

THE ASSISTED HUMAN REPRODUCTION ACT REFERENCE AND THE FEDERAL CRIMINAL LAW POWER

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1. Introduction

This paper has two basic objectives. The first is to recharacterize the disagreement between McLachlin CJC and LeBel and Deschamps JJ in the *Reference re Assisted Human Reproduction Act*.¹ It appears, superficially, that the justices disagree about whether the impugned provisions of the *Assisted Human Reproduction Act (AHRA)*² have the right type of purpose to support their classification as valid criminal law. I shall suggest, however, that this ostensible disagreement masks a more substantial disagreement concerning two other matters. First, there is a dispute about principle, namely as to the permissibility of delegated prohibitory legislation. Second, there is a dispute about what the impugned provisions of the Act actually do. I shall argue that the Chief Justice is on firmer doctrinal ground than LeBel and Deschamps JJ on the question of principle, but that her analysis of the legal effects of the impugned provisions is questionable. Specifically, she appears to be too quick to dismiss as unimportant the licensing requirement for assisted reproduction activities which are not prohibited by the Act or its regulations.

My second objective is to discuss, from a somewhat broader perspective, the scope and limits of the criminal law power. The vagueness of the conventional three-part test derived from *Reference re Validity of Section 5(a) of the Dairy Industry Act*³ has left many, apparently including LeBel and Deschamps JJ, unconvinced that the test establishes any limits at all. I can understand the dissatisfaction with the *Margarine Reference*, but I do not agree that the criminal law power has no doctrinally

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¹ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, 3 SCR 457 [AHRA Reference].

² SC 2004, c 2.

³ *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 [Margarine Reference].

discernible limits. It is just that we need to look beyond the *Margarine* case to identify them. In particular, I do not agree with LeBel and Deschamps JJ's suggestion that it is necessary, in order to circumscribe the criminal law power, to introduce a "reasoned apprehension of harm" threshold below which the power may not be used.

In the next part of the paper, I provide a very brief summary of the structure of the Act and of the Reference (Part 2), before analyzing the disagreement between the two main opinions (Part 3), and addressing the broader question of the scope and boundaries of the federal criminal law power (Part 4).

2. *The Act and the Reference*

The principal prohibitory provisions of the *AHRA* are of two types: sections 5 to 9 of the Act prohibit outright certain activities ("prohibited activities"); and sections 10 through 12 prohibit certain other activities ("controlled activities") from being carried out "except in accordance with the regulations and a licence." In addition, section 13 prohibits licensees from undertaking controlled activities in unlicensed premises.⁴

The constitutionality of some of these provisions was not disputed. In particular, the Quebec government, which brought the reference that culminated in the Supreme Court's decision, conceded the criminal law character, and hence the validity, of sections 5 through 7 of the Act. However, Quebec argued that in relation to sections 8 and 9 (a prohibition against the use of reproductive material without the donor's consent, and against the use of reproductive material from a donor under 18 years of age); all of the controlled activities prohibitions; and other provisions of the Act concerning the administration of the scheme by a federal agency, the Act went beyond federal powers.⁵

The jurisprudence establishes three requirements for a valid exercise of the criminal law power conferred by section 91(27) of the *Constitution Act, 1867*: the law must consist of a prohibition, it must impose a penalty,

⁴ The *AHRA* also contains supporting provisions regarding information collection and privacy (ss 14-19), the establishment and powers of an administrative agency (ss 20-39), the issuance of licences and obligations of licensees (ss 40-44), inspection and enforcement (ss 45-59), and equivalency agreements with provincial governments (s 68). The federal government took the position that these were ancillary provisions within a scheme the characterization of which should be driven by the prohibitions in ss 5-13.

⁵ Aside from ss 8-13, the Quebec government challenged ss 14-19, 40-53 (licensing and inspection), 60 and 61 (offences) and 68 of the *AHRA*.

and the law must be directed at a valid criminal law purpose.⁶ The first two requirements are often described as requirements as to form, whereas the last is a requirement as to substance. In the *AHRA Reference*, the two main judgments agreed that the impugned prohibitory provisions satisfied the formal requirements.⁷ The judges were divided, however, as to whether any or all of them possessed a valid purpose. In the opinion of the McLachlin CJC (with whom three justices concurred), they did;⁸ in the opinion of LeBel and Deschamps JJ (with whom two other justices concurred), they did not. The tie-breaking vote was cast by Cromwell J, who concluded that, taken as a whole, the “challenged provisions cannot be characterized as serving any purpose recognized by the Court’s jurisprudence,”⁹ but that sections 8, 9 and 12, considered individually, could be so characterized. These latter provisions were, therefore, within the power conferred by section 91(27).¹⁰

The federal government declined to argue that the validity of any of the provisions could be maintained on the basis of any federal power other than the criminal law power. Thus, Cromwell J’s agreement with LeBel and Deschamps JJ that some of the impugned provisions did not come within the criminal law power entailed the conclusion that those provisions were invalid.

