Regulating Assisted Reproduction in Canada:
From Troubled Past to Uncertain Future

The Supreme Court of Canada has advised the Federal government that much of the Assisted Human Reproduction Act is *ultra vires* Federal jurisdiction. In particular, regulation of research and clinical uses of assisted reproductive technologies is within Provincial / Territorial competence, and cannot be policed by the Federal government. It is clear from the Supreme Court's reasons that the regulatory model adopted by the Federal government is unlikely ever to lead to successful governance. But where do we go from here? All that is required by way of response to the SCC's reasons is piecemeal change. But that is not enough. After reviewing the history of ART regulation in Canada and outlining Canada's current regulatory picture, I will argue that Canada's policy approach needs to evolve in order to reflect contemporary concerns and to provide relevant and evidence-based regulation. Drawing on approaches adopted in other jurisdictions, I will also ponder what the future of ART regulation in Canada might look like.

The Assisted Human Reproduction Act was over 11 years in the making, and it has now been over two decades since the release of the Royal Commission report that grounds the Canadian policy approach. As a consequence, Canadian policy on ARTs (at least at the Federal level) seems mired in the issues that were at play in the early 1990s. Now, many jurisdictions are moving beyond these (often moral) concerns to focus on health and safety rather than the threat posed to social mores by changing conceptions of family and modes of family formation. It is time for Canada to do the same.

There are several areas where the policy approach enshrined in the AHR Act needs to change. In its declaratory provisions, the AHR Act adopts a paternalistic attitude toward safeguarding women's well-being rather than one of respect for womens' ability to and interest in making their own reproductive decisions. This protective stance is in part what justifies or explains the criminal prohibitions on payment for egg donation and for surrogacy services. But it is at odds with current empirical work which demonstrates that some of the potential harms that were speculated about in the early days of ARTs are not true harms. Ironically, the Federal government's inaction on implementing its governance structure has arguably created far more significant risks for women than the technologies themselves, because of the persistent uncertainty around regulation (eg egg donation and compensation) and because it drives the women who do participate in egg donation and surrogacy to do so in fear and silence.

Another example is the treatment of gamete donor information in the Act. While the Act seeks to foster the wellbeing of offspring born as a result of the use of ART treatments, in permitting gamete donor anonymity, the law fails to take seriously the concerns of donor offspring. Thus, some of the policy choices made in the early days of ARTs appear to be potentially harmful to those whose interests they purport to protect.

Even the structure and functions of the regulatory Agency as laid out in the AHR Act is cause for concern, given the lack of representation on the Board of Directors of those with scientific and medical expertise in ART practice and the absence of the Agency from a role in policy-making.

Where to from here? Change is clearly needed, but what should regulation look like? Canada initially sought to emulate the regulatory structure adopted in the United Kingdom, where a national body plays an important role. But federalism dictates that this model cannot be adopted in Canada, unless on the basis of some head of power other than the criminal law power. Arguably, the only way to achieve national regulation of ARTs is on the basis of Federal / Provincial / Territorial cooperation.

The SCC decision leaves power to regulate ART treatment in the hands of the Provinces and Territories. Will they expend the resources and political capital needed to create a regulatory structure when some are home to only one or two fertility clinics? To date, only Quebec has passed legislation. An expert panel on infertility and adoption recommended that Ontario take legislation action, but no action has been taken.

Should the Provinces regulate? There are disadvantages to regional regulation in a country like Canada, where travel across Provincial and Territorial borders is unconstrained. If Provinces take significantly differing approaches, with some imposing more restrictions than others, there is nothing to stop women and couples from seeking treatment in a jurisdiction with a less restrictive regime. Indeed, this would simply make the existing phenomenon of ‘cross border reproductive care’ less onerous, in that Canadians could seek treatment without having to cross international borders.

Perhaps the next step for Canada is a shift in focus from strictly government-based regulation to a combined approach that relies on significant input from the professions involved in delivering ART related care, including professional societies and licensing bodies. The Australian model provides one example of such a combined approach, where national ethics guidelines, national and state legislation and professional accreditation all play a role in regulating ART practice. One significant disadvantage of Australia’s model is its fragmentation and complexity, but I remain optimistic that we can design a creative policy approach by drawing on lessons from the successes and failures of other regimes.