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The Applicability of Co-Operative Federalism: Lessons Learned from the Assisted Human Reproduction Act

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A thesis submitted in partial fulfillment of the requirements for the degree in Master of Laws

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THE APPLICABILITY OF CO-OPERATIVE FEDERALISM: LESSONS LEARNED
FROM THE ASSISTED HUMAN REPRODUCTION ACT

(Thesis format: Monograph)

by

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Graduate Program in Law

A thesis submitted in partial fulfillment
of the requirements for the degree of
Master of Studies in Law

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Abstract

The *Assisted Human Reproduction Act (AHRA)* is a piece of federal legislation that was passed in 2004. The province of Quebec issued a reference question regarding the constitutionality of the federal legislation and in 2010 the Supreme Court of Canada rendered its opinion. The result was a success for the provinces because the Supreme Court's verdict severely limited the scope of the federal legislation. In addition to clarifying the limits of the federal government's criminal law power, the saga of the *AHRA* also helps illustrate the integral role the concept of co-operative federalism plays in modern Canadian inter-governmental relations. The nature and extent of the role played by co-operative federalism will be determined through an examination of 1) the history of co-operative federalism in Canada; 2) a discussion concerning co-operative federalism as a concept; 3) an examination of competitive federalism, the central opposing theory to co-operative federalism; 4) the development and implementation of the *Assisted Human Reproduction Act*; 5) the events that occurred prior to, during, and after the Supreme Court ruling in 2010, and critical commentary on that decision; and 6) the potential implications that the Supreme Court opinion may have on future federalism disputes in Canada.

Keywords

Federalism, Biotechnology Policy, Constitutional Law, Co-Operative Federalism, Reproductive Technologies, Assisted Human Reproduction Act, Criminal Law Power

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1. Introduction

Canada is a large and geographically diverse country with a multi-cultural population that is constantly seeking to define its national identity. The tensions that exist within the Canadian Federation are fuelled by various linguistic, cultural and regional concerns. Due to the great size of the country the nation utilizes a variation of the federal system of government where legislative powers and responsibilities are divided amongst the central government and numerous provincial governments. Interactions between both levels of government are common in Canada. A specific relationship that has garnered significant attention is the one that exists between the federal government of Canada and the provincial government of Quebec. The province of Quebec has long maintained that the linguistic, cultural and legal structures that exist within its borders are unique in comparison to the other provinces, and these structures have been the source of constant inter-governmental tensions. As a result, Quebec has occupied a central place in the Canadian federalist narrative.

That said, inter-governmental relationships in Canada have undergone drastic changes since Canada became a nation in 1867. From 1867 to 1930 inter-governmental relations in Canada were characterized as operating like ‘water-tight compartments’ where each individual governmental branch attended to its own business. This framework continued to operate until the beginning of the Great Depression and with the events leading up to World War II. The changing economic conditions and evolving demands of a modern Canadian state proved to be too demanding for each governmental jurisdiction

to operate in isolation from one another. Thus, in an effort to combat the strains of a growing nation Canadian governments began to interact with one another and more specifically, began to employ a concept known as co-operative federalism. Co-operative federalism is essentially a network of relationships that exist between different levels of government. These relationships are initiated and maintained by various political actors of the central and regional governments.¹ Through these relationships mechanisms are developed that allow for the continuous redistribution of powers and resources without seeking a remedy from the courts or the amending process.²

This project has six main sections. The first section of this project will be largely historical, and will consist in a review of the unique circumstances surrounding the formation of the Canadian Federation and analyze the influence of the Judicial Committee of the Privy Council, the legal institution that played a significant role in moulding early Canadian inter-governmental relations. In addition, the section will examine the status and defining characteristics of Canadian inter-governmental affairs before the Great Depression, and conclude with the events that triggered the shift from classical federalism to co-operative federalism.

The second section will be devoted to formally introducing the concept of co-operative federalism and discussing the views of three leading scholars whose perspectives assist in articulating what co-operative federalism is and the role that the concept has played in modern Canadian politics. The final portion of this section will be dedicated to briefly examining the writings of contemporary scholars regarding co-

¹ Peter W. Hogg, *Constitutional Law of Canada: 2012 Student Edition*, 5th ed (Toronto: Carswell, 2012) at 5-46.

² Ibid.

operative federalism in an effort to solidify that the concept and its resulting mechanisms have endured and have become permanent fixtures in the landscape of Canadian inter-governmental relations.

Section three of this project will introduce and discuss the concept known as competitive federalism, the central opposing outlook to co-operative federalism. Once the competitive model of federalism has been considered, both of the concepts will be compared and contrasted to one another. Key similarities and differences will be uncovered to demonstrate the uses of both concepts and to clarify that co-operative federalism is the best alternative to judicial review.

To adequately illustrate the uses of co-operative federalism the saga of a contested piece of federal legislation called the *Assisted Human Reproduction Act (2004)*,³ will be examined. In particular section four will centre upon the genesis of the *Assisted Human Reproduction Act* including an analysis of the Royal Commission on New Reproductive Technologies,⁴ the drafting of the legislation, and a brief overview of the provisions contained within the *Act*. Once the provisions of the *Act* have been outlined general observations pertaining to the legislation will be highlighted along with a short examination of the legislative landscape prior to the creation of the *Act*.

The fifth section of this paper will explore the saga of litigation that occurred as a result of the Government of Quebec issuing a reference question to the Quebec Court of Appeal regarding the constitutionality of the *Assisted Human Reproduction Act*. A

³ *Assisted Human Reproduction Act*, ESC 2004, c 2.

⁴ Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Commission on New Reproductive Technologies* (Ottawa: Canada Communication Group, 1993) [*Proceed with Care*].

concise summary of the jurisprudence related to the federal government's criminal law power and the provincial jurisdiction over property and civil rights will be provided in order to comprehend the legal arguments put forth in the *Reference re Assisted Human Reproduction Act (2010)*⁵. Also, the three opinions of the Supreme Court of Canada will be explored followed by a critical commentary on the reference case, which will include the views of legal scholars in relation to the reference opinion.

The final section will be dedicated to discussing the potential implications of the majority opinion in the *Reference re Assisted Human Reproduction Act* and presenting concluding thoughts pertaining to the possible effects co-operative federalism can have on the *Assisted Human Reproduction Act*, subsequent Canadian policy initiatives and future constitutional disputes.

Overall, the objective of this thesis is to examine co-operative federalism as the ideal alternative to judicial review, one that appeals to the idea that the judiciary should only be considered as a 'fail-safe' mechanism for governments, if prolonged inter-governmental negotiations are unsuccessful. In particular, I will defend the proposition that greater inter-governmental negotiation and consultation concerning the creation of policy, especially complex policy with constitutional implications, will result in legislation that is less likely to be challenged in the judiciary. In other words, co-operative federalism will be presented and defended as the best way to manage inter-governmental tensions in the Canadian federation as it is currently structured.

⁵ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457.

2. Historical Background

2.1 Canada Before the Great Depression

To begin, a brief introduction to the history and development of co-operative federalism is necessary. There were a series of factors that assisted in the negotiating, drafting and signing of the *British North America Act, 1867*.⁶ By 1864 it was clear that the industrial North in the United States had won the American Civil War and would consolidate the Southern states back into the American union.⁷ Due to the strained diplomatic relations between Britain and the United States, the Canadian colonies now had a very unfriendly and powerful opponent to the south. Before these events Britain was against the idea of Canadian Confederation but in order to secure a strong military base within its remaining colonies in North America, the British government was forced to change its position.⁸ Within Canada, each eventual participant in Confederation had their own concerns about federalism, but in the end they accepted that forming a federation would create stability. It was the intention of the original drafters of the Canadian Constitution to have the numerous provincial governments bound by a strong central governmental branch. The newly created central government would handle matters of national concern while the provincial governments would possess the powers required to effectively manage local and regional matters. Along with national security, trade was of particular importance to the economic state of all the colonies that would

⁶ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3.

⁷ Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (Montreal: McGill-Queen's University Press, 2004) at 24.

⁸ *Ibid* at 26.

comprise Canada in 1867. The idea that there would be no tariffs applied to inter-provincial Canadian trade was extremely appealing, particularly because the United States had terminated a long standing reciprocal trade agreement with the Canadian British colonies in 1866.⁹ Nevertheless, Canada was formed into a sovereign nation due to the various colonies entering into the agreement known as the *British North America Act (BNA Act)*, subsequently referred to as *Constitution Act, 1867* after 1982, which culminated in Confederation in 1867.

The unique society and culture that had been fighting for survival within the borders of Quebec ever since the Conquest of 1759 was the driving force in negotiations leading up to the formation of the Canadian Federation in 1867. As noted by Stevenson, “The demands for provincial legislative powers came mainly from the French Canadians, for whom the establishment of a Quebec legislature was the major attraction of Confederation.”¹⁰ The powers that Quebec wanted control over were related to education, the legal system, and the family. Even the prominent provincial jurisdiction of ‘property and civil rights’, located in section 92 (13) of the *BNA Act, 1867* that numerous constitutional disputes have been decided upon was expressly designed to protect Quebec’s distinctive legal system, “... by repeating a phrase first used in the *Quebec Act of 1774...*”¹¹ It was the demands of French Canada that significantly influenced how the provincial and federal powers were going to be distributed in sections 91 and 92 of the original *British North America Act, 1867*.

⁹ Stevenson, *supra* note 7 at 27.

¹⁰ *Ibid* at 29.

¹¹ *Ibid*.

Canada's first Prime Minister Sir John A. Macdonald had a particular version of federalism in mind when he and his associates were negotiating and drafting the Canadian Constitution. It was clear that Macdonald's concept of federalism accepted that provincial interests were important and legitimate. However, these provincial worries were seen as less important than the national goals of the federal government.¹² Macdonald also believed that provincial concerns were not represented exclusively by the provincial governments. Seeing as the federal government represented all of the pressing provincial matters it seemed obvious that both levels of government shared responsibility in highlighting provincial issues.¹³ The federal government was responsible for ensuring regional concerns were addressed so that in turn, the entire nation could flourish. The implications of Macdonald's perspectives are clear, the federal government represented national interests as well as a portion of matters of particular provincial and local importance. If this was true than provincial governments were only responsible for matters of provincial and local nature that were not represented by the federal government. While it seemed that Sir John A. Macdonald's conception of federalism did not consider both levels of government as equal, this notion disappeared when constitutional disputes were brought to the attention of the Judicial Committee of the Privy Council (JCPC).

2.2 The Influence of the Judicial Committee of the Privy Council

The institution that shaped the future of Canadian inter-governmental politics was not an establishment based in Canada but rather one that operated out of England. The

¹² Stevenson, *supra* note 7 at 35.

¹³ *Ibid* at 36.

JCPC was the final court of appeal for Canada from 1867 until 1949.¹⁴ Due to the existence of the JCPC, the creation of a Canadian “general court of appeal” was not seen as a necessity and this explains why the Supreme Court of Canada was not created until 1875.¹⁵ The creation of the Supreme Court of Canada was fundamentally different from the establishment of the Supreme Court in the United States. The Canadian Supreme Court was created by the passing of an ordinary statute the *Supreme Court Act, 1875*, unlike in the United States where the U.S. Supreme Court and its powers are entrenched within the U.S. Constitution. Due to the presence of the JCPC, the final rulings over federal-provincial disputes were not being determined by the Supreme Court of Canada. As stated by Hausegger et al. “Even After 1875, it was possible to bypass the Supreme Court and appeal directly... to the JCPC...”¹⁶ The Supreme Court of Canada did not become Canada’s final court of appeal until 1949. Consequently, the subservient stature of the Supreme Court of Canada before 1949 allowed for the JCPC to mould provincial and federal relations into a form that was far different from the concept put forth by the Fathers of Confederation.

The law lords that comprised the JCPC singlehandedly decentralized trends in Canadian public life. This can be explained by highlighting that at this time British legal practitioners subscribed to the view that “checks and balances” were beneficial to a federal state.¹⁷ In essence the dominant legal outlook took seriously the significance of

¹⁴ Lori Hausegger et al. *Canadian Courts: Law, Politics and Process* (Toronto: Oxford University Press, 2009) at 56.

¹⁵ Stevenson, *supra* note 7 at 46.

¹⁶ Hausegger et al. *supra* note 14 at 56-57.

¹⁷ Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen’s University press, 2010) at 65-66.

jurisdictional separation.¹⁸ This legal attitude was demonstrated by the JCPC when the court provided a narrow interpretation of the “peace, order and good government” clause that was found in the Constitution of 1867 and a more generous interpretation regarding provincial jurisdiction over property and civil matters.¹⁹ As time passed, “...this literal... understanding of legal formalities was displaced by a focus on empirical realities that were simply not captured by descriptions of the formalities.”²⁰ As Canadian political culture matured into the 1900’s it was clear that essential institutional actors, such as parties and cabinets, were never mentioned in constitutional documents. This is interesting because many fundamental political actors within Canadian politics today are not included in constitutional documents but are instead products of constitutional convention. This speaks to the flexibility of Canadian federalism and is evidence that the country does not operate exactly as described in the Canadian Constitution. This lends to the legitimacy of co-operative federalism as an alternative to judicial review in disputes concerning federalism because, although the *Constitution Act, 1867* makes no mention of inter-governmental co-operative structures, the Canadian state is capable of introducing new constitutional concepts without express constitutional declarations. Furthermore, inter-governmental relationships depend upon informal agreements which have no foundation in the Constitution, statutes or conventions.²¹ One example of such arrangements is first ministers’ conferences, which are conferences involving the provincial Premiers and the federal Prime Minister. With the support of senior ministers

¹⁸ Baker, *supra* note 17 at 66.

¹⁹ Herman Bakvis et al. *Contested Federalism: Certainty and Ambiguity in the Canadian Federation* (Toronto: Oxford University Press, 2009) at 31.

²⁰ Baker, *supra* note 17 at 66.

²¹ Hogg, *supra* note 1 at 5-46.

and officials, the First Ministers are in a position to make commitments on behalf of government, including commitments that require legislative action.²²

2.3 The Shift to Co-Operative Federalism

The structure of governmental politics and division of powers that was established with the constitutional interpretation of the Judicial Committee of the Privy Council operated effectively until the first worldwide economic meltdown. The Great Depression of the 1930's tested the financial capabilities of all the provinces and exposed the fiscal limitations of the provincial governments.²³ Conservative Prime Minister R.B. Bennett attempted to introduce legislation that was inspired by the New Deal, which was a piece of legislation implemented in the United States to combat the effects of the Depression. Unfortunately a number of the measures were rejected by the JCPC because in its view the contingencies went beyond the federal government's jurisdiction.²⁴ By 1938, the Rowell-Sirois Commission²⁵ was appointed to analyze the financial implications of the Great Depression. The Commission recommended major changes to the current distribution of powers and a greater centralization of fiscal power in Ottawa.²⁶ The official report of the Commission was not released until 1940 and when it was finally unveiled it was vehemently opposed by the three most populated and richest provinces.²⁷ However, it was clear that the provinces did not have the required financial resources to counter-act the effects of a worldwide economic crisis.

²² Hogg, *supra* note 1 at 5-46.

²³ Bakvis et al. *supra* note 19 at 31.

²⁴ *Ibid.*

²⁵ Royal Commission on Dominion-Provincial Relations, *Report of the Royal Commission on Dominion-Provincial Relations*, (Ottawa: King's Printer, 1940) [Rowell-Sirois Report].

²⁶ *Ibid* at 32.

²⁷ *Ibid.*

The beginning of the Second World War and the re-introduction of a wartime economy initiated the construction of the Canadian social welfare state. A period of federal dominance during the World War II introduced the era of co-operative federalism. Co-operative federalism was a system of relationships amongst the governmental leaders of the federal and provincial governments.²⁸ Utilizing co-operative federalism, “fiscally and politically strong provincial governments and a national government armed with a potent spending power created social programs in areas of provincial jurisdiction...”²⁹ Some of the new social programs related to healthcare, post-secondary education, and social assistance.³⁰ The Canada Pension Plan (CPP) was one of the social programs that flawlessly sourced the tenets of co-operative federalism and produced a framework that continues to benefit all Canadians. Throughout the process of creating the CPP the two orders of government worked in such an intimate fashion to construct the agreement, that the final version included a provision that required a specified number of provincial governments as well as Ottawa to approve any future changes to the CPP.³¹

Additionally, after the war Ottawa took control over a number of tax fields and it became evident that there was a need to improve linkages between the east and the west. Two examples of such linkages include the construction of the Trans- Canada highway and the creation of natural gas and oil pipelines from western Canada to supply central Canadian markets.³² Finally, the social and economic devastation of the Great Depression served as the primary motivation to create the national social safety net. The areas

²⁸ Hogg, *supra* note 1 at 5-46.

²⁹ Herman Bakvis and Grace Skogstad, *Canadian Federalism*, 3d ed (Toronto: Oxford University Press, 2012) at 6.

³⁰ *Ibid.*

³¹ *Ibid* at 32.

³² Bakvis et al. *supra* note 19 at 32.

required to create an effective welfare system were largely within provincial jurisdiction but it was evident that Ottawa had the motivation and the necessary monetary resources to implement the framework successfully.³³ The federal government needed the assistance of the provinces seeing as they were responsible for health and welfare matters. It was from this point forward that new relationships emerged between the provincial and federal government. New consultative structures developed between the elected officials of both levels of government and these structures have remained in place ever since.³⁴ The emergence of co-operative federalism was facilitated by various Supreme Court verdicts that made it possible for one level of government to wilfully delegate an authority to an agency of another order of government.³⁵ An example of such an agency is the Canadian Egg Marketing Agency (CEMA).³⁶ The legislative package that created CEMA constituted a solution worked out, through federal-provincial co-operation, to address the problems of regulating the marketing of agricultural products.³⁷ The legislation and companion agreement signed by the federal government and all ten provincial governments, established a comprehensive program for the regulation and marketing of eggs in Canada.³⁸ Finally, the co-operative nature of Canadian federalism was enhanced when beginning in the 1920's the Supreme Court began to provide a more liberal interpretation of 'peace, order and good government'.³⁹ The peace, order and good government clause in s. 91 of the *Constitution Act, 1867* was interpreted as enabling

³³ Jennifer Smith, *Federalism* (Vancouver: UBC Press, 2004) at 22.

³⁴ *Ibid.*

³⁵ Bakvis et al. *supra* note 19 at 33.

³⁶ Patrick Macklem & Carol Rogerson, eds, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2010) at 365.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Bakvis et al. *supra* note 19 at 33.

Ottawa to enact legislation that might otherwise come within provincial jurisdiction.⁴⁰ As established in *Fort Frances Pulp & Power Co. v. Manitoba Free Press (1923)*⁴¹ and subsequently in *Toronto Electric Commissioners v. Snider (1925)*,⁴² it can do so temporarily and quite extensively in order to respond to emergency situations.⁴³ Also, Parliament has the authority to justify permanent legislation in circumstances involving provincial authority if the matter has attained a sufficient ‘national concern’ or ‘national dimension’ such as aeronautics and the national capital region.⁴⁴ Overall, the post-war era marked the end of an age that was characterized by the jurisdictions of the provinces and federal government as being separated like water-tight compartments.

3. Co-Operative Federalism

The creation of the federal system in Canada was a political compromise between proponents of national unity and proponents of diversity.⁴⁵ In a country that spans such a vast territory it is appropriate to have a federal governmental system in place. However, due to the distinct regional identities that exist across the country it would be difficult for the federal government to efficiently operate and adequately represent countless concerns at the provincial and local levels. Therefore the federal shape of Canada dictates that the national government is responsible for all matters of national importance and that the

⁴⁰ Dave Snow & Rainer Knopff, “Assisted Reproduction Policy in Federal States: What Canada Should Learn from Australia” (2012) 5 University of Calgary: The School of Public Policy, SPP Research Papers 1 at 7.

⁴¹ *Fort Frances Pulp & Paper v. Manitoba Free Press*, [1923] AC 695.

