

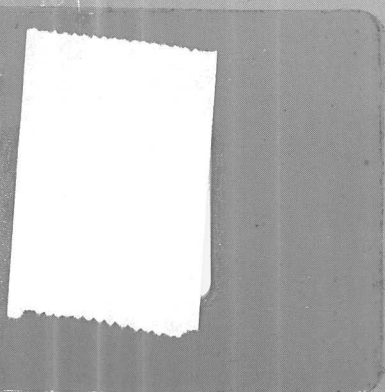
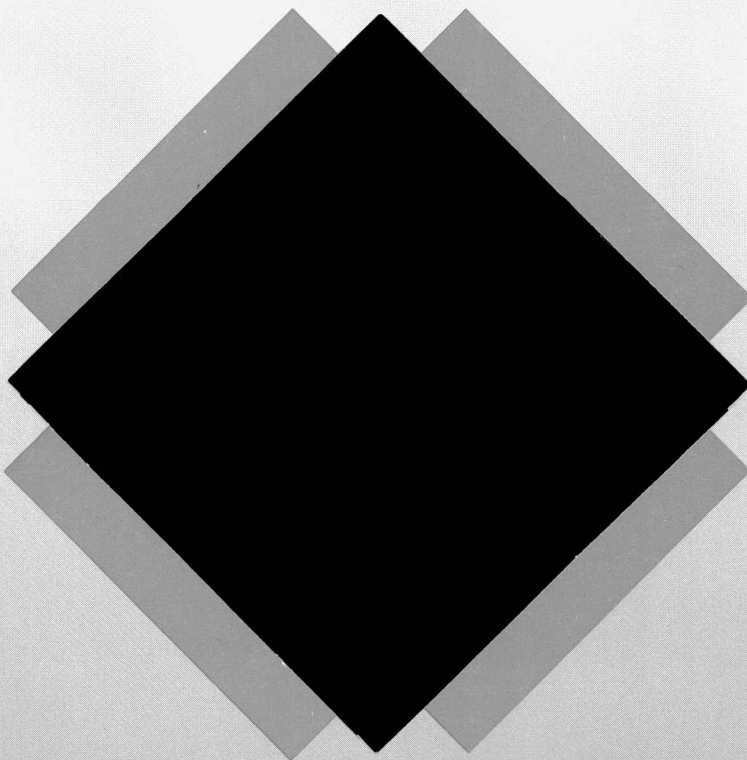
Royal Commission on
New Reproductive Technologies

