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Not a General Regulatory Power — A Comment on *Reference re Assisted Human Reproduction Act*

Graeme G. Mitchell*

I. INTRODUCTION

The emergence of the criminal law power located in section 91(27) of the *Constitution Act, 1867*¹ as a general regulatory power for Parliament began in earnest during the final decades of the 20th century. An expansive regulatory function for section 91(27), the most breathtaking example of which remains *R. v. Hydro Québec*,² appeared secure after *Reference re Firearms Act (Canada)*³ where the Supreme Court of Canada sustained the constitutionality of the *Firearms Act*⁴ which amended the *Criminal Code*⁵ and created an exhaustive licensing and registration statute for firearms owners. However, *Reference re Assisted Human Reproduction Act*⁶ delivered at the close of 2010 signals that at least a majority of the current justices has grown uneasy about an ever-expanding regulatory capacity for the criminal law. An unusually

* Q.C., Director, Constitutional Law Branch, Saskatchewan Ministry of Justice and Attorney General, Regina. The views expressed in this article do not represent the views of the Attorney General for Saskatchewan or his Ministry. Candour commends I disclose my participation as counsel for the Attorney General in two judgments referred to in this paper: *Reference re Firearms Act (Canada)*, [2000] S.C.J. No. 31, [2000] 1 S.C.R. 783 (S.C.C.), and *Reference re Assisted Human Reproduction Act*, [2010] S.C.J. No. 61, [2010] 3 S.C.R. 457 (S.C.C.). I am indebted to my friend, John D. Whyte, Q.C., for generously sharing with me his insights on this *Reference* and a draft copy of his paper, “Federalism and Moral Regulation: A Comment on *Reference re Assisted Human Reproduction Act*” (2011) 74 Sask. L. Rev. 45. I also want to acknowledge with appreciation Professor Bruce Ryder for his excellent editorial comments on an earlier version of this article, which was presented at the Osgoode Hall 2010 Constitutional Cases Conference on April 15, 2011.

¹ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

² [1997] S.C.J. No. 76, [1997] 3 S.C.R. 213 (S.C.C.) [hereinafter “*Hydro-Québec*”].

³ [2000] S.C.J. No. 31, [2000] 1 S.C.R. 783 (S.C.C.) [hereinafter “*Firearms Reference*”].

⁴ S.C. 1995, c. 39.

⁵ R.S.C. 1985, c. C-46.

⁶ [2010] S.C.J. No. 61, [2010] 3 S.C.R. 457 (S.C.C.) (*sub nom Attorney General of Canada v. Attorney General of Quebec*) [hereinafter “*RAHRA*”].

fractured Court (4-4-1) declared numerous regulatory provisions found in the *Assisted Human Reproduction Act*⁷ *ultra vires* Parliament principally for the reason they impermissibly invaded exclusive provincial legislative jurisdiction in relation to health, hospitals, medical facilities and the medical profession. *RAHRA* also offers important insights into how the characterization aspect of the pith and substance analysis and the ancillary powers doctrine should operate in disputes over the proper application of the division of federal and provincial legislative powers.

Regulation is, of course, a function of the criminal law; however, such regulation is traditionally prohibitory in nature. With the emergence of the modern regulatory state, governments began to utilize penal offences to regulate and control anti-social conduct. Over time courts came to tolerate non-punitive civic regulation as a legitimate objective of the criminal law power. Regulatory regimes of this kind were characterized variously as “carve outs” or exemptions from the penal aspects of the statute which directly obtained their constitutional sustenance from section 91(27) of the *Constitution Act, 1867*.⁸ Provided the statute furthered a valid criminal law purpose — an amorphous concept to be sure — and was connected to a prohibition coupled with a penalty, courts endorsed massive regulatory frameworks created by Parliament which were built upon a narrow platform of penal provisions. Indeed, it was on this basis that the Supreme Court upheld the extensive environmental regulatory regime found in the *Canadian Environmental Protection Act*⁹ and the cradle-to-grave regulation of firearms ownership established in the *Firearms Act*.¹⁰

In light of this constitutional pedigree, the regulatory elements of the AHR Act at first blush might appear to be on firm jurisdictional footing. Thus, when the Government of Quebec sought an advisory opinion from the Quebec Court of Appeal respecting the constitutionality of those provisions it seemed these should pass constitutional muster. To be sure, the areas regulated by the AHR Act were more closely aligned to areas of exclusive provincial legislative jurisdiction than those at issue in either *Hydro-Québec* or the *Firearms Reference*. At the same time, it did not appear to be too long a bow to draw to bring matters related to health care services and medical research within “the criminal law in its *widest*

⁷ S.C. 2004, c. 2 [hereinafter “AHR Act”].

⁸ See notes 106-108, *infra*, and accompanying text.

⁹ R.S.C. 1985, c. 16 (4th Supp.); *Hydro-Québec*, *supra*, note 2.

¹⁰ *Firearms Reference*, *supra*, note 3.

sense”¹¹ However, should the constitutionality of these provisions be sustained, it would mean section 91(27) of the *Constitution Act, 1867* had truly evolved into the general regulatory power for the Parliament of Canada.

The Quebec Court of Appeal, fearing such a consequence, unanimously declared the disputed sections of the AHR Act unconstitutional.¹² Drawing on classical Greek mythology, the Quebec appeals court asserted that to characterize assisted human reproduction practices and research as “subject matters relating to the criminal law rather than health could create a Trojan horse that would significantly reduce provincial jurisdiction over health by permitting exhaustive regulation of other fields of medical practice, particularly those that have recently been developed”¹³ The Attorney General of Canada appealed this judgment to the Supreme Court and after more than a year and a half — 20 months to be exact — of deliberation, the Court released its judgment.

Three opinions were filed, opinions which are not models of clarity. Four judges led by McLachlin C.J.C. (Binnie, Fish and Charron JJ. concurring) found the AHR Act in its entirety to be a valid exercise of the criminal law power. Four judges speaking through LeBel and Deschamps JJ. (Abella and Rothstein JJ. concurring) held that while the absolute prohibitions against certain assisted human reproduction practices described in the statute as “Prohibited Activities” were constitutional, the impugned regulatory sections which formed the bulk of the statute were not. Justice Cromwell wrote separately. He agreed with LeBel and Deschamps JJ.’s pith and substance analysis; yet, he parted company with them in respect of certain of the regulatory provisions at issue. In the end, the Court allowed the appeal in part with the result that the AHR Act is now more streamlined and narrower in its focus.

RAHRA is the most significant ruling respecting the regulatory function of section 91(27) of the *Constitution Act, 1867* since *Hydro-Québec*. Yet, the case received scant attention in legal and academic circles outside Quebec until after the Supreme Court released its judgment. In

¹¹ *Hydro-Québec, supra*, note 2, at para. 119, *per* La Forest J. (emphasis in original), quoting *Ontario (Attorney General) v. Hamilton Street Railway*, [1903] A.C. 524, at 528-29 (P.C.). But see Patrick Healy, “Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada” (1995) 40 McGill L.J. 905, for a pre-*Hydro-Québec*, yet nevertheless powerful, critique of utilizing the criminal law power to regulate assisted reproductive technologies.

¹² *Renvoi relative à la Loi sur la procréation assistée (Canada)*, [2008] J.Q.J. No. 5489, 2008 QCCA 1157, 298 D.L.R. (4th) 712 (Q.C.C.A.) [hereinafter “*Quebec Reference*”].

¹³ *Id.*, at para. 141.

this paper I explore the influence *RAHRA* may have on the future use of the criminal law power as a mechanism for wide-ranging civic regulation. My thesis is that the Court is moving away from an unbridled acceptance of this role for section 91(27). The paper proceeds in four parts. Part II will offer an overview of the AHR Act with particular attention given to those aspects of the legislation attacked in *RAHRA*. Part III will analyze the three opinions filed in the Supreme Court. Part IV will attempt to identify the doctrinal significance of *RAHRA* and will anticipate its implications for future federalism disputes. Part V will consider the regulation of health generally and of assisted reproduction technologies particularly in the wake of *RAHRA*.

II. THE *ASSISTED HUMAN REPRODUCTION ACT* — ITS GENESIS AND ARCHITECTURE

When a government — federal or provincial — refers the issue of a proposed law's constitutionality to an appeals court for an advisory opinion, legislative context is always relevant. Yet in *RAHRA* such context gains heightened significance. In order to understand the Court's ultimate disposition, it is necessary to have a good appreciation of not only the impugned sections of the AHR Act, their relationship to the uncontested provisions (largely prohibitions and offence sections) and the architecture of the overall statutory scheme. This becomes essential since Cromwell J.'s controlling opinion turns very much on the specific subject matter of the impugned provisions and their connection to other provisions the constitutionality of which was not challenged.

After a number of false starts, Parliament finally enacted the AHR Act on March 29, 2004.¹⁴ This followed an extended period of study and consultation by academics, medical practitioners and researchers, as well as government officials at both the federal and provincial levels, and represented the culmination of the Royal Commission on New Reproductive Technologies chaired by Dr. Patricia Baird. The Baird Commission began its work in 1989 and for the next four years studied the thorny legal, ethical and scientific questions thrown up by the emergence of new reproductive technologies. In its Final Report delivered in 1993 entitled *Proceed With Care*, the Baird Commission recommended that Parliament

¹⁴ For a recounting of the statute's difficulty history see: *Quebec Reference*, *supra*, note 12, at paras. 4-24.

utilize its criminal law power to prohibit certain reproductive technologies such as human cloning and the creation of animal-human hybrids.¹⁵ The Commission further proposed the establishment of a national administrative body to regulate and oversee the reproductive technologies Parliament deemed appropriate and to license medical practitioners and researchers wishing to administer and investigate those technologies. These two general recommendations found their way into the AHR Act.

The AHR Act is comprised of 17 parts, not all of which Quebec attacked. In broad compass, the statute pertains to all clinical and research activities relating to assisted human reproductive technologies. It established two categories of activities: Prohibited Activities and Controlled Activities. No exception was taken to most of the sections characterized as Prohibited Activities which comprise the bulk of the prohibitions created by the statute. Rather, Quebec objected to numerous sections relating to Controlled Activities.

The AHR Act statute opens with a broad declaration of principles found in section 2, principles not customarily advanced by the criminal law. These include Parliament's intention to promote matters such as the "health and well-being of children born through the application of assisted human reproductive technologies" (subsection 2(a)); "the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general" (subsection 2(b)); "the health and well-being of women ... in the application of these technologies" (subsection 2(c)), and the protection of "human individuality and diversity, and the integrity of the human genome" (subsection 2(g)).

The Prohibited Activities that are created by, and form the core of, the AHR Act are located in sections 5 to 9.¹⁶ Section 5 prohibits various assisted reproductive practices that Parliament deems unacceptable. These include human cloning (subsection 5(1)(a)); creating an *in vitro* embryo for any purpose other than creating a human being (subsection

¹⁵ Final Report of the Royal Commission on New Reproductive Technologies, *Proceed With Care* (Ottawa, 1993), at 106-25, referenced in the *Quebec Reference*, *id.*, at para. 4.