⁶ *Margarine Reference*, *supra* note 3 at 50. Non-colourability is often mentioned as an additional requirement. I omit it here because it is not a requirement unique to the criminal law power: it is a general principle, rather than one specific to laws enacted in reliance on s 91(27), that validity is governed by the impugned law’s actual purpose, rather than by its ostensible purpose.

⁷ *AHRA Reference*, *supra* note 1 at paras 89, 91, 93, 106, 110, 113, *per* McLachlin CJC; and at paras 234 (a regulatory scheme taking the form of exemptions from prohibitions meets the formal requirement) and 247 (the key issue in this case concerns the “evil” that the provisions were intended to suppress – that is, their purpose), *per* LeBel and Deschamps JJ. Cromwell J did not comment on whether the provisions satisfied the formal requirement.

⁸ In addition, McLachlin CJC accepted the federal government’s argument that the challenged non-prohibitory provisions (*supra* note 5) were valid on the basis that they were ancillary to the prohibitions in ss 5-13.

⁹ *AHRA Reference*, *supra* note 1 at para 287.

¹⁰ Cromwell J also upheld the non-prohibitory “provisions which set up the mechanisms to implement” s 12, and certain administrative provisions ancillary to ss 5-9. Specifically, Cromwell J upheld ss 40(1), (6), (7), 41-43, 44(1) and (4), 45 and 53, insofar as they relate to ss 5-9 and 12; see *AHRA Reference*, *ibid* at para 292, *per* Cromwell J.

3. *The Disagreement Between the Chief Justice and LeBel and Deschamps JJ*

In this section, I analyze the nature of the disagreement between the two main judgments. As we have seen, the disagreement between the McLachlin CJC and LeBel and Deschamps JJ ostensibly relates to the purpose requirement for criminal legislation. I wish to suggest that this impression is misleading; the substance of their disagreement lies elsewhere.

Case law recognizes health, morality and personal security as legitimate purposes for criminal legislation.¹¹ According to the Chief Justice, these were the interests safeguarded by the impugned provisions, as well as by the Act as a whole, which has as its “dominant purpose to prohibit inappropriate practices.”¹² By contrast, in the view of LeBel and Deschamps JJ, the purpose of the impugned provisions was not to protect these interests against any “serious risk”¹³ posed by the controlled activities, but was instead to “establish mandatory national standards for assisted human reproduction.”¹⁴

Two things are puzzling about the manner in which the judges present their disagreement. One is that it appears to be about semantics. The question whether the purpose of the Act or the impugned provisions is to prohibit conduct that harms health, morality or security, or rather to establish national standards for the controlled activities, is akin to arguing about whether the purpose of a teenager’s curfew is to prevent late nights out or rather to establish the time at which the teenager’s evening excursions must end. It is a choice between two ways of saying the same thing and does not appear to turn on any matter amenable either to objective verification or to reasoned argument.

The second concerns the several paragraphs devoted by LeBel and Deschamps JJ to constructing an argument that a threshold of harm should

¹¹ *Margarine Reference*, *supra* note 3 at 50; *AHRA Reference*, *ibid* at para 41, *per* McLachlin CJC and para 232, *per* LeBel and Deschamps JJ.

¹² *AHRA Reference*, *ibid* at para 24.

¹³ *Ibid* at para 251.

¹⁴ *Ibid* at paras 226, 251. Cromwell J concurred in the conclusion that the “challenged provisions cannot be characterized as serving any purpose recognized by the Court’s jurisprudence;” see *ibid* at para 287. He did not specify what, in his view, the purpose of the impugned provisions He came closest to doing so when he suggested, earlier in his reasons, he that an “examin[ation of] both their purpose and effects” led him to conclude that the “essence” of the provisions “the regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction;” see *ibid* at para 285.

be a component of the requirement of a valid criminal law purpose,¹⁵ and that any risk posed by the controlled activities does not meet this threshold.¹⁶ This discussion might lead one to assume that the divergent conclusions reached by the McLachlin CJC and LeBel and Deschamps JJ turn on a disagreement between them as to the level of risk or harm necessary before criminal prohibitions may be applied, but this assumption would be incorrect. McLachlin CJC characterized the Act as authorizing the Governor-in-Council to identify under what circumstances the controlled activities are harmful or dangerous, and as prohibiting that subset of them; it would be difficult to dispute that the scenarios she described, against which she supposes that prohibitory regulations will be directed, represent serious harms.¹⁷