⁴² *Toronto Electric Commissioners v. Snider* [1925] AC 396.

⁴³ *Ibid.*

⁴⁴ Hogg, *supra* note 1 at 17-31.

⁴⁵ *Ibid* at 5-14.

provincial governments ensure that matters of local importance are safeguarded.⁴⁶

Essentially, "... the federal imperative is that territorially-bounded interests be given a strong influence in the governmental process."⁴⁷

Due to the federal composition of the Canadian state, different levels of government exist to represent and protect particular interests. The period in Canadian governmental history prior to World War II is characterized as a time when different levels of Canadian government behaved like 'watertight compartments'.⁴⁸ This 'watertight compartment' notion of federalism views each branch of government as operating on its own and rarely over-lapping with another level of government.⁴⁹ According to academics like Peter W. Hogg, Donald V. Smiley, W.R. Lederman, Richard Simeon, Ian Robinson and Ronald L. Watts, this type of governmental behaviour went against the fundamental goals of the Canadian federal system. Smiley explains that "The constitutional distribution of powers between Parliament and the provinces underlies a situation in which the two orders of government are highly interdependent..."⁵⁰ Since the Constitution bestows explicit powers upon particular levels of government, it is necessary for the provincial and federal governments to interact. Scholars advocating for the existence of effective Canadian federalism state that "... a continuous process of federal-provincial consultation and negotiation is at the heart of the Canadian federal system."⁵¹ It is critical that co-operative relationships exist between various governmental

⁴⁶ Hogg, *supra* note 1 at 5-14.1.

⁴⁷ Donald V. Smiley. *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at 84 [Smiley, "Federal Condition"].

⁴⁸ Bakvis et al. *supra* note 19 at 6.

⁴⁹ *Ibid.*

⁵⁰ Smiley, "Federal Condition", *supra* note 47 at 85-86.

⁵¹ *Ibid* at 86.

components of the Canadian legislative structure to ensure that the system operates smoothly and efficiently while minimizing inter-governmental tensions.

The formal structure of the Canadian Constitution suggests that eleven legislative bodies are confined to separate jurisdictions and that each of these entities act independently of the others.⁵² In addition, the Constitution does not take into account the political implications of the three territorial governments, along with the influence of the numerous Aboriginals bands that still exist today. Nevertheless, in many fields effective policies require joint actions between numerous legislative bodies. The reality of the modern Canadian Federation is that all levels of government are interdependent. As Peter W. Hogg explains, “The related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation have combined to produce what is generally described as “cooperative federalism”.”⁵³ Co-operative federalism is described as a system of relationships between various political actors that allow for the continuous reallocation of responsibilities and resources without appeals to the courts or a need to utilize the amending process.⁵⁴ These relationships encourage consultations to occur on issues that are important to the federal and provincial governments.⁵⁵ It is essential that these relationships remain as they assist in the development of policies and agreements that are beneficial for all Canadians.

The creation of the Canadian Federation was the result of an agreement of mutual consent between parties that supported both unification and diversity. Tensions are

⁵² Hogg, *supra* note 1 at 5-45.

⁵³ W.R. Lederman, “Some Forms and Limitations of Co-Operative Federalism” in W.R. Lederman, ed, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Toronto: Butterworth, 1981) at 315.

⁵⁴ Hogg, *supra* note 1 at 5-45, 5-46.

⁵⁵ Lederman, *supra* note 53 at 315.

inherent within any federal system because the powers of government are distributed between a national government and other local governmental bodies. However, one of the distinct advantages of having a federal system in place is that this type of governmental organization is highly adaptable. When the Canadian Federation was formed in 1867, it was common for disputes related to jurisdiction to be brought to the attention of the judiciary. There was little consultation and negotiation occurring between the federal government and the provincial governments. This era of inter-governmental relations in Canada between 1867 and 1930 has often been described as a time when governments acted like ‘watertight compartments’. Prior to 1930, very little had been written on the subject of Canadian federalism.⁵⁶ As the Great Depression continued to affect the economic stability of the country, it was clear that the current operation of Canadian federalism had been inadequate in meeting the demands of the Canadian population.⁵⁷ Both levels of government could no longer afford to bicker amongst one another and wait for the courts to render decisions concerning jurisdiction and the allocation of resources. The governmental bodies in Canada needed to establish a new framework that would solve inter-governmental disputes, without litigation within the courts and without the pursuit of constitutional amendment. To address the pressing concerns of the country, Canadian legislatures began to employ the concept of co-operative federalism. In what follows the views of constitutional law experts Peter W. Hogg, W.R. Lederman and Donald V. Smiley will be considered to illustrate the important role that co-operative federalism plays in the modern Canadian Federation. Above all, co-operative federalism will be discussed as the best alternative to judicial review particularly in cases concerning

⁵⁶ Donald V. Smiley, *Constitutional Adaptation and Canadian Federalism Since 1945* (Ottawa: Queen’s Printer for Canada, 1970) at 84 [Smiley, “Constitutional”].

⁵⁷ *Ibid* at 85.

federalism, and that the judiciary should only be involved if extended inter-governmental relations fail to provide a viable solution.

3.1 The End of the Classical Federalism Era

The structure of Canadian governmental institutions and the division of powers that occurred with the judicial opinions of the Judicial Committee of the Privy Council lasted until the beginning of the first stock market crash in 1929. The Great Depression of the 1930's revealed that the provinces could not mitigate the effects of this crisis alone.⁵⁸ Canadian Prime Minister R.B. Bennett attempted to pass federal regulations that would combat the economic conditions. Unfortunately, the proposed legislation did not survive the scrutiny of the JCPC and the established division of powers.⁵⁹ The failure of Prime Minister Bennett's legislation led many to believe that the Canadian Constitution did not allow the federal government to adequately address the issues of the day.⁶⁰

In response, the federal government appointed the Royal Commission on Dominion-Provincial Relations in 1938.⁶¹ The Commission, also known as the Rowell-Sirois Report, "... published in 1940, constitutes, along with the specialized studies undertaken at the direction of the Commission, the most comprehensive study of a working federal system that has ever been made."⁶² The Commission was ordered to analyze the current state of federalism in Canada and review the entire financial structure of the federation. The final report recommended greater centralization of powers to the

⁵⁸ Bakvis et al. *supra* note 19 at 31.

⁵⁹ *Ibid.*

⁶⁰ Smiley, "Constitutional", *supra* note 56 at 85.

⁶¹ Donald V. Smiley, *Conditional Grants and Canadian Federalism* (Toronto: Canadian Tax Foundation, 1963) at 6 [Smiley, "Grants"].

⁶² *Ibid.*

federal government and greater fiscal controls transferred to Ottawa.⁶³ It was clear that the report was highly critical of collaborative activities between the federal and provincial governments. However, the Rowell-Sirois Report seriously underestimated the future possibilities of federal-provincial co-operation.⁶⁴

Overall, the post-war era marked the end of the age of ‘classical federalism’. This ‘classical federalism’ period has been described by academics as a time when the jurisdictions of the provinces and federal government were completely separated as if each jurisdiction was a ‘water-tight compartment.’ Canadian constitutional scholar Peter H. Russell observed that:

“This so-called “co-operative federalism” of the post-war period has been much less a litigious struggle between Ottawa and the provinces to defend and expand their own enclaves of power than a matter of political compromise and administrative pragmatism.”⁶⁵

This concludes my discussion of the genesis of the concept of co-operative federalism. The next portion of this project will be dedicated to introducing the views of three Canadian constitutional law scholars who define what co-operative federalism is, and articulate the impact the concept has had on modern Canadian inter-governmental relations. It is important to consider the perspectives of these scholars especially when one is attempting to understand what co-operative federalism is and how the model applies to actual legal and political situations.

⁶³ Smiley, “Constitutional”, *supra* note 56 at 85.

⁶⁴ *Ibid* at 86.

⁶⁵ Lederman, *supra* note 53 at 315.

3.2 Peter W. Hogg and Co-Operative Federalism

Since the mid 1940's co-operative federalism has been a concept utilized by Canadian governmental institutions. Canadian constitutional law expert Peter W. Hogg has written about the countless benefits of co-operative federalism within the context of the Canadian Federation. Hogg explains that the formal structure of the Constitution seems to describe the existence of eleven separate legislative bodies that operate independently of one another.⁶⁶ In certain fields this is exactly what happens. However, mechanisms such as equalization grants demonstrate that this is not always the case. For example, the equalization grants were created to account for regional economic disparities. The prosperous provinces are required to assist the poorer provinces in order to help maintain a minimum national average for public services across the country.⁶⁷

Over time, changing conditions require the federal system to evolve and adapt in order to survive.⁶⁸ For a federation to keep pace with the shifting values and expectations of modern society it is necessary to modify the Constitution. Constitutional adaptation can occur through the courts, constitutional amendment or inter-governmental co-operation.⁶⁹ First, change through recourse to the courts is time consuming and incremental. The courts can only render decisions based upon the cases that come to the attention of the judiciary. Also, it is recognized that there is a significant delay between when cases reach the bench of the Supreme Court and when the Court releases a decision. Next, adaptation within the federal system does not ordinarily occur through constitutional amendment, as this process is highly demanding and lengthy. The

⁶⁶ Hogg, *supra* note 1 at 5-45.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

amending process instituted by the *Constitution Act, 1982* “...require(s) such a broad consensus for most amendments that they cannot be a regular form of adaptation.”⁷⁰

Hogg concludes that since adaptation through the courts is incremental and constitutional amendment is extremely demanding, the efficient operation of the modern Canadian state demands a significant degree of co-operation. Examples of co-operation between governments include interdependence of government policies, equalization of regional disparities and constitutional adaptation. In Canadian academic literature, co-operation between governments has been identified as co-operative federalism.

The essence of co-operative federalism is a network of relationships that exist between various executives and public representatives of the central and provincial governments.⁷¹ Through these relationships mechanisms are created, “...which allow a continuous redistribution of powers and resources without recourse to the courts or the amending process.”⁷² Most inter-governmental relationships depend on informal arrangements between different governmental bodies. These informal measures have no basis in the Constitution, statutes or constitutional convention.⁷³ There are numerous federal-provincial committees of ministers that meet on occasion.⁷⁴ Similarly, there are frequent meetings between bureaucratic officials of both levels of government and countless organizations, committees and conferences involved in the inter-governmental

⁷⁰ Hogg, *supra* note 1 at 5-45.

⁷¹ *Ibid* at 5-46.

⁷² *Ibid*.

⁷³ *Ibid* at 5-47.

⁷⁴ *Ibid*.

liaison.⁷⁵ It is clear that vast arrays of consultative organisms are operating within the Canadian Federation.⁷⁶

3.3 W.R. Lederman's View of Co-operative Federalism

Canadian constitutional scholar W.R. Lederman wrote extensively on issues related to the Canadian Constitution. Lederman wrote that all federal systems must employ co-operative federalism to some degree.⁷⁷ He observed that in Canada, there is the increasing need for agreements and understandings between the federal and provincial governments. For both levels of government to operate efficiently it is important for there to be clarification concerning specified uses of respective powers and resources.⁷⁸ These agreements and understandings take many forms, operate in many ways and occur at every official level. Co-operation within the Canadian governmental system is ongoing and occurs on a regular basis.

It is clear that these consultations are not simply a measure of good will and that hard bargaining is expected. Such negotiations occur within the framework provided by the federal Constitution. The Constitution is important because it provides the initial definition of which powers and resources are to be wielded by both levels of government. Essentially, the Constitution provides the framework of how co-operative measures between governments in Canada will be undertaken.⁷⁹ Lederman stresses that the courts play an important role in the operation of co-operative federalism. Interpretations of the Constitution that are supplied by the judiciary are important because it is these

⁷⁵ Hogg, *supra* note 1 at 5-47.

⁷⁶ *Ibid.*

⁷⁷ Lederman, *supra* note 53 at 314.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

explanations that inform the jurisdictional underpinnings of the Canadian federal system. The bargaining position of each respective level of government is determined by legal interpretation.⁸⁰

The federal system of government divides legislative powers amongst different levels of government. However, the federal government and the provinces are responsible for the same population living in the same territory. Thus, this division of power implies a certain level of government interdependence.⁸¹ Both governments have a joint responsibility to the same territory and the same people but are limited to a specific list of powers. In the Canadian context inter-governmental co-operative measures are desirable because, both the federal and provincial legislatures need to respond to the wishes of the same electoral bodies residing in the same territory.⁸² If the federal and provincial lists of power were clear, complete and mutually exclusive in all circumstances, then there would be no need for co-operative federalism.⁸³ The employment of co-operative federalism is a necessity in Canada today. In modern Canadian society, statutes have become more complicated and multi-faceted. The more complex a statute, the greater need there is for inter-governmental collaboration.

In sum, Lederman demonstrates that the federal and provincial governments are constantly involved with one and another. Based on the division of powers stipulated in the Constitution governments in Canada have always been dependent. Inter-governmental conferences, committees and meetings are a permanent fixture of modern Canadian

⁸⁰ Lederman, *supra* note 53 at 315.

⁸¹ *Ibid* at 318.

⁸² *Ibid* at 318-319.

⁸³ *Ibid* at 319.

federalism.⁸⁴ Lederman explained that the presence of wide-ranging co-operative activity is a sign of health and vitality within the Canadian federal system.⁸⁵ Moreover, co-operative federalism contains elements of efficiency and flexibility that will allow the Canadian Federation to adapt and change over time.⁸⁶ The widespread use of the concept has demonstrated that co-operative federalism allows governments to address the changing needs of Canadian society with far greater effectiveness, as opposed to if the legislatures appealed to the courts or constitutional amendment.

3.4 Donald V. Smiley and Co-Operative Federalism

Canada's premier federalism scholar Donald V. Smiley has published numerous works pertaining to the history and development of the Canadian Federation. Smiley stated that the goal of any federal system is to safeguard regional interests and to ensure that these interests are given strong influence in the governmental process.⁸⁷ Due to the presence of a federal system in Canada, "... the constitutional distribution of powers...underlies a situation in which the two orders of government are highly interdependent but are not directly related to one another..."⁸⁸ For Smiley, a continuous process of federal-provincial consultation and negotiation is at the very heart of the Canadian federal system.⁸⁹

Within the academic community, co-operative federalism has been described as an effective mechanism for creating arrangements between governments that are

⁸⁴ Lederman, *supra* note 53 at 335.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Smiley, "Federal Condition", *supra* note 47 at 84.

⁸⁸ *Ibid* at 85.

⁸⁹ *Ibid* at 86.

beneficial to all Canadians. Smiley emphasized collaboration between governments as opposed to ‘classical federalism’, where each level of government fulfilled constitutional duties in relative isolation from one another.⁹⁰ As Canada’s foremost student in the field of federalism, Smiley sought to describe the features that embody the concept of co-operative federalism. First, co-operative federalism envisages an increasingly more institutionalized framework for inter-governmental relations. These structures would encourage regular meetings between government officials and greater transparency regarding the activities performed during these consultations.⁹¹ Second, co-operative federalism involves interactions between the federal and provincial governments concerning the most fundamental aspects of public policy.⁹² With the increasing complexity of modern legislation, co-ordination and consultation between governments is essential to ensure tensions within the federation are at a minimum. Furthermore, in areas that could have not been foreseen at the time of Confederation, such as environmental law and advances in health technology, collaboration is necessary because the Constitution is silent concerning these emerging fields. The third feature is directly related to the second. Co-operative federalism endorses consultation between governments prior to the commitment to new policies that may infringe on the jurisdiction of the other.⁹³ It was not uncommon for the federal government to act unilaterally in areas related to provincial jurisdiction shortly after the Second World War.⁹⁴ The 1950’s were considered to be the height of this aforementioned federal dominance. However, co-operative federalism precludes any unilateral legislative

⁹⁰ Smiley, “Constitutional”, *supra* note 56 at 81.

⁹¹ *Ibid* at 84.

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ *Ibid* at 82.

action.⁹⁵ The Quebec Premier Jean Lesage at the Federal-Provincial Conference stressed this understanding in July 1965 when he stated:

“Sound practice of federalism requires that each government respect the jurisdiction of the other legislative authorities. In an era when interdependence is as pronounced as it is today...even when legislating in fields within its own jurisdiction, each government should be concerned with the repercussions of its decisions on the others’ plans and the orderly conduct of the country’s affairs in general.”⁹⁶

The final feature of co-operative federalism is the most crucial to the successful application of the concept. The way in which governments continuously redistribute powers, responsibilities and resources amongst one another is through constant interaction between the federal and provincial government rather than constitutional amendment or changing patterns of judicial review.⁹⁷ The Honourable Guy Favreau accurately described the new circumstances surrounding post-war Canadian federalism when he stated, “Gone are the days when constant recourse to the courts was hurriedly made to obtain an interpretation that would finally resolve jurisdictional conflicts between the federal and provincial governments.”⁹⁸ Most of the basic conflicts between the two levels no longer require the involvement of the judiciary. Constitutional amendment is demanding and changes to constitutional documents simply delineate

⁹⁵ Smiley, “Constitutional”, *supra* note 56 at 82.

⁹⁶ *Ibid* at 83.

⁹⁷ *Ibid* at 81.

⁹⁸ *Ibid*.

powers and privileges rather than articulating specific activities.⁹⁹ Under the prevailing attitudes it would be regarded as inappropriate for the governments to submit a dispute of fundamental importance to the judiciary unless extensive inter-governmental negotiations had failed to result in an agreement.¹⁰⁰

3.5 Other Contemporary Thoughts on Co-Operative Federalism

Recent writings on the concept suggest that co-operative federalism has had a profound impact on Canadian governance. There is a general consensus within the academic community that “well-performing federal institutions... [are] conducive to negotiation, consultation, or simply an exchange of information.”¹⁰¹ Given the changing policy environment and continually shifting agendas, governments need to interact with one another and communicate to adjust their respective roles.¹⁰² In a federal system, producing results for the population means reaching agreements on a variety of issues. In general, “Canadians have no deep commitment to the principle of federalism, have little knowledge of the existing division of powers, and care little about which government exercises which power.”¹⁰³ Nevertheless, Canadians care about results and they view co-operation between governments as the best way to achieve this.¹⁰⁴ As mentioned, the development of negotiation and coordination between both levels of government occurred after the conclusion of World War II. Together, the provinces and federal government coordinated to create social programs within provincial jurisdiction that would benefit all Canadians. Modern scholars have reported that co-operative federalism

⁹⁹ Smiley, “Constitutional”, *supra* note 56 at 82.

¹⁰⁰ *Ibid.*

¹⁰¹ Bakvis & Skogstad, *supra* note 29 at 4.

¹⁰² *Ibid.*

¹⁰³ *Ibid* at 17.

¹⁰⁴ *Ibid.*

has evolved into a less hierarchical form since the 1990's.¹⁰⁵ The dedication to co-operative federalism has allowed Canada to become one of the world's most decentralized federations, with the federal and provincial governments relatively evenly balanced in their power and status and at the same time highly inter-dependent.¹⁰⁶

The influence that co-operative federalism has had on Canadian inter-governmental relations is undeniable. The writings of Peter W. Hogg, W.R. Lederman, Donald V. Smiley and other more recent research clearly indicate that co-operative federalism is an indispensable feature of a healthy Canadian federal system. The utilization of the concept has demonstrated that co-operative federalism has allowed the Canadian federation to survive and flourish. The defining characteristic of co-operative federalism is for political and administrative processes to be the chief instruments of change.¹⁰⁷ The flexibility and efficiency of the modern Canadian state relies on the existence of ongoing negotiation and collaboration between the federal and provincial governments. Bringing disagreements to the attention of the courts should only be considered as a 'fail-safe' mechanism in the rare event of an irreconcilable misunderstanding between governments. The use of the judiciary as an absolute last resort is widely accepted within the academic community. All collaborative resources that are accessible within the modern inter-governmental framework must be exhausted before a disagreement is brought to the attention of the judiciary.

The concept of co-operative federalism reflects the flexibility and efficient operation of Canadian federalism. The ending of the classical federalism era

¹⁰⁵ Bakvis & Skogstad, *supra* note 29 at 8.