¹⁶ Section 60 of the AHR Act created the offence and penalties for a breach of any of these sections. Section 61 created the offence and penalties for breaches of any of the sections of the AHR Act and the regulations other than those found in sections 5 to 9. These sections impose sanctions from a fine to a maximum of \$500,000 to imprisonment to a maximum of 10 years. The Court sustained the constitutionality of these provisions but only to the extent they applied to constitutionally valid sections of the *RAHRA*, *supra*, note 6, at para. 155, *per* McLachlin C.J.C.; at para. 175, *per* LeBel and Deschamps JJ., and at para. 293, *per* Cromwell J.

5(1)(b)); creating an embryo from a cell or part of a cell of an embryo or foetus (subsection 5(1)(c)); altering a genome of a cell such that the alteration may be transmitted to descendants (subsection 5(1)(f)), and using, manipulating or transplanting reproductive material of a non-human life from chimeras or hybrids to create a human being (subsection 5(1)(g) to (j)). Sections 6 and 7 prohibit the unauthorized commercialization of the reproductive functions of men and women, especially the payment of consideration to a surrogate mother. However, section 12 blunts the effect of these particular prohibitions by allowing surrogate mothers, and sperm or *ova* donors to be reimbursed for their expenses, provided these activities accord with the regulations or a licence issued under the AHR Act.¹⁷ Section 8 prohibits the non-consensual use of both *in vitro* embryos or posthumous removal of human reproductive material. Finally, section 9 prohibits the harvesting or use of sperm or *ova* from a donor less than 18 years of age unless it will be used to create a human being who will be raised by the donor.

The Controlled Activities are located in sections 10 to 13 of the AHR Act and Quebec attacked the constitutional validity of all of them. The statute prohibits activities of this kind unless they are carried out in accordance with regulations promulgated under the statute. A variety of medical practices and procedures fell into this category including the use of human reproductive material to create embryos (section 10); research into transgenics which is the practice of combining human genes with those of animal species (section 11), and carrying out controlled activities only in premises licensed under the AHR Act (section 13).

Sections 14 through 19 of the AHR Act establish a comprehensive statutory regime pertaining to the collection and retention of personal health information of persons who seek assisted human reproduction technologies. This regime requires the mandatory collection of such private health information (section 14); enumerates circumstances when such information may be disclosed (sections 15 and 18); permits access to or the destruction of private health information in specific circumstances (section 16), and creates a registry for such information (section 17).

The AHR Act also creates an administrative body described as the Assisted Human Reproduction Agency of Canada (the “Agency”) (section 21) and gives to the federal Minister of Health the responsibility of

¹⁷ For a comparative review of the legality of surrogacy fees and expenses in the United States, see M. Holcomb & M. Bym, “When Your Body is Your Business” (2010) 85 Wash. L. Rev. 647.

establishing the Government of Canada's policy of assisted human reproduction as well as overseeing the Agency's operations (section 20). The Agency is responsible for administering the legislation and is statutorily mandated (a) "to protect and promote the health and safety, and the human dignity and human rights, of Canadians, and (b) to foster the application of ethical principles, in relation to assisted human reproduction and other matters" covered by the AHR Act (section 22). These responsibilities include establishing a personal health information registry, licensing medical professionals wishing to deliver, or to conduct research into, a controlled activity (section 40), as well as, licensing medical facilities to carry out controlled activities (subsection 40(5)). This Part of the AHR Act also creates the entire organizational organization structure of the Agency, including its board of directors (sections 26 and 28), advisory panel (section 33), and the offices of Chairperson (section 34), Vice-Chairperson (section 34) and President (sections 36, 37).

As well, the AHR Act contains extensive administrative and enforcement powers. These include the designation of investigators (section 46); rights of entry for inspectors (section 47); a warrant requirement for entry into a dwelling house (section 48), and the power to seize any information or material which an inspector believes on reasonable grounds is evidence of a contravention of the statute (sections 50 and 53).

The final section of the AHR Act which Quebec challenged was section 68. This provision recognized equivalency agreements — agreements between the federal government and a provincial government — declaring that if the province in question had enacted legislation the federal government deemed to be equivalent to the AHR Act, it would withhold the application of the federal law's regulatory aspects in that particular jurisdiction. At the time the Quebec Court of Appeal decided the *Reference*, the Quebec government had placed before the National Assembly Bill 23 entitled *An Act respecting clinical and research activities relating to assisted procreation*,¹⁸ but it had not yet been enacted into law. The new law came into force in June 2009 after the Supreme Court hearing, but it played no role in the Court's judgment.¹⁹

As is common with regulatory statutes, much of the work is done in the regulations, and adhering to this model the AHR Act contains in

¹⁸ *Quebec Reference*, *supra*, note 12, at para. 17.

¹⁹ *RAHRA*, *supra*, note 6, at para. 7. The law is *An Act respecting clinical and research activities relating to assisted procreation*, R.S.Q., c. A-5.01.

section 65 a wide-ranging regulation-making power. It authorizes the Minister of Health to make regulations for most sections of the legislation. An unusual feature of this regulation making power is the requirement found in section 66 that any regulation must be tabled in both the House of Commons and the Senate before it can become law. Typically, regulations are promulgated with little, if any, prior public scrutiny, so the additional requirement for regulations enacted under the AHR Act is noteworthy, if not doctrinally significant.

III. THE JUDGMENT OF THE SUPREME COURT OF CANADA

Three opinions were filed. Both McLachlin C.J.C. (Binnie, Fish and Charron JJ., concurring), and LeBel and Deschamps JJ. (Abella and Rothstein JJ. concurring) wrote lengthy judgments coming to opposite conclusions: McLachlin C.J.C. sustained the constitutionality of the AHR Act, while LeBel and Deschamps JJ. accepted only the offence provisions of the statute as valid exercises of the criminal law power. In a laconic but pivotal opinion Cromwell J. approved of certain of the regulatory features of the legislation provided their operation was closely linked to those sections he found to be constitutional. This uncommon division among the judges makes it difficult to identify a majority view with precision. Respecting doctrinal issues, Cromwell J. adopts generally the analysis contained in LeBel and Deschamps JJ.'s joint opinion.²⁰ For this reason, it may be said that their opinion represents the majority view on matters of doctrine. However, in the application of this doctrine, Cromwell J.'s opinion is dispositive and governs the result in *RAHRA*.

1. The Opinion of Chief Justice McLachlin

In her reasons for judgment, McLachlin C.J.C. endorsed a plenary reading of section 91(27) of the *Constitution Act, 1867*. She opened by asserting that assisted reproductive technologies present some of “the most important moral issues faced by this generation” of Canadians.²¹ Chief Justice MacLachlin’s characterization of the subject matter regulated by the AHR Act as predominantly a moral issue led her to find

²⁰ *RAHRA, id.*, at paras. 285-288.

²¹ *Id.*, at para. 1.

the statute as a whole fulfilled a valid criminal law purpose. She elaborated on her characterization as follows:

Criminal law may target conduct that Parliament reasonably apprehends as a threat to our central moral precepts ... Moral disapprobation is itself sufficient to ground criminal law when it addresses issues that are integral to society.

.....

Assisted reproduction raises weighty moral concerns. The creation of human life and the processes by which it is altered and extinguished, as well as the impact this may have on affected parties, lie at the heart of morality. Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on persons like donors and mothers. Taken as a whole, the Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants. This is a valid criminal law purpose, grounded in issues that our society considers to be of fundamental importance.²²

Indeed, characterizing morality as “the principal criminal law object of [the *AHR Act*]”²³ influenced all aspects of McLachlin C.J.C.’s federalism analysis from the pith and substance inquiry to the operation of the ancillary powers doctrine.

Morality, of course, is an extremely broad and subjective concept, a reality which the Chief Justice acknowledged but discounted.²⁴ Yet, because of its imprecision morality can easily become a proxy for extending the reach of the criminal law power into legitimate areas of provincial legislative jurisdiction. Historically, Parliament used the criminal law to enforce “conventional standards of propriety”²⁵ best illustrated by prohibitions against sexual immorality, debauchery and other displays of public wantonness. Over time courts expanded the concept of morality to include “societal values beyond the simply

²² *Id.*, at paras. 50 and 61 (citations omitted).

²³ *Id.*, at para. 48.

²⁴ *Id.*, at para. 50. (“Different people hold different views about issues such as the artificial creation of human life. However, under federalism analysis, the focus is on the importance of the moral issue, not whether there is societal consensus on how it should be resolved. Parliament need only have a reasonable basis to expect that its legislation will address a moral concern of fundamental importance[.]”)

²⁵ *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 77 (S.C.C.) [hereinafter “*Malmo-Levine*”].

prurient or prudish”²⁶, or as Sopinka J. grandly characterized them in *R. v. Butler*²⁷ “values which are integral to a free and democratic society”.²⁸

It is not difficult to anticipate that such an expansive conception of public morality may result in an overly generous interpretation of section 91(27). This is especially so in relation to medical research where scientific advances and the development of cutting-edge medical technologies may challenge the religious and moral convictions of many Canadians. Does it follow then that these emerging technologies too may be subject to regulation under the criminal law power? The Quebec Court of Appeal²⁹ and at least four of McLachlin C.J.C.’s colleagues³⁰ worried this may be so. Yet the Chief Justice deflected the issue by suggesting such concerns are exaggerated:

Different medical experiments and treatments will raise different issues. Few will raise “moral” issues of an order approaching those inherent in reproductive technologies. The federal criminal law at issue in this case does not threaten “the constitutional balance”.³¹

Having selected morality as the predominant criminal law purpose advanced by the AHR Act, McLachlin C.J.C. identified two secondary rationales for grounding its constitutionality in section 91(27). These are health and personal security.³² As with morality, she adopted a broad view of the type of public health issues which legitimately will fall within the ambit of the criminal law. These share three common elements, namely, “(1) human conduct that (2) has an injurious or undesirable effect (3) on the health of members of the public”.³³ Invoking La Forest J.’s judgment in *RJR-MacDonald Inc. v. Canada (Attorney General)*,³⁴ McLachlin C.J.C. asserted that “Parliament is entitled to use the criminal law power to safeguard the public from conduct that may have an injurious or undesirable effect on the health of members of the public, notwithstanding the provinces’ general right to regulate the

²⁶ *Id.*

²⁷ [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.).

²⁸ *Id.*, at para. 80.

²⁹ *Supra*, note 12, at paras. 140 and 141.

³⁰ *RAHRA*, *supra*, note 6, at paras. 254-257, *per* LeBel and Deschamps JJ.

³¹ *Id.*, at para. 74.

³² *Id.*, at para. 48. (“The objects of prohibiting public health evils and promoting security play supporting roles with respect to some provisions.”)

³³ *Id.*, at para. 54.