It appears to me that, at least insofar as the controlled activities provisions are concerned, the question that actually separates McLachlin CJC and LeBel and Deschamps JJ is not what the threshold of harm is, but which set of activities must meet that threshold: the controlled activities in general,¹⁸ or only the prohibited subset of them.¹⁹ Within this question reside two others: a question of principle and a question as to what the impugned provisions of the Act actually do. The question of principle is whether, in circumstances where a given activity (X) is not intrinsically harmful or dangerous but may be harmful or dangerous if carried out in a particular manner or under particular circumstances (X'), it is a permissible exercise of the criminal law power to authorize the executive to determine and prohibit X'. This is a question relating to the form of criminal legislation. The second issue is whether authorizing the prohibition of X' is all the controlled activities provisions actually do and, more precisely, whether they do not also alter the legal status of activities falling outside X'.

¹⁵ *Ibid* at paras 236-40.

¹⁶ *Ibid* at paras 248-49.

¹⁷ E.g. “ovarian hyperstimulation syndrome (a potentially dangerous condition)” (*ibid* at para 97), “cerebral palsy” and other health problems (*ibid*), “elevated risk of developing deformities, functional disturbances, and cancer” (*ibid*), “sex-selective abortions” (*ibid* at para 100), “cross-species hybrids,” “baby farms,” and “devaluation of persons with disabilities” (*ibid*).

¹⁸ *Ibid* at para 249, *per* LeBel and Deschamps JJ: “[T]he controlled activities ... include practices ... on which ... a broad consensus exists [that they are legitimate].”

¹⁹ *Ibid* at para 101, *per* McLachlin CJC: “Acting under s 10, the executive may prohibit reprehensible conduct, while leaving the positive aspects of assisted reproduction untouched.”

A) *The Permissibility of Delegated Prohibition*

Can a criminal law delegate to the Governor-in-Council the authority to determine and prohibit by regulation the harmful or dangerous forms of an activity which is not intrinsically harmful or dangerous? A negative answer to this question faces a formidable doctrinal obstacle in the form of the Supreme Court's ruling in *R v Hydro-Quebec*,²⁰ which is directly on point, and which answered the question in the affirmative.

In *Hydro-Quebec*, the Supreme Court upheld under the criminal law power provisions of the *Canadian Environmental Protection Act (CEPA)*²¹ whereby the Minister of the Environment was authorized to designate certain substances as "toxic" and to prescribe the maximum quantity and concentrations in which those substances may be released into the environment. The relevant prohibition under the *CEPA* – a general prohibition against contravening the regulations – was even less specific than the controlled activities prohibitions within the *AHRA*. Yet, a majority of the Court held that the Act satisfied the form requirement for legislation under the criminal law power. In the words of the majority judgment, "the Act ultimately prohibits" the emission of the "listed substances ... in a manner contrary to the regulations."²²

Hydro-Quebec appears to be conclusive as to the formal permissibility of a system of delegated prohibition. The emission of substances in general is not intrinsically harmful to the environment; the *CEPA* authorized the Minister to determine the subset of substances susceptible of harming the environment, and the quantities and circumstances under which the emission of those substances would be harmful, and to proscribe only the latter. The case squarely raised the question whether such a scheme satisfies the form requirement for criminal law, and the Court's answer was that it does.

If one wished to mount an argument against the conclusiveness of *Hydro-Quebec*, one strategy would be to rely upon the *Reference re Firearms Act (Canada)*,²³ a more recent decision of the McLachlin Court. In the latter judgment, the Court made a point of referencing the dissenting judgment in *Hydro-Quebec*, observing that the firearms registration offences related to conduct defined in the statute, rather than by the

²⁰ [1997] 3 SCR 213 [*Hydro-Quebec*].

²¹ RSC 1985, c 16 (4th Supp).

²² *Hydro-Quebec*, *supra* note 20 at para 146.

²³ 2000 SCC 31, [2000] 1 SCR 783. It is telling that LeBel and Deschamps JJ cited the *Firearms Reference* eight times and *Hydro-Quebec* only once. By comparison, McLachlin CJC cited the *Firearms Reference* six times, and *Hydro-Quebec* seven times.

executive.²⁴ The Court also emphasized that guns “pose a pressing safety risk in many if not all of their functions,” which explained why the regulation of gun possession is valid criminal law even if the regulation of, for instance, motor vehicles would not be.²⁵ One might be tempted to infer from the *Firearms Reference* a requirement that an activity be dangerous before it may be subjected to a regime enacted under the criminal law power and a principle that, even then, the prohibited conduct should be defined within the statute rather than by reference to regulations promulgated by the executive.

