Legislative Responses to New Reproductive and Genetic Technologies

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Canadian policy makers and legal analysts have been agonizing over new reproductive and genetic technologies (hereinafter "NRGTs") for well over a decade now and the subject continues to attract great discussion and debate. At this point it is some seven years since the release of the Final Report of the Royal Commission on New Reproductive Technologies[1] and three and one half years since Bill C-47,[2] the only legislative response to the Final Report, died on the order paper. While Health Canada has been working on a new bill, as of the time of writing it has not appeared, and when it does, it is likely to attract great controversy regardless of what it says.

In her presentation, Dr Baird has outlined the complexity and dangers associated with a few of the emerging technologies, and argued that they call for a legal response. In my presentation, I want to address some of the legal challenges that may help explain why it is that legislative action has been so slow in coming in Canada. In doing so, I also hope to highlight some of the limits of law—in itself—as an effective response with which to deal with the challenges posed by NRGTs. The first issue to address is how lawmakers can legitimately assess what the collective will or consensus is in a rapidly changing, pluralistic and multicultural society. The second issue relates to the efficacy of law, and different sorts of legal responses (*e.g.* criminal law or regulation), as a mechanism of social control. The third issue, and one which has proved to be very challenging in Canada, is the reality of division of powers.

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1 Royal Commission on New Reproductive Technologies, *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services, 1993) [hereinafter Royal Commission Report or *Proceed With Care*].

2 Bill C-47, *Human Reproductive and Genetic Technologies Act*, 2d Sess., 35th Leg., 1996.

I. SEEKING SOCIAL CONSENSUS IN A PLURALISTIC, MULTICULTURAL AND RAPIDLY CHANGING SOCIETY

Bill C-47 consisted of a series of prohibitions of the following practices:

(i) sex selection for non-medical purposes;

(ii) buying and selling of eggs, sperm and embryos, including their exchange for goods, services or other benefits, but excluding the recovery of expenses incurred in the collection, storage and distribution of eggs, sperm and embryos for persons other than a donor;

(iii) germ-line genetic alteration;

(iv) ectogenesis (maintaining an embryo in an artificial womb);

(v) cloning of human embryos;

(vi) creation of animal-human hybrids;

(vii) retrieval of sperm or eggs from cadavers or fetuses for fertilization and implantation, or research involving the maturation of sperm or eggs outside the human body; and

(viii) commercial preconception or surrogacy arrangements.

When the Bill was tabled, the government also released a Discussion Paper entitled *Setting Boundaries, Enhancing Health*.[3] *Setting Boundaries* made it clear that the prohibitions contained in the Bill were founded on consensus among Canadians that such practices offended the values of Canadians and should therefore be prohibited.[4] There are a number of problems, however, with such an assertion in a multicultural, pluralistic society like ours. How do we define the collectivity? Who interprets what the collectivity is? How do we take the range of religious, secular and cultural communities into account? How do we reconcile this with the high value our legal and political culture places on individual choice and autonomy as articulated in the *Canadian Charter of Rights and Freedoms*?[5]

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[3] Government of Canada, (June 1996) at 5 [hereinafter *Setting Boundaries*].

[4] For a more thorough discussion of the role of social consensus in this area, see A. Harvison Young & A. Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies" (1998) 6 Health L.J. 239.

[5] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

The difficulties inherent in these questions are illustrated by some of the prohibitions contained in C-47. Let us take the prohibition (or criminalization) of commercial surrogacy as an example. The Royal Commission expended considerable effort and expenditure in collecting the views of Canadians. Some of these were collected via testimony[6] before the Commission. The Commission also established phone-in lines. In addition, it conducted surveys through polling agencies such as Angus Reid and others,[7] and it refers to the responses to these surveys throughout the report. On the subject of surrogacy, the views, even as assessed in the 1993 Royal Commission Report, were varied:

> "We found that opinions on this issue are diverse and difficult to catalogue, ranging from outright opposition to the practice, whatever form it might take, to acceptance and even encouragement of the practice by public policies to regulate it, to enforce contracts, and to provide medical services in support of it. Ranged between these positions are those who oppose commercial arrangements but would tolerate non-commercial arrangements, particularly in cases where the commissioning woman's health was the reason for seeking a preconception arrangement; those who would find commercial arrangements acceptable if certain safeguards or regulations were in place; and those who would not encourage or participate in a (non commercial) preconception arrangement themselves but would not prohibit others from doing so."[8]

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[6] This is particularly evident in *Setting Boundaries*, which is replete with statements such as: "Canadians have made it clear that they are looking to the federal government to manage these technologies [...]"; "there is widespread agreement among Canadians about prohibiting those aspects of NRGTs that are the most problematic [...]"; "reflecting the collective values of Canadians", *supra* note 3 at 5, 9, and 10 respectively.