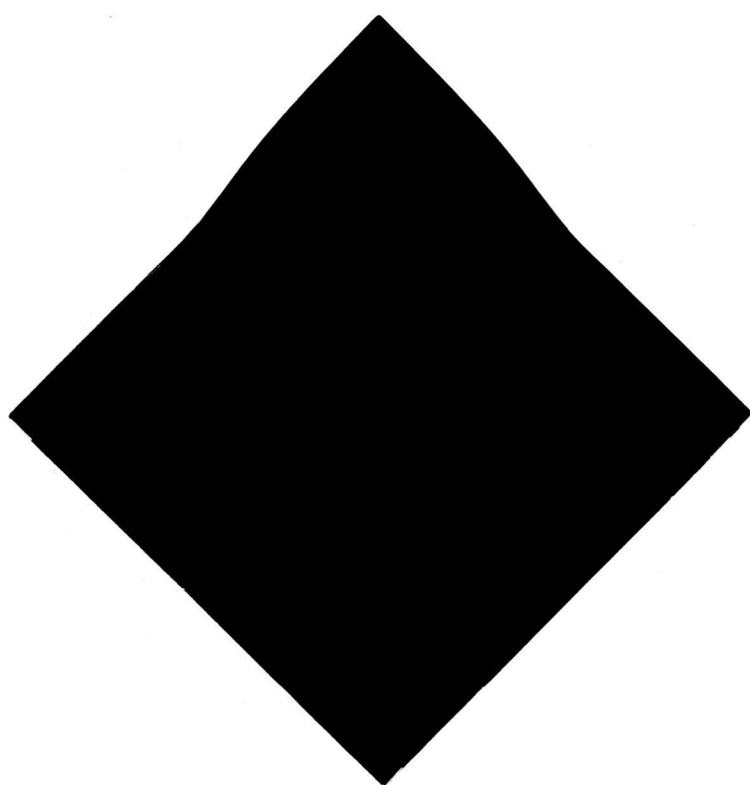


Commission royale sur les
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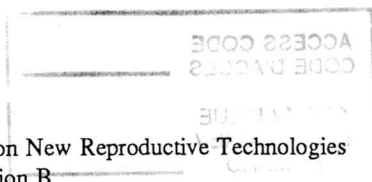
**NEW REPRODUCTIVE TECHNOLOGIES:
INTERNATIONAL LEGAL ISSUES
AND INSTRUMENTS**

by

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The Royal Commission on New Reproductive Technologies was established in October 1989 to examine current and potential medical and scientific developments related to new reproductive technologies. In particular, the Commission has been asked to consider their social, ethical, health, research, legal, and economic implications for women, children, and society as a whole. The Commission is to report to the federal government by October 1992.

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Preface from the Chairperson

The federal government established the Royal Commission on New Reproductive Technologies in October 1989 and gave it a wide-ranging mandate. The mandate directs it to examine the issues surrounding a range of new reproductive technologies, considering in particular their social, ethical, health, research, legal, and economic implications.

The challenge facing the Royal Commission is to help Canadians understand and deal with the implications of new and powerful technologies related to human reproduction. Canadians have many questions about how the technologies are already being used in Canada, and why, and about what their role in society should be.

In many of the areas covered by the Commission's mandate, reliable data are simply not available on which to base recommendations as to what policies and safeguards should be applied. For this reason, the Commission set in motion a multi-disciplinary program of Research and Evaluation to provide rigorous, credible, and timely data about and critical analysis of the issues surrounding new reproductive technologies.

The Royal Commission is committed to an open and transparent research process with high standards and a protocol which includes peer review. Specialists in academic disciplines ranging across law, history, ethics, medicine, sociology, and philosophy are examining the implications of the technologies through a variety of methods. The Commission is in contact with various communities across the country to solicit advice and to commission research projects. Guidelines have been developed to help ensure the quality, integrity, and usefulness of all research studies. Research projects are subjected to rigorous internal and external review processes, first at the design stage and later at the report stage. Peer review for content and for methodology is a key feature of the process. In addition, researchers using human subjects are required to comply with appropriate ethical review standards.

Many academics, researchers, and groups who have participated in the Commission's work have requested access to the data and information generated by the Commission to help them consider their positions and make their recommendations to the Commission.

In response to these requests, the Commission sought and obtained permission to publish some of the research papers in advance of its Final Report. Reports such as this one will be released over the duration of its mandate to assist those working in the field of reproductive health and new reproductive technologies and to help inform the public.

Executive Summary

The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women all contain certain principles which Canada, as a party to these treaties, is obligated to respect. This paper identifies those substantive rights which may be applicable to the area of new reproductive technologies, and suggests avenues for research to determine their implications for what legislatures may do within the terms and spirit of the conventions by which Canada is bound.

The right to life; right to liberty and security of the person; right to marry and found a family; right to private and family life; rights to information and education; right to reproductive health and health care; right to the benefits of scientific progress; and right to sexual non-discrimination may all have relevance to the field of new reproductive technologies. For instance, the right to liberty and security of the person, if interpreted as a positive right, could give individuals legal claims that government-funded health services must take due account of the incidence of infertility and of individuals' dependence on government action to realize their liberty interests in having children. Similarly, the right to have a family could be interpreted as a positive right that would require governments to provide services for infertile persons. The right to information, and specifically information about family planning, may include a positive component of planning a family with the assistance of a new reproductive technology.

The definition of discrimination against women, contained in the Convention on the Elimination of All Forms of Discrimination Against Women, transcends other human rights, including, for instance, the right to found a family. While this is most often phrased in the context of birth control, it may apply no less to birth facilitation. The Royal Commission may undertake research to review in a comprehensive way what forms of distinctions may constitute unlawful discrimination on grounds of sex. Alternatively, research could be postponed until the Commission formulates tentative recommendations, which could then be reviewed to determine whether any appear to offend international human rights provisions on sexual non-discrimination.