The proposition that the *Firearms Reference*, rather than *Hydro-Quebec*, defines the outer limits of the criminal law power does not, however, strike me as especially compelling from a doctrinal standpoint. The *Firearms Reference* does not purport to overrule *Hydro-Quebec*. The *Firearms Reference* was also not a borderline case; once the Supreme Court had accepted the proposition that all guns, and not only handguns and automatic firearms, are intrinsically dangerous, the legislation in that case could even be argued to fall within the category of traditional crimes.²⁶ To the extent that the *Firearms Reference* was not a borderline case, it is of limited assistance in defining the border. It should be understood as presenting facts falling well within the boundaries established in *Hydro-Quebec*, rather than as narrowing those boundaries.

Another strategy is to attempt to distinguish the environmental protection legislation upheld in *Hydro-Quebec* from the *AHRA*. In *Hydro-Quebec*, the majority emphasized that delegation of the authority to determine and proscribe the harmful sphere of conduct was necessary in light of “the particular nature and requirements of effective environmental protection legislation.”²⁷ This observation, of course, invites the question whether the effective prevention of harms relating to assisted human reproduction shares, or does not share, these “particular ... requirements.”

Moreover, the *CEPA* contained a definition of “toxic” such that it is reasonable to believe that the Governor-in-Council’s determination whether to add a substance to the list of toxic substances, and in what quantity and concentration the emission of the substance should be permitted, is to be based on whether the emission would “constitute a

²⁴ *Ibid* at para 37.

²⁵ *Ibid* at para 43.

²⁶ *Ibid* at paras 22-23, 33 (“gun control has traditionally been considered valid criminal law because guns are dangerous”), 53 (“gun control has been the subject of federal law since Confederation”).

²⁷ *Hydro-Quebec*, *supra* note 20 at para 147.

danger to the environment [or] to human life or health.”²⁸ The absence of a similar cue in the *AHRA* requires us, to a greater extent, to accept on faith that the prohibitions will ultimately be directed at harmful or dangerous practices.

These strategies aside, on the question of principle as to whether delegated prohibition is constitutionally permissible under the criminal law power, the better doctrinal view is that it is. McLachlin CJC is on firmer ground on this question than LeBel and Deschamps JJ.²⁹

B) The Legal Effect of the Impugned Provisions

In addition to the question of principle, there is also a question as to what the impugned provisions of the *AHRA* actually do. To be more specific, the question concerns the relationship between the licensing provisions of the Act and the prohibitory provisions.

We have seen that delegated prohibition is permissible within the criminal law power. If there is a subset of activities related to assisted human reproduction that “would undercut moral values, produce public health evils, and threaten the security of donors, donees and persons conceived by assisted reproduction”³⁰ – in short, that are harmful or dangerous – Parliament may prohibit this subset either directly or by authorizing the Governor-in-Council to define the prohibited sphere.

But this is not all that the impugned provisions do. Sections 10 to 13 also subject activities that are not within the prohibited sphere to a requirement that they be carried out only with a federal licence.³¹ Sections 14 to 19 impose information gathering, reporting and disclosure requirements upon licensees; and section 40(6) confers discretion upon a federal agency to attach terms and conditions to any licence at any time. In

²⁸ *CEPA*, *supra* note 21, s 11.

²⁹ It is also worth noting that LeBel and Deschamps JJ’s position would call into question the validity of the *Hazardous Products Act*, RSC 1985, c H-3, which also employs the device of delegated prohibition, and which has been assumed to be valid criminal law, including by the Supreme Court; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 42; *R v Cosman’s Furniture (1972) Ltd* (1976), 32 CCC (2d) 345. This point is also made by Barbara von Tigerstrom, “Federal Health Legislation and the Assisted Human Reproduction Act Reference” (2011) 74 Sask L Rev 33 at 37-38.

³⁰ *AHRA Reference*, *supra* note 1 at para 20, *per* McLachlin CJC, summarizing the federal government’s description of the harm targeted by the legislation.

³¹ The provisions state, uniformly, that “no person shall, except in accordance with the regulations *and a licence*” [emphasis added], engage in the subject activities

short, the *AHRA* imposes significant legal burdens, by means of a requirement of federal licensing, on the controlled activities.

Parliament does not appear to have made any judgment that the controlled activities, outside the zone of prohibition to be established by the Governor in Council, are harmful or dangerous.³² Yet, neither *Hydro-Quebec* nor the *Firearms Reference* goes as far as to authorize the imposition of a federal licensing requirement upon an activity that is neither harmful nor dangerous: in *Hydro-Quebec*, there was no licensing scheme; in the *Firearms Reference*, there was, but the Court there emphasized that the activity was intrinsically dangerous.