[7] Other agencies involved were Decima Research and SPR Associates Inc. The commission also received written submissions and opinions, held roundtable discussions, symposia, and colloquia on research findings related to new reproductive technologies.

[8] *Supra* note 1 at 669.

It is interesting to note, however, that the Commission relied more directly and more heavily on social consensus in its "Overview of Recommendations" than it appeared to do earlier in the Report. In introducing the section on criminal legislation, the Report stated that:

> "[...] certain activities conflict so sharply with the values espoused by Canadians and by this Commission, and are so potentially harmful to the interests of individuals and of society, that they must be prohibited by the federal government under threat of criminal sanction."[9]

The Commission concluded that commercial surrogacy may exploit women, is degrading to them, and commodifies children and reproduction. It consequently recommended that the federal government legislate to prohibit advertising for, or acting as, an intermediary to bring about a preconception arrangement, as well as to prohibit receiving payment or any financial or commercial benefit for acting as an intermediary, under threat of criminal sanction. It also recommended legislating to prohibit making payment for a preconception arrangement, under threat of criminal sanction.[10] My point here is that, given the range of views on the subject, outright prohibition—even of commercial surrogacy—is hard to justify on the basis of the "views of Canadians" or of the "collectivity." It may be the case that there are other bases for the prohibitions, but social consensus, even in 1993, was not a strong one.

Setting Boundaries, the Discussion Paper which accompanied Bill C-47, went considerably further in justifying criminalization on the basis of social consensus. Although it articulated the principle of non-commodification of human reproduction, it swept all the proposed prohibitions under the wide skirt of public consensus, asserting that:

> "[s]ince there is widespread agreement among Canadians about prohibiting those aspects of NRGTs that are the most problematic, the government has moved quickly to legislate in this area."[11]

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9 *Ibid.* at 1022.

10 The Report also recommended a number of other measures. See *Proceed With Care*, *ibid.* at XXXIII-XXXV and 1021-1050.

11 *Setting Boundaries*, *supra* note 3 at 9.

The clear inference was that there was strong social consensus that commercial surrogacy should be criminalized, something that went beyond the evidence amassed by the Royal Commission itself.

Furthermore, if one is relying on social consensus as a justification for legal action, one must also take account of the possibility of changing social attitudes. For example, in England, it seems that the public became more sympathetic to surrogacy as a response to infertility, at least in some circumstances, than was the case previously.[12]

There is also some difficulty with the application of shared general values to particular circumstances. For example, all Canadians may agree that we do not want to commodify human life and compromise human dignity. That does not mean that all those Canadians would agree that the compensation of sperm donors constitutes "sale" and commodifies human existence, or that it should be criminalized as opposed to regulated, for example, as to conditions of donation and the maintenance of health and safety standards.

II. LAW AS A MEANS OF SOCIAL CONTROL

The limitations of law as a mechanism of social control have been the subject of legal scholarship throughout the century. The great jurist and founder of the legal theory school known as "sociological jurisprudence", Roscoe Pound, observed that enforcement of law is not a problem in homogenous societies where the formal law merely codifies widely shared and observed practices. On the other hand, he wrote, in 1917:

> "[...] when men demand much of law, when they seek to devolve upon it the whole burden of social control [...] enforcement of the law comes to involve many difficulties. [...] The purposes of the legal system are not all upon the surface, and it may be that many whose nature is by no means anti-social are out of accord with some or even with many of these purposes. Hence today, in the wake of ambitious social programs calling for more and more interference with every relation of life, dissatisfaction with law, criticism of legal and

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[12] See D. Bromham, "Public Acceptance of Surrogacy: What Are the Limits?" (Abstract 0698) in S. Ratman, E. Teoh, K. Seng & M. MacNaughton, eds., *Proceedings of the Thirteenth World Congress of Gynecology and Obstetrics (FIGO)* (1991) Abstracts 3 at 305-314, cited in *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain* (London: British Medical Association, 1996).

judicial institutions, and suspicion as to the purpose of the lawyer becomes universal."[13]