While there are few legally enforceable means of seeking international remedies should these principles be contravened, there is considerable political weight attached to decisions of international tribunals and the obligation to report to international committees on compliance with the principles contained in international agreements to which Canada is a party.

Introduction

The modern era of international human rights law can be said to have begun in 1945 with the adoption of the Charter of the United Nations. The Charter established the role of the United Nations in furthering international human rights and opened the door for the United Nations General Assembly to adopt the Universal Declaration of Human Rights in 1948. This Declaration was given legal force through two general international covenants and an increasing number of specialized international conventions. The two general covenants are the International Covenant on Civil and Political Rights (Political Covenant) and the International Covenant on Economic, Social and Cultural Rights (Economic Covenant). Prominent among the specialized conventions is the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention).

Canada was a founding member of the United Nations and an early and enthusiastic full participant in the leading international human rights covenants founded on the Universal Declaration of Human Rights. Language from these international instruments shaped the *Canadian Charter of Rights and Freedoms*.¹ In a significant sense, the legal effect of the Charter is to meet Canada's international obligations to give effect in its domestic law to its international undertakings. It has been observed that "the Charter then becomes a bridge between municipal and international law to a degree, and with an intensity, not heretofore known in any of the multitude of links between the Canadian and international legal orders."² Accordingly, the application of the Charter by Canadian courts, and in particular by the Supreme Court of Canada, can be expected to give force to the human rights and government obligations and restraints embodied in the international human rights conventions that Canada has ratified. This is an area where Canadian Charter interpretation will extend beyond the influence of the constitutional practice of the United States, since the United States has not ratified the leading international human rights conventions.

The terms of reference of the Royal Commission on New Reproductive Technologies touch on key principles of international human rights law at many points. Any recommendations that the Commissioners make as a result of their studies and deliberations should be informed by their location within the network of individual rights and governmental obligations contained in the leading international human rights conventions. This paper identifies such rights and indicates where research is required to explicate the details of these rights and their implications for what legislatures may do within the terms and the spirit of the conventions by which Canada is bound. Further, research should address how Canadian courts have responded and, under the regime of the Charter, are likely to respond to the application in domestic law of legal obligations Canada has assumed under international law.

The authority that binds Canada internationally is that of the federal government. Under the *Constitution Act, 1867*, many of the legislative powers affecting new reproductive technologies are in the hands of the provincial and territorial governments, which are not legally obliged to give effect to commitments assumed internationally by the federal government. To reduce the potential for conflict, machinery has evolved by which the federal government seeks

approval from provincial and territorial governments before ratifying new international human rights conventions. Legal conflict in interpreting provincial and territorial legislation is further reduced because such legislation is subject to the Charter, which is likely to be interpreted compatibly with the international human rights obligations Canada has assumed. The area of federal-provincial-territorial response to such conventions in domestic law warrants some attention by the Royal Commission in fashioning its recommendations.

This paper is directed to the dominant international human rights conventions relevant to new reproductive technologies, namely the Political and Economic Covenants and the Women's Convention. Research to which this paper may give rise will identify several related conventions including, for instance, the recently adopted Convention on the Rights of the Child.

Substantive Rights

Right to Life

In international terms, maternal mortality rates in Canada are relatively low, although no effort should be spared to reduce them further. Among disadvantaged populations, however, rates remain unacceptably high. Maternal mortality and pregnancy-related morbidity that threatens life are associated with pregnancies that come too early, too late, too frequently, or too closely spaced in women's reproductive lives. Control of unwanted pregnancy and effective birth spacing depend on effective contraception. Research to facilitate more effective promotion of reproductive health, including safer and more effective contraception, is underfunded and obstructed in many ways. Contraceptive research is associated with research on fertilization and implantation of pre-embryos *in utero*.

The Royal Commission's consideration of research on gametes, pre-embryos, and embryos should be sensitive to the potential impact of its recommendations on women's contraceptive choices, because these relate to women's right to life under international human rights conventions.

Article 6.1 of the Political Covenant provides that "[e]very human being has the inherent right to life. This right shall be protected by law." Decisions to date by international human rights tribunals have been based on a narrow interpretation of Article 6. Nevertheless, the Human Rights Committee established under the Political Covenant has observed that "the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot be properly understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."³ We can therefore speculate that the right to life will come to be seen and applied to broader effect. How far such a tendency may go warrants attention in the context of recent Canadian law developed by the Supreme Court of Canada.