¹⁰⁶ *Ibid.*

¹⁰⁷ Smiley, "Constitutional", *supra* note 56 at 3.

demonstrated that Canadian federalism has the ability to adapt. No longer were governments operating as if they were in seclusion from one another, the demands of a mature Canada necessitated modifications. The introduction of co-operative federalism laid the foundation for the current inter-governmental mechanisms that exist to this day. The fact that contemporary political scientists and constitutional law scholars continue to discuss the impact of the concept suggests that the concept is influential in the field of inter-governmental relations. The continuous discussion of the concept in academic literature indicates co-operative federalism is irreplaceable in the attempt to minimize tensions within the Canadian Federation. Additionally, adhering to the tenets of co-operative federalism has the potential to not only decrease tensions but can also allow for the creation of legislation that it is accepted by both the federal and provincial governments.

4. Competitive Federalism

It is clear that in the mid-1930's and following the conclusion of World War II, federalism within the Canadian Federation adapted to the changing social and economic concerns of 20th century Canada. According to leading Canadian constitutional scholars the use of co-operative federalism resulted in increased co-ordination between governments that allowed for the establishment of the Canadian welfare state.¹⁰⁸ However, when performing an analysis concerning the effectiveness of co-operative federalism it is important to consider differing perspectives. The central opposing theory to the notion of co-operative federalism is a concept known as competitive federalism.

¹⁰⁸ Bakvis & Skogstad, *supra* note 29 at 6.

Canadian economist Albert Breton first postulated the formal theory of competitive federalism. Breton wrote an article in early 1985 as a criticism of some recommendations contained in the *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*.¹⁰⁹ In the article, Breton outlined his theory of competitive federalism that questioned the operation of co-operative federalism. Breton began by highlighting that there was a tendency within the academic literature to compare the Canadian federal system with the political infrastructures of the United States and the United Kingdom. He explained that each of these modern nations operated while utilizing distinct forms of political organization. For example, the United Kingdom is a unitary-parliamentary state, the United States is a federal-congressional state and Canada is a federal-parliamentary state.¹¹⁰ Unlike the federal states of Canada and the United States, the United Kingdom does not have to worry about division of powers disputes because of the unitary structure it employs. Breton made the distinction between the three nations to emphasize that Canada was the first country to employ the federal-parliamentary style of state organization. He explained that since then numerous federal countries have chosen to incorporate Canada's combination of the parliamentary and federal systems.¹¹¹

Although Canadian federalism had survived for almost 150 years, Breton disagreed with how the system had evolved and adapted since the 1930's. He stressed the need for increased competition within the Canadian Federation and added that competition would increase the effectiveness of federalism in Canada. In particular,

¹⁰⁹ Albert Breton, "Towards a Theory of Competitive Federalism" (1987) 3 EJPE 263 at 263.

¹¹⁰ Ibid at 266.

¹¹¹ Ronald L. Watts, *Comparing Federal Systems*, 2d ed (Kingston: McGill-Queen's University Press, 1999) at 24.

Breton claimed that increased competition could be introduced by changing the Canadian political system to include additional checks and balances.¹¹² According to Breton, little competition, or few checks and balances, exist within the parliamentary system of government. In his view the checks and balances that are present within the Canadian political system stem from powerful interests such as “...economic (like business and labour, though these are not usually of equal strength), religious (churches), intellectual (academics and research organizations), and so on.”¹¹³ Other checks and balances come from Question Period in the House of Commons and more importantly, the competition that originates from the political necessity to garner public support that is contested at regular intervals.¹¹⁴ However, Breton was of the view that, overall inter-governmental competition is rather weak, especially when the political party in power has obtained a majority government.¹¹⁵

Breton explained that the shortage of checks and balances in the Canadian political structure originated from the lack of separation between the executive and legislative branches.¹¹⁶ According to renowned federalism scholar Ronald L. Watts:

“The most innovative feature of the [Canadian] federation was that, in contrast to the U.S. and Swiss federations, which emphasized the separation of the executive and legislature in their federal institutions, Canada was the first federation to

¹¹² Breton, *supra* note 109 at 267.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

incorporate a system of parliamentary responsible government in which the executive and the legislature are fused.”¹¹⁷

With decreased checks and balances the aspirations and opinions of the public are not likely to be richly represented, as they would be in a system with a larger amount of competition.¹¹⁸ Breton stressed that the solution lied in the proven adaptability of Canadian federalism. *The Report of the Royal Commission on the Economic Union and Development Prospects for Canada* presented recommendations that had the potential of improving inter-governmental competition, such as making suggestions pertaining to Senate reform. Breton sought to go one step further when he suggested, “... serious consideration should be given to finding ways of reducing party discipline... for all matters, except budgetary ones.”¹¹⁹ The logic behind this proposal was to increase the power of individual elected representatives and in turn, enhance the minister’s capability to voice the opinions of their constituents, which would improve a voter’s ability to influence government.

The heart of Breton’s argument is steeped in the idea of Canadian intra-governmental competition. What Breton meant by ‘intra-governmental competition’ was the competition that occurred between various political parties, the executive, the legislature, the judiciary and bureaucracies.¹²⁰ These various components of the Canadian political system are constantly competing for popular support. In Breton’s view, popular support is “... something that is as needed for the effectiveness of governing parties as

¹¹⁷ Watts, *supra* note 111 at 24.

¹¹⁸ Breton, *supra* note 109 at 267.

¹¹⁹ *Ibid* at 268.

¹²⁰ *Ibid* at 271-272.

revenue is essential for the effectiveness of business firms.”¹²¹ In other words, it is essential for the effective operation of the Canadian Federation for various political entities to compete with one another with the goal of maximizing public support.

4.1 Breton’s Criticism of Co-Operative Federalism

With this notion of competition in mind, Breton examined the effectiveness of co-operative federalism within the context of Canadian federalism. Breton stated that “it must be recognized that co-operative federalism is aimed at removing the competition which is a natural by-product of federal organization.”¹²² In some cases it is beneficial for competitive relationships to remain in place, such as the adversarial relationship between prosecutors and defense attorneys in a court of law, and the competitive nature of various political parties vying for public support in electoral contests. These examples underline that in some cases co-operation is a less efficient alternative to a competitive environment. Breton was clear when he warned, “... co-operation can easily degenerate into collusion, conspiracy and connivance and that this is not necessarily good!”¹²³ The collusion that Breton referred to was reflected in the operation of co-operative federalism, which Breton declared was the same as executive federalism. Renowned Canadian federalism scholar Donald V. Smiley defined executive federalism as, “... the relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in interprovincial actions.”¹²⁴ The danger of executive federalism is that it relocated negotiations out of the political realm and into the offices of the executive and the bureaucracy. When executive

¹²¹ Breton, *supra* note 109 at 273.

¹²² *Ibid* at 275.

¹²³ *Ibid* at 274.

¹²⁴ *Ibid* at 275.

federalism and by extension co-operative federalism is viewed in such a fashion one could come to the conclusion that, “The heart of co-operative federalism is secret deals, not the stuff on which a lively democracy thrives!”¹²⁵ In an attempt to limit the subversive effects of co-operative federalism, Breton proposes a variety of solutions, most notably that all federal-provincial consultation must take place in the debates that follow discussions in the House of Commons and provincial parliaments and not in closed meetings that precede parliamentary interactions.¹²⁶

Two major concerns stemmed from the Canadian political system’s adherence to the tenets of co-operative federalism. First, Breton warned that separatism would thrive within a federation that utilizes co-operative federalism since federations are inherently competitive. Given that the component parts that make up a federation are constantly competing with one another, a co-operative framework would allow separatists to claim that the entire system does not work.¹²⁷ Breton maintained that if inter-governmental co-operation was suppressed the separatist argument would be weakened.

Second, co-operative federalism condemns unilateralism, which is the independent action by one government of the federation.¹²⁸ As indicated by Smiley, “... cooperative federalism embodies consultations between the provinces and the federal government prior to the latter committing itself to policies directly affecting provincial interests.”¹²⁹ Breton goes one step further by clarifying that proponents of co-operative federalism condemn any unilateral action by either level of government. This particular

¹²⁵ Breton, *supra* note 109 at 275.

¹²⁶ *Ibid* at 293.

¹²⁷ *Ibid* at 276.

¹²⁸ *Ibid*.

¹²⁹ Smiley, “Constitutional”, *supra* note 56 at 82.

principle of co-operative federalism drastically affects the activities of the federal government and only minimally impedes policy objectives within provincial jurisdiction.¹³⁰ For example, in order for the provinces to act in unison there must be an agreement that is reached between ten separate competitive entities. On the other hand, the central government is far more likely to act unilaterally than the provinces seeing as the federal government's policy responsibilities have national implications and because these obligations have a greater likelihood of imposing on provincial jurisdiction. Therefore, by prohibiting unilateral governmental action co-operative federalism is preventing the federal government from addressing issues it alone can resolve and is constitutionally responsible for sorting out.¹³¹ Breton concludes by stipulating that a denial of unilateralism equates to the rejection of the division of powers and federalism itself and continuing to abide by the principles of co-operative federalism is akin to the creation of a unitary state disguised within a federal system.¹³²

In essence, according to Breton it is of great necessity to foster a culture of competition within the Canadian Federation in order to ensure the effective maintenance of the Canadian democracy. The parliamentary system is characteristically less competitive because it has far fewer checks and balances when compared to countries that employ a congressional scheme.¹³³ When likened to the congressional composition in the United States, it is easier for laws to be passed within the confines of the Canadian parliamentary system. When it is more difficult to pass legislation it demonstrates that numerous obstacles are in place. For statutes to overcome various impediments political

¹³⁰ Breton, *supra* note 109 at 276.

¹³¹ *Ibid.*

¹³² *Ibid* at 277.

¹³³ *Ibid* at 285.

figures must discuss and debate on the matters to be legislated.¹³⁴ Increased debate leads to more involvement by politicians, lobbyists, bureaucrats, academics, writers and so on. This enhanced system of checks and balances stimulates discussion in the public forum and at the same time, heightening society's demand for access to information and decreasing secrecy within political institutions.¹³⁵ With greater public involvement in the legislative process the legitimacy of statutes is intensified. This newfound legitimacy translates into valid legislation that is far less likely to be reversed or repealed even with the inevitable change of governments.¹³⁶

In sum, Breton maintains that a Canadian parliamentary system with greater checks and balances would be beneficial to all Canadians and to the survival of Canadian democracy. In contrast, co-operative federalism advances the idea that the establishment and maintenance of consultative mechanisms will ensure the creation of accepted legislation and limit the inter-governmental tensions that often result in constitutional litigation.

4.2 Brief Comparison of Co-Operative Federalism and Competitive Federalism

There is little doubt that the competitive dynamic is inherent within the Canadian Federation as it is "... rooted in ideological diversity, genuine differences of interest arising from differences in material/economic base and societal demands, and the electoral imperative to gain credit and avoid blame."¹³⁷ Numerous provincial and national

¹³⁴ Breton, *supra* note 109 at 286.

¹³⁵ *Ibid.*

¹³⁶ *Ibid* at 287.

¹³⁷ Bakvis & Skogstad, *supra* note 29 at 6.

political parties are constantly jostling for position with voters, while attempting to maximize autonomy and jurisdiction.¹³⁸

Regardless of the competition that exists within the federation, inter-governmental relations after the 1930's have been characterized as an era of executive federalism, where elected and appointed officials of the two orders of government constantly interact.¹³⁹ Breton warned that the shift away from 'classical federalism' would prove to be detrimental to the effective function of Canadian federalism. This classical model was prevalent prior to World War II and is described as a time when both levels of government operated independently with little legislative overlap or inter-governmental collaboration.¹⁴⁰

The concept of co-operative federalism was introduced after the Second World War when the federal government took the lead in establishing the foundations of the modern welfare state.¹⁴¹ The federal government required the assistance of the provinces, since matters like health and welfare are areas that fall within provincial jurisdiction.¹⁴² Over the years consultative structures were created that ensured constant communication between elected officials and public servants of both orders of government. The emergence of executive federalism has been viewed by the academic community as a response to policy interdependence or, "...the overlap and duplication that are inevitable with two activist orders of government."¹⁴³ Since the rise of the modern welfare state

¹³⁸ Bakvis & Skogstad, *supra* note 29 at 6.

¹³⁹ *Ibid.*

¹⁴⁰ Smith, *supra* note 33 at 22.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Bakvis & Skogstad, *supra* note 29 at 7.

there have been very few policy areas in which either Ottawa or the provinces operate without infringing on the jurisdiction of another government. Even the most straightforward of policy initiatives may require collaboration between governments. In the modern Canadian federation a government with the necessary authority to make a decision must consider the implications for other governments.¹⁴⁴

When referring to Donald V. Smiley's definition of executive federalism, there is no mention of the public being involved in inter-governmental negotiations. Breton explained that the lack of public participation "spoils the promise of democratic openness and responsiveness that is inherent in classical federalism."¹⁴⁵ Under classical federalism it is possible for governments to compete for the affections of the masses. Furthermore, when governments act purely on their own authority, as they do in classical federalism, clear lines of accountability are drawn.¹⁴⁶ Hence, it is less difficult for the public to identify which level of government is responsible for each policy initiative.

Overall, Breton's theory of competitive federalism contains valid points of discussion. However, he believes that a competitive environment with checks and balances is essential for the continuance of the parliamentary organization of government.¹⁴⁷ This notion comes from the idea that, just as competition produces superior benefits in the open market by preventing market domination of monopolies and oligopolies, society will be better served by governments moving within a competitive

¹⁴⁴ Bakvis & Skogstad, *supra* note 29 at 7.

¹⁴⁵ Smith, *supra* note 33 at 23.

¹⁴⁶ *Ibid.*

¹⁴⁷ Smiley, "Federal Condition", *supra* note 47 at 97.

setting.¹⁴⁸ Breton compares co-operative federalism to collusion directed at serving the interests of political elites and not ordinary citizens.¹⁴⁹ However, in an age of increasing policy collaboration both domestically and internationally, it can be said that competitive federalism will only result in minor solutions that only help particular provinces or regions. Canadian federalism based on inter-governmental co-operation has demonstrated the uncanny ability to evolve and adapt based on the current demands of the Canadian Federation.

Up to this point this project has analyzed the historical roots of the Canadian Federation to reveal that the country was founded by two groups of individuals, one group that supported national unity and another that favoured regional diversity. Canada was created through the utilization of the federal system of government to appease the proponents of national cohesion and proponents of diversity. The signing of the original *British North America Act* in 1867 would create numerous provinces held together by one central governmental branch. The provinces and the federal government were each designated areas of exclusive jurisdiction that were enforced by the constitutional interpretation of the courts. The presence of a new federal system in Canada meant that inter-governmental tension was guaranteed. Until 1930, the JCPC reinforced the era of classical federalism, a time in Canada where each individual jurisdiction operated in relative isolation from one another with little or no jurisdictional overlap. The Great Depression, World War II and the establishment of the Supreme Court of Canada as Canada's final court of appeal in 1949, all led to the end of the classical federalism era and assisted with the introduction of co-operative federalism. An extensive system of

¹⁴⁸ Watts, *supra* note 111 at 61.

¹⁴⁹ *Ibid.*

inter-governmental consultative structures were established in an effort to combat the effects of the Great Depression and meet the societal demands of a modern Canada. The concept of co-operative federalism was extremely attractive because it allowed for the constant redistribution of powers and resources between governments without the involvement of the judiciary or constitutional amendment. This allowed for both governments to efficiently implement policy without extended delays.

The concept of competitive federalism as theorized by Albert Breton assumes that greater checks and balances in the Canadian political system will result in better policy initiatives. Still, it has been proposed that the tenets of co-operative federalism will create superior legislation in a flexible and highly efficient manner and this will result in decreased inter-governmental tensions.

However, in order to effectively assess the usefulness of co-operative federalism a recent legislative saga will be examined. The next section of this thesis will therefore be dedicated to analyzing the development of a piece of federal legislation known as the *Assisted Human Reproduction Act (2004)*. Once the genesis of the *Act* has been examined there will be a brief overview of the provisions contained within the legislation. Once that section is complete the final portion of the project will be dedicated to providing a critical commentary on the Supreme Court reference opinion entitled the *Ref re Assisted Human Reproduction Act (2010)*. The constitutional justifications utilized by both the federal government and the provincial governments will be assessed. The opinions of the Court will be discussed followed by various reactions from the academic community. It will be proposed that the federal legislation did not survive constitutional scrutiny because the tenets of co-operative federalism were not adhered to during the formulation of the *Act*.

Finally, a discussion concerning the implications the reference opinion may have on future constitutional disputes and assisted human reproductive technology will take place. The logic behind analyzing all of these components is to show that the *Assisted Human Reproduction Act* is a bad example of co-operative federalism and that if the tenets of the concept were extensively utilized throughout the legislative process it would have been less likely that constitutionality of the *Act* would have been challenged.

5. The Genesis of the *Assisted Human Reproduction Act*

Canada along with the United States, Switzerland and Australia, is one of the first major federal nations to exist worldwide. Canadians must contend with local and municipal governments, provincial and territorial governments, Aboriginal governments and the federal government. Jennifer Smith posits that “given the size of the country and the heterogeneity of the population, [one might say] that it would hardly do to organize the governing system any other way.”¹⁵⁰ To account for the vast size and diversity of the country the creation of a federation was the most suitable structure for Canada. However, because Canada is a federation the diverse views that exist across the country will result in a never-ending cycle of political and societal tension. This strain that is always apparent in inter-governmental relations worsens when new controversial topics arise. In 2004 the federal government passed *An Act Respecting Assisted Human Reproduction and Related Research*.¹⁵¹ The *Act*, which would later be referred to as the *Assisted Human Reproduction Act (AHRA)*, was the culmination of fifteen years of research and

¹⁵⁰ Smith, *supra* note 33 at 8.

¹⁵¹ *Supra* note 3.

policy development in a field that could not have been foreseen at the time of Confederation.¹⁵²

5.1 The Evolving Influence of Women in the 1980's

In the early 1980's the Canadian political forum underwent drastic alterations following the successful patriation of the Canadian Constitution. At this time there was a collective and highly focused campaign in which many women who were lawyers played a significant role in the wording of Section 15 of the *Canadian Charter of Rights and Freedoms*.¹⁵³ This section of the *Charter* guaranteed equality rights by ensuring no one would be discriminated against based on “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability...”¹⁵⁴ The prominent role that women in a variety of capacities had on the wording of this section affected political events for the remainder of the decade. For instance, the legal recourse for those experiencing discrimination encouraged the establishment of the Women's Legal Education and Action Fund.¹⁵⁵ This powerful charitable organization ensured countless legal successes that drastically impacted political discourse pertaining to women's rights in Canada and around the world.¹⁵⁶ The most famous contribution of this group was their activities that led to the implementation of equal pay for work of equal value in the public sector.¹⁵⁷ Around the same time, women's abortion rights were being questioned in the political and legal arenas. The activities of Dr. Henry Morgentaler acted as the catalyst that

¹⁵² Mavis Jones & Brian Salter, “Proceeding carefully: Assisted human reproduction policy in Canada” (2010) 19 *Public Understand Sci* 420 at 423.

¹⁵³ *Ibid* at 422-423.

¹⁵⁴ *Canadian Charter of Rights and Freedoms*, s 15, Part I of the Constitution Act, 1982 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

¹⁵⁵ Jones & Salter, *supra* note 152 at 423.