³⁴ [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) [hereinafter “*RJR-MacDonald*”].

medical profession.”³⁵ Here, too, she downplayed objections that because most if not all “medical practices come with risks”³⁶ they potentially could be subject to criminal sanction, and counters that “conduct with little or no threat of harm is unlikely to qualify as a ‘public health evil’.”³⁷ She asserted that how “assisted reproduction techniques are used can mean the difference between life and death, health and sickness”³⁸ with the consequence that their abuse “poses risks to the health of the population and may legitimately be considered a public health evil to be addressed by the criminal law”.³⁹ This, however, does not blunt the force of the objection.

Finally, McLachlin C.J.C. accepted that protection of personal security is also “peripherally”⁴⁰ relevant here because certain aspects of the AHR Act purport to protect vulnerable groups seeking access to assisted reproductive technologies, most especially women. It cannot be disputed that preserving personal security is a fundamentally important objective advanced by the criminal law. However, despite an apparent paucity of evidence on the record to support such a claim, McLachlin C.J.C. was prepared to accept this objective as being furthered by the AHR Act noting simply that such concerns “are easy to envision”.⁴¹

The significance of McLachlin C.J.C. grounding the basis for the exercise of the criminal law power in the enforcement of public morality is apparent. It is a broadly defined, subjectively assessed standard which can become quite diffuse when applied. It is, perhaps, the most expansive of the broad purposes accepted by the Supreme Court as appropriate for the operation of the criminal law.⁴² As a consequence, it is ample enough to sustain most laws sought to be defended under section 91(27). Moreover, identifying health related concerns as only a subsidiary rationale underlying the AHR Act legislation is a curious way to characterize a statute which patently relates to health services and to health professionals.

³⁵ *RAHRA*, *supra*, note 6, at para. 57, expressly referencing para. 32 of La Forest J.’s judgment in *RJR-MacDonald*, *id.*

³⁶ *RAHRA*, *id.*

³⁷ *Id.*, at para. 56, 1 referencing *Malmö-Levine*, *supra*, note 25, at para. 212, *per* Arbour J.

³⁸ *RAHRA*, *id.*, at para. 62.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*, at para. 63.

⁴² The others are public peace, order, security and health: *Reference re Validity of Section 5(a) of the Dairy Industry Act (Canada)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1, at 50 (S.C.C.), *per* Rand J. [hereinafter “*Margarine Reference*”].

Yet her characterization of the statute as principally protecting public morality allowed McLachlin C.J.C. to hold that “the legislative scheme is not directed toward the promotion of positive health measure, but rather addresses legitimate criminal law objects.”⁴³ Since “the other two elements of criminal law, prohibition and penalty, are established on the face of the Act ... the *Assisted Human Reproduction Act*, viewed as a whole, is valid criminal legislation.”⁴⁴ The Chief Justice’s approach allowed her to relegate the significant health law aspects of the statute to a secondary role. This, in turn, determined how she applied the ancillary powers doctrine.

Chief Justice McLachlin acknowledged that most of the impugned sections of the legislation did not qualify as criminal law in the traditional sense⁴⁵ but instead operated as “large carve-outs for practices that Parliament does not wish to prohibit”.⁴⁶ In order to sustain the constitutionality of these regulatory aspects of the legislation she employed two doctrines of Canadian constitutional law: (1) Parliament’s authority to create elaborate regulatory schemes under section 91(27); and (2) the ancillary powers doctrine. Taken together, the application of these doctrines persuaded her that the AHR Act in its entirety was *intra vires* Parliament.

Chief Justice McLachlin advocated a robust regulatory function for the criminal law power provided it furthered “the law’s criminal purpose”.⁴⁷ She explained that “evolving technologies” such as assisted reproduction require “a nuanced scheme consisting of a mixture of absolute prohibitions, selective prohibitions based on regulations, and supporting administrative provisions”.⁴⁸ A framework of this flexibility will need to be highly regulatory particularly as it relates to complex modern medical practices and technologies. Yet, for McLachlin C.J.C. this degree of regulation appears to be of little moment since “the extent or comprehensiveness of a criminal law regulatory scheme does not affect its constitutionality” provided it “reflects and furthers proper criminal law goals”.⁴⁹

⁴³ *RAHRA*, *supra*, note 6, at para. 64.

⁴⁴ *Id.*

⁴⁵ *Id.*, at para. 125.

⁴⁶ *Id.*, at para. 38.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, at para. 85, citing *RJR-MacDonald*, *supra*, note 34, and *Firearms Reference*, *supra*, note 3, in support.

It was on this basis that she sustained the constitutionality of the remaining provisions relating to Prohibited Activities, namely, sections 8 through 13 of the AHR Act.⁵⁰ These sections regulated in whole or in part practices such as donors' consent to use *ova* or sperm, subsidizing donors or surrogates for their expenses, and the licensing of medical facilities where such procedures likely would take place. These various provisions, McLachlin C.J.C. concluded, regulate discrete aspects of assisted reproductive technologies which are more generally prohibited in sections 5 to 7 of the legislation, sections that were not impugned.

Chief Justice McLachlin sustained the constitutionality of the balance of the AHR Act by invoking the ancillary powers doctrine. This doctrine “holds that legislative provisions which, in pith and substance, fall outside the jurisdiction of the government that enacted them, may be upheld on the basis of their connection to a valid legislative scheme”.⁵¹ The leading authority on the ancillary powers doctrine is *General Motors of Canada Ltd. v. City National Leasing Ltd.*⁵² There Dickson C.J.C. announced a three-part test for assessing whether an “extra-jurisdictional incursion”⁵³ is severe enough to defeat the constitutional validity of the impugned sections of an otherwise valid statute.⁵⁴ The Court in *General Motors* further directed that the severity of this extra-jurisdictional incursion or “overflow” as it has come to be described⁵⁵ dictated the level of scrutiny to be applied in each particular case where the ancillary powers doctrine is invoked. If the intrusion is minimal, a rational,

⁵⁰ *RAHRA, id.*, at paras. 89 to 122. Interestingly, she admits considerable reservations about the scope of s. 10.

⁵¹ *Id.*, at para. 126.

⁵² [1989] S.C.J. No. 28, [1989] 1 S.C.R. 641 (S.C.C.) [hereinafter “*General Motors*”].

⁵³ The term appears in McLachlin C.J.C.’s opinion in *RAHRA, supra*, note 6, at para. 128. See also *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38, [2010] 2 S.C.R. 453, at para. 35 (S.C.C.), *per* McLachlin C.J.C.

⁵⁴ *Supra*, note 52, at 666-69. The first step is to determine whether the impugned provision intrudes on the other level of government’s powers; if so, the second step is to determine whether the impugned provision is part of a valid legislative scheme; if so, the third step is to determine whether the impugned provision is sufficiently integrated with that scheme. *Id.*, at 666-67. See also *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146, at para. 58 (S.C.C.), *per* LeBel J.; and *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] S.C.J. No. 66, [2005] 3 S.C.R. 302, at para. 21 (S.C.C.), *per* LeBel J.

⁵⁵ The term “overflow” has now become part of our constitutional lexicon after *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3 (S.C.C.). Justices LeBel and Deschamps wrote in *RAHRA, supra*, note 6, at para. 188, that “[a]s a result of some clarifications made in *Canadian Western Bank*, at para. 32, regarding the doctrine of interjurisdictional immunity, we now prefer — rather than speaking of an ‘encroachment’, as in *General Motors, Kirkbi* and *Kitkatla Band* — to use the word ‘overflow’ when discussing the ancillary powers doctrine.”

functional connection test is warranted; however, if the intrusion is substantial, then a more stringent standard of necessity is demanded.

Applying these principles, McLachlin C.J.C. concluded that a standard of rational connection applied to the AHR Act since the impugned provisions “constitute only a minor intrusion on provincial power”.⁵⁶ She offered three reasons for her conclusion. First, the competing heads of provincial power—property and civil rights (section 92(13)), and matters of a merely local or private nature (section 92(16)), are broad with the consequence that any intrusion by a federal statute into these particular heads of provincial legislative power is by definition less serious and more tolerable.⁵⁷ Second, the impugned sections relate to administration and enforcement of the AHR Act. Consequently, they touch upon only “a small corner of the vast topography of the provincial power over health: namely, the harmful aspects of assisted human reproduction”.⁵⁸ Third, history appears to support legislation of this kind, as “Parliament has long sought to address issues of morality, health and security” through the criminal law power.⁵⁹

One of the criticisms levelled against the *General Motors* “severity of the intrusion test” is that it is overly subjective, and malleable enough to accommodate the jurisprudential preferences of the reviewing court.⁶⁰ Indeed, once the operative test is identified, the die is usually cast in most cases. Since McLachlin C.J.C. had already ruled that morality was the predominant criminal law objective sought to be advanced by the AHR Act with public health being relegated to a peripheral role, it was not too difficult to deduce that any invasion of provincial legislative jurisdiction over health very likely will be viewed as minimal.⁶¹ As a consequence, the information and access to information provisions in sections 14 to 19 satisfied the rational connection standard because “[f]unctionally, they fill gaps that would otherwise undermine the

⁵⁶ *RAHRA, id.*, at para. 136.

⁵⁷ *Id.*, at para. 134.

⁵⁸ *Id.*, at para. 135.

⁵⁹ *Id.*, at para. 136.

⁶⁰ See, e.g., Peter W. Hogg, *Constitutional Law in Canada*, looseleaf (Scarborough, ON: Carswell), at 15-43. Chief Justice McLachlin acknowledged Hogg’s concern but asserted that it need not be determined in this *Reference: supra*, note 6, at para. 127.

⁶¹ In coming to this conclusion, McLachlin C.J.C. made no reference to the important intervention filed by Dr. Michael Awad, a medical doctor trained in assisted human reproductive technologies and licensed to practice in this area of medicine by the College of Physicians and Surgeons of Alberta but who was unable to obtain a licence under the AHR Act: see note 78, *infra*.

operation of the prohibition regime.”⁶² For similar reasons, the various organizational, administrative and enforcement provisions found in the statute were sustained as they assisted the proper functioning of the legislative scheme.⁶³

2. The Joint Opinion of Justices LeBel and Deschamps

Justices LeBel and Deschamps came to the opposite conclusion arrived at by McLachlin C.J.C. They ruled that apart from a handful of absolute prohibitions, the pith and substance of the balance of the AHR Act is the regulation of assisted reproduction technologies as a public health service. These matters more properly were anchored in provincial heads of power in relation to the management of hospitals (subsection 92(7)); to “essential aspects of the relationship between a physician and persons who require assistance of reproduction”,⁶⁴ and to the practice of medicine,⁶⁵ all matters traditionally regulated under sections 92(13) and 92(16) of the *Constitution Act, 1867*. Indeed, the AHR Act intruded so significantly into such areas of exclusive provincial legislative jurisdiction it could not be sustained under the ancillary powers doctrine. Their philosophical approach to federalism differs starkly from McLachlin C.J.C.’s, and informs the whole of their analysis of the division of powers issues presented in *RAHRA*.