In international human rights jurisprudence, the right to life has never been applied before live birth. Indeed, a number of leading international human rights tribunals have expressly held

that the unborn have no right to life in cases in which national legislation permitting abortion has been challenged.⁴ Separate from the right to life before birth, however, is the right of the state to protect its own interest in unborn human life. In the Morgentaler case, all judges recognized that the state may lawfully exercise an influence in favour of continuation of pregnancy at some point toward the latter part of gestation. Accordingly, the Royal Commission should take account of the potential in Canadian law to restrict abortion compatibly with the evolving rights of women and of fetuses under principles of international human rights law.

Right to Liberty and Security of the Person

Article 9.1 of the Political Covenant provides that

[e]veryone has the right to liberty and security of person ... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Jointly with the right to life, this provision is expressed directly in the *Canadian Charter of Rights and Freedoms*. In the Morgentaler case, a majority of the Supreme Court struck down restrictive abortion legislation because it violated the right to liberty and, particularly, the right to security of the person.

In international human rights jurisprudence, the right to liberty and security tends to be seen as a negative right. That is, it is a right to non-interference by government in the exercise of personal choice. The right is relevant to individuals' resort to new reproductive technologies and to legislative restrictions on access. The right may evolve, however, to become a positive right, affording individuals a right to government assistance in pursuit not only of security but also of liberty. Currently, individual recourse to a new reproductive technology would appear to be a liberty interest rather than a security interest, because personal security is not endangered by a natural inability to conceive. It may be otherwise, however, where women in infertile relationships are vulnerable to divorce, abandonment, or comparable disadvantage endangering their health or other security. If the right to liberty and security develops into a positive right, individuals may acquire legal claims that government-funded health services must take due account of the incidence of infertility and of individuals' dependence on government action to realize their liberty interest in having children. Such a claim would have special force in Canada, where the *Canada Health Act* requires provincial health insurance programs to provide comprehensive health services.

Research should identify the imminence of a legal transition of the right to liberty and security from a negative to a positive right, and the willingness of Canadian courts to apply Charter or other provisions of law to require governments positively to service individuals' legal rights to pursue reproductive choices. Further, the extent to which Canadian legislation can limit individuals' access to private infertility clinics warrants study, as does potential regulation of direct involvement in surrogate motherhood and its mediation.

Right to Marry and Found a Family

Article 23.2 of the Political Covenant states that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized." This provision reflects Article 16.1 of the Universal Declaration, which originated in a reaction to the Nazi racial and reproductive policies that culminated in genocide.⁵ A matter of legal concern is whether marriage is a legal precondition to the right to found a family. The human rights codes of some Canadian provinces prohibit discrimination on grounds of marital status, and such discrimination may be found unlawful as one of the unenumerated grounds of discrimination under section 15.1 of the Charter. Further, the reference to marriageable age raises questions of discrimination on grounds of age. These matters warrant research in Charter jurisprudence.

There is international human rights jurisprudence on the rights of single parents to enjoy family life, raising questions about legally permissible criteria for admission to assisted reproduction programs in Canada. The right to found a family is a negative right in that governments are precluded from intervening in the plans and behaviour of those who are able to found families without assistance, subject to permissible limits on grounds of young age, incest and, for instance, mental capacity. The right may also have positive aspects, however, that would require governments to provide services for infertile persons, on the basis of either the right itself or the prohibition on denying health services to people with disabilities, including those with reproductive impairments. Where provincial health plans cover, for instance, microsurgical reconstruction of damaged or diseased fallopian tubes or tubal transplantation, the refusal to cover *in vitro* fertilization may be challenged as discrimination on grounds of medical disability or on grounds of marital status where such microsurgery is available without regard to marriage status.