¹⁵⁶ *Ibid*

¹⁵⁷ *Ibid*.

prompted the abortion debate amongst lawyers and politicians. The arrest and imprisonment of Dr. Morgentaler following the realization that he was operating illegal abortion clinics solidified that the topic required Parliament's attention.¹⁵⁸ After the highly publicized Supreme Court of Canada judgment and extensive political debates, abortion was decriminalized in 1988.¹⁵⁹

5.2 The Push For An Investigation Into Assisted Reproductive Technology

When the late 1980's came around feminist activists, academics and health advocates began pushing for a formal inquiry into new human reproductive technology in Canada. This collection of individuals formed the Canadian Coalition for a Royal Commission on New Reproductive Technologies.¹⁶⁰ The group chose to lobby for a Royal Commission because of the favourable reception of the previous Royal Commission on the Status of Women that took place between 1967 and 1971.¹⁶¹ The coalition justified the need for biotechnology policy in Canada by emphasizing the social and ethical implications of genetic technologies. This approach was vastly different from the biotechnology policies in other countries that were considered in the interest of economic policy. For example, in the United States private companies fund the vast majority of medical research, and these are not subject to federal funding regulations.¹⁶² As a result, the approach of the Canadian Coalition for a Royal Commission on New Reproductive Technologies ensured these social and ethical considerations would be considered throughout the duration of the ensuing Royal Commission.

¹⁵⁸ Jones & Salter, *supra* note 152 at 423.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid* at 426.

After a long lobbying campaign the efforts of the Coalition were successful when in 1989 the Canadian government appointed the Royal Commission on New Reproductive Technologies.¹⁶³ Dr. Patricia Baird was selected as Chair of the Commission and like many other Royal Commissions commonly known by the name of the chair, the Baird Commission commenced in 1989.¹⁶⁴ The commission was charged with the mandate to:

“examine current and potential scientific and medical developments related to reproductive technologies but also to go beyond them to consider: the impact of the technologies on society as a whole; their impact on identified groups in society, specifically women, children, and families; and the ethical, legal, social, economic, and health implications of these technologies.”¹⁶⁵

The Baird Commission was plagued with difficulties from the outset with the most notable challenge being a severe lack of public feedback on the topic. Those who have analyzed the processes utilized by the Royal Commission have been able to reveal a variety of procedural flaws including the poor design of public hearings, and the presence of an intimidating and dismissive hearing atmosphere.¹⁶⁶ Furthermore, these glaring inadequacies were most apparent when the Commission admitted to have knowingly lacked input from “francophones, ethno-cultural groups, religious groups, and aboriginals...”¹⁶⁷ The Commission maintained that these sub-sections of the population had no valid opinions to provide regarding the topic of assisted reproductive

¹⁶³ Jones & Salter, *supra* note 152 at 424.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Proceed with Care*, *supra* note 4 at 2.

¹⁶⁶ Jones & Salter, *supra* note 152 at 424.

¹⁶⁷ *Ibid.*

technologies.¹⁶⁸ The issues uncovered by critics made it apparent that the Royal Commission on New Reproductive Technologies was not fully addressing its mandate, especially with regards to examining the impact of biotechnology on vulnerable groups. In 1991 four Commissioners publicly expressed their dissatisfaction with the exclusionary design of the Commission's public participation component, its internal politics and Dr. Patricia Baird's fostering of an undemocratic internal structure.¹⁶⁹ Finally, after launching a lawsuit against the Commission, the four commissioners were fired and the final report was released without four of its original members.¹⁷⁰

5.3 The Commission's Final Report: *Proceed with Care*

The procedural problems that occurred during the operation of the Baird Commission led to a politically charged atmosphere when the completed report was released to the public.¹⁷¹ The highly publicized objections of the four former Commissioners only enhanced tensions. Nevertheless, the Commission released its final report entitled *Proceed with Care* in 1993.¹⁷² Although it did not seem like it throughout the term of the Commission, the final recommendations reflected the original objectives of the Canadian Coalition for a Royal Commission on New Reproductive Technologies. The report conveyed this purpose when it embodied the spirit of caution against the commercialization of human bodies.¹⁷³ Overall, the report received a warm welcome when it was realized that its findings had the potential to revolutionize reproductive

¹⁶⁸ Jones & Salter, *supra* note 152 at 424.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Proceed with Care*, *supra* note 4.

¹⁷³ Jones & Salter, *supra* note 152 at 424.

healthcare governance in Canada.¹⁷⁴

The framework instituted in the United Kingdom significantly influenced the drafting of the Canadian legislation. In particular, this inspiration came from the U.K.'s *Human Fertilization and Embryology Act, 1990*.¹⁷⁵ The birth of Britain's first baby with the aid of assisted human reproductive technology in 1978 initiated a series of debates related to the ethical issues of assisted human reproduction.¹⁷⁶ These deliberations culminated in Baroness Warnock's 1985 report *A Question of Life* that formed the basis of the *Human Fertilization and Embryology Act*.¹⁷⁷ An important goal sought by the drafters of the *AHRA* was to create a structure that included a regulatory body as influential as the UK Human Fertilisation and Embryology Authority.¹⁷⁸ The establishment of Assisted Human Reproduction Canada emulated this organization. The adoption of this model was extremely attractive due to the ongoing regulatory vacuum that was present in an expanding technological field. Although the Canadian legislation analyzed this foreign legislation to assist in the construction of an effective statute, the *AHRA* was the culmination of an extensive consultation process that established a uniquely Canadian framework.¹⁷⁹

The distinctively Canadian nature of the legislation was essential due to the fundamental political differences that exist between Canada and the United Kingdom. Academics often note that, in the field of healthcare and biotechnology policy, Canada

¹⁷⁴ Jones & Salter, *supra* note 152 at 424.

¹⁷⁵ *Human Fertilization and Embryology Act* (UK), ESC 1990, c 37 [*Fertilization Act*].

¹⁷⁶ Jones & Salter, *supra* note 152 at 424.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* at 427.

has experienced difficulties formulating legislation because of the countless jurisdictional issues that arise between the federal and provincial governments.¹⁸⁰ Jones and Salter quoted a respondent in their 2010 article who stated “Canada is different to Britain... You need to... [create legislation] ...in the context of federal/provincial relations, which are always touchy; but you cannot do it any other way because if it was different in every province you would get reproductive tourism... It wouldn’t make sense for the country.”¹⁸¹ Additionally, the authors noted that despite the apparent need for the framework, it was difficult to garner significant provincial support for the *AHRA*.¹⁸² It was also suggested that the delicate negotiations between the federal and provincial governments prevented Canada from legislating in this field at an earlier time.¹⁸³ Due to the absence of a federal-parliamentary system, British legislators did not encounter the critical jurisdictional impediments experienced by Canadian public officials. Regardless of the well-known inter-governmental tensions between Canadian governmental bodies, many continued to believe that the introduction of a federal framework was the best route to take.¹⁸⁴

Two years after the publication of *Proceed with Care* the Minister of Health Diane Marleau announced a voluntary moratorium on several reproductive technologies that the Baird Commission had found to be contrary to Canadian ethics and values.¹⁸⁵ The resulting committee provided the necessary transition between the final report of the

¹⁸⁰ Jones & Salter, *supra* note 152 at 427.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid* at 425.

Baird Commission and the development of a possible regulatory framework.¹⁸⁶ Ultimately, “...several incarnations, five health ministers, two parliamentary sessions, and many stakeholder consultations...” were needed for the results of the Baird Commission to become federal legislation.¹⁸⁷ The completed legislation known as Bill C-6 *An Act Respecting Assisted Human Reproduction and Related Research* received Royal Assent on March 31, 2004.¹⁸⁸

5.4 Overview of the *Assisted Human Reproduction Act*

The completed legislation closely followed the major recommendations outlined in the final report of the Baird Commission. The report suggested a combination of criminal sanctions and regulations to provide the legislation with the ability to be flexible and to further respond to evolving technologies.¹⁸⁹ The Royal Commission was clear in communicating its unwavering support of a national framework, stating in the final report that matters “so important to women and children... cannot differ from province to province.”¹⁹⁰ Using the social and moral implications of assisted reproductive technologies as a platform, the Baird Commission found ample justification to anchor the *AHRA* within federal jurisdiction. It was determined that the federal government was justified in the creation of a national framework due to the criminal law power and the residual peace, order, and good government clause that both permit federal legislation in

¹⁸⁶ Jones & Salter, *supra* note 152 at 425.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Supra* note 3.

¹⁸⁹ Dave Snow, “Judicialization of Assisted Reproductive Policy in Canada: Decentralization, Medicalization, and Mandatory Regulation” (2012) 27 *Can J L & Soc* 169 at 173.

¹⁹⁰ *Ibid.*

areas of ‘national concern’.¹⁹¹

5.4.1 Prohibited Activities

The federal government set out to clearly prohibit specific activities with the *AHRA*. Sections 5 to 9 of the *Act* ban certain actions and if someone breaches these provisions are guilty of a criminal offence and

a) is liable, on conviction on indictment, to a fine not exceeding \$500,000 or to imprisonment for a term not exceeding ten years, or both; or¹⁹²

b) is liable, on summary conviction, to a fine not exceeding \$250,000 or to imprisonment for a term not exceeding four years, or both.¹⁹³

Section 5 pertains to activities involving technical knowledge. The legislation prohibits the cloning of a human being¹⁹⁴ as well as creating an *in vitro* embryo for any purposes other than creating a human or improving assisted human reproductive processes.¹⁹⁵ To clarify, an *in vitro* embryo means an embryo that exists outside of the body of a human being. The transfer or creation of an embryo from any part of a cell, embryo or foetus for the purpose of creating a human being is prohibited.¹⁹⁶ Following the fourteenth day of development it is illegal to artificially maintain an embryo, in a manner that would allow it to continue maturing outside the body of a female.¹⁹⁷ Beyond the intention of creating a human being, alterations are prohibited that would increase the

¹⁹¹ Snow, *supra* note 189 at 173.

¹⁹² *Supra* note 3, s 60 (a).

¹⁹³ *Ibid*, s 60 (b).

¹⁹⁴ *Ibid*, s 5 (1)(a).

¹⁹⁵ *Ibid*, s 5 (1)(b).

¹⁹⁶ *Ibid*, s 5 (1)(c).

¹⁹⁷ *Ibid*, s 5 (1)(d).

probability that an embryo will be a particular sex.¹⁹⁸ The only exception to this provision would be if the alteration would prevent, diagnose, or treat a sex-linked disorder or disease.¹⁹⁹ Furthermore, it is forbidden to alter the genome of a cell to a point where the alteration would be capable of being transmitted to descendants.²⁰⁰ Any activity involving the mixture of human and non-human genetic material for the purposes of creating chimera or hybrids is strictly forbidden.²⁰¹ Under Section 5 (2) and Section 5 (3) of the *AHRA*, offering, advertising, paying or offering to pay for any of the above activities is designated as committing a criminal offence.²⁰²

The provisions located in Section 6 of the *Act* concern activities involving surrogate mothers. It is illegal for a person to pay, offer to pay or advertise payment for a surrogate mother.²⁰³ Similarly, it is a criminal offense for someone to pay, advertise or offer to pay an intermediary to arrange surrogacy services, and for an intermediary to offer, advertise or organize surrogate services.²⁰⁴ Another provision relating to surrogate mothers stipulates that, no female under the age of 21 should be counselled, induced, or undergo any medical procedure to become a surrogate mother.²⁰⁵ The final subsection on surrogate mothers stipulates that the entirety of Section 6 does not affect the validity of provincial laws that enable agreements under which a person agrees to become a

¹⁹⁸ *Supra* note 3, s 5 (1)(e).

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*, s 5 (1)(f).

²⁰¹ *Ibid.*, s 5 (1)(i)(j).

²⁰² *Ibid.*, s 5 (2) and s 5 (3).

²⁰³ *Ibid.*, s 6 (1).

²⁰⁴ *Ibid.*, s 6 (2) and s 6 (3).

²⁰⁵ *Ibid.*, s 6 (4).

surrogate mother.²⁰⁶

Section 7 of the *AHRA* contains the provisions directed at preventing the commercialization of human tissue. No person is allowed to purchase, offer to purchase or advertise the purchase of *in vitro* embryos, sperm, ova or any other reproductive material. In addition, individuals are prohibited from selling, offering to sell or advertising to sell *in vitro* embryos.²⁰⁷ Section 8 stipulates that reproductive materials and *in vitro* embryos shall not be utilized without the express written consent of the donor.²⁰⁸ These same conditions also apply in the event of the donor's demise.²⁰⁹ Finally, Section 9 concludes the 'Prohibited Activities' section by declaring donors must be at least 18 years of age for the use of any sperm or ova obtained, "except for the purpose of preserving the sperm or ovum or for the purpose of creating a human being that the person believes will be raised by the donor."²¹⁰

5.4.2 Controlled Activities

The bulk of the *AHRA* was dedicated to the establishment of a regulatory framework where assisted reproductive activities would be permitted if practices occurred in accordance with the regulations and a license issued by the regulatory board Assisted Human Reproduction Agency of Canada. Specifically, Sections 10 to 13 specify the 'Controlled Activities' of the *Act*. Section 10 designates that no person can alter, manipulate or treat human reproductive material or an *in vitro* embryo, unless; the

²⁰⁶ *Supra* note 3, s 6 (5).

²⁰⁷ *Ibid*, s 7 (1), s 7 (2) and s 7 (3).

²⁰⁸ *Ibid*, s 8 (1) and s 8 (3).

²⁰⁹ *Ibid*, s 8 (2).

²¹⁰ *Ibid*, s 9.

activities are in accordance with regulations and the required license.²¹¹ Also, except in compliance with regulations and a license, restrictions are placed on one's ability to obtain, transfer, destroy, import or export reproductive material.²¹² Section 11 explains that combining human genetic material with any part of the genome of another species is restricted, except in accordance with the regulations of the *Act* and a license.²¹³ Section 12 deals specifically with economic considerations such as reimbursement of expenditures and receipts. Any reimbursements or expenditures that are incurred require a license and documentary proof of expenses.²¹⁴ With regards to surrogacy, it is forbidden to compensate the mother for a loss of work-related income unless a medical practitioner provides a certificate validating that continuing to work would pose a risk to the mother and the unborn child.²¹⁵ The final part of the 'Controlled Activities' section states that the federal government controls the locations where the regulated activities may be conducted. Thus, activities shall only occur on premises that have been granted a license.²¹⁶ Sections 14 to 20 establish rules for the collection of data and the respect of privacy and access to information. Criminal penalties in section 61 of the *AHRA* stipulate that whoever contravenes any of the 'Controlled Activities' is guilty of a criminal offence and

a) is liable, on conviction on indictment, to a fine not exceeding \$250,000 or to imprisonment for a term not exceeding five years, or both; or²¹⁷

²¹¹ *Supra* note 3, s 10 (1) and s 10 (2).

²¹² *Ibid*, s 10 (3)(a)(b).

²¹³ *Ibid*, s 11(1).

²¹⁴ *Ibid*, s 12 (2).

²¹⁵ *Ibid*, s 12 (3)(a).

²¹⁶ *Ibid*, s 13.

²¹⁷ *Ibid*, s 61 (a).

b) is liable, on summary conviction, to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding two years, or both.²¹⁸

To conclude, the focus on social and ethical implications of assisted human reproduction was central during the term of the Baird Commission. This emphasis enabled legal scholars to understand why the Commission cited the federal responsibility related to criminal law to justify legislating in a field of disputed jurisdiction. However, the ‘Controlled Activities’ provisions in the *Act* were far more contentious, especially considering the jurisdictional implications of the regulatory provisions designated within the section.

5.5 General Observations

Several general observations of the legislation are as follows. The *Act* embodies the overall perspective of academics writing in the field of biotechnology policy because of its focus on social and ethical issues. In contrast, the economic focus of American biotechnology policy is often seen as unusual because in the scholarly literature, assisted reproduction is discussed under the umbrella of moral policy rather than economic policy.²¹⁹ Regulations in relation to “embryonic stem-cell research; and payment for sperm, eggs, and surrogacy constitute legal sanctions of right and wrong that validate a particular set of fundamental values.”²²⁰ Although some areas require payment considerations, issues related to assisted reproduction are not chiefly economic. The

²¹⁸ *Supra* note 3, s 61 (b).

²¹⁹ Snow, *supra* note 189 at 172.

²²⁰ *Ibid.*

primary concerns in this field involve parentage, identity, sexuality, reproduction, gender, and human life itself.²²¹ Additionally, assisted reproduction policy is framed in the language of individual rights such as “the rights of the infertile; fetal rights; the rights of single mothers, gays and lesbians; and, most frequently, the rights of children born through assisted reproduction.”²²² For example, the legislation forbids “a variety of genetics-related technologies including such controversial activities as the creation of chimerae or hybrids and human germ-line alteration.”²²³ Furthermore, when compared to the biotechnology legislation enacted by other modern nations, the *AHRA* takes a strict stance against the commercialization of human tissue.²²⁴ The *AHRA* prohibits the direct exchange of payment for sperm and eggs, and for surrogate motherhood. It is possible for exchanges to happen but these interactions must occur in the form of expense reimbursement.²²⁵ Finally, those who contravene provisions of the *Act* are committing a criminal offense and the authors view this as an attempt “to police a powerful professional community, the medical practitioners.”²²⁶

5.6 The Legislative Landscape and the AHRA

It is important to remind oneself of the legislative landscape during and after the drafting of the *AHRA*. Throughout the legislative process leading up to the creation of the *AHRA*, some provinces complained that the regulatory aspects of the *Act* infringed upon the provincial jurisdiction over the social and medical aspects of fertility technologies.²²⁷

²²¹ Snow, *supra* note 189 at 172.

²²² *Ibid.*

²²³ Jones & Salter, *supra* note 152 at 421.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ Snow, *supra* note 189 at 174.

However, legal academic Dave Snow points out that “because few provincial governments actually expressed any desire to legislate, the federal government moved forward with the *AHRA*.”²²⁸ Quebec was the only province that maintained certain aspects of the *AHRA* were unconstitutional, through a series of letters written to the federal Minister of Health.²²⁹ The reservations of the Quebec government were taken into consideration, but the threat of a legislative vacuum in a growing technological field was too drastic to ignore.

Ultimately, numerous stakeholders and groups involved in the drafting of the legislation had to make compromises to ensure the survival of the legislation.²³⁰ During the drafting process, virtually all organizations and individuals who appeared before Parliament called for the Bill to be passed.²³¹ Even the Catholic Church, who are completely opposed to embryo research urged Parliament to pass the legislation.²³² These religious representatives pointed to the events that surrounded the previous abortion laws in Canada. During the abortion saga, numerous organizations fought against the Canadian abortion law and in the end the statute was struck down and no law was able to pass the scrutiny of the Senate to take its place.²³³ Consequently there is no current criminal law in Canada that regulates or forbids abortion.

By the end of the 1990’s the stakes were high and it was recognized that there was an urgent need for policy to take shape in this area. The lack of a regulatory framework in

²²⁸ Snow, *supra* note 189 at 174.

²²⁹ *Ibid.*

²³⁰ Jones & Salter, *supra* note 152 at 429.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

Canada prior to the *AHRA* allowed for clinicians and researchers to practice numerous controversial activities without guidance or restriction.²³⁴ Although it was not possible for everyone involved with the legislation to be completely satisfied, most could agree that some sort of framework was preferred rather than none at all.²³⁵ In any event, although the genesis of the *AHRA* was plagued with problems from the outset and numerous constitutional questions arose, the legislation that was created using the Commission's findings was well received and considered a necessity for Canada by all those involved.

The presence of a legislative vacuum in the field of assisted human reproduction was one of the main motivations for creating a broad national regulatory framework. The Quebec government was adamant in their view that the regulatory scheme instituted by the federal government violated the division of powers as set out in the *Constitution Act, 1867*. Shortly after the *AHRA* received Royal Assent, the Quebec government launched a reference to the Quebec Court of Appeal to determine the constitutional validity of the *Act*. It seemed as though the Government of Quebec was emboldened by the fact that the provincial legislature were in the midst of drafting provincial laws related to assisted reproduction. In 2009 the government of Quebec passed *An Act respecting clinical and research activities relating to assisted procreation*.²³⁶ With the enactment of the *Assisted Procreation Act* Quebec passed several Civil Code provisions concerning assisted reproduction, has included *in vitro* fertilization under provincial health coverage since

²³⁴ Jones & Salter, *supra* note 152 at 429.