If the requirement that the controlled activities be licensed is valid, it must be because such a requirement is incidental to the broader prohibitory scheme.³³ Under the ancillary powers (or necessarily incidental) doctrine, legislative provisions which, viewed in isolation, do not come within the powers of their enacting body are nonetheless valid if they are sufficiently minor and sufficiently related to the functioning of an otherwise valid scheme.³⁴ McLachlin CJC concluded that the licensing provisions fit this

³² For instance, s 2 of the *AHRA*, which sets forth the principles underlying the Act, contains no suggestion that Parliament considers assisted human reproduction to be dangerous, let alone harmful. Nor, in its factum, did the federal government contend that the controlled activities, outside the zone of prohibition established by the Governor in Council, are harmful or dangerous. The federal government did argue that “the practices addressed by the Act ... pose unique risks to morality or health, or both, because the practices involve the artificial creation of human life;” *AHRA Reference, supra* note 1, Factum of the Appellant at para 32 (see also paras 6, 134), but this falls short of a claim that the activities are harmful or dangerous. The operation of motor vehicles poses risks, too; yet, a federal driver’s licensing scheme would not be valid criminal legislation. See *Firearms Reference, supra* note 23 at para 43. Similarly, the McLachlin CJC did not suggest that the controlled activities are, in general, harmful or dangerous; rather, she regarded the scheme of the controlled activities provisions as one in which the Governor-in-Council is authorized to determine the harmful or dangerous subset of them, while leaving the others “untouched;” see *AHRA Reference, ibid* at para 101.

³³ McLachlin CJC came close to suggesting, at one point, that the licensing provisions are a form of delegated prohibition in themselves; the idea would be that the terms set by the licensing agency define, for each licensee, the sphere of prohibited conduct; see *AHRA Reference, ibid* at para 149. The conflation of licensing and prohibition is, however, doctrinally problematic; see Part 4 B)3), *infra*; and McLachlin CJC’s observation arose in the context of an overall argument the thrust of which is not that the licensing provisions are in themselves criminal prohibitions, but that licensing is useful for the effectiveness of the criminal prohibitions elsewhere in the Act; see *AHRA Reference, ibid* at paras 147-51.

³⁴ *General Motors v City National Leasing*, [1989] 1 SCR 641 at 670-71 [*General Motors*].

description. On the one hand, she decided, primarily on the basis of the breadth of the provincial property and civil rights power, and the fact that the licensing provisions do not create civil rights, that the “incursion on provincial jurisdiction” is but minor.³⁵ On the other hand, the requirements “help to ensure that the Act’s prohibitions are respected.”³⁶

There is, however, another perspective on the matter. To say that the licensing requirements are incidental to the prohibitory features of the Act is arguably another way of saying that the prohibitory features are the Act’s dominant features, its “pith and substance.”³⁷ Indeed, in characterizing the *AHRA*, McLachlin CJC concluded that the “dominant effect” of the Act is to prohibit certain things.³⁸ For her to reach this conclusion despite the licensing provisions, it was not sufficient for her to be persuaded that the “incursion” effected by the licensing provisions is small relative to the enormity of the property and civil rights power; she needed to determine that the licensing requirements are minor relative to the rest of what the Act does. The questions that become relevant, but which McLachlin CJC did not ask, are: How large is the prohibited sphere of activity (including the sphere prohibited by regulation) relative to the licensed, non-prohibited sphere? And how onerous are the legal requirements placed upon licensees?

It is a shortcoming of McLachlin CJC’s judgment that she simply asserted prohibition to be the “dominant effect” of the regime, without asking the questions necessary in order for that conclusion to be warranted.³⁹ It does not strike me as immediately obvious that the licensed sphere will be much smaller than the prohibited sphere, or that the obligations of licensees are not substantial. Evidently, neither LeBel and Deschamps JJ nor Cromwell J⁴⁰ were persuaded that the legal effect of the impugned provisions upon non-prohibited behaviour is minor in this sense.

³⁵ *AHRA Reference*, *supra* note 1 at para 137. The considerations identified by McLachlin CJC were also relied upon in *General Motors*, *ibid*.

³⁶ *AHRA Reference*, *ibid* at para 145.

³⁷ See Peter W Hogg, *Constitutional Law of Canada 2011 Student Edition* (Toronto: Carswell, 2011) sec 15.9(c) (describing the relationship between the ancillary powers doctrine and pith and substance analysis).

³⁸ *AHRA Reference*, *supra* note 1 at para 32.

³⁹ The relevant part of the McLachlin CJC’s reasons is found in *AHRA Reference*, *supra* note 1 at paras 31-33. This analysis is rather thin; it appears to consist of an acknowledgment that the Act “has an impact on the regulation of medical research and practice and hospital administration” followed by an assertion that “dominant effect” of the Act is prohibitory despite its “impact on provincial matters.”