Founding a family may clearly implicate reproductive technologies, but it also includes reproduction not dependent on medical technology, such as surrogate motherhood arrangements that may be initiated by simple means, including condoned adultery. Does a couple have a legally protected human right to resort to third-party collaboration in this way? Does a third party have a reciprocal right to collaborate in founding the family of a couple of which she is not a partner? These questions are greater variants of more minor but considerably more common questions concerning the rights of infertile people to found their families through donated gametes or pre-embryos, and the rights of individuals to donate gametes and pre-embryos to assist the foundation of families by others. Accordingly, research should be undertaken on the international human rights powers and limitations relevant to gaining access to assisted reproduction and to giving assistance on both an unpaid and a commercial basis.

Right to Private and Family Life

Canadian courts have deliberately held open the question of whether there exists in Canadian law a right to privacy comparable to that recognized in the United States, where restrictive legislation on abortion and contraception has been held unconstitutional for violating the right to privacy.⁶ The Political Covenant provides in Article 17 that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or

correspondence..." and that everyone enjoys "the right to the protection of the law against such interference."

Research should be undertaken to distinguish lawful from unlawful state interference with reproductive privacy. Research should also determine to what extent provincial legislation regulating reproductive technologies would be lawful or is a denial of the protection of the law guaranteed under international human rights conventions.

The right to private and family life is distinguishable from the right to found a family, although for some purposes the latter right may be considered to be part of the former. The right to private life may include the right to avoid pregnancy and, within the limits indicated in the Morgentaler decision, to terminate pregnancy, but from its origins in the Universal Declaration of Human Rights and the Political Covenant, the right to private life has been hedged by words of limitation that accommodate compromises of the right in favour of state interests. Nevertheless, the human rights guarantee that privacy enjoys the protection of law against interference puts signatory states on notice that they must be able to present compelling reasons for asserting their interests over individuals' claims to privacy in their personal and family lives, and states must offer more than ideological grounds for restraining individuals' exercise of private and family integrity.

Research into international human rights jurisprudence and its reflection in Canadian law should be undertaken to establish what constitutes a denial of such integrity protected by section 7 of the Charter, and what may be a limitation of integrity permissible by virtue of section 1 of the Charter.

Rights to Information and Education

The evolution of Canadian criminal law shows us to be little more than two decades beyond characterizing the delivery of information about contraception as a Crime Against Morality. More recent experience in the United States shows how widely ideologically driven administrations can compromise health professionals' freedom to speak to patients about abortion options. The field of reproductive choice demonstrates the importance of patients being informed through counselling that offers them education in choices, not simply counselling that conditions them to accept a counsellor's or government's ideological preference.

Article 19.2 of the Political Covenant provides that

[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print...

Article 19.3 observes the special duties and responsibilities that attend this right and provides that it may be subject to certain restrictions, but these

[s]hall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Accordingly, any policy of not informing infertile patients about opportunities for recourse to new reproductive technologies must be "provided by law" (that is, enacted in legislation or specified in subordinate regulations). Further, such policies must be established for the protection of public health or morals. For instance, any decision to prevent or discourage surrogate motherhood, whether practised on an altruistic or commercial basis, would have to be enacted and justifiable on such grounds. Similarly, although access to *in vitro* fertilization may be limited through decisions to withhold provincial funding, any decision to restrict means of private resort, for instance to private *in vitro* fertilization clinics, must be legislated and justified.

The right to information is developed in a more explicit form in the Women's Convention. Article 10 (h) provides that women shall enjoy equally with men

[a]ccess to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

Several other provisions of the Women's Convention reinforce women's rights to information about family planning. The expression "family planning" is commonly understood to be a euphemism for planning to avoid pregnancy, although increasingly it is being applied in the context of birth spacing to maximize the health of women and their existing and prospective children. The expression is evolving, however, to include the prevention of avoidable infertility and the protection or restoration of reproductive health. It therefore includes appropriate sex and reproductive health education to prevent the spread of disease and to promote the preservation of reproductive capacity. Research can address whether "family planning" may include a positive component of planning a family with the assistance of a new reproductive technology.

Right to Reproductive Health and Health Care

By its adherence to Article 12.1 of the Economic Covenant, Canada recognizes "[t]he right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Canada also subscribes to the Constitution of the World Health Organization, which defines

health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

The inability to restrict fertility, as well as the fear of initiating or having to continue an unintended pregnancy, clearly endanger health. The World Health Organization is concerned with the development of reproductive health programs in member states to prevent unintended pregnancy, abortion, and infertility and, where possible, to develop effective treatment programs. Infertility is not in itself threatening to life or physical health, but it is evident that the inability

to have wanted children may threaten mental health and denies the well-being mentioned in the World Health Organization definition of health.