²³⁵ *Ibid.*

²³⁶ *An Act respecting clinical and research activities relating to assisted procreation*, [2010] RSQ c A-5.01 (available on CanLII) [*Assisted Procreation Act*].

2010, and has adapted its regulations in response to recent judicial decisions.²³⁷

Unilateral efforts on behalf of the Canadian federal government to initiate policy development are not unheard of in Canada. As mentioned, Ottawa in the past has used its spending power to influence provincial policy, including health policy.²³⁸ In recent years federal approaches to harmonize health policy has been on the decline and this new environment is not well suited to organize the regulation of assisted reproductive technology. Dave Snow and Rainer Knopff point to Ottawa's leadership in achieving Canada's *Agreement on Internal Trade (AIT)* where "Ottawa initiated negotiations but then came to be seen 'as an equal party' rather than a 'dominant senior partner in inter-governmental arrangements'".²³⁹ While further trade policy harmonization has been propelled by provincial collaboration, the federal government brought the issue to the forefront of the provincial economic agendas.²⁴⁰ Still, the presence of inter-provincial trade barriers exist in Canada and some believe that Ottawa should use its influence to impose its will on reluctant provinces. However, as will be discussed in the following section of this project, Ottawa cannot impose its will outside of its criminal law jurisdiction to influence assisted reproduction technology. Snow and Knopff state that the federal government "must rely on the softer power of inter-governmental negotiation and persuasion.", to influence other aspects of assisted human reproduction policy.²⁴¹

²³⁷ Snow & Knopff, *supra* note 40 at 16.

²³⁸ *Ibid* at 19.

²³⁹ *Ibid*.

²⁴⁰ *Ibid*.

²⁴¹ *Ibid*.

6. Reference re Assisted Human Reproduction Act

6.1 Reference re Assisted Human Reproduction Act (Quebec Court of Appeal)

The passing of the *AHRA* occurred with plenty of constitutional uncertainty, particularly because the legislation instituted a broad national strategy that was highly centralized in a field commonly operated by the provinces. The risks that were taken during the formulation, drafting, and passing of the *AHRA* were constitutionally assessed when the government of Quebec referred a question to the Quebec Court of Appeal concerning the constitutional validity of the *Act*.²⁴² The reference question was submitted in 2008 only four years after the *Act* received Royal Assent. As mentioned in the previous section, Quebec was the only government that actively opposed the passing of the *AHRA*, so it seemed appropriate that Quebec would be the province to formally challenge the federal legislation. According to the Attorney General of Quebec, the pith and substance of the legislation was the regulation of all aspects of medical practices related to assisted reproduction, including medical practitioners and the institutions where these individuals work, the doctor-patient relationship, and civil aspects of medically assisted human reproduction.²⁴³ The province of Quebec declared that the legislation was meant to regulate the exclusive provincial jurisdiction over property and civil rights, as stipulated in section 92 (13) of the *Constitution Act, 1867*.²⁴⁴ The Attorney General of Canada submitted that the impugned provisions were valid pursuant to the Parliament of Canada's power to enact laws in relation to criminal law and the 'double aspect

²⁴² *Reference re Assisted Human Reproduction Act*, [2008] QCCA 1167, 298 DLR (4th) 712 [QCCA *Ref re AHRA*].

²⁴³ QCCA *Ref re AHRA*, *supra* note 242.

²⁴⁴ *Ibid.*

doctrine'.²⁴⁵ He explained that the purpose of the *Act* is to protect health, safety, and public morals and that because of this the *AHRA* had a valid criminal law purpose.²⁴⁶ Double occupancy of a field such as health is a permanent feature of the Canadian constitutional structure. It leads to a standard of 'double aspect' analysis under which two separate aspects, one federal and the other provincial, exist side by side unless there is a conflict, in which case the federal aspect prevails.²⁴⁷ The absolute prohibitions were conceded to be valid criminal law and were not challenged. The Quebec Court of Appeal issued its reference opinion, siding entirely with the government of Quebec and ruling nearly every regulatory component of the *AHRA* unconstitutional.²⁴⁸ When the Attorney General of Canada appealed to the Supreme Court of Canada he did not include the 'double aspect' doctrine in his justification. Therefore, for the purposes of this project it is not necessary to perform an examination of the 'double aspect' doctrine. On the other hand, in order to fully understand the federal government's reasoning for using the federal criminal law power to justify its argument in the Supreme Court reference case *Reference re Assisted Human Reproduction Act (2010)*, it is essential to perform a brief analysis of the criminal law power as an accepted constitutional principle. Furthermore, in the Supreme Court reference the position of the Attorney General of Quebec remained the same, thus an explanation of the provincial jurisdiction over property and civil rights will also be provided.

²⁴⁵ QCCA *Ref re AHRA*, *supra* note 242.

²⁴⁶ *Ibid.*

²⁴⁷ *Quebec (Procureur general) c Canada (Procureur general)*, 2010 CarswellQue 13213 (WL Can) at para 67 (SCC) [*Ref re AHRA*].

²⁴⁸ Snow, *supra* note 189 at 174.

6.2 Federal Criminal Law Power

In Canada, Section 91 (27) of the *Constitution Act, 1867* assigns the responsibility of criminal law to federal Parliament.²⁴⁹ As demonstrated by the case law, s.91 (27) has experienced dramatic shifts of judicial interpretation. In the 1922 reference decision entitled *Reference re The Board of Commerce Act*,²⁵⁰ Viscount Haldane interpreted the criminal law power as applicable only “where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence.”²⁵¹ The definition of the criminal law power provided in the *Reference re The Board of Commerce Act* opinion appeared to be quite restrictive. Although Viscount Haldane did not clarify what was meant by ‘the domain of criminal jurisprudence’, Peter Hogg argues that “the phrase could be read as freezing the criminal law into a mould established at some earlier time, presumably 1867.”²⁵²

Subsequently in 1931, four years after the death of Viscount Haldane, Lord Atkin rendered a decision in *Proprietary Articles Trade Association v. AG Canada (P.A.T.A)*²⁵³ that drastically altered the interpretation of the criminal law power. Lord Atkin rejected the narrow definition of criminal law, which stipulated that the power would be restricted to matters that have traditionally fallen within the domain of criminal jurisprudence.²⁵⁴ Instead, Lord Atkin declared a very wide definition of the criminal law power, one “that included all acts that at any particular period of time are prohibited with penal

²⁴⁹ *Constitution Act*, *supra* note 6, s 91 (27).

²⁵⁰ *Reference re The Board of Commerce Act*, [1922] 1 AC 191 (PC).

²⁵¹ Macklem & Rogerson, *supra* note 36 at 421.

²⁵² Hogg, *supra* note 1 at 18-4.

²⁵³ *Proprietary Articles Trade Association v. AG Canada*, [1931] AC 310 (PC).

²⁵⁴ Macklem & Rogerson, *supra* note 36 at 421.

sanctions.”²⁵⁵ However, this new definition appeared too wide, as it would enable the federal Parliament to expand its jurisdiction indiscriminately, simply by presenting legislation in the form of a prohibition accompanied by a penalty.²⁵⁶ Lord Atkin clarified that this new understanding of the criminal law power did not excuse Parliament if it used this power to intentionally encroach on provincial jurisdiction.²⁵⁷ According to Hogg, “the P.A.T.A. definition is still too wide, because it would uphold any federal law which employs a prohibition and penalty as its primary mode of operation.”²⁵⁸

One of the most famous cases related to the criminal law power is commonly referred to as the *Margarine Reference (1951)*.²⁵⁹ Modern discussions of Parliament’s criminal law power begin with this reference because the opinion rendered establishes a third criterion in the definition of criminal law. In the 1880’s the federal government passed legislation that prohibited the manufacture, importation or sale of margarine.²⁶⁰ At this time margarine posed a legitimate threat to the health and safety of Canadians. This was because the poor quality of the product led to the presence of abnormally high e-coli levels within margarine. During World War II, however, there was a shortage of dairy products because of resources being dedicated to the war effort and many farmers were involved as soldiers in the conflict overseas. Moreover, after the war ended it was recognized that margarine had begun to be manufactured differently and that as a result, it was a realistic cheaper oil-based substitute to dairy products such as butter. As time passed, it was realized that the purpose of the prohibition on margarine was to protect the

²⁵⁵ Macklem & Rogerson, *supra* note 36 at 421.

²⁵⁶ Hogg, *supra* note 1 at 18-4.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Reference re Validity of Section 5 (a) of the Dairy Industry Act*, [1949] SCR 1, 1 DLR 433.

²⁶⁰ Hogg, *supra* note 1 at 18-4.

dairy industry.²⁶¹ The Judicial Committee of the Privy Council held that, although the law pertaining to margarine abided by the criminal form of a prohibition backed by a penalty, the economic aspect of the legislation insulating the dairy industry from competition made the substance of the law related to property and civil rights of the provinces.²⁶² The judicial reasoning that followed from the *Margarine Reference* opinion has had a lasting impact on the Canadian conception of the federal criminal law power. The JCPC adopted the reasoning of Canadian Supreme Court Justice Rand, when they accepted that a criminal prohibition was not criminal unless it served “a public purpose which can support it as being in relation to the criminal law.”²⁶³ Specifically, public peace, order, security, health and morality were considered ordinary but not exclusive ends served by criminal law.²⁶⁴ After establishing this new step in the criminal law analysis, Rand J. determined that the protection of the dairy industry did not constitute a qualifying purpose to invoke the criminal law power.²⁶⁵

The judicial reasoning of Viscount Haldane, Lord Atkin and finally, Canadian Supreme Court Justice Rand outlined the fundamental tenets of the criminal law power. Yet the specific facet of the criminal law power that directly pertains to the *Reference re Assisted Human Reproduction Act* is whether Rand’s interpretation of section 91 (27) “will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority.”²⁶⁶ Typically, there is not any intervention by

²⁶¹ Hogg, *supra* note 1 at 18-4.

²⁶² *Ibid* at 18-5.

²⁶³ *Ibid*.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid*.

²⁶⁶ *Ibid* at 18-27.

an administrative agency or official prior to the application of a law.²⁶⁷ It is common for a law to be administered by law enforcement officials and for the courts to act in a mechanical capacity after the prohibited conduct has occurred.²⁶⁸ The cases that follow are meant to demonstrate the progression of the relationship between criminal law and regulatory authority.

6.2.1 Nova Scotia Board of Censors v. McNeil

In 1967, the provincial government of Nova Scotia enacted the *Theatres and Amusements Act* to establish a licensing and regulation system for the showing of motion pictures.²⁶⁹ The legislation required all films to be submitted to the provincial censor board prior to being released to the public.²⁷⁰ The board had the power to allow or forbid the showing of a film, or to permit its exhibition with alterations.²⁷¹ Sanction for breach of board regulations resulted in a monetary penalty and removal of the theatre owner's license.²⁷² A private citizen pursued legal action to have the censor board regulations declared unconstitutional, specifically by arguing that the provincial legislature was infringing on federal jurisdiction by wrongfully exercising the criminal law power.

In 1978, the Supreme Court of Canada in *Nova Scotia Board of Censors v. McNeil*,²⁷³ by a narrow margin of five to four, held that the censorship of films was not criminal.²⁷⁴ Ritchie J., writing for the majority, determined that the provincial censorship

²⁶⁷ Hogg, *supra* note 1 at 18-27.

²⁶⁸ *Ibid.*

²⁶⁹ Macklem & Rogerson, *supra* note 36 at 453.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ *Nova Scotia Board of Censors v. McNeil*, [1978] 2 SCR 662, 84 DLR (3d) 1.

²⁷⁴ Hogg, *supra* note 1 at 18-28.

law did not take criminal form because it did not issue a prohibition coupled with a penalty.²⁷⁵ As noted by Hogg, the suppression of ideas that are contrary to current moral attitudes is a criminal objective but in this instance the prior case law necessitated a particular form as well as a criminal objective.²⁷⁶

The precedent set by *Nova Scotia Board of Censors v. McNeil* outlined that one of the main constraints on the criminal law power was in relation to form. The usual form of criminal legislation is characterized by a prohibition and penalty enforced by the courts.²⁷⁷

The presence of regulatory features in federal legislation “such as powers of licensing and prior inspection, involvement of an administrative agency exercising discretionary authority in the administration of the law, detailed regulation and civil remedies” may prevent the judiciary from viewing the law as an authentic exercise of the criminal law power.²⁷⁸ It is important to note that, in cases where a clear criminal law purpose has been found, courts have allowed for a slight departure from the general expectation that valid criminal law must be a prohibition backed by a penalty.²⁷⁹

6.2.2 R. v. Hydro-Quebec

The federal government established a framework under the *Canadian Environmental Protection Act* that regulated the use and disposal of toxic substances.²⁸⁰ Under the legislation the Canadian Minister of Health and the Minister of Environment

²⁷⁵ Hogg, *supra* note 1 at 18-28.

²⁷⁶ *Ibid.*

²⁷⁷ Macklem & Rogerson, *supra* note 36 at 432.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ Hogg, *supra* note 1 at 18-29.

were granted the authority to examine the effects of substances and recommend the substance be labeled toxic.²⁸¹ Once classified as toxic, the substance comes under the regulatory authority of the Governor in Council, which may institute regulations pertaining to the toxic substance.²⁸² These directives may include how the substance is imported, manufactured, processed, transported, stored, sold, used, discarded and released into the environment.²⁸³ However, in select circumstances where a substance has not yet been classified as toxic, either Minister may decide immediate action must be taken and issue an ‘interim order’ in the absence of full toxic categorization.²⁸⁴ The interim order is temporary but breach of the order or of an established regulation is an offence punishable by fine or imprisonment.²⁸⁵

In the 1997 Canadian Supreme Court case entitled *R. v. Hydro-Quebec (Hydro-Quebec)*,²⁸⁶ Hydro-Quebec was accused of violating an interim order issued under the *Canadian Environmental Protection Act*.²⁸⁷ The order was violated when Hydro-Quebec dumped chlorobiphenyls into a river in 1990.²⁸⁸ The corporation argued that the entire *Act*, and by extension the interim order, was *ultra vires* the federal jurisdiction of criminal law. However, La Forest J. writing for the majority, upheld the *Act* as a valid exercise of the federal government’s criminal law power. The reasoning behind this judgment was that, because the administrative procedure resulted in a prohibition supported by a penal

²⁸¹ Hogg, *supra* note 1 at 18-29.

²⁸² *Ibid.*

²⁸³ *Ibid* at 18-30.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *R v. Hydro-Quebec*, [1997] 3 SCR 213, 151 DLR (4th) 32.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

sanction, the framework was adequately prohibitory in nature.²⁸⁹ Furthermore, he recognized that the exemption for provinces with comparative legislation effectively meant that the preservation of the environment was concurrent.²⁹⁰ At any rate, this decision solidified the modern judicial stance that an extensive degree of regulation could be justified under the criminal law power.²⁹¹

6.2.3 Reference re Firearms Act (2000)

A reference question was posed to the Supreme Court of Canada in 2000, pertaining to federal gun control legislation that was a part of the Canadian Criminal Code. The unanimous opinion of the Supreme Court in *Reference re Firearms Act (2000)*²⁹² maintained that because the purpose of gun control was public safety the *Act* was serving a criminal law purpose.²⁹³ It was argued that the legislation was regulatory rather than criminal because of the statutory complexity of the scheme and the discretionary powers granted to licensing authorities.²⁹⁴ Opponents of the legislation declared that only an outright prohibition of guns would constitute a proper criminal law.²⁹⁵ In the reference the Supreme Court sustained the constitutionality of the federal legislation, which amended the Criminal Code of Canada and created an extensive licensing and registration statute for firearms owners.²⁹⁶ To support the opinion of the bench, the Supreme Court cited its decision in *R. v. Hydro-Quebec* to clarify that “the

²⁸⁹ Hogg, *supra* note 1 at 18-30.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Reference re Firearms Act (Can.)*, [2000] 1 SCR 783, 185 DLR (4th) 577.

²⁹³ Hogg, *supra* note 1 at 18-30.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid* at 18-31.

²⁹⁶ Graeme G. Mitchell, “Not A General Regulatory Power- A Comment on *Reference re Assisted Human Reproduction Act*” (2011) 54 SCLR (2d) 633 at 633.

criminal-law power authorizes complex legislation, including discretionary administrative authority.”²⁹⁷ Furthermore, the Court highlighted that in *RJR-MacDonald v. Canada (1995)*²⁹⁸ it was determined that a criminal purpose may be pursued by indirect means.²⁹⁹ The Court proclaimed that the safety risks of guns did not require an outright ban on firearms and similarly, the health hazards of tobacco did not necessitate a complete ban of cigarettes.³⁰⁰ In essence, procedures that indirectly advance a legislative purpose, such as advertising bans on tobacco products or the licensing and registration of firearms, were authorized by the federal criminal law power.³⁰¹

Numerous variations in judicial mindset concerning the criminal law and regulatory authority are demonstrated in the case law of the federal criminal law power. Regardless of these fluctuations, a clear precedent was established leading up to the opinion rendered in the *Reference re Assisted Human Reproduction Act*. This precedent demonstrated that it was possible for the criminal law power to justify the institution of an intricate legal framework that creates a regulatory board that is able to enforce sanctions authorized by specific legislation.

6.3 Provincial Jurisdiction Over Property and Civil Rights

When the reference question concerning the *Assisted Human Reproduction Act* was posed to the Quebec Court of Appeal and subsequently to the Supreme Court of Canada, the Attorney General of Quebec argued that the legislation infringed upon the provincial government’s exclusive legislative authority over property, civil rights and

²⁹⁷ Hogg, *supra* note 1 at 18-31.

²⁹⁸ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1.

²⁹⁹ Hogg, *supra* note 1 at 18-31.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

matters of local or private nature.³⁰² Therefore, a brief discussion of these provincial responsibilities is essential when attempting to understand the position of the provinces in the *Reference re Assisted Human Reproduction Act*.

Section 92 (13) of the *Constitution Act, 1867* grants the provincial legislatures the ability to make laws in relation to “property and civil rights in the province.”³⁰³ This provincial power has played a significant role in numerous constitutional disputes. As Hogg notes, “This is by far the most important of the provincial heads of power.”³⁰⁴ Arguably the most significant sources of federal power are those pertaining to peace, order, and good government, trade and commerce, and criminal law.³⁰⁵ These three major federal jurisdictions have come into direct conflict with the property and civil rights provision. Many of the most vital cases related to constitutional law have put different federal heads of power up against the provincial responsibility over property and civil rights.³⁰⁶

The phrase ‘property and civil rights’ is one that has long been part of Canadian political history, as its presence extends as far back as the *Quebec Act, 1774*.³⁰⁷ Nonetheless, it is important to distinguish between the pre-Confederation meaning of the phrase and how the phrase was utilized within the context of the *Constitution Act, 1867*. The first notable appearance of the phrase occurred in section 8 of the *Quebec Act, 1774* and its inclusion resulted in the reinstatement of the French Civil Law tradition as the

³⁰² Macklem & Rogerson, *supra* note 36 at 448.

³⁰³ Hogg, *supra* note 1 at 21-1.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid* at 21-2.

³⁰⁶ *Ibid.*

³⁰⁷ *Quebec Act*, [1774] 14 Geo III, c 83; Hogg, *supra* note 1 at 21-2.

private law system within the borders of Quebec.³⁰⁸ The section was created to guarantee that the entire body of law governing relationships between individuals within Quebec would not be displaced.³⁰⁹ Furthermore, the phrase was also included in the first Act of the Legislature of the province of Upper Canada, when in 1792 the province declared English law as the private law of the colony.³¹⁰

The phrase was solidified when the Fathers of Confederation designated ‘property and civil rights in the province’ as a provincial power in section 92 (13) of the *Constitution Act, 1867*. The drafters of the Canadian constitution included property and civil rights to describe the complete body of private law that manages the relationships between citizens, in contrast to the law that governs interactions between citizens and the state.³¹¹ Originally, the phrase was meant to have the same meaning as it had obtained in 1774 and 1792. However, with the creation of a new federal system the property and civil rights provision was now operating alongside a new central branch of government with extensive powers and responsibilities.³¹² This new reality altered the traditional definition of property and civil rights. For the federal Parliament to operate effectively within the Canadian federation it was necessary for certain federal responsibilities to include a number of provisions that were part of the original conception of property and civil rights.³¹³ Some of the matters that were redistributed included trade and commerce, marriage and divorce, patents of invention and discovery, interest, and banking.³¹⁴

³⁰⁸ Hogg, *supra* note 1 at 21-2.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid* at 21-3.