⁴⁰ Cromwell J, for instance, adopted the Quebec Court of Appeal’s assessment in *Assisted Human Reproduction Act Reference*, 2008 QCCA 1167 at para 121, 298 DLR (4th) 712:

In summary, it is not clear to me that it is helpful to think about the disagreement between the McLachlin CJC and LeBel and Deschamps JJ in the terms in which they presented it, namely as a disagreement about the purpose of the *AHRA* or of the impugned provisions. The ostensible disagreement between the two main judgments masks a more significant divergence between the judges as to, on the one hand, the permissibility of delegated prohibitory legislation and, on the other hand, the significance of the federal licensing requirement for assisted human reproduction activities not falling within the prohibitory zones established by the statute or the regulations. While the doctrine favours McLachlin CJC's view that delegated prohibition is permissible under the criminal law power, she did not acknowledge, let alone meet, her burden of showing that the licensing requirement imposed upon the controlled activities is sufficiently minor that it does not affect the characterization of the Act.

4. *The Scope of the Criminal Law Power*

The foregoing analysis has focused narrowly on a small handful of precedents, especially *Hydro-Quebec* and the *Firearms Reference*, and on the impugned Act. In the remainder of this paper, I offer some observations about the scope of the criminal law power from a broader perspective.

A) *The Conventional View of the Problem*

I begin by describing the problem posed by the interpretation of the criminal law power, as I believe it is conventionally understood.

It is trite to say that the criminal law power is difficult to define.⁴¹ Indeed, a common move in judicial analyses of section 91(27) is to describe it in vague terms either as a “plenary power” (especially when a

With respect to everything that is not subject to a total prohibition, the Act constitutes a complete code governing all clinical and research activities relating to assisted reproduction. In fact Parliament first of all empowers the government to regulate more than 25 areas of activity relating to assisted reproduction. These include standards relating to the qualification and licensing of materials, facilities, and the persons engaged in these controlled activities, as well as the form of consent to be given by the donor of human reproductive material. It then creates the Agency, on which it confers the double mandate of qualifying and licensing establishments and persons involved in assisted reproduction activities in compliance with the regulations, and of overseeing the application of the Act.

⁴¹ See e.g. Hogg, *supra* note 37, sec 18.2 (“very difficult to define”); *Scowby v Glendinning*, [1986] 2 SCR 226 at 236 (“Criminal law is easier to recognize than to define.”); *AHRA Reference*, *supra* note 1 at para 230, *per* LeBel and Deschamps JJ (“a difficult task”).

federal law is being upheld)⁴² or as a power that is “broad, [but] not unlimited” (especially when a federal law is being invalidated).⁴³

In search of greater precision, it is conventional to refer to three requirements derived from the opinion of Rand J in the *Margarine Reference* and which are considered definitive of the scope of the criminal law power: a prohibition, a penalty, and a valid criminal law purpose.⁴⁴ While uncertainty as to the meaning of doctrinal requirements is a fact of life, however, in the case of the *Margarine Reference* criteria, these uncertainties come dangerously close to placing in doubt whether the requirements have any content at all.

For instance, while the requirement of a prohibitory form is presumably intended to distinguish “prohibition” from “regulation,”⁴⁵ one may wonder whether this requirement has any substance if, as LeBel and Deschamps JJ stated, “a regulatory scheme, [taking] the form of exemptions from a prohibitory scheme, falls within the field of criminal law.”⁴⁶ In other words, a system of prohibitions and exemptions so detailed and extensive that it amounts to a regulatory scheme nonetheless complies with the requirement of a prohibitory form.

As for the requirement of a valid criminal law purpose, the non-exhaustive list of purposes recognized by the cases – “public peace, order, security, health, morality”⁴⁷ – is so encompassing that the list may as well read “peace, order and good government.” Indeed, LeBel and Deschamps JJ’s proposal to tweak the purpose requirement by introducing what they call a “threshold” of risk is a response to their belief that, otherwise, the power “would in reality have no limits.”⁴⁸

⁴² See e.g. *AGBC v AG Canada*, [1937] AC 368 [*Section 498a Reference*]; *AGBC v Smith*, [1967] SCR 702 at 708; *Hydro-Quebec*, *supra* note 20 at para 118, *RJR-Macdonald*, *supra* note 29 at 28, *R v Malmo-Levine*, 2003 SCC 74 at para 73, 3 SCR 571 [*Malmo-Levine*].

⁴³ See e.g. *AHRA Reference*, *supra* note 1 at para 245, *per* LeBel and Deschamps JJ; *Ward v Canada*, 2002 SCC 17 at para 51, 1 SCR 569. Admittedly, in both cases the passage is a quotation from the *Firearms Reference*, in which federal legislation was upheld.