Research may establish the breadth of Canadian courts' understanding of health; provincial health plans do not include dental care and commonly exclude support of assisted reproduction. The Royal Commission may want to address whether reproductive health dependent on assistance by artificial means should be included in provincial health plans, or whether the matter should be left to provincial judgment. Legal research on international human rights may establish the forms of reproductive health care that Canada has committed itself to recognize as a right of its citizens.

International agencies are increasingly placing the treatment, relief, and bypassing of infertility, including by reproductive technologies, in the wider context of reproductive health that is promoted and reinforced through such international human rights instruments as the Political and Economic Covenants and the Women's Convention. The World Health Organization Special Program of Research, Development and Research Training in Human Reproduction considers that reproductive health implies that people have the *ability* to reproduce, to regulate their fertility and to practise and enjoy sexual relationships. It further implies that reproduction is carried to a *successful outcome* through infant and child survival, growth, and healthy development. It finally implies that women can go *safely* through pregnancy and childbirth, that fertility regulation can be achieved without health hazards and that people are safe in having sex.⁷

This vision places the task of the Royal Commission in a somewhat broader context than that in which Commissioners may want to interpret their terms of reference. The underlying concept, however, has both broad and narrow aspects. One narrower aspect, for instance, concerns alternative gestation (that is, a surrogate mother) for a child whose own mother would present it with seriously impaired prospects for survival or healthy birth, for example because of chronic spontaneous abortion or PKU (phenylketonuria).

Research may establish what degree of detail will be legally implied in the right to reproductive health care and children's rights to health inheritance.

A broader aspect under Canadian law, governed by the Charter's importation of international human rights principles, is whether Canadians enjoy only equal rights to health services that provinces fund, or whether provinces are legally obliged to fund services to a level that the courts determine is required to achieve reproductive health.

Right to the Benefits of Scientific Progress

The new reproductive technologies are clearly the product of scientific progress, but whether they represent benefits is a matter more open to interpretation. Like other scientific developments, the uses to which they may be put will govern whether they are beneficial or detrimental. Individual agendas will reflect differently on applications of reproductive technologies, some considering them beneficial, others considering them detrimental, and most

making an assessment on the continuum linking benefit and detriment. The assessment of whether this area of scientific progress is beneficial cannot be made by reference to any legal criterion. It is for advocates of different causes to show that they are beneficial, or that they are not.

Article 15.1.b of the Economic Covenant recognizes the right of everyone "[t]o enjoy the benefits of scientific progress and its applications." Significantly, by the closely related Article 15.3, signatory states "undertake to respect the freedom indispensable for scientific research..." This makes clear that the individual human right to the benefits of scientific progress includes freedom for scientific research. Research is regarded as the precondition to scientific progress, and the legal entitlement to the fruits of research includes a legal right to research itself. It does not follow that states have a duty to fund research, but they do have a duty to respect the freedom of those independently able to undertake research to do so. The Economic Covenant does not establish a state duty to support research, but a state duty to permit research and to respect the private freedom to pursue research. Accordingly, any legislation resulting from a recommendation to control scientific research will be subject to rigorous scrutiny under the Charter if it contains provisions that appear to restrict, for instance, the liberty of researchers or the liberty and security of others to enjoy the benefits of research achievements.

The reproductive technologies illustrate how research directed to one purpose can contribute to developments in another area. Studies to understand and overcome infertility have resulted in better understanding of planned prevention of fertility and of medical methods of abortion that are now called contragestation, which is a contraction of the term contra-gestation.⁸ Moreover, related research to inhibit conception furnishes knowledge through which infertility can be prevented or overcome and conception can be facilitated. Both pure and applied research may therefore contribute, sometimes in unexpected ways, to scientific progress, and human rights law protects the exercise of human imagination and understanding that can turn the potential of research to human benefit. The Economic Covenant is one of several international agreements on scientific and technological exchanges that should be researched to determine their effect on reproductive technologies.