They began their judgment by underscoring the primacy of the federal principle throughout the division of powers analysis. In *Reference re Secession of Quebec*,⁶⁶ the Supreme Court identified federalism as a fundamental organizing principle informing constitutional interpretation and the “lodestar by which the courts have been guided”.⁶⁷ For LeBel and Deschamps JJ. this principle means “the powers of the different levels of government in a federation are co-ordinate, not subordinate, powers”, and if functioning correctly “a government does not encroach on the powers of the other level of government.”⁶⁸ An element of the federal principle to which they ascribe great relevance is the principle of

⁶² *RAHRA, supra*, note 6, at para. 141.

⁶³ *Id.*, at paras. 147-151.

⁶⁴ *Id.*, at para. 265.

⁶⁵ *Id.*, at para. 266.

⁶⁶ [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.).

⁶⁷ *Id.*, at para. 56.

⁶⁸ *RAHRA, supra*, note 6, at para. 182.

subsidiarity which holds that “legislative action is to be taken by the government that is closest to the citizen and is thus considered to be in the best position to respond to the citizen’s concerns.”⁶⁹ These unwritten principles gain heightened significance when expansive heads of federal or provincial legislative power are engaged as they help “to maintain the constitutional balance of powers at all stages of the constitutional analysis”.⁷⁰

Like McLachlin C.J.C., LeBel and Deschamps JJ. believed *RAHRA*’s ultimate result turned in large measure on the application of the ancillary powers doctrine.⁷¹ At the same time, they did not follow her loose approach to the pith and substance inquiry. Rather, LeBel and Deschamps JJ. advocated a rigorous pith and substance analysis particularly in disputes where capacious federal and provincial heads of legislative power like criminal law and procedure (section 91(27)), and property and civil rights in the province (section 92(13)) are in tension. They explained why such rigour is warranted:

It is important to identify the pith and substance of the impugned provisions as precisely as possible. A vague or general characterization of the pith and substance could have perverse effects on more than one level: first on the connection with an exclusive power and then on the extent of the overflow. For example, a finding that a provision is in pith and substance in relation to health or to the environment would be problematic. Those subjects are so vast and have so many aspects that, depending on the angle from which they are approached, they can support the exercise of legislative powers of either level of government. It is therefore necessary to take the analysis further and determine what aspect of the field in question is being addressed ... The identification of the pith and substance of a provision or a statute is therefore subject to the same requirement of precision as the identification of the purpose of a provision establishing a limit in the context of the infringement of a right in an analysis under s. 1 of the *Canadian Charter of Rights and Freedoms*. In both cases, properly identifying the purpose forms the cornerstone of the analysis ... If vague characterizations of the pith and

⁶⁹ *Id.* The relevance of the doctrine of subsidiarity to the analysis is discussed more fully by Eugénie Brouillet, “Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora’s Box?” in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 601. For another view about the doctrine’s relevance in division of powers analysis, see Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74 Sask. L. Rev. 21, at 26ff.

⁷⁰ *RAHRA*, *id.*, at para. 196.

⁷¹ *Id.*, at para. 267.

substance of provisions were accepted, this could lead not only to the dilution of and confusion with respect to the constitutional doctrines that have been developed over the years, but also to an erosion of the scope of provincial powers as a result of the federal paramountcy doctrine.

In sum, the need for precision in characterizing the pith and substance of a statute or a provision assumes greater importance where a connection must be made with a power whose limits are imprecise. In the event of uncertainty, it becomes necessary to turn to the broader, unwritten rules that serve as the basis of and provide a framework for Canadian federalism[.]⁷²

When attempting to characterize the AHR Act's purpose, LeBel and Deschamps JJ. took into account its legislative text and context. For them, this included having regard to the Final Report of the Baird Commission. Despite McLachlin C.J.C.'s overt criticism of their approach⁷³ LeBel and Deschamps JJ. concluded that the statute's architecture — comprised of prohibited activities and controlled activities — demonstrates that Parliament "adopted the two recommendations of the Baird Commission unconditionally".⁷⁴ In addition, they noted that medical research had rapidly evolved since the release of the Commission's Report with the result assisted human reproductive technologies no longer are viewed as "a social 'evil'"⁷⁵ Instead, they represent "a form of scientific progress that is of great value to individuals dealing with infertility problems".⁷⁶ For LeBel and Deschamps JJ. the legislative purpose animating the AHR Act was not predominantly to control a matter of public morality as found by McLachlin C.J.C. Only the absolute prohibitions could be characterized in this way. Instead, their analysis led them to opine that the bulk of the AHR Act pertained to the regulation of medical research, health professionals and the provisions of health services.

These judges discovered that a careful assessment of the effects of the impugned provisions particularly those relating to controlled activities of the

⁷² *Id.*, at paras. 190-191 (citations omitted). For a most illuminating discussion of the importance of identifying a legislative objective with precision for the purposes of s. 1 analysis, see *Reference re Saskatchewan (Marriage Act, Marriage Commissioners)*, [2011] S.J. No. 3, [2011] 3 W.W.R. 193, at paras. 110-153 (Sask. C.A.), *per* Smith J.A. (Vancise J.A. concurring).

⁷³ *RAHRA, id.*, at para. 29. ("The Baird Commission was writing a policy analysis (not a constitutional law paper), on a subject thought to raise serious issues of morality.")

⁷⁴ *Id.*, at para. 210.

⁷⁵ *Id.*, at para. 212.

⁷⁶ *Id.*, at para. 213.

AHR Act substantiated their characterization of its legislative purpose. Many of these provisions, they determined, seriously interfere with the practice of medicine. In particular, they cited the consent provision in section 8 as having a “direct impact on the relationship between physicians called upon to use assisted reproductive technologies, donors, and patients”,⁷⁷ and the various sections which “require researchers and physicians who engage in activities related to treatments for infertility to obtain licences” from the Agency, activities traditionally falling within provincial legislative jurisdiction.⁷⁸ Their examination of the AHR Act in keeping with the rigorous inquiry necessary to identify the pith and substance which they advocated at the outset of their joint opinion led them to conclude:

[T]he purpose and effects of the provisions in question relate to the regulation of a specific type of health services provided in health-care institutions by health-care professionals to individuals who for pathological or physiological reasons need help to reproduce. *Their pith and substance must be characterized as the regulation of assisted human reproduction as a health service.*⁷⁹

Justices LeBel and Deschamps’ characterization of the AHR Act’s pith and substance as being in relation to public health services manifested a significant disagreement with McLachlin C.J.C.’s philosophical approach to the pith and substance inquiry. These judges acknowledged that federal legislative action based upon morality can be a legitimate exercise of the criminal law power. At the same time, they cautioned that “care must be taken not to view every social, economic or scientific issue as a moral problem.”⁸⁰ In their view, McLachlin C.J.C.’s overly deferential acceptance of the federal government’s defence of the AHR Act as a public morality measure meant Parliament only had to demonstrate “a

⁷⁷ *Id.*, at para. 220.

⁷⁸ *Id.*, at para. 221. The effect of these requirements is that qualified medical practitioners could not practice assisted reproductive technologies if they did not possess a licence issued under the AHR Act, a reality attested to by Dr. Michael Awad, who filed a personal intervention in this *Reference*: Factum of the Intervener, Michael Awad (on file with author). Paragraph 2 outlines Dr. Awad’s dilemma as follows:

Dr. Awad is a physician in Red Deer, Alberta. He has undertaken intensive training in the area of in vitro fertilization (“IVF”), following 11 years experience as a specialist obstetrician and gynecologist. He is unable to pursue this practice because of the requirement that he obtain a licence under the [AHR Act], pursuant to regulations that currently do not exist.

Not one of the three opinions rendered in *RAHRA* referred to Dr. Awad’s important intervention.

⁷⁹ *Id.*, at para. 227 (emphasis added).

⁸⁰ *Id.*, at para. 239.

reasonable basis to expect that its legislation will address a concern of fundamental importance”⁸¹ for it to succeed. Were this the accepted standard for federalism purposes, it would extend the criminal law power to the point it could evade effective judicial review, and jeopardize “the constitutional balance of the federal-provincial division of powers”.⁸²

For LeBel and Deschamps JJ. more rigour needed to be brought to the pith and substance inquiry not only in the characterization of the AHR Act’s purpose but also in considering whether it could be allocated to the criminal law power. They noted that when dealing with legislation in relation to the protection of public health, courts, generally speaking, have been less deferential to Parliament’s reliance on the criminal law power if the public health risk sought to be regulated “could not be easily demonstrated”⁸³ through empirically-based scientific research. For example, well documented and devastating health risks associated with tobacco consumption supported the extensive regulation of tobacco advertising under section 91(27) in *RJR-MacDonald*⁸⁴ while the failure to establish a clear link between the use of margarine and human disease defeated the law at issue in the *Margarine Reference*.⁸⁵ Rigorous scrutiny is warranted because criminal laws motivated by public health concerns invariably intrude some distance onto provincial legislative jurisdiction over health related matters.

The wide-ranging regulation of assisted reproductive technologies found in the AHR Act lacked such linkages. Indeed, certain technologies such as artificial insemination and *in vitro* fertilization have now been added to the list of basic services underwritten by the public health insurance plans of provinces like Ontario and Quebec.⁸⁶ Justices LeBel and Deschamps concluded that assisted human reproduction is not “an evil needing to be suppressed”; rather, it “is a burgeoning field of medical practice and research that, as Parliament mentions in s. 2 of the

⁸¹ *Id.*, at para. 238

⁸² *Id.*, at para. 239.

⁸³ *Id.*, at para. 241.

⁸⁴ *Supra*, note 34.

⁸⁵ *Supra*, note 42.

⁸⁶ *RAHRA*, *supra*, note 6, at paras. 248-251. Not all provinces include such services as part of their provincial health insurance scheme, however. It has been concluded that a government’s decision not to underwrite assisted reproductive technologies from the public treasury does not violate the *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 [hereinafter “Charter”]): see *Cameron v. Nova Scotia (Attorney General)*, [1999] N.S.J. No. 297, 177 D.L.R. (4th) 611 (N.S.C.A.), leave to appeal refused [2000] 1 S.C.R. vii (S.C.C.).

AHR Act, brings benefits to many Canadians”.⁸⁷ They accept that many of the new and emerging assisted human reproduction technologies qualify as novel. However, this reality cannot justify extensive regulation by the federal government under the criminal law power, otherwise “nearly every new medical technology could be brought within federal jurisdiction.”⁸⁸

The various types of matters which the Supreme Court has permitted to be regulated under section 91(27) of the *Constitution Act, 1867* fulfil a typical criminal public purpose.⁸⁹ These include tobacco advertising,⁹⁰ the emission of toxic substances into the environment,⁹¹ and the improper use of firearms,⁹² all of which are activities which can threaten public health and safety. Even abortion which until 1988 had been closely regulated under the *Criminal Code* had a lengthy historical pedigree as a criminal law measure.⁹³ In contrast, assisted human reproduction technologies are neither obviously harmful to public health nor historically subject to regulation under the criminal law. Apart from the absolute prohibitions against the most reprehensible technologies, the balance of the AHR Act strayed far afield from the traditional subject matters of the criminal law.