In discussing the limits of law, we refer to law as it is most commonly understood: law in terms of simple commands such as "thou shall ..." or "thou shalt not ..." It is this deployment of law that tends to have the greatest popular appeal, and many social crises give rise to the "there oughta be a law" reaction. As Pound noted, the layperson "believes that law may be made. He believes that law is the product of the will of the lawmaker. Accordingly, whenever he wills something that he would like to see enforced upon his neighbor, he essays to make law freely."[14]

This deployment of law also frequently leads to the greatest political mileage for governments promulgating it, even though more subtle or complex approaches might well be more effective in the longer term. This is often especially true with respect to the criminal law. In Canada, there is great public pressure to increase the severity of treatment of young offenders by the law. It is not difficult to understand the incentives for the politicians: a "tough" new law will look good to the voters even if it is ultimately ineffective. The alternatives, such as intensifying rehabilitative efforts, or providing early support to families in difficulty, are unlikely to show speedy results and are difficult to measure.

This century provides many examples of the failure of the law's commands: abortion and prohibition (of alcohol) are two glaring examples. In some cases, the failure has extended beyond inefficacy to include the exacerbation of many of the very evils sought to be redressed by the law in question. In the cases of abortion and prohibition, the demand was clearly strong, and the legal prohibitions merely forced the practices underground and created a black market. Prohibition is credited today with having created the incentive for the development of the infrastructure (initially illegally) that has in modern years become the basis for a highly profitable industry. Laws criminalizing abortion certainly did not stop the practice, but they did force the practice underground, where many women suffered the effects of

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[13] Roscoe Pound, "The Limits of Effective Legal Action", an address presented to the Pennsylvania Bar Association, (1917) 3 A.B.A.J. 55 at 56.

[14] *Ibid.* at 56.

unsafe abortions and were often afraid to seek medical help when complications ensued.[15]

The 1960s and 1970s are replete with lessons of a rather different sort about the failed promise of law in the social arena. The famous busing case of *Brown* v. *Board of Education*[16] was greeted by civil libertarians with great optimism but some 40 years later, the reality of segregation in inner city American schools continues: *de facto*, rather than *de jure*. Although *Roe* v. *Wade*[17] declared that women had a constitutionally protected right to abortion, the law has neither delivered meaningful access to abortion nor diminished the social controversy.

What do the examples of abortion, prohibition against alcohol, and discrimination legislation have to do with each other or with NRGTs? What are the common denominators? These are all matters that trigger strong and often emotional responses that are controversial within society and with respect to which consensus may be difficult to achieve. As Pound understood, the subsequent enforcement of law depends on a certain level of commitment to the goals reflected. We can all think of the weak enforcement of laws on jaywalking or even possession of marijuana in these terms. On the other hand, if we consider matters that have galvanized us and attracted a strong consensus, legislative initiatives are much more successful. For example, one might argue that tougher drinking and driving laws (or seatbelt laws) over the past decade have been quite successful. But the legislation has been grounded in a strong level of public support which finds expression in the level of police resources devoted to detection of drunk drivers, in public education campaigns, in the emergence of "designated driver" programs, and so on. The lesson, as one of the author's professors once put it, is that "the only laws likely to be really effective are those you don't need anyway!"[18]

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[15] See generally A. McLaren & A.T. McLaren, *The Bedroom and the State: The Changing Practices and Politics of Contraception and Abortion in Canada, 1880-1980* (Toronto: McClelland & Stewart Ltd, 1986) [hereinafter *The Bedroom and the State*].

[16] 347 U.S. 483 (1954) (Brown I); 349 U.S. 294 (1955) (Brown II).

[17] 410 U.S. 312 (1974).

[18] One of the authors recalls her professor and former McGill colleague, Roderick Macdonald, making the point a number of times, most vividly to a first-year "Foundations of Canadian Law" class which they co-taught in the Fall term, 1988.