Right to Sexual Non-Discrimination

Permeating international instruments, including the United Nations Charter, the Universal Declaration, and its implementing general and special conventions, is the principle of non-discrimination on grounds of sex, which is translated into domestic law through the Canadian Charter and the provincial human rights codes. Canadian jurisprudence confirms that pregnancy-based discrimination is sex discrimination because "[w]hile pregnancy-based discrimination only affects parts of an identifiable group, it does not affect anyone who is not a member of the group."⁹ The Women's Convention is the predominant international instrument for the achievement of sexual equality. Its Article 1 defines "discrimination against women" as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women,

irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Accordingly, discrimination consists in limitations, produced either on purpose or in effect, on women's exercise of rights, and women enjoy rights irrespective of their marital status.

The definition and the Convention supporting it transcend all other human rights including, for instance, the right to found a family. United Nations documentation has drawn on extensive worldwide evidence to reach the conclusion that "the ability to regulate the timing and number of births is one central means of freeing women to exercise the full range of human rights to which they are entitled."¹⁰ This observation was made in the context of birth control, but may apply no less to birth facilitation. Accordingly, the Royal Commission must exercise care in proposing distinctions between the sexes on such matters as procreative opportunities, gamete donation, and control of pre-embryos. Similarly, care must be exercised not to discriminate on grounds of age, for instance, concerning gamete donation or receipt.

This is not to say, of course, that distinctions on grounds of sex cannot be justified and legally sustained. Not every distinction constitutes discrimination, and discrimination itself may be considered permissible under section 1 of the Charter (although section 1 may compromise Canada's adherence to the international covenants and conventions it has ratified). The Human Rights Committee established under the Political Covenant applies a standard of reasonableness to assess national legislation where sex discrimination is concerned; the Committee has observed that a "differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 [of the Political Covenant]."¹¹

Research may be undertaken to review in a comprehensive way what forms of distinctions in recourse to new reproductive technologies and, for instance, in support of reproductive health research, may constitute unlawful discrimination on grounds of sex. Alternatively, research might be postponed until the Royal Commission formulates tentative recommendations, which could then be reviewed to determine whether any appear to offend international human rights provisions on sexual non-discrimination. The latter approach would, of course, be more economical and might be an exercise of no less scholarly value.

Enforceability

Once domestic remedies have been exhausted, Canadian law at the federal, provincial, and territorial level can be challenged before several international tribunals on grounds of violating international human rights provisions. The International Court of Justice has jurisdiction under the conventions Canada has ratified in contentious cases brought by parties from other states and can give Advisory Opinions (which, strictly, are not legally enforceable but which carry political weight) on the request of, for instance, the United Nations General Assembly. In light of international experience, it is improbable that challenges to Canadian legislation would be presented at this level.

On the other hand, however, Canada has direct and embarrassing experience of national legislation being scrutinized and condemned as contrary to the Political Covenant before the Human Rights Committee.¹² Because of the evolving interdependence of international covenants and conventions, the Human Rights Committee has observed that the anti-discrimination provisions of the Political Covenant "would still apply even if a particular subject-matter is referred to or covered in other international instruments" such as the Women's Convention.¹³

Further, under the Women's Convention itself, Canada is obliged to submit periodic reports of its activities, including legislation concerning the status of women and sex-based discrimination. When the Committee on the Elimination of Discrimination Against Women receives and reviews country reports, private groups, including activist groups with special interests, may make public responses critical of the government's submission; such criticism may be politically influential when the Committee discusses the report. Similar reporting obligations arise under the Political and Economic Covenants, and the Economic Committee also accommodates private reports.

Since joining the Organization of American States, Canada is accountable for conformity of its laws to the American Declaration of the Rights and Duties of Man and amenable to the jurisdiction and jurisprudence of the Inter-American Commission on Human Rights.¹⁴ The Inter-American Commission has jurisdiction over cases arising under the American Declaration, including cases concerning reproductive rights and sexual discrimination, and has entertained challenges against United States legislation in these areas.¹⁵

Accordingly, research might be undertaken to establish before which general international tribunals and international human rights tribunals and committees Canada is answerable for its legislation affecting new reproductive technologies. Options would be to undertake a survey in the abstract, or to postpone a survey until the Royal Commission has considered the direction of its recommendations.