Despite the “overflow of the exercise of the federal criminal law power”⁹⁴ occasioned by the impugned sections, LeBel and Deschamps JJ. were prepared to consider whether it may be possible to salvage some or all of them through the operation of the ancillary powers doctrine. Ultimately, however, they concluded that the ancillary powers doctrine did not apply in these circumstances. To begin, they held that the seriousness of the overflow into areas of provincial legislative jurisdiction occasioned by the AHR Act required the federal government to demonstrate “the impugned provisions have a relationship of necessity”⁹⁵

⁸⁷ *RAHRA, id.*, at para. 251.

⁸⁸ *Id.*, at para. 256.

⁸⁹ *Id.*, at para. 237.

⁹⁰ *RJR-Macdonald, supra*, note 34.

⁹¹ *Hydro-Québec, supra*, note 2.

⁹² *Firearms Reference, supra*, note 3.

⁹³ See, e.g., *R. v. Morgentaler (No. 2)*, [1993] S.C.J. No. 95, [1993] 3 S.C.R. 463, at 491 (S.C.C.), per Sopinka J. (“As early as the mid-nineteenth century, with the adoption of legislation imitating *Lord Ellensborough’s Act* (U.K.), 43 Geo. 3, c. 58, through the time of Confederation and up to the 1969 amendments to the *Criminal Code* ... the criminal law in Canada prohibited abortions with penal consequences”.)

⁹⁴ *RAHRA, supra*, note 6, at para. 267.

⁹⁵ *Id.*, at para. 275.

and not simply a functional connection with those sections found or conceded to be constitutional.

They reasoned that this high standard could not be satisfied principally for two reasons. First, since the absolute prohibitions found in the AHR Act did not depend upon its extensive regulatory scheme to be effective, any connection between the prohibitory and regulatory aspects of the statute is “artificial”.⁹⁶ The prohibitions covered those assisted reproductive technologies Parliament deemed to be reprehensible while the regulatory aspects pertained to processes and technologies deemed to be legitimate. The AHR Act amounted to an impermissible commingling of “provisions falling within provincial jurisdiction with others that in fact relate to the criminal law”.⁹⁷ Second, the legislative history of the AHR Act but also the history of regulating medical procedures related to assisted human reproduction did not connect the impugned provisions to the criminal law. Accordingly, all of the impugned sections containing the regulatory as opposed to the prohibitory framework of the AHR Act were declared *ultra vires* Parliament.

Justices LeBel and Deschamps’ approach is consistent with the Supreme Court’s direction in *Canadian Western Bank v. Alberta*⁹⁸ that for federalism purposes when the content of a particular statute overflows into the legislative jurisdiction of the other level of government, “a firm application of the pith and substance analysis” is warranted because the “scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power.”⁹⁹ This is exactly what these judges discovered as they analyzed the impugned aspects of the AHR Act, namely, provisions which on their face appear to operate as exceptions to criminal prohibitions are revealed as sections extensively regulating matters falling within provincial heads of power.

⁹⁶ *Id.*, at para. 278.

⁹⁷ *Id.*, citing *Scowby v. Glendinning*, [1986] S.C.J. No. 57, [1986] 2 S.C.R. 226 (S.C.C.), in support of this proposition.

⁹⁸ *Supra*, note 55.

⁹⁹ *Id.*, at para. 31 (emphasis added).

3. The Opinion of Justice Cromwell

Justice Cromwell's brief opinion serves as the "tie-breaker" in *RAHRA*.¹⁰⁰ Although at times his reasoning borders on the Delphic, it is apparent his ultimate conclusion is driven by his considered assessment of the integration of the regulatory aspects of the AHR Act with its purely prohibitory, and by definition criminal, aspects. At bottom, he views *RAHRA* as testing the limits of the criminal law power's regulatory function. Indeed, he characterizes the central issue this way: "The main question, as I see it, is whether the federal criminal law power permits Parliament to regulate virtually all aspects of research and clinical practice in relation to assisted human reproduction."¹⁰¹

Respecting the pith and substance analysis, Cromwell J. characterized the AHR Act in a manner far more devastating to the Government of Canada than did the other judges. He aligned himself squarely with the Quebec Court of Appeal's characterization of the AHR Act¹⁰² which "goes far beyond"¹⁰³ the characterization of this legislation identified by LeBel and Deschamps JJ., namely, regulating assisted human reproduction as a public health service. In Cromwell J.'s assessment the intensely regulatory aspects of the statute constitute "minute regulation of every aspect of research and clinical practice" and are "best classified as being in relation to three areas of exclusive provincial legislative competence: the establishment, maintenance and management of hospitals [section 92(7)]; property and civil rights in the province [section 92(13)]; and

¹⁰⁰ For an elaborate and provocative analysis of law, adjudication and judges as tie breakers in a democratic society, see Adam M. Samaha, "On Law's Tiebreakers" (2010) 77 U. Chicago L. Rev. 1661, esp. at 1717-37.

¹⁰¹ *Supra*, note 6, at para. 283.

¹⁰² *Id.*, at para. 285. Justice Cromwell specifically referred to paras. 121-122 of the Quebec Court of Appeal's judgment in *RAHRA*. In those paragraphs the lower court stated:

With respect to everything that is not subject to a total prohibition, the [AHR Act] constitutes a complete code governing all clinical and research activities relating to assisted reproduction. In fact Parliament first of all empowers the government to regulate more than 25 areas of activity related to assisted reproduction ... It then creates the Agency, on which it confers the double mandate of qualifying and licensing establishments and persons involved in assisted reproduction activities ... and of overseeing the application of the Act.

.....

This short and simplified summary of the Act reveals the legislative intent is to cover the entire field of assisted reproduction, with respect to both clinical practice and research. In this respect, the Act may be characterized as comprehensive and exhaustive legislation on the subject, just as the Baird Commission wished.

Quebec Reference, supra, note 12, at paras. 121-122 (emphasis added).

¹⁰³ *RAHRA, supra*, note 6, at para. 286.

matters of a merely local or private nature in the province [section 92(16)]”.¹⁰⁴ As a consequence, he concludes that the various impugned sections of the AHR Act do not further any criminal law purpose currently recognized by the Supreme Court’s section 91(27)’s jurisprudence.

It is at this point where Cromwell J.’s reasoning becomes somewhat obscure. While he finds no criminal law purpose being advanced by the impugned sections collectively, he accepts that certain specific provisions “to the extent that they relate to provisions of the [AHR Act], which are constitutional, were properly enacted by Parliament in accordance with the federal criminal law power”.¹⁰⁵ It is not entirely apparent, however, on what he bases his conclusion. Is it because these particular sections fall within the criminal law power’s regulatory capacity and, therefore, qualify as being validly enacted under section 91(27)? Or are they legitimated through the application of the ancillary powers doctrine by virtue of the strength of their connection to provisions of the AHR Act validly enacted pursuant to section 91(27)?

Close scrutiny reveals that Cromwell J. employed both bases depending on the nature of the particular provision at issue. While Cromwell J.’s philosophical approach to the division of powers issue is more compatible with that of LeBel and Deschamps JJ., he appears more willing than they to afford greater scope to the operation of both the criminal law power and the ancillary powers doctrine than his Quebec colleagues.

First, he accepted that a handful of the impugned sections either fall within the traditional boundaries of the criminal law or function as exceptions to criminal prohibitions set out in the AHR Act the constitutionality of which were not impugned. These included provisions relating to consent and age of consent found in sections 8 and 9, matters often addressed by the criminal law in other contexts.¹⁰⁶ While not a traditional criminal law measure, the exception for certain commercial activities set out in section 12 serves as “a form of exemption ... and to some extent, defines the scope of the prohibitions” on the commercialization of reproductive functions set out in sections 6 and 7 of the statute.¹⁰⁷ These particular provisions though they incidentally affect matters falling within provincial legislative authority can be classified as relating to

¹⁰⁴ *Id.*, at para. 287.

¹⁰⁵ *Id.*, at para. 292.

¹⁰⁶ *Id.*, at para. 289.

¹⁰⁷ *Id.*, at para. 290.

matters falling within the traditional domain of the criminal law. For this reason, Cromwell J. concludes they are validly enacted pursuant to section 91(27) of the *Constitution Act, 1867*.

To sustain certain of the other impugned provisions, Cromwell J. appeared to apply the ancillary powers doctrine without expressly identifying that he is doing so. Instead, he was content to reference it indirectly by citing two of its foundational precedents.¹⁰⁸ His cryptic application of this doctrine leaves certain questions unanswered not the least of which is by what standard does he measure how the doctrine is to be assessed: the functional connection standard or the necessity standard? In view of his strongly expressed conclusion that the impugned sections intrude or overflow significantly into matters strongly anchored in areas of exclusive provincial legislative jurisdiction, it is possible to surmise that he, like LeBel and Deschamps JJ., applied a test of necessity. Justice Cromwell underscored that the licensing, inspection and enforcement provisions are constitutionally acceptable provided their operation is tied directly to those sections of the AHR Act which are valid exercises of the criminal law power. Regulatory provisions of this kind are needed to facilitate the smooth operation of the prohibitions; yet, there must be a close and direct connection between the regulatory and prohibitory sections.

In view of its pivotal importance to the outcome of *RAHRA*, not to mention its significance to the doctrinal evolution of section 91(27) of the *Constitution Act, 1867*, it is unfortunate that Cromwell J. was not more expansive in setting forth his reasoning in his short opinion. As a result, one is left to divine much of his intent. At the same time, however, it cannot be denied he is uncomfortable with the relaxed approach toward the elasticity of the criminal law power embraced by McLachlin C.J.C. and her allies. While Cromwell J. accepts some regulatory capacity in the contemporary interpretation criminal law power, he sees keenly the need to maintain the constitutional balance of legislative powers requiring firm limitations upon its evolution. He is assiduous in ensuring section 91(27) does not by stealth emerge as a general regulatory power for Parliament.

¹⁰⁸ *Id.*, at para. 288. These two precedents are: *Canada (Attorney General) v. Canadian National Transportation Ltd.*, [1983] S.C.J. No. 73, [1983] 2 S.C.R. 206 (S.C.C.), and *General Motors, supra*, note 52.

IV. ANALYSIS

No other head of federal legislative power in the *Constitution Act, 1867* is potentially as capacious as section 91(27). As a consequence, its loose application would swallow up much of provincial legislative jurisdiction and disrupt the division of federal and provincial legislative powers. Unfortunately, what qualifies as valid criminal law is often difficult to discern. “Criminal law is easier to recognize than to define,” Estey J. observed in *Scowby v. Glendinning*;¹⁰⁹ “[i]t is easier to say what is not criminal law than what is.”¹¹⁰ This lack of clarity means the Supreme Court must be vigilant and place limits upon the emerging contemporary trend to expand the criminal law power since “a limitless definition, combined with the doctrine of paramountcy, has the potential to upset the constitutional balance of federal-provincial powers.”¹¹¹

Historically, the jurisprudential debate centred on how to define criminal acts. In more recent times, particularly in the final decades of the 20th century the focus of this debate has shifted from assessing what constitutes a valid criminal law purpose and by extension what may qualify as a crime, to how far is the reach of the criminal law power’s regulatory function. At least since 1924 and the Privy Council’s ruling in *Ontario (Attorney General) v. Reciprocal Insurers*¹¹² it has been generally accepted that Parliament cannot through the formal mechanism of a criminal offence, namely, the creation of a prohibition coupled with a penalty, purport to regulate matters falling squarely within provincial legislative jurisdiction. Justice Duff (as he then was) writing for the Judicial Committee in that appeal stated that “to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which ... was ‘not to weld the Provinces into one or to subordinate

¹⁰⁹ *Supra*, note 97.