Law, then, is not self-enforcing and requires a certain level of social commitment and consensus for the successful implementation of its provisions. This is particularly true of top down "command and control" which Bill C-47 exemplified. In discussing the causes of non enforcement of law, Pound offered the following explanation, which is strikingly applicable to much of the subject-matter in Bill C-47:

> "[The causes of non enforcement] grow out of over ambitious plans to regulate every aspect of human action by law, they are involved in continual resort to the law to supply the deficiencies of other agencies of social control, they spring from attempts to govern by means of law things which in their nature do not admit of objective treatment and external coercion."[19]

In addition to the risk of simple unenforcement of criminal laws, such laws may even make matters worse. The history of the criminalization of abortion in Canada and in other countries has been well documented and need not be recited in detail here.[20] The criminalization of abortion predated and was included in the first *Criminal Code* of 1892.[21] It remained an entirely criminal matter until 1969, when the law on abortion was altered to allow a "therapeutic exception" for a doctor who received certification from a Therapeutic Abortion Committee in an accredited hospital. There remained the requirement that the continuation of the pregnancy "would or would be likely to" endanger the life or health of the pregnant woman.[22]

This continued to be the law in Canada until the *Morgentaler*[23] decision in 1988 struck down the relevant provisions of the *Criminal Code*[24] on constitutional grounds. Since then, the one serious attempt to recriminalize abortion was defeated in the Senate.[25]

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[19] R. Pound, *supra* note 14 at 56.

[20] For an excellent account of the history of abortion in Canada, see *The Bedroom and the State, supra* note 16.

[21] *Criminal Code,* 1892, 55-56 Victoria, c. 29, s. 272-273.

[22] *Ibid.*

[23] *R.* v. *Morgentaler (n^o 2)*, [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*].

[24] R.S.C. 1985, c. C-46.

[25] Bill C-43, *An Act Respecting Abortion*, 2d Sess., 34th Leg., 1989. The House of Commons passed Bill C-43 without amendment on May 29, 1990 by a narrow vote of 140-131. Bill C-43 was defeated in the Senate on January 31, 1991. Canada is thus exceptional in that it does not have an abortion law.

In short, abortion was treated as a criminal offence for the last half of the nineteenth century and the first half of this one. How effective was that legislation, and what parallels might be drawn to the legal regulation of new reproductive technologies? The practice was carried out in secrecy either by women themselves or with the aid of an illegal abortionist.[26] Historical evidence suggests that abortion services were also offered overtly, but in a disguised form. Newspapers at the turn of the century and later, for example, openly advertised services and products for women designed to make their periods "regular." This extra legal abortion regime, however, was not without its costs; many Canadian women died and many more became infertile as the result of desperate last resorts to gain control over their reproductive capacities.[27]

In addition, enforcement of the law was sporadic. Legal authorities generally took action only when a death had fairly clearly resulted from an abortion. The McLarens have also painstakingly explored the relationship between actual maternal deaths or injuries and the official statistics on the subject.[28] Many abortion related deaths or injuries were never reported, or were reported in ways that masked their true origin. This was especially true when the women involved were affluent or well-connected. At the end of the day, the disparity between actual incidences of abortion and official indicators which McLaren outlines can only be described as staggering. If he is right, and the evidence is scant at best to contradict him, one can very properly conclude that one of the major effects of abortion legislation was to mask it, not to limit it.

By the first half of this century, then, "women were trapped between the rising pressures to limit fertility and the implacable opposition of both the government and the medical profession to providing safe and effective means of birth control and abortion."[29] Government legislation deprived the mass of the Canadian population of access to reliable birth control.[30] Prohibitions did nothing to stop the practice. Abortion simply became less visible and more dangerous.

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[26] See generally *The Bedroom and the State, supra* note 16.

[27] *Ibid.* at 44-51.

[28] *Ibid.* at 45-51.

[29] *Ibid.* at 51.

[30] Criminalization of contraception was not removed until the late 1960s (*ibid.* at 9).

Prohibitions against abortion merely stopped the practice by those physicians who did not want to break the law. In other words, one might argue that it stopped only the "best" of the abortion practitioners. In driving the practice underground, the legislation masked its existence and stifled the outcry that might have resulted if the real horror and costs had been known. The big losers were the women, and generally less affluent women, who were forced to go underground and were powerless and vulnerable in the event that they were mistreated, overcharged, or butchered.[31] Put this way, if the first concern is that "law as command" is ineffective, just as important is the concern that the existence of the formal command may create the public perception that the practice has ended, masking social reality, and perhaps even thereby facilitating the exploitation of those most vulnerable. This example is particularly opposite to certain practices such as surrogacy, but may also apply to the "sale" of gametes or to sex-selection to the extent that such prohibitions might be difficult to enforce.

One more potential issue should be flagged and that is the issue of reproductive autonomy and the issues of equality and liberty under the *Charter of Rights and Freedoms.*[32] Legislation affecting reproductive choices will attract scrutiny pursuant to the *Charter* and this must be taken into account.