³¹⁴ *Ibid.*

Moreover, the peace, order and good government phrase included in the *Constitution Act, 1867* allows the federal government, in situations with national implications, to overstep the boundaries established by the property and civil rights provision.

The use of peace, order and good government to justify the occasional infringement of provincial jurisdiction is reflected in the 1966 Supreme Court of Canada decision *Munro v. National Capital Commission*.³¹⁵ The *National Capital Act* established a National Capital Commission that was mandated to “prepare plans for and assist in the development, conservation and improvement of the National Capital Region... in accordance with its national significance.”³¹⁶ Litigation occurred when property owned by Munro was expropriated under the *Act* to ensure the development of the National Capital Region around Ottawa.³¹⁷ Munro argued that the federal legislation was a form of planning and zoning legislation already governed by the provincial *Planning Acts*. The decision rendered by the Supreme Court of Canada clarified that the development of the National Capital Region was justified under the peace, order and good government principle because the development was a single matter of national concern.³¹⁸

Even with the reallocation of specific property and civil rights powers to the list of exclusive federal powers “property and civil rights in the province still covers most of the legal relationships between persons in Canada.”³¹⁹ The body of law relating to property, succession, the family, contracts and torts is largely within provincial

³¹⁵ *Munro v. National Capital Commission*, [1966] SCR 663, 57 DLR (2d) 753.

³¹⁶ Macklem & Rogerson, *supra* note 36 at 297.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ Hogg, *supra* note 1 at 21-3.

jurisdiction under s. 92 (13).³²⁰ It is important for the purposes of this project to highlight that the historical foundation of property and civil rights in Canada differs from the foundation of similar rights in other nations. The purpose of doing so is to clarify how the terms are used and defined in Canadian law. In the United States, the term ‘civil rights’ is interchangeable with the civil liberties that are guaranteed in the American Bill of Rights.³²¹ When referring to the use of civil rights in the *Constitution Act, 1867*, civil rights and civil liberties are distinct from one another. The civil rights referred to in the *Constitution Act, 1867* are made up of mainly proprietary, contractual or tortious rights.³²² These rights come into existence when a legal rule stipulates that in certain circumstances one person is entitled to something from another.³²³ In contrast, civil liberties exist when there is an absence of formal legal rules. In the Canadian context saying one has the right to criticize the government is something completely different from declaring one’s right to have a loan repaid.³²⁴ This differentiation exists because there is no law that forbids the criticism of government but there is however, the law of contract that stipulates certain commitments must be performed, “...by imposing sanctions for non-performance.”³²⁵ In sum, the term ‘civil rights’ in s. 92 (13) of the Canadian Constitution is utilized in a different sense, especially when compared to the United States.

The dominance of s. 92 (13) in constitutional disputes has resulted in the limited use of s.92 (16) or the provincial power over “... all matters of merely local or private

³²⁰ Hogg, *supra* note 1 at 21-3.

³²¹ *Ibid.*

³²² *Ibid* at 21-4.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Ibid.*

nature in the province...”³²⁶ Although the section has not been completely ignored, when mentioned it is often suggested as an alternative to s. 92 (13) as opposed to an independent source of power. Different cases have suggested that arguments would have been best served by using s. 92 (16) as the sole justification. In most cases the provincial power related to matters of local or private nature is often presented in tandem with s. 92 (13).

The powerful provincial jurisdiction over property and civil rights and local matters are the sections of the *Constitution Act, 1867* that the government of Quebec cited when the *Reference re Assisted Human Reproduction Act* went to the Supreme Court of Canada. The stage was now set for the Supreme Court to analyze the piece of legislation and determine the constitutional validity of its provisions.

6.4 Overview of the Supreme Court of Canada’s *Reference re Assisted Human Reproduction Act (2010) Opinion*

The opinion written by the Quebec Court of Appeal regarding the constitutional justification of the *AHRA* prompted a reaction from the Government of Canada. This response occurred when the Attorney General of Canada decided to appeal to the Supreme Court of Canada. Using almost identical constitutional justifications presented at the Quebec Court of Appeal the *AHRA* was to be analyzed by Canada’s highest court. However at the Supreme Court level, the Attorney Generals of New Brunswick, Saskatchewan and Alberta, who were each granted intervener status, supported the reasoning of the government of Quebec. The Supreme Court of Canada issued a 4-4-1 split opinion regarding the *Reference re Assisted Human Reproduction Act (Ref re*

³²⁶ Hogg, *supra* note 1 at 21-4.

AHRA) in December 2010. The Court was bitterly divided in its opinion particularly regarding the dominant purpose of the federal legislation.³²⁷ Four justices would have held the *Act* as valid in its entirety because they concluded the dominant purpose was to safeguard morality, public health and the personal security of those associated with assisted reproductive technology.³²⁸ The other four Supreme Court Justices decided that the overriding purpose of the *AHRA* was to regulate assisted human reproduction as a health service.³²⁹ Essentially, the Justices were contemplating two questions that were raised by Chief Justice Beverley McLachlin:

“is the *Assisted Human Reproduction Act* properly characterized as legislation to curtail practices that may contravene morality, create public health evils or put the security of individuals at risk, as the Attorney General of Canada contends? Or should it be characterized as legislation to promote positive medical practices associated with assisted reproduction, as the Attorney General of Quebec contends?”³³⁰

It is apparent that the Court was attempting to determine if the dominant purpose of the legislation was to prohibit an ‘evil’ or regulate a ‘good’.³³¹

6.4.1 The Opinion of Chief Justice McLachlin

Chief Justice McLachlin, with Justices Binnie, Fish and Charron concurring, provided the first opinion in the *Ref re AHRA*. McLachlin C.J. began her opinion by pointing out that each generation encounters unique moral issues and historically, those

³²⁷ Snow, *supra* note 189 at 174.

³²⁸ Hogg, *supra* note 1 at 18-32.

³²⁹ *Ibid.*

³³⁰ *Ref re AHRA*, *supra* note 247 at para 21.

³³¹ Snow, *supra* note 189 at 174.

generations have relied upon criminal law to address them.³³² With the development of assisted reproduction technologies important moral, religious and juridical questions arose.³³³ The enormous advances in a budding technological field encouraged the Canadian federal government to appoint the Baird Commission in an effort to examine the numerous implications of assisted reproduction technologies.³³⁴ The efforts and findings of the Baird Commission resulted in the creation of the *AHRA*. The Chief Justice clarified that sections 5 to 7 of the *AHRA* were conceded as criminal law but the Attorney General of Quebec was challenging the remaining provisions.³³⁵ In the view of McLachlin C.J., the additional sections 8 to 13 would have been declared as valid criminal law.³³⁶ Chief Justice McLachlin acknowledged that some of the prohibitions impacted the regulation of medical research and practice, as both areas are commonly controlled by the provinces. However, the effect that the legislation had on these provincial matters was purely incidental to the *Act's* criminal law purpose.³³⁷ In addition, McLachlin C.J. recognized that sections 14 to 68 of the *AHRA* – the administrative, organizational and enforcement provisions – were not, in pith and substance criminal law, but were valid as they were essential to the successful operation of the overall prohibition regime.³³⁸

After providing a breakdown of both the prohibited activities and controlled activities sections contained within the *AHRA*, McLachlin C.J. held that the remaining sections of the legislation “are directed [at] administering and enforcing the primary

³³² *Ref re AHRA, supra* note 247 at para 1.

³³³ *Ibid* at para 4.

³³⁴ *Ibid* at para 5.

³³⁵ *Ibid* at para 10.

³³⁶ *Ibid*.

³³⁷ *Ibid*.

³³⁸ *Ibid*.

criminal law prohibitions.”³³⁹ The Attorney General of Canada and the Attorney General of Quebec viewed the legislation from two fundamentally different perspectives. The Attorney General of Canada stated that the purpose and effect of the legislative scheme was to prohibit practices that would undercut moral values, produce public evils, and threaten the security of donors, donees, and persons conceived by assisted reproduction.³⁴⁰ The Attorney General of Quebec submitted that the central purpose of the legislation was to regulate the field of reproductive medicine and research.³⁴¹ Thus the federal government maintained that the legislation was a valid exercise of the federal criminal law power, while Quebec asserted that the legislation established an illegal scheme that regulated matters associated with health concerns that fall under the provincial powers.³⁴²

McLachlin C.J. explained that the purpose of the *Act* was to prohibit reprehensible activities by imposing sanctions. She categorized the *Act* as a series of prohibitions followed by a set of secondary provisions governing their administration.³⁴³ Chief Justice McLachlin chose to highlight that her colleagues who provided the second opinion in the *Ref re AHRA* believed the legislation had two purposes. This meant that the other judges thought the legislation was aimed at prohibiting reprehensible conduct and also promoting beneficial practices.³⁴⁴ The dissenting justices claimed that criminal law is only concerned with prohibiting undesirable conduct, and does not extend to promoting

³³⁹ *Ref re AHRA*, *supra* note 247 at para 13.

³⁴⁰ *Ibid* at para 20.

³⁴¹ *Ibid*.

³⁴² *Ibid*.

³⁴³ *Ibid* at para 26.

³⁴⁴ *Ibid* at para 27.

the beneficial aspects of assisted reproductive technologies.³⁴⁵ However, McLachlin C.J. clarified that the *Act* did not have two purposes, but rather targeted unacceptable conduct while incidentally permitting beneficial practices through regulations.³⁴⁶ The regulation of positive actions in McLachlin C.J.'s opinion did not make the *AHRA* unconstitutional.³⁴⁷ The central issue was whether or not the *AHRA* had a dominant criminal purpose. In the opinion of McLachlin C.J. the *AHRA* did in fact have a dominant criminal law purpose. Furthermore, one of the goals of criminal legislation is to prohibit certain actions in order to achieve desired beneficial effects.³⁴⁸ Therefore, the presence of a dominant criminal law purpose enabled the federal government to enact a law that had a substantial impact on matters outside of its jurisdiction.³⁴⁹

In her effort to establish that the *AHRA* fell within section 91 (27) of the *Constitution Act, 1867* Chief Justice McLachlin proposed that the legislation fulfilled the recognized criteria to qualify as valid criminal law. The established principle related to the federal criminal law power was cited in the recent reference opinion entitled *Ref re Firearms Act (Canada)* in 2000. In that reference the Court reiterated the opinion of Rand J. who in the *Margarine Reference* stated that a proper exercise of the federal criminal law power must include a prohibition, backed by a penalty, with a criminal law purpose.³⁵⁰ McLachlin C.J. stated that the *AHRA* imposed prohibitions backed by appropriate penalties, but some of the provisions did permit certain exceptions. A large portion of the legislation was dedicated to the establishment of a regulatory framework.

³⁴⁵ *Ref re AHRA, supra* note 247 at 27.

³⁴⁶ *Ibid* at para 30.

³⁴⁷ *Ibid*.

³⁴⁸ *Ibid* at para 33.

³⁴⁹ *Ibid* at para 32.

³⁵⁰ *Ibid* at para 41.

However, McLachlin C.J. was clear in her opinion when she stated that Parliament is permitted to create a regulatory scheme under the criminal law power, provided that the regulatory structure advances the criminal law objective.³⁵¹ Additionally, she cited the *Hydro-Quebec* case to communicate that “The complexity of modern problems often requires a nuanced scheme consisting of a mixture of absolute prohibitions, selective prohibitions based on regulations, and supporting administrative provisions.”³⁵² The established precedent permitted the existence of legislation that creates a regulatory framework, and in turn allows flexibility that is vital in changing fields such as the environmental policy and assisted reproductive technologies.³⁵³

McLachlin C.J. was mindful of the Attorney General of Quebec’s objections to sections 8 to 13 of the *AHRA*. She was aware that the Attorney General of Quebec was scrutinizing the provisions in a way where the ‘absolute prohibitions’ were separate from the ‘controlled activities’ section of the legislation.³⁵⁴ When viewed in this way, the Attorney General of Quebec contended that the ‘controlled activities’ category as set out in sections 10 to 13 of the *Act* created a system that was meant to regulate medicine and research in the area of assisted reproduction.³⁵⁵ The Attorney General of Quebec went on to view sections 8 and 9 through a similar lens.³⁵⁶ In essence, the Attorney General of Quebec’s contention was that sections 8 to 13 of the *AHRA* were in pith and substance an attempt to regulate the medical profession and medical research.³⁵⁷ The validity of the

³⁵¹ *Ref re AHRA, supra* note 247 at para 36.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid* at para 80.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid* at para 86.

Attorney General of Quebec's argument was reliant upon sections 8 to 13 being examined in isolation from the rest of the *Act*. However, McLachlin C.J. disagreed and insisted the *Act* must be scrutinized within the entire legislative context "which takes into account the relationship between the absolute and selective prohibitions, as well as the other provisions of the *Act*."³⁵⁸ When viewed within the context of the complete legislative scheme sections 8 to 13 were directed in pith and substance to be valid criminal law objectives.³⁵⁹

McLachlin C.J. was convinced that assisted reproduction raised significant moral concerns. She viewed the *Act* in its entirety as a legitimate attempt to avoid serious damage to the fabric of Canadian society by prohibiting and regulating practices that had the potential to devalue human life and degrade participants.³⁶⁰ She continued to reason that the *Act* served a valid criminal law purpose as it was grounded in issues that Canadians consider to be of fundamental importance.³⁶¹ Based upon this logic and the topics discussed above, McLachlin C.J. concluded that the legislative scheme instituted by the *AHRA* was not meant to promote positive health measures, but rather to address legitimate criminal law matters.³⁶² Therefore, the official opinion of McLachlin C.J. and the three others concurring was that the entire *Act* is valid criminal legislation.³⁶³

³⁵⁸ *Ref re AHRA, supra* note 247 at para 87.

³⁵⁹ *Ibid* at para 88.

³⁶⁰ *Ibid* at para 61.

³⁶¹ *Ibid* at para 62.

³⁶² *Ibid* at para 64.

³⁶³ *Ibid* at para 156.

6.4.2 The Joint Reference Opinion of Justices Deschamps and LeBel

The crucial difference between Chief Justice McLachlin's outlook and the second opinion of the *Ref re AHRA* rendered by Justices Deschamps and LeBel, with Justices Abella and Rothstein concurring, is demonstrated in the way the judges considered the impugned provisions. The opening paragraph of the Deschamps and LeBel JJ. opinion demonstrated the key difference in how the legislation was analyzed. The justices proposed that it was incorrect to look at the entire *AHRA* as one cohesive piece of legislation.³⁶⁴ Furthermore, Justices Deschamps and LeBel declared that the appeal related "to the connection between certain provisions of the *AHR Act* [or the *Assisted Human Reproduction Act*] and the federal criminal law power."³⁶⁵

The two justices began by reproducing specific sections of the *AHRA* to determine the overall objective Parliament was pursuing when the legislation was enacted. Deschamps and LeBel JJ. then emphasized how the provisions of the *Act* were divided into two categories; the 'prohibited activities' and 'controlled activities'. In their view the provisions under these two separate headings represented two distinct branches of activities related to assisted human reproduction.³⁶⁶ Deschamps and LeBel JJ. relied upon the final report of the Baird Commission to highlight the fundamental difference that existed between the prohibited and controlled activities sections of the *AHRA*. Citing specific statements published in *Proceed with Care*, the justices conceived "that the Commission was of the opinion that assisted reproductive activities and related research should be permitted. This means that it considered them morally and socially

³⁶⁴ *Ref re AHRA*, *supra* note 247 at para 157.

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid* at para 165.

acceptable.”³⁶⁷ The opinion was developed further when Deschamps and LeBel JJ. explained the prohibited activities section of the *Act* listed dangerous activities and the controlled activities contained provisions that benefitted society.

Justices Deschamps and LeBel acknowledged that the interpretation they provided was vastly different from the justification provided in the first opinion written by Chief Justice McLachlin. The judges thought McLachlin C.J. was incorrect when she chose to disregard the legislative history of the *AHRA* in her judicial reasoning.³⁶⁸ Deschamps and LeBel JJ. maintained the standpoint that the legislative history and the Baird Commission’s distinctions between prohibited and controlled activities needed to be considered when interpreting the goals of the legislation.³⁶⁹ Deschamps and LeBel JJ. argued that the difference of opinion occurred because McLachlin C.J. refused to consider factors outside the text of the *AHRA* itself. The justices supported their outlook further by citing the opinion of the Quebec Court of Appeal. In essence, the Quebec Court of Appeal determined that “the fundamental and dominant purpose of the impugned part of the Act is the safeguarding of health and not the elimination of an ‘evil’.”³⁷⁰

Deschamps and LeBel JJ. rejected the Attorney General of Canada’s argument that the analysis of the *AHRA* should be conducted while considering the entire piece of legislation. Instead, they believed that the impugned provisions were to be studied

³⁶⁷ *Ref re AHRA, supra* note 247 at para 169.

³⁶⁸ *Ibid* at para 177.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid* at para 180.

separately from the rest of the *Act*.³⁷¹ Justices Deschamps and LeBel performed an analysis of the impugned provisions considering the stipulations in isolation from the remainder of the *AHRA*.³⁷² In addition, the justices thought it was obvious that the Baird Commission wanted to prohibit certain activities and to create a national framework to institute uniform guidelines. These standards would apply across Canada and govern assisted human reproduction and related research activities.³⁷³ The justices reasoned that separation of the *AHRA* into two distinct categories of activities signified that the Baird Commission recommended two unique approaches with different purposes.³⁷⁴ Deschamps and LeBel JJ. determined that the way the *AHRA* was drafted demonstrated a clear dichotomy between reprehensible activities and other desirable practices.³⁷⁵ They took this as an indication that Parliament accepted the recommendations of the Baird Commission when it drafted legislation containing two separate sections with different goals.³⁷⁶

According to Deschamps and LeBel JJ., expert reports and official parliamentary transcripts submitted by the Attorney General of Canada and the Attorney General of Quebec suggested the positive perspective of assisted human reproduction in society. The justices interpreted these sources as evidence that society did not view assisted reproductive technologies as a social 'evil', but as a potential solution to reproductive problems experienced by a segment of society.³⁷⁷ For these reasons it was postulated that

³⁷¹ *Ref re AHRA, supra* note 247 at para 194.

³⁷² *Ibid* at para 198.

³⁷³ *Ibid* at para 206.

³⁷⁴ *Ibid*.

³⁷⁵ *Ibid* at para 210.

³⁷⁶ *Ibid*.

³⁷⁷ *Ibid* at para 212.

assisted reproductive technologies were regarded as a form of scientific progress that was of great value to those with infertility issues.³⁷⁸ Therefore, the justices ascertained that the impugned provisions concerning the controlled activities of the *AHRA* did not have the same purpose as sections containing the prohibited activities.³⁷⁹ As a result, Deschamps and LeBel JJ. identified that the pith and substance of the impugned provisions was characterized as the regulation of assisted human reproduction as a health service.³⁸⁰

During Deschamps and LeBel JJ.'s analysis of the federal criminal law power, they stated that Rand J.'s reference to an 'evil' in the *Margarine Reference* required the evil or threat to be real and legitimate.³⁸¹ Without this essential interpretation the criminal law power would be given unlimited scope and the federal government would have the authority under the Constitution to enact laws in any jurisdiction.³⁸² The justices could not find any evidence on record to suggest that the controlled activities were to "be regarded as conduct that is reprehensible or represents a serious risk to morality, safety or public health."³⁸³ Therefore, it was determined that the purpose of the *AHRA* was not to protect individuals from actions that were inherently harmful, but rather to encourage medical practice and research that brings benefits to Canadians.³⁸⁴ Deschamps and LeBel JJ. warned that if the *AHRA* was determined to be constitutional it would set a dangerous

³⁷⁸ *Ref re AHRA, supra* note 247 at para 213.