¹¹⁰ *Id.*, at 236. Chief Justice McLachlin makes a similar observation in her opinion in *RAHRA*, *supra*, note 6, at paras. 40-43 (“Much judicial ink has been spilled in attempting to elucidate a precise definition of a valid criminal law purpose.”)

¹¹¹ *RAHRA*, *id.*, at para. 43, *per* McLachlin C.J.C. A good example of where the Supreme Court has previously put the brakes to a limitless criminalization of conduct is *R. v. Boggs*, [1981] S.C.J. No. 6, [1981] 1 S.C.R. 49 (S.C.C.). There, Estey J. struck down certain provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, that attached criminal consequences to driving offences under provincial law, conduct unrelated to any criminal offence.

¹¹² [1924] A.C. 328 (P.C.).

the Provincial Governments to a central authority’.”¹¹³ In other words, this would offend the federal principle.

Over the decades courts began to shed this minimalist view of a regulatory function for the criminal law power. In particular under the guise of section 91(27), the Supreme Court tolerated the creation of exemptions from criminal prohibitions because they provide to Parliament some flexibility in defining the prohibited conduct and designing the criminal offence.¹¹⁴ Yet, the power to create exemptions had to be ancillary to the prohibition which after all is the primary function of the criminal law. If, however, exemptions and dispensations overwhelmed the prohibitions, and the offence provisions proved incidental to the enforcement of social norms, the law’s essence or dominant purpose is regulatory in nature and not criminal. Activities which are not *per se* criminal in nature or are otherwise exempt from the taint of criminality should not be regulated by Parliament under section 91(27), unless a jurisdictional source can be located in another head of federal legislative power.¹¹⁵

In spite of this earlier history which accepted a restricted regulatory role for the criminal law power, the Supreme Court more recently has approved of highly intrusive and sweeping regulatory measures as legitimate exercises of the criminal law power. For example, in *Hydro-Québec*¹¹⁶ an elaborate regulatory mechanism created under the *Canadian Environmental Protection Act*¹¹⁷ for identifying toxic substances was sustained on the basis that Part II of this statute prohibited through penal sanction the unauthorized use of those substances. The most recent example of a robust regulatory regime being sustained under section 91(27) is the *Firearms Reference*.¹¹⁸ There the *Firearms Act* established licensing and registration requirements for all firearms, including rifles and shotguns. The Supreme Court in an unattributed opinion accepted

¹¹³ *Id.*, at 342-43 (citations omitted), quoting Lord Watson in *Maritime Bank of Canada v. Receiver General of New Brunswick*, [1892] A.C. 437, at 441 (P.C.).

¹¹⁴ See especially: *R. v. Morgentaler*, [1975] S.C.J. No. 48, [1976] 1 S.C.R. 616 (S.C.C.); *R. v. Furtney*, [1991] S.C.J. No. 70, [1991] 3 S.C.R. 89 (S.C.C.), and *RJR-MacDonald*, *supra*, note 34.

¹¹⁵ See, e.g., *Furtney*, *id.*, at 103, and *Horsemen’s Benevolent & Protective Assn. of Alberta v. Alberta (Racing Commission)*, [1989] A.J. No. 1151, 63 D.L.R. (4th) 609, at 615-17 (Alta. C.A.), leave to appeal refused, [1990] 1 S.C.R. viii (S.C.C.).

¹¹⁶ *Supra*, note 2. It should be recalled that the result achieved in *Hydro-Québec* was razor-thin (5-4). Justice La Forest (L’Heureux-Dubé, Gonthier, Cory and MacLachlin JJ. concurring) wrote for the majority upholding the impugned legislation. Chief Justice Lamer and Iacobucci J. (Sopinka and Major JJ. concurring) filed a joint opinion declaring it *ultra vires* Parliament.

¹¹⁷ R.S.C. 1985, c. 16 (4th Supp.).

¹¹⁸ *Supra*, note 3.

that “[g]un control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety.”¹¹⁹ As a result, the Court ruled the impugned statute fulfilled a valid criminal law purpose. In both cases, however, it might be said that the tail appeared to be wagging the dog!

This brief chronology underscores why many constitutional lawyers consider *RAHRA* to be such a significant case. The AHR Act is predominantly a regulatory statute pertaining to subject matters generally understood as falling within exclusive provincial legislative jurisdiction. Previously, Parliament had not sought to employ the criminal law power to regulate so pervasively matters such as medical research, medical procedures or the medical profession. To be sure, it may be laudable to establish national benchmarks for the provision of assisted reproductive technologies. The Baird Commission fervently desired such a result. Yet, pan-Canadian norms in the provision of health care services and health-related matters have to be achieved with regard to well-established principles regarding the constitutional division of federal and provincial legislative powers. The majority of the Supreme Court in *RAHRA* is surely correct when it states that recourse to section 91(27) cannot “be based solely on concerns for efficiency and consistency, as such concerns, viewed in isolation, do not fall under the criminal law”¹²⁰.

The judicial push back in *RAHRA* to Parliament’s attempt in the AHR Act to expand yet again section 91(27)’s regulatory capacity was achieved principally through the majority’s approach to the characterization function of the pith and substance inquiry and the ancillary powers doctrine. Together, the Supreme Court’s interpretation of these two principles of constitutional analysis reveals that not only must boundaries on the regulatory aspect be established but also at the moment these boundaries seem fragile and may depend upon the philosophical proclivities of reviewing judges.

The fragility of the Supreme Court’s boundary setting in *RAHRA* is best illustrated by the differences in the characterization analysis undertaken in all three judgments. Chief Justice McLachlin identified morality as the dominant purpose of the AHR Act with health and security of the person as being secondary. Justices LeBel and Deschamps selected the provision of public health services as the core-subject matter addressed

¹¹⁹ *Id.*, at 804, para. 33.

¹²⁰ *Supra*, note 6, at para. 244, *per* LeBel and Deschamps JJ., and at para. 287, *per* Cromwell J.

by the impugned provisions. Justice Cromwell went even farther determining that the impugned sections purported to regulate all manner of medical research and clinical practice in relation to assisted reproductive technologies. The reason for the stark discrepancy between these judges when characterizing the dominant legislative purpose of the legislation is exemplified by McLachlin C.J.C.'s relaxed approach to the task of characterizing the legislation's objective. An important element of *RAHRA* is the discipline which LeBel and Deschamps JJ. advocate is necessary when ascertaining an impugned law's pith and substance generally, but especially when Parliament seeks to sustain a law under the criminal law power. Their joint opinion is important because a majority of the Supreme Court has again directed that the characterization exercise is a rigorous one and if undertaken properly should avoid vague or overly broad characterizations particularly in the context of general heads of legislative power.¹²¹ It is exceptional because for the first time in federalism jurisprudence a majority analogized this task to identifying a legislative objective for purposes of section 1 of the *Canadian Charter of Rights and Freedoms*,¹²² a potentially groundbreaking doctrinal shift.

In *RAHRA*, the dominant purpose or aspect each judge identified for the AHR Act in effect determined the outcome of their division of powers analysis. For McLachlin C.J.C. the selection of public morality meant that the health related aspects of the impugned provisions were purely incidental and their overflow into provincial legislative authority deemed minimal. For the other five judges, the selection of health regulation as the dominant objective¹²³ firmly anchored the pith and substance of the impugned provisions in provincial legislative jurisdiction. It followed that these significant regulatory aspects of the AHR Act could only be sustained if it could be demonstrated these were needed to ensure the proper functioning of the statute as a whole. Disagreement emerged among those judges, however, about which of the impugned sections could be described as essential. For purposes of my thesis the source of this disagreement is not important. Rather, what is significant is that five members of the Court employed a stringent pith and substance

¹²¹ See especially *Canadian Western Bank*, *supra*, notes 98 and 99 and accompanying text.

¹²² *Supra*, note 86.

¹²³ This characterization extended in Cromwell J.'s formulation to "virtually every aspect of research and clinical practice in relation to assisted human reproduction": *RAHRA*, *supra*, note 6, at para. 285.

analysis together with a strict application of the ancillary powers doctrine to cabin excessive regulation under the guise of section 91(27) of the *Constitution Act, 1867* of matters falling squarely within section 92.

To be sure, the close result achieved in *RAHRA* means it will be necessary to await other division of powers rulings from the Supreme Court to assess whether this judgment does mark a watershed in federalism analysis. It is apparent that certain judges have grown concerned, even alarmed about the growing regulatory function with which Parliament continues to imbue the criminal law power. This is an encouraging signal for those worried by the subtle yet real shift in the constitutional balance of powers between the national and provincial governments achieved through section 91(27). Indeed, it has already made its presence felt in lower courts. For example, very recently *RAHRA* influenced the analysis of the Alberta Court of Appeal in *Reference re Securities Act (Canada)*¹²⁴ to hold that widespread economic regulation such as that contemplated in the proposed Canadian *Securities Act*¹²⁵ could not be attained under section 91(27) because it is too far removed from traditional criminal law purposes of prohibiting and sanctioning fraudulent conduct.¹²⁶

The next opportunity for the Supreme Court to test the durability of the federalism analysis advocated in *RAHRA* will be *Reference re Canadian Securities Act (Can.)*.¹²⁷ There the Court must decide if the proposed Canadian *Securities Act* is a valid exercise of Parliament's jurisdiction to legislate under the trade and commerce power located in section 91(2) of the *Constitution Act, 1867*. The draft federal statute emulates, if not entirely duplicates, many aspects of existing and constitutionally valid provincial securities laws. To be sure, in contrast to its American counterpart¹²⁸ the elasticity of the Canadian trade and com-

¹²⁴ [2011] S.J. No. 228, 332 D.L.R. (4th) 697 (Alta. C.A.).

¹²⁵ R.S.A. 2000, c. S-4.

¹²⁶ *Supra*, note 124, at paras. 31-32, *per* Slatter J.A. for the Court. On March 31, 2011, the Quebec Court of Appeal (Dalphond J.A., dissenting) also declared the Proposed Canadian *Securities Act ultra vires* Parliament: see *Quebec (Procureure générale) c. Canada (Procureure générale)*, [2011] J.Q. no 2940, 2011 QCCA 591 (Que. C.A.). Indeed, the plurality of Forget, Bich and Bouchard J.J.A. relied heavily on *RAHRA* in their pith and substance analysis: see *Quebec (Procureure générale) c. Canada (Procureure générale)*, *id.*, especially at paras. 236, 238, 239 and 297.

