Supreme Court to Rule on Validity of Canada's Assisted Human Reproduction Act

On April 24, 2009, the Supreme Court of Canada heard oral arguments on the constitutional validity of the federal *Assisted Human Reproduction Act*[1](*AHRA*).[2] Judgment has been deferred until a later date.

The Quebec government initiated this case with a reference question to the Quebec Court of Appeal.[3] The reference asked whether the *AHRA* was validly enacted federal legislation. The Court of Appeal rendered its decision on June 19, 2008, finding the *AHRA* invalid because the federal government lacks the necessary constitutional authority to pass it.[4] The Government of Canada has asked the Supreme Court to reverse the Quebec decision.

In the Quebec Court of Appeal, the province argued that it, and not the federal Parliament, has jurisdiction over health, according to the *Constitution Act, 1867*.[5] Canada, on the other hand, argued that the "pith and substance" of the *AHRA* falls under federal jurisdiction over criminal law because the law "safeguard[s] public health, safety and morality."[6]

Quebec contended that the *AHRA* is not criminal law, since it is not directed at a "legitimate evil."[7]Furthermore, the provisions of the *AHRA* deal with health in a context properly connected with the provincial authority over maintenance of hospitals, property and civil rights, and matters of a local or private nature.[8]

Quebec did not seek to have the entire *AHRA* declared invalid, but rather sought to have specific sections severed from the *AHRA*.[9] These sections dealt with the creation of a registry for genetic information, regulation of creation of embryos, and reimbursement of costs associated with assisted human reproduction.[10]

The federal government defended the entirety of the *AHRA*, claiming that the "unsafe or ethically reprehensible" prohibited behaviour constituted an evil to society. [11] It also argued that the sections of the law in dispute were "integral and inseparable" from the rest of the *AHRA*. [12] It further claimed that the effect of the impugned sections on provincial jurisdiction was only incidental, so the grounds for ruling them invalid were not strong enough.[13]

The Quebec Court of Appeal noted that health had traditionally been under the authority of the provinces. [14]However, health is not explicitly mentioned in

the *Constitution Act, 1867*. The court found that the exceptions to the prohibitions in the *AHRA* were too broad to be considered merely incidental.[15] Moreover, allowing the federal government to legislate in the area of health law in this way would drastically decrease the power of the provinces to legislate over health care.[16]

"If we want to demonstrate that federalism is capable of working, then it must be capable of respecting the jurisdiction of provinces," said Jocelyne Provost, the Crown Prosecutor who argued the case for the province.[17]

Some experts are concerned that the Supreme Court will uphold the Quebec decision. Françoise Baylis, the Canada Research Chair in Bioethics and Philosophy at Dalhousie University, worried that if provisions of the*AHRA* are held to be invalid, "there is the very real risk that our future will simply be the sum of idiosyncratic decisions made by women and couples who exercise their reproductive freedom as they please. This risk exists because there is nothing to compel a province or territory to introduce legislation to regulate assisted human reproduction."[18]

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[1] S.C. 2004, c.2.
[2] Françoise Baylis, "Baby making technologies: fertile field for federal or provincial oversight?" *The Globe and Mail* (4 May 2009).
[3] In the matter of a Reference by the Government of Quebec pursuant to the *Court of Appeal Reference Act*, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 60, 61 and 68 of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2,2008 QCCA 1167.
[4] *Ibid*.
[5] *Ibid* at para 26.
[6] *Ibid* at para 35.
[7] *Ibid* at para 31.
[8] *Ibid* at paras 72 and 73; *Constitution Act, 1867* sections 92(7), (13), and (16).
[9] *Supra* note 3 at para. 26.
[10] Luis Millán, "Federal government overstepped its authority, says Quebec Court of Appeal" *Law in Quebec* (17 March 2009).
[11] *Ibid* at para 38.
[12] *Ibid* at para 37.
[13] *Ibid* at para 39.
[14] *Supra* note 3 at para 89.
[15] *Ibid* at para 99.
[16] *Ibid* at para 141.

[17] *Supra* note 10.
[18] *Supra* note 2.