The Supreme Court's Split View on the Commodification of Reproduction.

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In *Reference re the Assisted Human Reproduction Act*, a majority of the Supreme Court judges upheld section 12, which provides the basis for the regulation of reimbursements in the context of several key reproductive services (surrogacy, gamete donation and the transfer of in-vitro embryos). It stipulates that reimbursement is only acceptable in accordance with regulations to be issued by the federal government. The section falls under the heading of controlled activities, many of which were ultimately held unconstitutional by a majority of the Supreme Court.

The reason for upholding the constitutionality of section 12 given by McLachlin CJ (with Binnie, Fish & Charron concurring) seem similar to those provided by Cromwell J, the lone Justice responsible for an alternating majority. They both characterize this provision as a prohibition of various forms of commercialization of reproduction and as a legitimate exercise of the criminal law power. Yet, they come to it via a different route. The McLachlin CJ ruling starts with identifying the general purpose of the Act, which is characterized as one of averting "serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants." It then proceeds with analyzing how the various provisions relate to the dominant purpose of the act. With respect to section 12, McLachlin CJ emphasizes that the provision aims to draw the line between inappropriate commodification and acceptable reimbursement and is clearly related to the same concerns as those addressed by non-contested sections 6 and 7 of the AHRA, which prohibit payment for surrogacy and purchase of gametes. Cromwell

J, for his part, seems to follow largely the approach taken by Lebel and Deschamps JJ, first identifying the pith and substance of the impugned provisions as the regulation of most aspects of research and clinical practice in relation to assisted human reproduction. He makes, however, an exception for three substantial provisions, which he identifies as focusing on the prohibition of negative practices related to assisted human reproduction, and for all the provisions that can be seen as providing regulatory implementation for these three provisions. The three substantial provisions relate to the requirement of consent for the use of reproductive material for the purpose of creating an embryo (s. 8), the retrieval of gametes from minors (s. 9) and the reimbursement of surrogates and gamete donors (s. 12). He also recognizes that section 12 seems clearly linked to the principled prohibitions in sections 6 & 7.

Lebel and Deschamps JJ (joined by Abella and Rothstein JJ) reject, as Cromwell J, the approach taken by McLachlin CJ, based on a general characterization of the AHRA. They emphasize in their judgment that the contested provisions aim at regulating technologies, which are a solution to health-related reproductive problems and have to be characterized as a set of health service regulations. They strongly insists that issues of "health, ethics and morality" should not be dealt with through the criminal law unless there is a clear "evil to be suppressed or prevented" and unless the provisions aim to address that evil or harm. They do not discuss in detail the specific purpose of section 12, but place this section within the context of all other impugned provisions, and they discuss at length what is required to place these provisions under the heading of a legitimate exercise of the criminal law power. In their discussion of how the substantive

component of the federal criminal law power has to be satisfied, Lebel and Deschamps JJ emphasize that in order to justify the use of criminal law with respect to issues of 'social morality' or 'the fundamental values of society', "the existence of real and important moral problems" is required [s. 239]. According to them, "[c]are must be taken not to view very social, economic or scientific issue as a moral problem" [ibid.]. Otherwise, Lebel and Deschamps JJ suggest, one would have a situation where "innumerable aspects of very diverse matters or conduct, such as participation in a religious service, the cohabitation of unmarried persons or even international assistance" could fall within the criminal law sphere. (This is not the only indirect warning about how an extensive use of the criminal law power could move the federal legislator towards using the criminal law in what are essentially religious matters. When they state that "societal changes have freed [the rules in the Criminal Code] from [the] fetters [of Judeo-Christian morality]," they indirectly suggest that McLachlin CJ's approach risks moving us back under those fetters.) From their analysis, it is clear that they fail to see how any of the impugned provisions are dealing with real and important moral problems." With in my view all too easy comparisons with other 'novel' medical procedures, they emphasize that AHR provide treatment "is a burgeoning field of medical practice and research that… brings benefits to many Canadians." [par. 251]. This seems sufficient to reject the presence of unique concerns related to AHR that could justify the use of the criminal law power. "[F]rom the standpoint of morality," they state, "no evil has been identified." [at par.]

Contrary to Cromwell J and obviously also McLachlin CJ's judgment, they do not recogize the fact that section 12 has an obvious connection to an explicit prohibition on

commercialization of surrogacy, gamete donation and embryo-creation. For them, section 12, as other provisions, is simply about the regulation of health.

Lebel and Deschamps JJ obviously do not discuss the constitutional validity of sections 6 and 7, the strict prohibitions on payment, since these provisions were not contested. Yet, the easy comparison made with ordinary medical practice, and the firm and broad rejection of the sufficient link to moral issues of all the impugned provisions seems to reflect a view that commercialization of reproduction is not a serious societal concern that threatens to undermine important values.

Others have already expressed why the Lebel and Deschamps JJ ruling, with its broad generalizations and its comparisons with ordinary medical practice, fails to acknowledge the unique and very complex impact of AHR services on women. In a forthcoming chapter, Vanessa Gruben argues for example—in my view convincingly—that the Supreme Court overall fails to emphasize in its judgment the profound impact AHR has on women. She highlights how unlike some of the medical practices invoked by Lebel and Deschamps, AHR does raise special concerns related to women's reproductive autonomy and health. Among the issues she identifies are the exploitation of women, equality rights in obtaining access to reproductive services, and the unique health risks involved in AHR for women (surrogates, but also gamete donors). The potential misuse of AHR, she suggests raises unique concerns at both the individual and societal level. She suggests that none of the judgments sufficiently discuss these unique harms to women. But she particularly singles out both the Lebel/Deschamps JJ and Cromwell J judgments

for not recognizing the crucial importance of an overall, criminal law based regulatory structure.

I want to focus in my presentation on the more narrow issue of commodification. I want to argue why the split majority of the Supreme Court was right, even if it may not have articulated sufficiently why, to uphold section 12 as one of the core rules that aim at rejection of commodification of reproduction. As I will argue, the concerns raised by commodification are complex and of a more abstract nature, which makes it harder to fulfill the Lebel and Deschamps JJ requirement for specificity and clarity. This is, however, in my view often inevitable when the law enters a domain where human actions have a profound impact on issues such as personal identity, the meaning of our relations to others, and societal ideals.

In my presentation, I want to flesh out the concerns related to commodification that are embedded in Justice McLachlin's decision (but not really articulated in any detail) and respond to some of the criticism against this approach. I will focus on some of the unique features of AHR that make monetary exchange, or use of market as distributive criterion in this context particularly problematic. Using Margaret Radin's market-inalienability approach and referring also to the work of other authors who have emphasized the special issues raised in the context of reproduction, and the special nature of reproductive goods, I will argue that criminal sanctions restricting the commercialization of gametes, surrogacy and embryos, are indeed legitimate and aim at confirming a richer concept of individual autonomy and at protecting human dignity. I will argue why, regardless of

changes in how we value assisted human reproduction itself, reproductive goods should continue to be awarded special status and special protection outside of the commercial market. The reasons for special treatment include the inherent relational nature of reproductive goods, and the profound link to identity and personhood. I will also distinguish a criminal prohibition of market-oriented sale from a state regulated compensation scheme, which section 12 enables. I will discuss why a prohibitory criminal law based approach to certain forms of payments in the context of AHR contributes to preserving the unique values embedded in AHR, but also why section 12, and the state regulation of 'reimbursement' can be seen as a core component of the state's role in preserving these values.