³⁷⁹ *Ibid* at para 217.

³⁸⁰ *Ibid* at para 227.

³⁸¹ *Ibid* at para 236.

³⁸² *Ibid* at para 240.

³⁸³ *Ibid* at para 251.

³⁸⁴ *Ibid*.

precedent that would allow the federal government to legislate in every situation concerning a new medical technology.³⁸⁵

In the opinion of Deschamps and LeBel JJ. the impugned provisions properly fell within the domain of provincial jurisdiction. In particular, the provisions related to the provinces' exclusive jurisdiction over hospitals, education, property and civil rights, and matters of a merely local nature.³⁸⁶ However, the justices appealed to the principle of subsidiarity to continue to give strength to their view. According to the principle "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."³⁸⁷ They continued on to point out that Peter W. Hogg stated the broad interpretation the JCPC awarded to the provincial jurisdiction over property and civil rights could be explained by the Council's acceptance of the principle.³⁸⁸ However, it was unnecessary to rely on the principle because the justices claimed there was no doubt that the provisions invaded exclusive provincial jurisdiction.³⁸⁹

Deschamps and LeBel JJ. began their conclusion by reiterating that "two very different aspects of genetic manipulation have been combined in a single piece of legislation."³⁹⁰ The justices declared that the social and ethical concerns of each category appeared to be distinct and even divergent.³⁹¹ Justices Deschamps and LeBel concluded "Parliament has therefore made a specious attempt to exercise its criminal law power by

³⁸⁵ *Ref re AHRA, supra* note 247 at para 256.

³⁸⁶ *Ibid* at para 259.

³⁸⁷ *Ibid* at para 183.

³⁸⁸ *Ibid*.

³⁸⁹ *Ibid* at para 273.

³⁹⁰ *Ibid* at para 278.

³⁹¹ *Ibid*.

merely juxtaposing provisions falling within provincial jurisdiction with others that in fact relate to criminal law...³⁹² Moreover, the regulatory scheme was deemed constitutionally invalid because the legislative historical account suggested assisted reproduction activities did not connect to criminal law. In other words, Deschamps and LeBel JJ. viewed the legislative history of the *AHRA* and the significant impact the impugned provisions had on provincial matters as an attempt by Parliament to enact legislation in a matter outside of its jurisdiction.³⁹³ All of the reasons listed above led Justices Deschamps and LeBel with Justices Abella and Rothstein concurring, to the conclusion that the all of the impugned provisions were unconstitutional and should be struck down.

6.4.3 The Deciding Reference Opinion of Justice Cromwell

Justice Cromwell was the final Justice who wrote the third and deciding opinion of the *Ref re AHRA*. Cromwell J. was the lone justice who disagreed with the opinions rendered by Chief Justice McLachlin and Justices Deschamps and LeBel.³⁹⁴ Justice Cromwell disagreed with McLachlin C.J.'s opinion that the purpose of the legislation was to prohibit negative practices associated with assisted reproduction.³⁹⁵ In addition, however, Cromwell J. also contended that Deschamps and LeBel JJ's opinion was too narrow. He claimed that the purpose and effect of the legislation was not limited to the regulation of assisted human reproduction as a health service.³⁹⁶ He asserted that the question in this reference case was "whether the federal criminal law power permits

³⁹² *Ref re AHRA*, *supra* note 247 at para 278.

³⁹³ *Ibid* at para 280.

³⁹⁴ *Ibid* at para 282.

³⁹⁵ *Ibid* at para 286.

³⁹⁶ *Ibid*.

Parliament to regulate virtually all aspects of research and clinical practice in relation to assisted human reproduction.”³⁹⁷ Cromwell J.’s opinion differed from those of his colleagues because he believed the essence of the impugned provisions went beyond prohibiting negative practices and enabled the federal government to minutely regulate research and clinical practice.³⁹⁸ Thus, Cromwell J. issued his opinion stating that the impugned provisions relate to three areas of provincial jurisdiction.³⁹⁹ The three subjects included “the establishment, maintenance and management of hospitals; property and civil rights in the province; and matters of a merely local or private nature in the province.”⁴⁰⁰ Cromwell J. reasoned that the impugned provisions did not serve a criminal law purpose as recognized by the jurisprudence. Furthermore, Cromwell J. agreed with Deschamps and LeBel JJ. that the impugned provisions when viewed in isolation did not fall under criminal law.⁴⁰¹

Although Justice Cromwell agreed in part with both of the preceding justifications, he needed to supply his judicial reasoning in order to complete the Supreme Court’s final opinion of the *Ref re AHRA* . Justice Cromwell explained which provisions within the *AHRA* were to remain and which sections were to be declared as unconstitutional. Unlike Deschamps and LeBel JJ., Justice Cromwell determined that some of the impugned provisions were anchored in the federal criminal law power. He concluded that sections “8, 9 and 12 in purpose and effect prohibit negative practices associated with assisted reproduction and that they fall within the traditional ambit of the

³⁹⁷ *Ref re AHRA*, *supra* note 247 at para 283.

³⁹⁸ *Ibid* at para 286.

³⁹⁹ *Ibid* at para 287.

⁴⁰⁰ *Ibid*.

⁴⁰¹ *Ibid*.

federal criminal law power.”⁴⁰² The constitutional affirmation of section 12 led to specific mechanisms that would ensure its implementation being upheld. In sum, Cromwell J., supported Chief Justice McLachlin in her opinion to uphold all of the prohibited activities set out in the *AHRA*.⁴⁰³ However, Cromwell J. partly supported the opinion supplied by Deschamps and LeBel JJ. This occurred when all of the remaining impugned provisions outside of those listed in the absolute prohibitions section of the *Act* were struck down as *ultra vires* federal jurisdiction.⁴⁰⁴

As a result of Justice Cromwell’s deciding opinion in the *Ref re AHRA*, the absolute prohibitions in the *AHRA* were upheld as criminal law, but the controlled activities, licensing and regulatory framework that supported the qualified prohibitions were mostly struck down.⁴⁰⁵

6.5 Critical Commentary on the *Reference re Assisted Human Reproduction Act*

Historically, constitutional disputes related to section 91 (27) centred on how to define criminal acts. More recently, the focus on the criminal law power has shifted from an inquiry to what constitutes a valid criminal law purpose to the judicial interpretation of the federal criminal law power’s regulatory function.⁴⁰⁶ The expanding nature concerning the regulatory function of section 91 (27) of the *Constitution Act, 1867* was assessed in the *Ref re AHRA*. Previous decisions related to the regulatory function of the federal criminal law power in *Hydro-Quebec* and *Reference re Firearms Act (Canada)* sustained

⁴⁰² *Ref re AHRA*, *supra* note 247 at para 291.

⁴⁰³ *Ibid* at para 294.

⁴⁰⁴ *Ibid*.

⁴⁰⁵ Hogg, *supra* note 1 at 18-33.

⁴⁰⁶ Mitchell, *supra* note 296 at 657.

the establishment of intricate regulatory and licensing regimes under section 91 (27). However, the majority opinion in *Ref re AHRA* “signals that at least a majority of the current justices has grown uneasy about an ever-expanding regulatory capacity for the criminal law.”⁴⁰⁷

The *AHRA* opens with a broad declaration of principles found in section 2, principles that are not typically advanced by the criminal law.⁴⁰⁸ These principles communicated what Parliament was attempting to do with the legislation. In particular, the Government of Canada wanted to ensure the health and well-being of children born through the application of assisted human reproductive technologies, while protecting human individuality and diversity, and the integrity of the human genome.⁴⁰⁹ Recall that sections 5 to 7, which contain the absolute prohibitions of the *AHRA*, such as creation of a human clone, creation of an *in vitro* embryo for purposes other than assisted human reproduction, creation of a chimera, or payment for surrogacy or for donation of human reproductive material, were not challenged.⁴¹⁰ Recall, too, that sections 8, 9 and 12, which prohibit the use of human reproductive material or embryos without consent, obtaining sperm or ova from a minor except for their own reproductive purposes, and reimbursement for donors or surrogates except by the mandatory regulations, were challenged but upheld as valid criminal law.⁴¹¹ Finally, sections 10, 11 and 13 banning controlled activities such as manipulating, using or storing an *in vitro* embryo or material created through the combination of animal and human matter except in accordance with a

⁴⁰⁷ Mitchell, *supra* note 296 at 633.

⁴⁰⁸ *Supra* note 3, s 2.

⁴⁰⁹ *Ibid.*

⁴¹⁰ Barbara von Tigerstrom, “Federal Health Legislation and the *Assisted Human Reproduction Act Reference*” (2011) 74 Sask L Rev 33 at 34.

⁴¹¹ *Ref re AHRA*, *supra* note 247 at para 291.

license and the regulations, and on a licensed premises, were struck down as *ultra vires* federal jurisdiction.⁴¹²

All of the justices agreed that an essential component of a valid use of the criminal law power requires the statute in question to have the purpose of preventing a legitimate ‘evil’ or harm. As Chief Justice McLachlin recognized, “The federal criminal law power may only be used to prohibit conduct, and may not be employed to promote beneficial medical practices.”⁴¹³ Professor Barbara von Tigerstrom agreed that the restriction to the prohibition of conduct is necessary in order to prevent an overly expansive interpretation of the criminal law power, but also noted that it is in practice challenging to apply this restriction.⁴¹⁴ It is difficult to identify the dominant purpose of an activity because many actions can have positive and negative effects. To help guide the justices to the appropriate judicial opinion the courts rely on judicial precedent. The precedent established before the *Ref re AHRA* in cases like *Hydro-Quebec* led to the belief that there was “considerable scope for future federal legislation aimed at controlling activities which put human health at risk, including those which have historically been perceived as entirely legitimate in nature.”⁴¹⁵ This belief led McLachlin C.J. to reason that a regulatory scheme, such as the one established by the *AHRA*, can be characterized as valid criminal law.⁴¹⁶ The constitutional pedigree heading into the reference suggested that the *AHRA* had a valid regulatory purpose steeped in constitutional precedent. Peter W. Hogg supported the view of the Chief Justice when he

⁴¹² von Tigerstrom, *supra* note 410 at para 287.

⁴¹³ *Ibid* at para 38.

⁴¹⁴ *Ibid* at 36.

⁴¹⁵ Martha Jackman, “Constitutional Jurisdiction Over Health in Canada” (2000) 8 Health LJ 95 at 97.

⁴¹⁶ *Ref re AHRA*, *supra* note 247 at para 36.

stated “In light of the decided cases, especially *Hydro-Quebec*, [Chief Justice McLachlin’s] opinion seemed to be the correct answer to the constitutional question...”⁴¹⁷

The position of Deschamps and LeBel JJ. appeared to be that since assisted reproduction technologies were beneficial and legitimate, then they were not inherently harmful or evil and as a result, could not be classified as valid criminal law. von Tigerstrom does not believe that it is easy to classify particular actions as “either beneficial and legitimate or harmful and reprehensible...”⁴¹⁸ I agree with Professor von Tigerstrom’s view because it is possible that countless risks can be associated with numerous activities even if they are designated as beneficial. If the opinion of Justices Deschamps and LeBel suggested that the federal criminal law power cannot be used to address such risks, then it would call into question a series of decisions that have previously validated this type of federal action.⁴¹⁹

There was a prevailing cautiousness shown by the majority of the Supreme Court Justices in the *Ref re AHRA*. It was apparent that the justices were concerned about the intensifying influence of the regulatory function of Parliament’s criminal law power.⁴²⁰ In particular, if the regulatory provisions of the *AHRA* were upheld, it might have allowed the federal government to regulate all health care practices under the auspices of the criminal law power. I agree with the perspective of John D. Whyte that while the Canadian Constitution recognizes certain situations where federal jurisdiction may

⁴¹⁷ Hogg, *supra* note 1 at 18-32.

⁴¹⁸ von Tigerstrom, *supra* note 410 at 37.

⁴¹⁹ *Ibid.*

⁴²⁰ Mitchell, *supra* note 296 at 661.

infringe upon provincial matters, this should not drastically alter the basic constitutional balance between the federal and provincial legislative capacities.⁴²¹ Nonetheless, legal scholars have communicated that this wariness on the part of the court concerning the *AHRA* seemed misplaced because “the Courts have repeatedly held, on the contrary [to the opinions of Cromwell, Deschamps and LeBel JJ.] that regulatory schemes, including partial prohibitions, exemptions, licensing regimes and provisions enabling regulatory controls, can also be valid exercises of [the criminal law] power.”⁴²²

In the case of the *Ref re AHRA*, the trade-off was that the federal government would infringe upon provincial jurisdiction to allow for the flexibility of a regulatory framework granted in the form of the *AHRA*. I agree with McLachlin C.J.’s claim that the flexibility of a regulatory scheme is essential, particularly when dealing with complex and novel subject matter.⁴²³ However, Graeme G. Mitchell suspected that if the constitutionality of the impugned provisions within the *AHRA* were sustained then “it would mean section 91 (27) of the *Constitution Act, 1867* had truly evolved into the general regulatory power for the Parliament of Canada.”⁴²⁴ Consequently, I support von Tigerstrom’s observation that, despite the judicial precedent, it appears that the majority of the Court was determined to prevent the federal government from playing a significant role in a domain traditionally reserved for the provinces.⁴²⁵

⁴²¹ John D. Whyte, “Federalism and Moral Regulation: A Comment on *Reference Re Assisted Human Reproduction Act*” (2011) 74 Sask L Rev 45 at 52.

⁴²² von Tigerstrom, *supra* note 410 at 40.

⁴²³ *Ref re AHRA*, *supra* note 247 at para 36.

⁴²⁴ Mitchell, *supra* note 296 at 635.

⁴²⁵ von Tigerstrom, *supra* note 410 at 40.

Deschamps and LeBel JJ. focused much of their efforts on reviewing the legislative history and stressing that the *AHRA* overlapped with provincial jurisdiction.⁴²⁶ The fact that the *AHRA* infringed upon provincial jurisdiction is not determinative in and of itself; in addition, the general purpose of the legislation must be considered as well. Furthermore, as Barbara von Tigerstrom writes, “their reasons do not analyze the content of the various impugned provisions in much detail, and some of what they say about this document is not entirely accurate...”⁴²⁷ This observation was supported by Hogg when he disagreed with Deschamps and LeBel JJ.’s declaration that the impugned provisions of the *AHRA* attempted to regulate assisted human reproduction as a ‘health service’.⁴²⁸ Hogg points out that “assisted human reproduction is not a ‘health service’ in any obvious sense.”⁴²⁹ It is true that the *Act* applied to some procedures performed by doctors in hospitals for healthy persons seeking assistance to have children.⁴³⁰ The provisions within the legislation suggest that the *AHRA* was meant to regulate highly contentious areas that exist outside the relationship of doctors and their patients. For example, the *Act* also applied to scientists, researchers, technicians, laboratories, clinics, sperm banks, donors, surrogate mothers, and persons who seek to exploit women and children or who seek to profit from selling the means to the artificial creation of life.⁴³¹ I agree that this function of the *AHRA* as expressed by Hogg highlights that the legislation was not meant to only regulate assisted human reproduction as a health service.

⁴²⁶ von Tigerstrom, *supra* note 410 at 42.

⁴²⁷ *Ibid* at 40.

⁴²⁸ *Ref re AHRA*, *supra* note 247 at para 227.

⁴²⁹ Hogg, *supra* note 1 at 18-32, n179e.

⁴³⁰ *Ibid*.

⁴³¹ *Ibid*.

Cromwell J.'s deciding opinion emphasized the fractured nature of the Supreme Court of Canada's opinion in the *Ref re AHRA*. Justice Cromwell stated that sections 8 and 9 of the *AHRA* were valid criminal law because the issues of consent and age traditionally fell within the ambit of criminal law.⁴³² However, von Tigerstrom highlights that those same issues have also been closely regulated in the medical sphere by provincial legislation.⁴³³ Additionally, Cromwell J. maintained the constitutional legitimacy of section 12 by saying that it relates to and defines the scope of sections 6 and 7.⁴³⁴ He compared these provisions with the other impugned sections of the *AHRA*, which he identified as not being "characterized as serving any criminal law purpose recognized by the Court's jurisprudence."⁴³⁵ I agree with Whyte's claim that, the short length of Cromwell J.'s opinion did not provide a thorough explanation of his position and did not explain why he rejected the opinion of McLachlin C.J. that the *AHRA* was created for the purposes of protecting health and morality.⁴³⁶

Whyte provided a comment on the *Ref re AHRA* and listed reasons for the constitutional challenge. He argued that the more elaborate the administrative scheme for identifying what is criminal, the less prohibitory it is.⁴³⁷ Administrative frameworks become more intricate when regulation occurs through an agency that "adopts the regulatory instruments of investigation, standard setting through regulations, granting licenses and administrative approvals."⁴³⁸ At the same time the exercise of administrative

⁴³² *Ref re AHRA*, *supra* note 247 at para 289.

⁴³³ von Tigerstrom, *supra* note 410 at 43.

⁴³⁴ *Ref re AHRA*, *supra* note 247 at para 290.

⁴³⁵ *Ibid* at para 287.

⁴³⁶ Whyte, *supra* note 421 at 45, n1.

⁴³⁷ *Ibid* at 52.

⁴³⁸ *Ibid*.

regulation, when dealing with matters within provincial jurisdiction, will more than likely duplicate or interfere with processes of administration the provinces are already engaged in.⁴³⁹ Basically, Whyte's comments clarified that the complexity of the regulatory framework as instituted by the *AHRA* in an area of provincial dominance increased the probability that the legislation would not be considered constitutionally legitimate by the Supreme Court of Canada.

The fractured opinion rendered in the *Ref re AHRA* has been criticized for failing to establish clear guidelines for medical regulation under section 91 (27).⁴⁴⁰ My view, however, is that this criticism misses the mark. On the contrary, I agree with Mitchell's view that the provisions of the *AHRA* that in fact survived the reference opinion demonstrate those actions related to assisted reproduction that fall squarely within the jurisdiction of the federal government.⁴⁴¹ Consequently, and at least with respect to those actions, the *Ref re AHRA* does set out clear guidelines. Mitchell explains "Prohibitions of this kind backed by an offence provision and a penalty clause are the essence of the criminal law."⁴⁴² Second, the *Ref re AHRA* does not eliminate the constitutional muster of conditional prohibitions created under section 91 (27). This was exemplified when the majority opinion in the *Ref re AHRA* only limited the reach of the controlled activities section of the *Act* and not eliminating the section entirely.⁴⁴³ The judicial precedent before the *Ref re AHRA* suggested that the courts have tolerated extensive regulatory regimes provided they were adequately connected to achieving a public health

⁴³⁹ Whyte, *supra* note 421 at 52.

⁴⁴⁰ Mitchell, *supra* note 296 at 665.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*

objective.⁴⁴⁴ I agree with Mitchell when he argued that “The degree of constitutionally acceptable medical regulation under the criminal law power is no longer so open-ended.”⁴⁴⁵ The *Ref re AHRA* restored some balance to the enterprise of utilizing section 91 (27) to justify extensive regulatory schemes in the medical field.⁴⁴⁶

Unfortunately, the majority opinion of the *Ref re AHRA* does not provide a clear example of how to view the minute distinctions present in difficult cases. This is enhanced by the absence of a clear majority opinion by the Court. The slim decision drew a line regarding the limits of federal legislation relating to health based on the criminal law power. The opinion in the *Ref re AHRA* represents in an area of constitutional law a shift from a preoccupation with defining what is properly considered criminal law to reviewing the legislation’s regulatory purpose and its effect on provincial jurisdictions in order to determine its true constitutional character.⁴⁴⁷ In other words, this opinion goes into a realm not previously supported by the jurisprudence. Although the outcome of the *Ref re AHRA* has been seen as reasonable, the judicial reasoning supporting the opinion of the Court did not clarify how to identify distinctions between the federal and provincial jurisdictions in such an intricate and evolving policy area.⁴⁴⁸ The general reaction to the ruling of the Court in the *Ref re AHRA* was that it was unsatisfying because of the malleability and uncertainty of the tests employed by the Court regarding section 91 (27).⁴⁴⁹ The drastic changes in legal precedent regarding the development of

⁴⁴⁴ Mitchell, *supra* note 296 at 666.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Whyte, *supra* note 421 at 55.