In my view, then, policy makers and law reformers must be mindful of the limitations of a "command and control" model in considering legal responses to the challenges posed by NRGTs. This does not mean, however, that I am suggesting that they throw up their hands and give up the attempt to use law as an important strategy. It does call for a great deal of creativity and the deployment of a multiplicity of formal and informal legal devices to address these issues. The criminal law, as the bluntest and potentially most forceful instrument, should be a last resort. I would like to briefly outline some of the legal resources open to law reformers.

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[31] For a dramatization of such a case, see M. Atwood, *Alias Grace* (New York: Doubleday, 1996).

[32] *Supra* note 5.

A. Regulation

Proceed With Care recommended both a national regulatory agency and the prohibition of a number of practices as a legal response. A regulatory agency somewhat similar to the Human Fertilization and Embryology Authority in Britain was suggested. Time and space will not permit a full discussion of such a regulatory agency but I do want to outline some of the advantages of a regulatory body. First of all, a licensing and inspection/accreditation regime can regulate aspects of practices, such as IVF, which may not call for prohibition but which trigger health, safety and related issues that can be most effectively addressed by targeting the service providers. Second, a regulatory body can be established with the means to respond very quickly to changing conditions. Third, a regulatory body may have a broader function of educating and communicating with the public, which might include organizing conferences, providing for an ombudsperson, etc. So why has it thus far proved so difficult to enact a regulatory scheme? The reason lies in that proverbial Canadian bug-bear: the division of legislative jurisdiction as set out in the *Constitution Act, 1867*.[33] The Royal Commission appears to have proceeded on the premise that federal legislation could be constitutionally grounded in the Peace, Order and Good Government power (POGG),[34] and particularly within the "national concern" branch developed by the courts.[35] However, as others have effectively noted,[36] little jurisprudential support exists for this position and in fact, there is substantial authority holding that the POGG power is to be restrictively interpreted.[37] In fact, the more likely authority for federal

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[33] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[34] *Proceed with Care*, *supra* note 1 at 19.

[35] See generally P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 452-461, as well as the leading case, *R*. v. *Crown Zellerbach Canada Ltd*, [1988] 1 S.C.R. 401, for a discussion of the national concern branch.

[36] P. Healy, "Statutory Prohibitions and Regulation of New Reproductive Technologies under Federal Law in Canada" (1995) 40 McGill L.J. 905 at 917-918.

[37] See *Crown Zellerbach*, *supra* note 35, which established that any legislation to be grounded in the POGG power would require a "singleness, distinctiveness, and indivisibility" of subject matter. The recent case of *R.* v. *Hydro-Quebec*, [1997] 3 S.C.R. 213 [hereinafter *Hydro-Quebec*], discussed below, would appear to add further doubt to the notion that authority for federal NRT legislation can be found within the POGG power. In *Hydro-Quebec*, the majority did not find it necessary to address the POGG argument, although the dissent and the lower courts did address this claim, and all

legislation regulating NRGTs might be found within the federal government's power to legislate with regard to the criminal law.[38] This is arguably why the government began Bill C-47, with the idea being that the criminal law power would provide the central jurisdictional "hook" while the regulatory and non-criminal matters could be understood as ancillary. Of course, the problem (still not resolved) is that the more heavily legislation relies on the criminal law model, the more serious the "command and control" problems are likely to be, and the more likely that such legislation is to successfully attract *Charter* challenge.

The social diversity in Canada may present another challenge for a national regulatory system. The greater the degree and detail of uniformity sought, the harder it will be to accommodate the level of social and cultural difference across the country.

B. Ethical Codes and Guidelines

One of the recurring themes since the release of the Final Report in 1992 has been the inadequacy of professional self-regulation as a response to the challenges posed by NRGTs. An unfortunate by-product of this has been a tendency to neglect the positive role that ethical codes and guidelines can play as one of a multiplicity of regulatory devices. Again, a full discussion of the role that ethical codes and guidelines might play is beyond the scope of this paper. It will suffice for our purposes to underline some of the reasons to ensure that they are not neglected.

The central reason for ensuring that codes and guidelines are not neglected is that they provide a framework of standards for the service providers closest to these issues, such as the physicians, lawyers, hospitals, and psychologists involved. This occurs at various levels. First of all, the periods of development of ethical codes and guidelines provide the opportunity for discussion and debate of these issues in the home contexts, as it were, of the service providers. This can be difficult and controversial, as was recently the case with the development of the Tri-Council Code of Ethical Conduct for Research Involving Humans.[39] Nevertheless, the very

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concluded that the environmental protection legislation at issue in *Hydro-Quebec* could not be grounded in the POGG power.