¹²⁷ S.C.C. No. 33718. This reference is currently under reserve following the hearing before the Supreme Court of Canada on April 13 and 14, 2011.

¹²⁸ Article I, Section 8 of the United States Constitution provides in part that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." For an important recent case on the Commerce Clause, see: *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), in which the United States Supreme

merce power has not been truly tested. While section 91(2) engages different considerations than the criminal law power, its potential to overflow significantly into areas of exclusive provincial legislative jurisdiction cannot be underestimated. Unbridled it would devastate the current balance of constitutional powers in relation to financial regulation in Canada. I refrain from elaborating further on this subject here except to say a wholesale endorsement of the draft federal legislation by the Supreme Court would be a not-too-subtle signal that in the 21st century, Canada's federal structure is outmoded and no longer capable of regulating satisfactorily economic matters in a globalized world.

V. WHAT'S NEXT? — FUTURE HEALTH REGULATION AND REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES

In light of the AHR Act's troubled history, not to mention that of its antecedents, the result in *RAHRA* may be viewed as a final blow to achieving national regulatory standards in relation to assisted reproductive technologies. Such pessimism is unwarranted. Nothing in *RAHRA* forbids the continued but careful use of the criminal law to regulate certain aspects of health related matters nor does it foreclose pan-Canadian regulation of assisted reproductive technologies. This Part will discuss the future implications of *RAHRA* both as they pertain to health regulation generally and to the regulation of assisted reproductive technologies particularly.

1. Health Regulation Generally

To be sure, section 91(27) of the *Constitution Act, 1867* has accommodated regulation of health-related matters provided it seeks to secure the "physical health and safety of the public".¹²⁹ Such regulation is tolerated when the laws in question, for example, pertain to the safety of the food supply;¹³⁰ false or misleading descriptions of products,¹³¹ or

Court (5-4) invalidated a federal law prohibiting individuals from carrying firearms near any school in the nation.

¹²⁹ *R. v. Wetmore (County Court Judge)*, [1983] S.C.J. No. 74, [1983] 2 S.C.R. 284, at 288 (S.C.C.), per Laskin C.J. [hereinafter "*Wetmore*"].

¹³⁰ See, e.g., *Standard Sausage Co. v. Lee*, [1933] B.C.J. No. 79, [1934] 1 W.W.R. 81 (B.C.C.A.), and *Saputo Inc. v. Canada (Attorney General)*, [2011] F.C.J. No. 291, 2011 FCA 69 (F.C.A.). But see: *Margarine Reference*, *supra*, note 42, where the Supreme Court ruled as *ultra*

hazardous materials available for public consumption.¹³² Yet, the Supreme Court declined to interpret section 91(27) so expansively as to accommodate wholesale regulation of the production and distribution of particular foods or drugs absent evidence those substances may be hazardous to health.¹³³

Despite constraints placed by these authorities upon the reach of section 91(27) to regulate health-related matters the federal government has continued to employ the criminal law power for purposes of creating increasingly extensive medical regulatory regimes. A recent case involving such far-reaching regulation is *Apotex Inc. v. Canada (Minister of Health); Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health)*.¹³⁴ Apotex Inc. and the Canadian Generic Pharmaceutical Association jointly attacked the *Data Protection Regulation* (“DPR”) of the *Regulations Respecting Food and Drug*¹³⁵ which created an eight-year period of exclusivity for the manufacturers of innovative drugs by imposing a moratorium on the marketing of all generic copies of drugs previously approved by Health Canada. The impugned regulation had been enacted by the federal government to comply with certain specific data protection provisions of both *NAFTA* and the *WTO Agreement*. This regulatory scheme contained a criminal prohibition against marketing a new drug which did not enjoy Health Canada’s approval. Various grounds of attack to the constitutionality of the DPR were advanced including that it was *ultra vires* section 91(27) of the *Constitution Act, 1867*. The Federal Court of Canada ruled that the DPR did not qualify as criminal law but its constitutionality could be sustained under the trade and commerce power.¹³⁶ The Federal Court of Appeal dismissed a subsequent appeal but disagreed with the lower court about which particular head of federal legislative power supported the DPR’s constitutionality. This Court concluded unanimously that the DPR was valid

vires s. 91(27) a prohibition against the sale of margarine not made from milk or cream found in the *Dairy Industry Act*, R.S.C. 1927, c. 45.

¹³¹ *Wetmore, supra*, note 129.

¹³² *R. v. Cosman’s Furniture (1972) Ltd.*, [1976] M.J. No. 97, 77 D.L.R. (3d) 312 (Man. C.A.) (upholding the *Hazardous Products Act*, R.S.C. 1970, c. H-3, as it purports to regulate to infants’ cribs and cradles).

¹³³ *Labatt Brewing Co. v. Canada (Attorney General)*, [1979] S.C.J. No. 134, [1980] 1 S.C.R. 914, at 934 (S.C.C.), *per* Estey J. for the majority.

¹³⁴ [2010] F.C.J. No. 1582, 2010 FCA 334 (F.C.A.) [hereinafter “*Apotex Inc.*”].

¹³⁵ C.R.C., c. 870.

¹³⁶ *Canadian Generic Pharmaceutical Assn. v. Canada (Minister of Health)*, [2009] F.C.J. No. 938, 2009 FC 725 (F.C.), *per* Mandamin J.

criminal law.¹³⁷ Ultimately, the Supreme Court of Canada denied leave to appeal.¹³⁸

The Federal Court found the dominant objective of the DPR, namely, the implementation of Canada's international trade obligations, did not further a valid criminal law purpose. The impugned regulations effectively granted an eight-year monopoly to large pharmaceutical companies which develop an innovative drug by imposing a lengthy moratorium on approval of any generic form of such a drug. This had "the overall effect of bestowing a commercial benefit to innovator drug manufacturers rather than a safety benefit to the public".¹³⁹ The DPR could not then be characterized as criminal law because it was not "directed at a legitimate public health evil".¹⁴⁰

On appeal, the Federal Court of Appeal ruled that the DPR qualified as criminal law and had been validly enacted by Parliament pursuant to its authority under section 91(27). Justice Nadon who wrote for the Court took issue with Mandamin J.'s characterization of the purpose of the DPR. He described the "true purpose of the DPR" as ensuring "Canadians have reasonable access, at reasonable prices, to new, safe and effective drugs"¹⁴¹ that will "protect the public from the sale of unsafe and/or ineffective drugs while, at the same time, making sure that the public has access to safe and effective drugs".¹⁴² Characterized in this loose fashion, Nadon J.A. upheld the DPR as a valid criminal law.

The Federal Court of Appeal's judgment in *Apotex Inc.* preceded the release of *RAHRA* by mere days; however, Nadon J.A.'s division of powers analysis is inconsistent with the approach to federalism questions advocated by the *RAHRA* majority. The judgments of LeBel and Deschamps JJ., and of Cromwell J., call for close critical scrutiny of the true objectives of impugned legislation particularly when the federal government asserts it is necessary to secure public health and safety. The

¹³⁷ *Supra*, note 134, *per* Nadon J.A. (Sharlow and Layden-Stevenson JJ.A. concurring).

¹³⁸ Leave to appeal to the Supreme Court refused July 14, 2011: [2011] S.C.C.A. No. 53, 2011 CanLII 43416, and [2011] S.C.C.A. No. 54, 2011 CanLII 43415, *per* McLachlin C.J.C., Deschamps and Charron JJ. It is well known that the Supreme Court's dismissal of a leave to appeal application does not represent approval of the lower court's reasoning: see, *e.g.*, *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] S.C.J. No. 53, [1999] 3 S.C.R. 281, at para. 31 (S.C.C.), *per* Binette J.; and *R. v. Côté*, [1977] S.C.J. No. 37, [1978] 1 S.C.R. 8, at 16 (S.C.C.), *per* De Grandpré J.

¹³⁹ *Supra*, note 136, at para. 73.

¹⁴⁰ *Id.*, at para. 77.

¹⁴¹ *Apotex Inc.*, *supra*, note 134, at para. 114.

¹⁴² *Id.*, at para. 122.

fact that the overall legislative scheme fulfils a valid criminal law purpose is not sufficient to legitimate a particular regulatory regime enacted pursuant to that scheme. It may be the distribution of safe patented drugs is a salutary side-effect of the DPR; however, it is obviously not its dominant purpose. Here the public health objectives are quite attenuated from the DPR's avowed purpose. Post-*RAHRA*, the *ratio* of the Federal Court of Appeal's judgment in *Apotex* stands on shaky ground.

RAHRA has been criticized for failing to establish clearer guidelines for medical regulation under the auspices of section 91(27).¹⁴³ This critique is not entirely fair. The criminal law represents a blunt instrument for addressing societal ills and possesses little normative flexibility for careful, let alone, nuanced boundary drawing in matters as intricate and complex as medical research. That said, there are general principles which can be drawn from *RAHRA* around which informed public policy choices may be made in future. To begin with the obvious, *RAHRA* does not disturb the reality that absolute prohibitions on unacceptable medical technologies or research continue to fall squarely within section 91(27). Prohibitions of this kind backed by an offence provision and a penalty clause are the essence of the criminal law. Such prohibitions in the AHR Act were not challenged nor could their validity be contested.

Second, *RAHRA* does not foreclose the continued utility of conditional prohibitions, namely, offences permitting exemptions; however, it limits their reach. This is because the few conditional prohibitions — designated in the AHR Act as “controlled activities” — upheld in *RAHRA* were very narrow in scope.¹⁴⁴ In particular, Cromwell J. accepted that conditional prohibitions upon medical research and technologies are permissible provided the exemption from criminal liability directly assists in defining the scope of the prohibition itself.¹⁴⁵ A

¹⁴³ See, e.g., Barbara von Tigerstrom, “Federal Health Legislation after the *Assisted Human Reproduction Act Reference*” (2011) 74 Sask. L. Rev. 33, at 42-43 [hereinafter “von Tigerstrom”]; and Angela Cameron & Vanessa Gruben, “Quebec’s Constitutional Challenge to the *Assisted Human Reproduction Act*: Overlooking Women’s Reproductive Autonomy” in S. Patterson, F. Scala and M. Sokolon, eds., *Fertile Ground: Exploring Reproduction in Canada* (Montreal: McGill-Queen’s University Press 2011) (forthcoming). (Draft paper found online: <<http://www.commonlaw.uottawa.ca/en/programs/public-law-group/emerging-issues-in-canadian-public-law.html>>).

¹⁴⁴ Indeed, in Cromwell J.’s view only three passed constitutional muster, namely, ss. 8, 9 and 12: *RAHRA*, *supra*, note 6, at paras. 289-291.

¹⁴⁵ *Id.*, at para. 290.

statutory regime which goes beyond these limited purposes and establishes a wide-ranging regulation of all matters relating to such objectives would likely not qualify as criminal law and could only be sustained through a strict application of the ancillary powers doctrine.