⁴⁴ See e.g. *AHRA Reference*, *ibid* at para 35, *per* McLachlin CJC, and para 233, *per* LeBel and Deschamps JJ.

⁴⁵ This distinction is made in another context by the Judicial Committee of the Privy Council; see *Local Prohibition Reference*, [1896] AC 348 at 363 (the “regulation of trade and commerce” does not include the prohibition of a trade). See also *Toronto v Virgo*, [1896] AC 88 (PC).

⁴⁶ *AHRA Reference*, *supra* note 1 at para 234.

⁴⁷ *Margarine Reference*, *supra* note 3 at 50.

⁴⁸ *AHRA Reference*, *supra* note 1 at para 240.

My own view is that, while the limits of the criminal law power have not always been successfully articulated, it is not the case that the power has no doctrinally discernible limits. A discussion of these limits is the subject of the next section.

B) The Relationship Between the Criminal Law and Property and Civil Rights Powers

It is almost too obvious to mention that if a law enacted in reliance on the federal criminal law power is held to be ultra vires, the law will often have been held to come instead within the provinces' jurisdiction over property and civil rights.⁴⁹ It appears, therefore, that an account of the scope of the criminal law power must describe its relationship to the provincial power over property and civil rights.

In my view, a useful description of this relationship might have the following three elements which I shall describe more fully below. First, the criminal law and property and civil rights powers are dual plenary powers. Second, judgments as to the classification of a law as between the two powers involve an assessment as to whether the material features of the law more closely resemble legislation in a criminal or civil paradigm. Third, within the gray area between the two paradigms, the limits of Parliament's criminal law jurisdiction are crossed when a federal law assumes control over an activity in order to suppress one harmful or dangerous form of the activity; on the other hand, Parliament may prohibit that form either directly or via delegated legislation.

1) Dual Plenary Powers

The category of criminal law enters our constitutional lexicon in the *Quebec Act 1774*,⁵⁰ where it is distinguished from private law. The Imperial instrument provided that disputes involving "property and civil rights" would be governed by French civil law (Article VIII); nevertheless, the "criminal law of England" would continue to be observed in the colony (Article XI). The same dichotomy appears in Blackstone's *Commentaries on the Laws of England*, which, for instance, distinguishes private wrongs, defined as the infringement of the civil rights of individuals, from crimes,

⁴⁹ See e.g. *In re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 AC 191; *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, *Margarine Reference*, *supra* note 3; *Dominion Stores Ltd v R*, [1980] 1 SCR 844 [*Dominion Stores*]; *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914 [*Labatt*].

⁵⁰ RSC 1985, Appendix II, No 2.

defined as the violation of “public rights or duties.”⁵¹ Criminal law, in other words, is the domain of public wrongs.

The structure established by the *Quebec Act* illuminates the sense in which the federal criminal law power is a “plenary power.” As has sometimes been observed, several of the enumerated federal classes of subjects appear to have been carved out from the broader concept of property and civil rights.⁵² Marriage, bills of exchange and promissory notes, for instance, were governed by civil law in Quebec prior to Confederation⁵³ and, but for their specific enumeration within section 91, would come within the general provincial authority in relation to property and civil rights.⁵⁴ This is not the case with the criminal law, which has occupied, nearly since the Conquest, a space separate from and opposite to property and civil rights. In fact, one of the classes of subjects enumerated in section 92 – the imposition of punishment for the enforcement of provincial laws (section 92(15)) – can be understood to be a subtracted subset of the broader concept of the criminal law. Thus, the federal criminal law power, like the provincial property and civil rights power, is plenary, in the sense that it is not a carved-out subset of a broader class of subjects within the legislative jurisdiction of the other level of government.⁵⁵

2) *Classification of Laws*

The dividing line between two concepts may be difficult to pin down; yet, a core of paradigmatic and undisputed applications of each concept may

⁵¹ (London: Routledge-Cavendish, 2001) book 3, c 1; see also *Re Alberta Statutes*, [1938] SCR 100, at 144.

⁵² See William R Lederman, “Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation” (1975) 53 Can Bar Rev 597 at 602-03.

⁵³ See *Civil Code of Lower Canada 1866*, Book 1, Title 5 (Of marriage); Book 1, Title 4 (Of bills of exchange, notes and cheques). Bankruptcy and insolvency would likely also have come within the concept of property and civil rights, although English-based commercial statutes had begun to displace French-based bankruptcy law in Lower Canada as early as 1830. See Alain Vauclair and Martin-François Parent, “Harmonization of Federal Legislation with Quebec Civil Law: Some Examples from the Bankruptcy and Insolvency Act” (Dept of Justice Canada, 2001) at 2.