[38] *Constitution Act, 1867*, *supra* note 33 at s. 91.27.

[39] Code of Ethical Conduct for Research Involving Humans: The Medical Research Council of Canada, The Natural Sciences and Engineering Research Council of Canada, The Social Sciences and Humanities Research Council of Canada (Prepared by the Tri-Council Working Group, July 1997).

process of attempting to promulgate such a policy is likely to stimulate discussion and sensitize the players to the existence of the ethical issues involved. To the extent that the media reports these debates, public involvement and response may in turn influence the development of codes and guidelines. For the institutions involved in the development of such codes, the process may provide a more open and transparent opportunity for discussion than normally arises.

The second way in which ethical codes and guidelines are crucial is by necessitating the creation of institutional structures—however informal—for their consideration, interpretation and application. While the existence of codes and guidelines may not predetermine the outcome of a particular matter, it is likely to ensure the discussion of the issues. In addition, the issues (such as a maximum age for ovum recipients or the pros and cons related to the number of embryos implanted) are addressed in very real life settings, often in individual cases. This aspect of a regulatory regime is most likely to be of the "bottom-up variety": new issues are likely to come into view from this angle. Recognizing the significance of these institutions as potential resources and sources of information will be crucial to the credibility of any regulatory structure. Depending on the structure of these bodies, their existence (especially in conjunction with a licensing form of regulation) could be an essential mechanism in promoting the accountability of the service providers, and in necessitating a high degree of communication with the regulator.

C. Contract and Tort Law

It is important to note that we do have legal institutions that do have some role to play in the development of both a formal and an informal network of law and regulation of new reproductive technologies. Contract and tort law both illustrate this point. In the most famous surrogacy case, *Baby M.*,[40] the New Jersey Supreme Court held that the contract was contrary to public policy and was therefore unenforceable. This is commonly considered to be the prevailing view of most American states and Canadian jurisdictions. Quebec has an equivalent provision in the *Civil Code of Quebec*[41] which states that agreements to procreate for another are absolutely null and void. The point is that an aspect of contract law which refuses to

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[40] *In the Matter of Baby M.,* 109 N.J. 396, 537 A.2d 1227 (1988) (N.J. Supreme Court), 217 N.J. Super. 313, 525 A.2d 1128 (S.C.).

[41] Section 541 C.C.Q.

enforce certain sorts of agreements or contracts does serve a regulatory function.

Contract law, or aspects of it, may also form part of formal regulatory schemes. In adoption regulations, for example, the consent of the birth parents is a fundamental part of the regime.[42]

Tort law may also play a part in the regulation of certain aspects of NRGTs. In *Stiver* v. *Parker*,[43] for example, a surrogate mother sued the "broker", as well as an attorney and the physicians involved, for damages sustained when her child was born with severe birth defects. The birth defects were allegedly caused by exposure to a disease carried by the contracting father's semen, which had not been tested prior to the inseminating attempt. Tort law as a remedy is normally available and is one legal device that provides some incentive for medical and other professionals to provide quality care and service. It can also be altered by a regulatory scheme, which may increase or decrease standards of care, and impose additional or more (or less) severe remedies for breaches.

CONCLUSION

New reproductive and genetic technologies exemplify almost all the conditions which present the greatest challenges for the development of an effective legal response. These challenges involve a rapidly developing range of technologies and an apparently infinite range of new issues, a growing public demand for many of the services and treatments made possible by these technologies, a range of issues that touch some of our most personal beliefs and values, and ones which vary considerably in a diverse and multicultural society such as ours. The challenges are also rendered even greater by the constitutional structure of Canada, including both the division of legislative powers between the federal and provincial governments and the *Charter.*

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[42] Unless the conditions for dispensing with consent, such as abandonment, exist.

[43] 975 F.2d 261 (6th Cir. 1992) (Michigan).

As I have suggested, a "command and control" model, epitomized by the criminal model, is likely to be the least effective means of addressing the challenges posed by NRGTs. The project must be one that includes and harnesses ground-up models. Criminal prohibitions should be a last resort. Our legal and regulatory system already includes a number of devices such as regulatory schemes, ethical guidelines and committees, contract and tort law that may be drawn upon as models and devices useful in addressing NRGTs. This multiplicity of means can combine formal with informal norms, traditional with less traditional institutions, and top-down with bottom-up forms of regulatory norms.