

# Case Law Update: Reference re Assisted Human Reproduction Act, 2010

March 1, 2011

2010 SCC 61 (Released 22 December 2010)

## Constitutional Law Division of Powers Federal Jurisdiction Over Criminal Law Provincial Jurisdiction over Property and Civil Rights

On December 22, 2010, the Supreme Court of Canada rendered a divided 4-4-1 decision in *Reference re Assisted Human Reproduction Act*. At issue was whether the impugned provisions, sections 8 to 19, 40 to 53, 60, 61 and 68 of the *Assisted Human Reproduction Act*, S.C. 2004, c.2, exceeded Parliament's authority to enact criminal law under s. 91(27) of the *Constitution Act, 1867*. The impetus for the legislation in question was the 1989 Royal Commission on New Reproductive Technologies (the "Baird Commission"), a report which made recommendations for federal legislation to address the concerns about certain practices in the field of assisted human reproduction. While conceding that the legislation contained certain provisions that were valid criminal law, the Attorney General of Quebec challenged the bulk of the legislation as being health legislation in pith and substance and encroaching on provincial jurisdiction. The Quebec Court of Appeal held that the impugned sections were not valid criminal law as their pith and substance, i.e. their real character, was the regulation of medical practice and research in relation to assisted reproduction.

At the Supreme Court, Chief Justice McLachlin, joined by Binnie, Fish and Charron JJ. would have upheld the entire legislation as valid criminal law. Lebel and Deschamps JJ. joined by Abella and Rothstein JJ., would have struck the entire legislation down after finding the impugned provisions were in pith and substance a matter of health law. In the end, Justice Cromwell decided the difference and allowed the appeal in part.

The first question raised was whether the statutory scheme is a valid exercise within the scope of federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. There are three requirements of a valid criminal law: prohibition, backed by a penalty, with a criminal law purpose.

The court split on the issue of the pith and substance of the legislation. According to the Chief Justice, the dominant purpose and effect of the legislative scheme is to prohibit practices that would undercut moral values, produce public health evils and threaten security of donors, donees, and persons conceived by assisted reproduction. Parliament may validly regulate in its criminal legislation to target a legitimate criminal law purpose, with the incidental effect of producing beneficial practices by prohibiting reprehensible conduct. This does not render the law unconstitutional. If the legislative scheme is a valid exercise of federal power but some of its provisions are invalid, the invalid provisions can be severed to leave the remaining provisions intact.

According to Lebel and Deschamps JJ., the Act has the two-fold purpose of: 1) prohibition of reprehensible practices; and, 2) promotion of beneficial practices. The impugned provisions regulated assisted human reproduction as a health service. The Baird Commission report is evidence of Parliament's intent to impose national medical standards, rather than uphold morality based on a reasoned apprehension of harm. In their view, the provisions of the Act which regulate human reproduction and research activities do

not fall under the federal criminal law power, but under the provincial jurisdiction over hospitals, property and civil rights, and matters of a merely local nature. Justice Cromwell held that the impugned provisions regulate virtually every aspect of research and practice of assisted human reproduction. To that end, sections 10, 11, 13, 14 to 18, 40(2), (3), (3.1), (4) and (5), sections 44(2) and (3) exceed the legislative authority of Parliament. However, he held that sections 8, 9 and 12 prohibited negative practices associated with assisted reproduction (such as donor consent and reimbursement for medical surrogacy expenses) and thus upheld them as valid criminal law. Sections 40(1), (6) and (7), 41 to 43, 44(1) and (4) are provisions implementing s. 12, and are thus constitutional. Sections 45 to 53, 60, 61 and 68 are constitutional provisions as they relate to inspection, enforcement and offences provisions.

This decision has been a long-awaited ruling on the constitutionality of the impugned provisions in the *Assisted Human Reproduction Act*. With many provisions of the legislation struck, it would be interesting to see how Parliament responds to regulate reproductive technologies in the future.

**WeirFoulds**<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

**Toronto Office**

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110

Fax: 416.365.1876

**Oakville Office**

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110

Fax: 905.829.2035