⁴⁴⁸ von Tigerstrom, *supra* note 410 at 43.

⁴⁴⁹ Patrick Monahan & Chanakya Sethi, “Constitutional Cases 2010: An Overview” (2011) 54 SCLR (2d) 3 at 42.

the federal government's criminal law power only enhanced this observation. As Patrick Monahan and Chanakya Sethi astutely identified, "The case appears to stand for little more than the proposition that one should check-in again in the future for the Court's take on the limits of the criminal law power."⁴⁵⁰

I agree with Mitchell's contention that the majority opinion in the *Ref re AHRA* indicated that the Court is moving away from an unbridled acceptance of the federal criminal law power's regulatory function.⁴⁵¹ However, "the close result achieved in [*Ref re AHRA*] 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."⁴⁵²

7. Implications of the AHRA and Conclusions

The critical analysis surrounding the *Ref re AHRA* centred upon the division of powers and the latitude of the federal government's criminal law power as set out in section 91 (27) of the *Constitution Act, 1867*. These discussions have provided insights into the limits of the criminal law power and how the *Ref re AHRA* may affect subsequent Supreme Court decisions. Those who have looked beyond the immediate implications of the *Ref re AHRA* have discussed alternatives to litigation and what the demise of many of the *AHRA* provisions mean for Canada.

There were a series of factors that contributed to the failure of the impugned provisions within the *AHRA*. During the development of the *AHRA* the United

⁴⁵⁰ Monahan & Sethi, *supra* note 449 at 42.

⁴⁵¹ Mitchell, *supra* note 296 at 636.

⁴⁵² *Ibid* at 661.

Kingdom's status as a world leader in assisted reproductive technology policy, as well as its system of parliamentary government, made it the ideal policy lender for Canada.⁴⁵³ However, unlike Canada the U.K. is a unitary country and its policy initiatives did not have to consider the division of powers that are ever-present in a federal system.⁴⁵⁴ Regardless of these potential jurisdictional issues Canadian policymakers continued to formulate the *AHRA* based on the laws of the U.K.⁴⁵⁵ Once the *AHRA* was finally passed in 2004 it was widely considered one of the most comprehensive pieces of reproductive technology legislation on the planet.⁴⁵⁶ The *Act* consisted of both prohibitions and regulations to enforce the provisions contained within. Although the prohibitions were considered controversial in terms of policy, there was little doubt that the absolute prohibitions fell within the jurisdiction of the federal government.⁴⁵⁷ This is supported further because the constitutionality of the prohibitions was not challenged at the Quebec Court of Appeal or the Supreme Court of Canada.

In comparison, the *Act's* regulatory provisions were often seen as infringing upon the provincial jurisdiction over healthcare. From the outset opposition party leaders expressed their displeasure with the regulatory provisions of the *AHRA*. Although the House of Commons Standing Committee on Health in 2001 advocated for a "single regulatory regime encompassing one set of standards and one set of penalties... with no exceptions", opposition members continued to question the scope of the *AHRA*.⁴⁵⁸ The Bloc Quebecois urged co-ordination and co-operation between the federal and provincial

⁴⁵³ Snow & Knopff, *supra* note 40 at 3.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid* at 6.

⁴⁵⁸ *Ibid.*

governments because large areas of assisted human reproduction fell within provincial jurisdiction.⁴⁵⁹ The Progressive Conservatives aggressively maintained that the provinces and territories should be involved in the drafting of the *AHRA*, while the Canadian Alliance expressed the view that without provincial input parts of the legislation would be susceptible to constitutional scrutiny.⁴⁶⁰

From the beginning numerous political actors warned of the consequences of such an intricate piece of federal legislation with little to no provincial participation. After the Baird Commission published its final report *Proceed with Care*, proponents of the *AHRA* grew impatient with constitutional courtesies.⁴⁶¹ Diane Marleau, the federal Minister of Health during much of the legislative drafting, acknowledged that assisted reproductive technologies tended to be in provincial jurisdiction. However, Marleau and other supporters of the *AHRA* felt that assisted reproduction posed controversial questions regarding the health of women and well-being of children born as a result of assisted reproductive methods.⁴⁶² The drafters of the *Act* believed that urgent action was needed in order to regulate this field and that suitable regulation could be achieved with the creation of one single piece of centralized federal legislation.⁴⁶³ This outlook was reflected in *Proceed with Care* when the Baird Commission rejected the notion that new reproductive technologies should continue to be subdivided into component parts and left to the provincial legislatures.⁴⁶⁴

⁴⁵⁹ Snow & Knopff, *supra* note 40 at 6.

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid* at 7.

By the late 1990's there was an increased sense of urgency to draft and pass legislation related to assisted reproduction. Jones and Salter documented that because of how high the stakes had become, the shaping of the *AHRA* came as a result of numerous compromises made by various parties involved in the formulation of the legislation.⁴⁶⁵ It has been widely held that those involved with the *AHRA* made concessions in order to have the *Act* passed so that there would be some sort of a regulatory framework in place related to assisted reproduction technologies.⁴⁶⁶ The lack of a regulatory framework in Canada "was leaving it open for clinicians and researchers to practice, without guidance or restriction, those controversial activities which later became prohibited or controlled under the *Act*."⁴⁶⁷ Although compromise amongst stakeholders did not come easily, all could agree that some sort of a legislative framework was preferred over nothing at all. The overriding theme of the legislative process leading up to the passing of the *AHRA* was therefore that many individuals involved with the legislation in a number of capacities fast tracked the legislation and ignored the numerous risks related to the constitutionality of the *Act*. As shown in the majority opinion of the *Ref re AHRA* these short cuts proved to be the *AHRA*'s undoing.

The result of the *Ref re AHRA* leaves the regulatory void to be filled by the provinces in many areas of assisted reproductive technologies.⁴⁶⁸ And as Hogg declared, "As a matter of policy, the result is unfortunate."⁴⁶⁹ It is critical to recognize that at the time the Supreme Court of Canada issued its majority opinion in the *Ref re AHRA*, only

⁴⁶⁵ Jones & Salter, *supra* note 152 at 429.

⁴⁶⁶ *Ibid*.

⁴⁶⁷ *Ibid* at 430.

⁴⁶⁸ Snow & Knopff, *supra* note 40 at 11.

⁴⁶⁹ Hogg, *supra* note 1 at 18-33.

one province had enacted a statute to regulate assisted human reproduction.⁴⁷⁰ The Quebec National Assembly passed *An Act respecting clinical and research activities relating to assisted procreation* on June 9, 2009.⁴⁷¹ The statute, commonly referred to as the *Assisted Procreation Act*, was passed only after Quebec issued the reference question to challenge the federal *Act*.⁴⁷² It seems as though the remaining provinces continue to be disenchanted with the notion of allocating resources towards the creation of provincial legislation concerning assisted reproduction. This observation is supported by Hogg's statement that "None of the other provinces had sought to regulate the field and six provinces did not even intervene in the reference."⁴⁷³ Furthermore, I agree with Hogg's claim that "It seems likely that in some provinces there will be no legislation, and therefore no regulatory oversight of practices that may be unsafe for the mother or the eventual offspring."⁴⁷⁴ Individuals desperate to have biological children may be undeterred by these risks and attracted to the provinces that currently or in the future offer assisted reproductive services.⁴⁷⁵ Nevertheless, the Supreme Court of Canada has ruled out the solution of a comprehensive national regime presented by the federal government in the form of the *AHRA*. All the same, it is possible that the disinterest demonstrated by the other provinces may be reduced due to the continued presence of Quebec's assisted reproduction legislation. In other words, the remaining provinces may be inspired and use the Quebec statute as a legislative template when drafting their own laws related to assisted reproduction. But even this is not guaranteed. For the sun may be

⁴⁷⁰ Hogg, *supra* note 1 at 18-33.

⁴⁷¹ Mitchell, *supra* note 296 at 667; *Assisted Procreation Act*, *supra* note 236.

⁴⁷² Hogg, *supra* note 1 at 18-33.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

setting on Quebec's *Assisted Procreation Act*, since as of August 5, 2013 the Minister of Health and Social and Services must report to the Quebec provincial legislature regarding the implementation of the legislation and on the advisability of maintaining it in force or amending it.⁴⁷⁶

Regardless of the fate that awaits the *Assisted Procreation Act* in Quebec the federal government deserves some credit for attempting to address the legislative vacuum that was present in the field of assisted reproductive technologies prior to the creation of the *AHRA*. Although the scope of the *AHRA* was severely limited following the majority opinion of the Supreme Court some important features remain. Most notably, the absolute prohibitions that survived the *Ref re AHRA* still continue to be enforced by Health Canada. These enduring prohibitions will be enforced by Health Canada because the Canadian federal government announced that it would oversee the closure of operations of Assisted Human Reproduction Canada (AHRC) by March 31, 2013.⁴⁷⁷

Some analysts have viewed the closing of the AHRC as a disaster regarding the regulation of assisted reproduction legislation.⁴⁷⁸ In contrast, I agree with Dave Snow and Rainer Knopff when they stated “the claim that the Supreme Court ruling created a new regulatory void is exaggerated because Assisted Human Reproduction Canada did virtually nothing in the way of monitoring or regulation.”⁴⁷⁹ For example, between April 2004 and December 2010, only one of the 30 regulations anticipated in the *AHRA* was

⁴⁷⁶ *Assisted Procreation Act*, *supra* note 236 at para 60.

⁴⁷⁷ Francoise Baylis, “The Demise of Assisted Human Reproduction Canada” (2012) 34 J Obstet Gynaecol Can 511 at 511.

⁴⁷⁸ Snow & Knopff, *supra* note 40 at 12.

⁴⁷⁹ *Ibid* at 13.

introduced by the AHRC.⁴⁸⁰ Health Canada explained it was delaying the introduction of the *AHRA* regulations because it was awaiting the opinion of the Supreme Court of Canada in the *Ref re AHRA*.⁴⁸¹ Also, between 2004 and 2012 there was only one reported RCMP investigation into alleged violations of the prohibitions set out in the *AHRA*.⁴⁸² As for the AHRC's responsibility to license clinics that perform controlled activities stipulated in the *AHRA*, no fertility clinic was ever granted a license by the AHRC.⁴⁸³ These examples provide clear evidence that the AHRC failed to promote compliance and enforce the provisions of the federal *Act*. Although, it must be recognized that the protracted litigation associated with the *AHRA* drastically limited the operations of the AHRC. Still, the inaction of the AHRC demonstrates how in theory the *AHRA* had the potential to revolutionize assisted reproduction technology policy in Canada, but in practice the provisions were under utilized and rendered relatively ineffective.

With the limitations placed upon the *AHRA* following the constitutional interpretation of the Supreme Court of Canada it is important to encourage the Canadian provinces to draft legislation that regulates assisted reproduction. The majority opinion in the *Ref re AHRA* effectively dismantled Parliament's unilateral attempt to institute a national framework capable of regulating the area of assisted human reproduction. However, I agree with Graeme G. Mitchell that it is still possible "to achieve pan-Canadian standards in the regulation of assisted human reproduction technologies."⁴⁸⁴ I would propose that inter-governmental co-operation might result in new and innovative

⁴⁸⁰ Baylis, *supra* note 477 at 512.

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid* at 511.

⁴⁸³ *Ibid.*

⁴⁸⁴ Mitchell, *supra* note 296 at 667.

ways to address the need for a cohesive national framework. I agree with Mitchell's view that the creation of a unified national scheme would "require forbearance by the federal government and a willingness to cooperate by provincial governments."⁴⁸⁵ In addition, Mitchell advises the provincial governments to address the legislative absence currently present in the field of assisted reproduction.⁴⁸⁶ Again, provinces have been reluctant to legislate in this area, but the opinion communicated in the *Ref re AHRA* should reduce this level of cautiousness. Mitchell was correct to warn that if the provinces continue to refuse to legislate in this burgeoning and important medical field, the provinces may be compelled to act if future cases arise concerning assisted human reproduction that expose legislative shortcomings.⁴⁸⁷ I concur with both Mitchell and Hogg that litigation is a protracted and expensive method to attain desired objectives and at times it fails to achieve the best policy outcomes.⁴⁸⁸ Similarly, awaiting directives from the judiciary is not only time consuming and expensive, but also is highly inefficient and has the propensity to heighten inter-governmental tensions. Anticipating judicial decisions is wasteful and removes the accountability of policy choices from the legislatures and relocates these decisions into the hands of the judiciary. Abiding by the tenets of cooperative federalism can potentially eliminate the need for judicial review in some cases, keeping policy decisions in the hands of elected officials and away from the appointed judiciary.

The population size and economic capabilities possessed by certain provinces, namely Quebec, Ontario, Alberta, and British Columbia, may allow these provinces to

⁴⁸⁵ Mitchell, *supra* note 296 at 667.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid* at 668.

⁴⁸⁸ Mitchell, *supra* note 296 at 669; Hogg, *supra* note 1 at 5-45.

allocate resources towards the drafting of assisted reproduction technology statutes. However, not all provinces may feel they possess the administrative competency to adequately regulate the countless issues associated with assisted reproduction. These uncertainties should not discourage future attempts to institute a national framework. I support the opinion of Mitchell that “There is a way to achieve this goal [of a national scheme] which is consistent with the robust concept of co-operative federalism espoused by the Supreme Court of Canada in recent years.”⁴⁸⁹ Mitchell proposes that the use of the co-operative federalism concept can result in administrative inter-delegation.

Administrative inter-delegation occurs when both levels of government wilfully delegate administrative responsibilities to a national agency. In *Federation des producteurs de volailles du Quebec v. Pelland (2005)* it was described that in order for administrative inter-delegation to be effective it 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...”⁴⁹⁰ Such inter-delegation to a single national agency by provincial and the federal governments of their respective jurisdictional powers in relation to a particular area of concentration has long been accepted by the Supreme Court.⁴⁹¹ Once these laws are ratified by each level of government the administration of this scheme could be afforded to a single regulatory agency created by Parliament.⁴⁹²

The *Assisted Procreation Act* enacted by Quebec is in place and can serve as a model for other provinces. The administration of all the provisions contained within each potential provincial statute can then be delegated to a single national body responsible for

⁴⁸⁹ Mitchell, *supra* note 296 at 669.

⁴⁹⁰ Ibid at 670.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

enforcing the national scheme. This arrangement “would permit national standards to be achieved yet also take into account local initiatives and values.”⁴⁹³ Although it is true that the *Ref re AHRA* seriously limited the capabilities of the *AHRA* to regulate sophisticated medical technologies, it does not prevent governments from accessing creative yet constitutionally acceptable solutions to achieving the formation of a national regulatory body responsible for overseeing activities related to assisted reproduction.

The solutions proposed by Mitchell would be possible if the federal and provincial governments were to engage in co-operative federalism. Furthermore, these solutions would eliminate the necessity in some situations for governments to appeal to the judiciary. But the presence of a legislative vacuum pushed policymakers to draft a constitutionally precarious piece of legislation. The threat of a legislative vacuum in such a controversial and evolving policy domain may have caused the legislative drafters to overlook the value that inter-governmental co-operation could have brought to the *AHRA*. This may have been because the policy makers did not believe that the provinces were willing or capable of reaching an agreement on an issue that was morally, socially, and politically controversial in nature. As highlighted above, opposition members frequently endorsed co-ordination between governments. The result of the *Ref re AHRA* proved that the constitutional gamble taken by those involved in the creation of *AHRA* did not pay off. Various political figures, academics and commentators writing both before and after the Supreme Court rendered its opinion in the *Ref re AHRA* discussed the enormous value inter-governmental co-operation could bestow upon the *Act*.

⁴⁹³ Mitchell, *supra* note 296 at 670.

Recall that at the core of co-operative federalism is a network of relationships that exist between the executives of the central and regional governments. Through these relationships inter-governmental mechanisms are created which allow for the constant redistribution of powers and resources without recourse to the courts or constitutional amendment. The development of the *AHRA* and the subsequent judicial saga culminating in the Supreme Court of Canada's majority opinion in the *Ref re AHRA* is an example of political actors failing to adhere to the tenets of co-operative federalism. In this situation, both the federal and provincial governments failed to abide by the principles of co-operative federalism therefore both levels of government must shoulder some of the blame. Contrary to the views of the opposition parties, it seems the federal government did not adequately consult the provinces while the *AHRA* was being developed.⁴⁹⁴ Moreover, the prolonged litigation process was initiated by the Government of Quebec and the decision to appeal to the judiciary contravened the primary goals of co-operative federalism. Regardless of the legislative vacuum being addressed with the passing of the *AHRA*, I would suggest that the *Act* was seen as expendable by Quebec, especially once the *Assisted Procreation Act* was being drafted and on its way to being passed. Furthermore, Quebec's political leaders may have viewed assisted reproduction as a topic that was on the fringes of society's central social and economic concerns. As a result, the Quebec government may have thought that laws drafted in the provincial legislature would adequately address any perceived concerns related to assisted human reproduction legislation. In sum, it appears the province of Quebec did not share the same sentiments of the federal government that viewed the *AHRA* as an indispensable piece of health legislation.

⁴⁹⁴ Jones & Salter, *supra* note 152 at 424.

Numerous academics and legal commentators have endorsed the concept of co-operative federalism as an option to adequately regulate assisted human reproductive technologies. This would suggest that in this case there is scholarly support for promoting co-operative federalism as an efficient substitute for judicial review. That is not to say that the involvement of the judiciary is not valuable, as in some cases litigation is unavoidable. The reality is that in some situations there may not be an agreement that can be reached between governments. However, I would argue that when possible, appeals to the judiciary should be considered only if extended inter-governmental negotiations are unsuccessful. Greater inter-governmental negotiation and consultation is needed when creating complex policy in an emerging field like assisted human reproduction. I endorse the notion that if inter-governmental interactions were to abide by the tenets of co-operative federalism legislation would be less susceptible to the long and expensive process of judicial review. In other words, if there is greater inter-governmental negotiation through the utilization of co-operative federalism during the drafting of legislation it is possible that laws can be endorsed by both levels of government. More consultation may lead to statutes that are accepted by both levels of government and thus less likely to be constitutionally challenged. This notion of laws being supported by both levels of government is at the centre of both co-operative federalism and its counter-part competitive federalism. Regardless, both concepts attempted to achieve the same goal albeit through different methods. The objective was to introduce a framework that would allow statutes to be supported by both levels of government.

In the end, many lessons can be learned from the failings of the *AHRA* if one heeds the advice of the Supreme Court of Canada, various legal commentators and

constitutional scholars. My view is that a possible solution to the difficulties encountered during the legislative saga surrounding the *AHRA* is greater inter-governmental co-ordination, consultation and negotiation as endorsed by the concept of co-operative federalism. In addition, I would go so far as to say that the applicability of the concept transcends this case and can be applied to others. As demonstrated throughout this project inter-governmental co-operative interaction – that is, co-operative federalism – makes it possible for governments to utilize creative constitutional processes such as administrative inter-delegation to achieve complex policy objectives including a national regulatory framework. Furthermore, it is possible to avoid unnecessary litigation, create widely accepted legislation and minimize inter-governmental tensions through the use of co-operative federalism. In the end, then, within the confines of Canada's current constitutional structure, co-operative federalism is the best way to manage tensions and increase efficiency within the Canadian Federation, while negating the presence of unnecessary litigation before the courts.

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