Third, it follows that any regulatory scheme created by such exemptions must relate directly to the conduct which is circumscribed by the prohibition. In her article, Professor von Tigerstrom predicts that as long as “the aim of ensuring the safety, efficacy and quality of medical products continues to be accepted as a legitimate criminal law purpose we probably can be quite confident in saying that the regulatory scheme is a means to this end rather than an attempt to regulate medical research and practice *per se*.”¹⁴⁶ With respect, this misreads the majority view in *RAHRA*. The degree of constitutionally acceptable medical regulation under the criminal law power is no longer so open-ended. This is apparent particularly from Cromwell J.’s endorsement of the Quebec Court of Appeal’s characterization of the scope of the regulatory regime contained in the AHR Act.¹⁴⁷ Now, there must be a direct correlation between the particular objective sought to be achieved by the prohibition and the provisions creating the regulatory scheme designed to achieve this objective. It stops far short of permitting wide-ranging regulation of such subjects as processes, procedures, facilities or qualifications of researchers. These subject-matters would appear no longer to fall within legitimate regulation under section 91(27).

It should not occasion surprise that the criminal law power is a crude mechanism to employ for the purpose of closely regulating matters of public health and safety. Despite this fact, courts have tolerated more and more extensive regulatory regimes provided they were ostensibly connected to achieving a public health objective. *RAHRA* restores some balance to the enterprise of utilizing section 91(27) for such purposes. It cabins legitimate health regulation to only those aspects of the subject-matter in question having a direct and obvious relationship to the objective of securing public safety by protecting against a public health evil. This will include establishing baseline standards for medical products, for example, but does not go so far as to authorize broadly based statutory and regulatory framework for attaining those standards. Professor von Tigerstrom laments that *RAHRA* does not assist in drawing

¹⁴⁶ von Tigerstrom, *supra*, note 143, at 42.

¹⁴⁷ See *supra*, note 102.

“difficult distinctions ... in this complex and evolving area”.¹⁴⁸ This, however, is a criticism which may be levelled at all areas of constitutional law. Only general principles can be established while the regulatory details are left to be determined in accordance with these principles. *RAHRA* indicates, at the very least, that federal legislators must proceed with caution when crafting extensive regulation of medical research.

2. Regulation of Assisted Human Reproduction Technologies

The immediate question in *RAHRA*'s wake is whether it is still possible to achieve pan-Canadian standards in the regulation of assisted human reproduction technologies. The answer is “yes” but it will require forbearance by the federal government and a willingness to cooperate by provincial governments. Provincial governments would be ill-advised to walk away from *RAHRA* without taking up some aspects of the jurisdictional authority in respect of this burgeoning and important medical technology which the Supreme Court identified as theirs. If nothing else, political imperatives may spur them to act.

It is true that to date many provincial governments have been reluctant to legislate in the area of assisted reproductive technologies. This reluctance may be due in large measure to uncertainty over a province's ability to legislate in relation to such subject-matter. Parliament's enthusiasm for the AHR Act only fuelled such uncertainty. Yet not all provinces have been reticent. Quebec, for example, following its success in the province's appeals court chose to regulate comprehensively assisted reproductive technologies rather than await the Supreme Court's ruling in *RAHRA*. The Quebec National Assembly enacted *An Act respecting the clinical and research activities relating to assisted procreation* on June 9, 2009.¹⁴⁹ As announced in section 1 its avowed purpose is “to regulate clinical and research activities relating to assisted procreation in order to ensure high-quality, safe and ethical practices” and “to encourage the ongoing improvement of services in that area”.¹⁵⁰ To that end the legislation establishes regulatory requirements for the licensing of physicians providing “assisted procreation activities” to

¹⁴⁸ von Tigerstrom, *supra*, note 143, at 43.

¹⁴⁹ *Supra*, note 19.

¹⁵⁰ *Id.*, s. 1.

patients;¹⁵¹ the operation of a “centre for assisted procreation”;¹⁵² the inspection and oversight of such centres’ operations,¹⁵³ and the permanent maintenance of records relating to “a person who resorted to assisted procreation activities or a child born such of activities” with the mandatory requirement that it is not possible to identify such individuals.¹⁵⁴

In view of the demise of much of the AHR Act, however, provinces may in future be compelled by the judiciary to act to fill the legislative vacuum. Very recently, for example, the British Columbia Supreme Court in *Pratten v. British Columbia (Attorney General)*¹⁵⁵ ruled that the omission of donor offspring from the record-keeping and disclosure obligations contained in the *Adoption Act*¹⁵⁶ and the *Adoption Action: Financial Administration Act — Adoption Regulation*¹⁵⁷ violated section 15 of the Charter and failed to qualify as a reasonable limitation upon those rights for the purposes of section 1. Justice Adair concluded that denying gametes donor offspring the ability to access information respecting their biological parents and siblings amounted to discrimination on the basis of manner of conception.¹⁵⁸ Furthermore, she held that the British Columbia Government advanced no pressing or substantial governmental objective for this under-inclusive statute.¹⁵⁹ As a consequence she declared this omission from the impugned sections of the *Adoption Act* and the *Adoption Regulation* unconstitutional but suspended the operation of her declaration of invalidity for 15 months in order to permit the British Columbia Legislature the opportunity to craft a new statutory regime which would accommodate the rights of gametes donor offspring.¹⁶⁰ It remains to be seen whether this ruling will be upheld on appeal.

¹⁵¹ *Id.*, s. 4.

¹⁵² *Id.*, Chapter III, ss. 11-24.

¹⁵³ *Id.*, Chapter IV, ss. 25-29.

¹⁵⁴ *Id.*, Chapter VIII, especially s. 42.

¹⁵⁵ [2011] B.C.J. No. 931, 2011 BCSC 656 (B.C.S.C.) [hereinafter “*Pratten*”]. An appeal to the British Columbia Court of Appeal from this ruling has been initiated. See *British Columbia (Attorney General) v. Pratten*, CA 39124.

¹⁵⁶ R.S.B.C. 1996, c. 5.

¹⁵⁷ B.C. Reg. 291/96 [hereinafter “*Adoption Regulation*”].

¹⁵⁸ *Pratten*, *supra*, note 155, at para. 268.

¹⁵⁹ *Id.*, at para. 325.

¹⁶⁰ *Id.*, at para. 333. The Uniform Law Conference of Canada (“ULCC”) prepared a *Uniform Child Status Act* intended as a statutory template for provinces and territories to adopt which addresses certain of the concerns raised in *Pratten*. The ULCC recommends preparing a new *Uniform Vital Statistics Act* to accommodate other issues unique to gametes donor offspring. See online:

To be sure litigation is a protracted, not to mention expensive, method to attain a desired objective and at times it fails to achieve the best public policy outcomes. It is encouraging then that provinces have moved forward to advance interests of persons resorting to assisted reproductive technologies in the absence of judicial prodding. For example, despite the Nova Scotia Court of Appeal's ruling in *Cameron v. Nova Scotia (Attorney General)*¹⁶¹ that excluding *in vitro* fertilization ("IVF") from the array of medically necessary services underwritten by public health insurance plans did not violate the Charter, other provincial governments have either decided to fund certain assisted reproduction technologies or to provide financial incentives for individuals choosing to access them.¹⁶² It may be expected that post-*RAHRA* other governments will assume more and more responsibility for the funding and regulation of these particular medical technologies.

Not all provinces, however, may feel they possess the administrative capacity to regulate adequately the myriad issues which attend these particular technologies. Yet this should not defeat a desire for national standards to regulate assisted reproductive technologies. There is a way to achieve this goal which is consistent with the robust concept of co-operative federalism espoused by the Supreme Court of Canada in recent years.¹⁶³ Administrative inter-delegation to a single national agency by provincial and the federal governments of their respective jurisdictional powers in relation to a particular subject matter has long been accepted by the Supreme Court in "a venerable chain of judicial precedent".¹⁶⁴ As

<<http://www.ulcc.ca/en/poam2/UNIFORM%20LAW%20CONFERENCE%20OF%20CANADA%20final%20Amended.doc>>.

¹⁶¹ *Supra*, note 86.

¹⁶² IVF treatments are expensive. One cycle of IVF may cost about \$10,000, but these costs may rise to \$20,000 if the woman requires higher doses of medication. At present, Quebec offers public funding for up to three cycles of IVF; Ontario funds IVF treatments only for women with bilateral fallopian tube obstruction, and Manitoba offers a provincial tax credit of up to \$8,000 for assisted reproductive technology. The Ontario Government's Expert Panel on Fertility and Adoption in its report entitled "*Raising Expectations*" recommended in 2009 that provincial funding should be enhanced to include up to three cycles of IVF of infertile women under 42 years of age. Alberta has committed to reviewing its policy in respect of IVF funding. For a complete survey of IVF funding across Canada, see Canadian Agency for Drugs and Technologies in Health, *Status of Public Funding for In Vitro Fertilization in Canada and Internationally* (December 2010), online: <http://www.cadth.ca/media/pdf/Public_Funding_IVF_es-14_e.pdf>.

¹⁶³ See, e.g., *NIL/TU, O Child and Family Services Society v. B.C. Government and Services Employees' Union*, [2010] S.C.J. No. 45, [2010] 2 S.C.R. 696, at para. 42 (S.C.C.), per Abella J.

¹⁶⁴ *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] S.C.J. No. 19, [2005] 1 S.C.R. 292, at para. 52 (S.C.C.). These authorities include *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*, [1952] S.C.J. No. 31, [1952] 2 S.C.R. 392 (S.C.C.); *Coughlin*

described in *Fédération des producteurs de volailles du Québec v. Pelland*¹⁶⁵ to be effective such an inter-delegation would require each level of government to enact laws and regulations based on “their respective legislative competencies, to create a unified and coherent regulatory scheme”¹⁶⁶ and to delegate the administration of this scheme to a single regulatory agency created by Parliament.

Such an agency already exists even after *RAHRA*. The legitimacy of the Assisted Human Reproduction Agency of Canada created in section 21 of the AHR Act was never attacked. As a consequence it survived the Supreme Court’s judgment and now is available to be utilized in much the same way as the inter-provincial agricultural marketing schemes have been for a number of decades. It remains for the various provinces to take the initiative to develop a regulatory scheme over assisted reproductive technologies. The Quebec law is now in place and can serve as a model for other provinces to emulate. The administration of these schemes could then be delegated to the Assisted Human Reproduction Agency of Canada. Such an arrangement would permit national standards to be achieved yet also take into account local initiatives and values. Not only would this demonstrate that *RAHRA* did not destroy the ability to achieve pan-Canadian regulatory standards in relation to sophisticated medical technologies but it would evidence that there are creative yet constitutional solutions to achieving such a desirable social and political end.

v. *Ontario (Highway Transport Board)*, [1968] S.C.J. No. 38, [1968] S.C.R. 569 (S.C.C.); *Manitoba (Attorney General) v. Manitoba Egg and Poultry Assn.*, [1971] S.C.J. No. 63, [1971] S.C.R. 689 (S.C.C.); *Reference re Agricultural Products Marketing Act, 1970 (Canada)*, [1978] S.C.J. No. 58, [1978] 2 S.C.R. 1198, and *Pelland*, *id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*, at para. 38.