Notes

1. Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 *Can. Bar Rev.* 265.
2. Cohen and Bayefsky, at 268.
3. Human Rights Committee, "General Comments" CCPR/C/21/Rev.1, 5 at para 5, 19 May 1989.
4. Cook, "U.S. Population Policy, Sex Discrimination, and Principles of Equality under International Law" (1987), 20:1 *N.Y.U.J. Int'l L. and Pol.* 93, at 114-130.
5. The most significant response is in the Convention on the Prevention and Punishment of the Crime of Genocide.
6. The U.S. Supreme Court appears ready to redefine the nature and scope of privacy rights in fields including but also extending beyond abortion.
7. M.F. Fathalla, "Promotion of Research in Human Reproduction: Global Needs and Perspectives," *Hum Reprod* 3:1 (January 1988), 7-10.
8. E.E. Baulieu, "RU 486: An Antiprogesterone Steroid with Contragestive Activity in Women," in *The Antiprogesterone Steroid RU 486 and Human Fertility Control*, eds. E.E. Baulieu and S.J. Segal (New York: Plenum Press, 1985), 1-25.
9. The Supreme Court of Canada in *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. (4th) 321.
10. United Nations, Status of Women and Family Planning, U.N.Doc. E/CN.6/575/Rev.1 (1975).
11. *Zwaan-de Vries v. the Netherlands*, 42 U.N. GAOR, Supp. (No. 40) 168, at para 13; U.N.Doc. A/42/40 (1987).
12. See for example *Lovelace v. Canada*, 36 U.N. GAOR, Supp. (No. 40) 166; U.N.Doc. A/36/40 (1981).
13. *Brooks v. the Netherlands*, 42 U.N. GAOR, Supp. (No. 40) 149, at para 12.1; U.N.Doc A/42/40 (1987).
14. Case 2141, Inter-Am. C.H.R. 25, OEA/Ser.L/V/11.54, Doc. 9 rev. 125 (1981).
15. Case 2141.

Bibliography

- Baulieu, E.E. "RU 486: An Antiprogesterin Steroid with Contraceptive Activity in Women." In *The Antiprogesterin Steroid RU 486 and Human Fertility Control*. Edited by E.E. Baulieu and S.J. Segal. New York: Plenum Press, 1985.
- Brooks v. Canada Safeway Ltd. (1989), 59 D.L.R. (4th) 321 (S.C.C.).
- Cohen, M. and A.F. Bayefsky. "The Canadian Charter of Rights and Freedoms and Public International Law." *Canadian Bar Review* 61 (1983): 265-313.
- Cook, R.J. "U.S. Population Policy, Sex Discrimination, and Principles of Equality under International Law." *New York University Journal of International Law and Politics*. 20, no.1 (Fall 1987): 93-142.
- Fathalla, M.F. "Promotion of Research in Human Reproduction: Global Needs and Perspectives." *Human Reproduction* 3, no.1 (January 1988): 7-10.
- United Nations. "Communication No. 172/1984, S.W.M. Broeks v. the Netherlands. (Views adopted on 9 April 1987 at the Twenty-Ninth Session)." In *Report of the Human Rights Committee, General Assembly Official Records: Forty-Second Session*. New York: United Nations, 1987. (GAOR: Supplement No. 40 A/42/40.)
- United Nations. "Communication No. 182/1984, F.H. Zwaan-de Vries v. the Netherlands (Views adopted on 9 April 1987 at the Twenty-Ninth Session)." In *Report of the Human Rights Committee, General Assembly Official Records: Forty-Second Session*. New York: United Nations, 1987. (GAOR: Supplement No. 40 A/42/40.)
- United Nations. Human Rights Committee. *General Comments Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights up to April 1989*. (CCPR/C/21/Rev.1, 19 May 1989.)
- United Nations. Status of Women and Family Planning. *Report of the Special Rapporteur Appointed by the Economic and Social Council under Resolution 1326 (XLIV)*. New York: United Nations, 1975. (U.N.Doc. E/CN.6/575/Rev.1.)
- United Nations. "Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. R.6/24, Sandra Lovelace v. Canada." In *Report of the Human Rights Committee, General Assembly Official Records: Thirty-Sixth Session*. New York: United Nations, 1981. (GAOR: Supplement No. 40 A/36/40.)

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