. The Canadian judiciary has awarded damages specifically for assisted reproductive treatments where the plaintiff has shown impaired fertility due to the injury and a desire to procreate, and established the potential costs of assisted procreation.<sup>88</sup> Medical malpractice cases involving infertility have also affirmed a right to assistive technologies in the awards given to patients rendered infertile. IVF was specifically mentioned as a treatment to mitigate the loss of fertility occasioned by the patients and the damages awarded were based on the cost of private treatment.<sup>89</sup>

## Conclusion

International law, the *Charter* and Canadian jurisprudence support a limited positive right to procreate. The right to found a family, as well as rights to family planning information and services and to benefit from scientific advancement, are codified in international human rights law and have been carried into Canadian domestic jurisprudence. Canadian health care legislation will be interpreted in light of these rights.

Within the right to reproduce are several positive and negative procreative rights. Section 7 of the *Charter* ensures that the state cannot unreasonably interfere in the personal reproductive autonomy of Canadians. The government cannot arbitrarily restrict access to available technologies. Sections 7 and 15 provide protections of procedural fairness in accessing available technologies. Section 15 equality rights were found to support a discrimination claim by an infertile couple although the legislation was saved by financial considerations under s. 1. The area of personal injury law also supports positive rights, as between civil parties, to assisted reproductive technologies.

Canadian law suggests a limited positive right to insured fertility services. This right is limited by fiscal constraints and the safety and efficacy of the treatment, and is not likely to include a right to particular services such as ARTs. Freedom cannot simply be the absence of interference, but must include the ability to make choices.<sup>90</sup> Prioritizing negative rights that do not foster freedom is unjust. If the right to reproduce does not include a positive right of access to reproductive technologies, the right is rendered void.<sup>91</sup> If persons are meant to have an equal opportunity to become parents, or found a family, the Canadian government must insure access to the means of reproduction.<sup>92</sup>

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## Notes

1. John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, New Jersey: Princeton University Press, 1994) at 22.
2. China's "one child" policy has been the basis of refugee claims in Canada. See *Chan v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 181 (F.C.A.); *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314 (C.A.).
3. Aditi Gowri, "Reproduction, Rights and Public Policy: A Framework for Assessment" (2000) 35 *Texas Int'l L.J.* 13 at 16.
4. Robertson, *supra* note 1 at 29.
5. Maja Kirilova Eriksson, *Reproductive Freedom: In the Context of International Human Rights and Humanitarian Law* (Boston: Martinus Nijhoff, 2000) at 189.
6. Robertson, *supra* note 1 at 5.
7. *Ibid.* at 98.
8. For an explanation of the procedure for *in vitro* fertilization see Robertson, *ibid.*
9. Health Canada, "Proposals for legislation governing assisted human reproduction," online: Health Canada <[http://www.hc-sc.gc.ca/english/pdf/reproduction/repro\\_over.pdf](http://www.hc-sc.gc.ca/english/pdf/reproduction/repro_over.pdf)>.
10. Kate Dewhirst, "An (In)Conceivable Question: Do Provincial Governments Discriminate Against The Infertile By Not Paying For IVF and ICSI Services?: A Comment On Cameron and Smith v. Nova Scotia (A.G.), The Minister Of Health, The Department Of



- Health And The Administrator, Insured Professional Services” (1999) 8 Dal. J. Leg. Stud. 160 at 168.
11. [1999] N.S.J. 297 (C.A.), aff’g [1999] N.S.J. No. 33 (S.C.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 531 (QL) [*Cameron*].
  12. Please see the following article for the contrary argument to the position taken in this paper: Laura Shanner, “The Right to Procreate: When Rights Claims Have Gone Wrong” (1995) 40 McGill L.J. 823.
  13. Robertson, *supra* note 1 at 4.
  14. *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3rd Sess., Supp. No.13, UN Doc A/810 (1948) 71 [*UDHR*]; Shanner, *supra* note 12 at 828; Athena Liu, *Artificial Reproduction and Reproductive Rights* (USA: Dartmouth, 1991) at 27.
  15. Shanner, *ibid.* at 831.
  16. *UDHR*, *supra* note 14.
  17. *Ibid.*
  18. *Ibid.*; Margaret Somerville, “Reproduction, Technologies and Human Rights” in Kathleen E. Mahoney & Paul Mahoney, eds., *Human Rights in the Twenty-first Century* (Netherlands: Kluwer Academic Publishers, 1993) 871 at 871.
  19. *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 [*ICCPR*]; CCPR General comment 19 (General Comments), Protection of the family, the right to marriage and equality of the spouses (Art. 23): 27/07/90; Eriksson, *supra* note 5 at 194-195; Liu, *supra* note 14 at 28.
  20. Corinne A.A. Packer, *The Right to Reproductive Choice* (Åbo, Finland: Åbo Akademi University, 1996) at 44.
  21. *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3 [*ICESCR*]; Eriksson, *supra* note 5 at 194-195.
  22. Shanner, *supra* note 12 at 828.
  23. Packer, *supra* note 20 at 38.
  24. *Ibid.* at 38.
  25. Eriksson, *supra* note 5 at 194-195.
  26. Shanner, *supra* note 12 at 829.
  27. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 [*Women’s Convention*].
  28. Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet & Maxwell, 1991) at 23-24.
  29. Packer, *supra* note 20 at 18.
  30. United Nations, *Report of the International Conference on Population, Mexico City*, 6-14 August 1984, UN Doc. A/CONF.171/3, 18 October 1994 at 7.6; United Nations, *Beijing Declaration and Platform for Action* (New York: United Nations, 1996) at 94, 95; Eriksson, *supra* note 5 at 194-195.
  31. Eriksson, *supra* note 5 at 188.
  32. *Ibid.* at 217; Robertson, *supra* note 1 at 30.
  33. Canada joined with the General Assembly on 10 December 1948 to pass the *UDHR*. Canada acceded to the *ICCPR* and the *ICESCR* on 19 May 1976, and the *Women’s Convention* on 10 December 1981.
  34. *Re Tax on Foreign Legations*, [1943] S.C.R. 208; *Reference re Secession of Québec*, [1998] S.C.J. No. 61 (QL).
  35. [2002] B.C.J. No. 2258 (C.A.), aff’g [2000] B.C.J. No. 1547 (S.C.), leave to appeal to S.C.C. granted [2002] S.C.C.A. No.510 (QL) [*Auton*].
  36. *Ibid.* at para. 63.
  37. *Ibid.*
  38. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
  39. *R. v. Oakes*, [1986] 1 S.C.R. 103.
  40. Law Reform Commission of Canada, *Medically Assisted Procreation* (Ottawa: Queen’s Printer, 1992) at 82.
  41. *R. v. Jones*, [1986] 2 S.C.R. 284 at paras. 71-78; Liu, *supra* note 14 at 34.
  42. Allison Harvison Young & Angela Wasunna, “Wrestling with the Limits of Law: Regulating New Reproductive Technologies” (1998) 6 Health L.J. 239.
  43. Timothy Caulfield, Marie Hirtle & Sonia LeBris, “Regulating NRGTS: Is Criminalization the Solution for Canada?” (1997) 18 Health L. Can. 3 at 3.
  44. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 128.
  45. Eriksson, *supra* note 5 at 193; Robertson, *supra* note 1 at 98.
  46. [1986] 2 S.C.R. 388 [*Eve*].
  47. *Ibid.* at 434.
  48. *Ibid.*
  49. *Ibid.* at 419-420.
  50. Roxanne Mykitiuk & Albert Wallrap, “Regulating Reproductive Technologies in Canada” in Jocelyn Downie & Timothy A. Caulfield, eds., *Canadian Health Law and Policy* (Markham, Ont.: Butterworths, 1999) 303 at 326.
  51. [1997] 3 S.C.R. 925; Timothy Caulfield & Erin Nelson, “Law, Reproductive Autonomy and The Allure Of Technopolicy” (1998) 36 Alta. L. Rev. 799 at 804.
  52. *Ibid.* at 960.
  53. Martha Jackman, “The Constitution and the Regulation of New Reproductive Technologies” in Research Studies of Royal Commission on New

Reproductive Technologies, *Overview of Legal Issues in New Reproductive Technologies*, vol. 3 (Ottawa: Queen's Printer, 1993) 2 at 21, 26; Katherine Mary Cherniawsky, *A Child of One's Own: Assisted Reproductive Technology and Law in Canada* (LL.M. Thesis, University of Alberta, 1999) [unpublished] at 42, 51.

54. Jackman, *ibid*; Cherniawsky, *ibid.* at 134.
55. Law Reform Commission of Canada, *Medically Assisted Procreation* (Ottawa: Queen's Printer, 1992) at 83; Cherniawsky, *supra* note 53 at 134.
56. [1999] 1 S.C.R. 497 [Law].
57. *Ibid.*; Law Reform Commission of Canada, *supra* note 55 at 92.
58. *Law, supra* note 78 at 174; *Law Reform Commission of Canada, supra* note 55 at 92.
59. *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1331.
60. (1996), 134 D.L.R. (4th) 437 (B.C.S.C.) [Korn].
61. Shanner, *supra* note 12 at 824.
62. *Ibid.*
63. [1989] 1 S.C.R. 1219 [Brooks].
64. *Ibid.* at 1243-1244.
65. *New Reproductive and Genetic Technologies: Setting Boundaries, Enhancing Health* (Ottawa: Minister of Health, 1996) at 11.
66. *Supra* note 11.
67. *Supra* note 50, s. 15.
68. For the purposes of this paper the discussion of *Cameron* will be limited to IVF, however, the case did address coverage of intra cytoplasmic sperm injection (ICSI), which is a variant of IVF.
69. *Cameron, supra* note 11.

70. *Ibid.*
71. *Ibid.* at paras. 84-85.
72. *ibid.*
73. *Ibid.*
74. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 304-305.
75. Dewhirst, *supra* note 10 at 164.
76. *Cameron, supra* note 11.
77. *Ibid.*
78. *Eldridge v. British Columbia (A.G.)*, [1998] 1 W.W.R. 50 (S.C.C.) [Eldridge].
79. *Ibid.*
80. *Supra* note 35.
81. *Ibid.*
82. *Ibid.* at para. 28.
83. *Ibid.* at para. 66.
84. *Supra* note 11.
85. *Supra* note 78; *Auton, supra* note 35.
86. Robertson, *supra* note 1 at 35.
87. Shanner, *supra* note 12 at 830.
88. See *Garat v. Chaisson*, [1993] B.C.J. No. 1588 (S.C.) (QL); *Ryocroft v. Kyte*, [1999] O.J. No. 296 (Gen. Div.) (QL); *Moore v. Cooper Canada*, [1990] O.J. No. 66 (H.C.J.) (QL), *supp'l* reasons 2 C.C.L.T. (2d) 57.
89. See *Kelly v. Lundgard*, [1990] O.J. No. 66 (H.C.J.) (QL), *supp'l* reasons 2 C.C.L.T. (2d) 57; *Berezowski-Aitken v. McGregor* (1998), 127 Man. R. (2d) 234 (Q.B.).
90. Gowri, *supra* note 3 at 19.
91. Liu, *supra* note 14 at 40.
92. Eriksson, *supra* note 5 at 191.

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