⁵⁴ Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel*, 5th ed (Cowansville: Éditions Yvon Blais, 2008) at 477.

⁵⁵ In a dissenting judgment in the Alberta Court of Appeal in *Reference Re Firearms Act* (1998), 164 DLR (4th) 513 at para 465, Conrad JA described the criminal law power as a “carve-out from provincial jurisdiction” over property and civil rights. Conrad JA’s view was rejected by the Supreme Court; see *Firearms Reference*, *supra* note 23 at para 28.

exist.⁵⁶ One way of thinking about the classification of laws is as a judgment as to whether the law more closely resembles paradigmatic legislation within one sphere of jurisdiction than within another. Thus, for instance, a provincial prohibitory law the purpose of which is to suppress traditionally criminalized conduct is sufficiently similar to laws within the settled core of the criminal law power that it is reasonable to conclude that the law's subject matter comes within that power, and is therefore incompetent to the provinces.⁵⁷

Labels such as “regulation” are not especially useful in making the judgment as to whether a law more closely resembles the criminal or civil paradigm. Consider, for instance, the prohibitions against agreements to restrain competition, price discrimination and participation in a combine,⁵⁸ on the one hand; and the prohibitions against the sale of a food product under a particular grade or designation, without meeting the standards for the use of that grade or designation, on the other hand.⁵⁹ The former were upheld as criminal legislation, and the latter were deemed invalid. Yet, in a sense, all of the laws in both groups are regulatory laws – in particular, they aim to modify the behaviour of commercial actors.

We can say more about each of these laws than that they are regulatory, and the additional details are what make the difference. In the case of the competition and price discrimination laws, the activity is prohibited on the theory that it is harmful to the public and, in particular, on the theory that it constitutes an exploitation by relatively powerful economic actors of relatively powerless ones (especially consumers).⁶⁰

⁵⁶ HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv L Rev 593 at 607 (distinction between the “core of settled meaning” of legal concepts and the surrounding “penumbra of debatable cases”). I recognize that this is a proposition about which the Supreme Court has recently manifested a lack of enthusiasm, albeit in a different context; see *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 43, 2 SCR 3 (expressing reservations about the doctrine of interjurisdictional immunity because of its reliance on the “attribution to every legislative head of power of a “‘core’ of indeterminate scope”).

⁵⁷ *Attorney General for Ontario v Hamilton Street Railway Co.*, [1903] AC 524 (non-observance of Lord's Day); *Birks v City of Montreal*, [1955] SCR 799 (non-observance of religious feast days); *Re Alberta Statutes*, *supra* note 51 (seditious libel); *R v Morgentaler*, [1993] 3 SCR 463 (abortion); *Westendorp v R.*, [1983] 1 SCR 43 (prostitution).

⁵⁸ *Proprietary Articles Trade Association v Canada*, [1931] AC 310 (PC) [PATA]; *Section 498a Reference*, *supra* note 42.

⁵⁹ *Dominion Stores*, *supra* note 49 (“Canada Extra Fancy” apples); *Labatt*, *supra* note 49 (alcoholic content of “light beer”).

⁶⁰ See *R v Goodyear Tire and Rubber Co.*, [1956] SCR 303 at 313 (the anti-combines provisions are “concerned solely with the harmful effects upon the economic

In the case of the grading standards laws, one might admittedly attempt to characterize the misuse of a grading standard as misleading and, therefore, the harm prevented by the laws as the deception of the public. However, the power to penalize the misuse of a standard presupposes the authority to create standards.⁶¹ It therefore becomes relevant that the establishment of standardized product grades or names is a mechanism to reduce the informational costs associated with transactions in those products. Reasonable consumers may well wish to purchase, and businesses wish to sell to them, products having different characteristics, including different levels of quality. Such transactions are facilitated if there are standard names for frequently-desired characteristics, or for products having certain bundles of characteristics.

It was possible for a court reasonably to conclude that a law making it an offence for the powerful to injure the weak resembles paradigmatic criminal law, whereas a law establishing what are in essence standardized contractual terms for the purpose of reducing the cost of doing business, and penalizing departures from those terms, is closer to the contract law (and therefore the civil law) paradigm than to the criminal law paradigm.

In order to accept the basic propositions being defended in this section, a reader need not agree with the Judicial Committee or Supreme Court's judgment calls as to the classification of the particular laws just discussed, but only allow that (1) there are clear, or paradigmatic cases of criminal law and of laws dealing with civil rights, and (2) classification may be conceptualized as an exercise in examining the similarities and dissimilarities of the impugned enactment with the paradigm examples, and making a judgment thereupon as to the relative proximity of the legislation to each of the paradigms.

3) *Doctrine*

The classification process just described is further constrained by *stare decisis*. Specifically, principles of decision for the classification of legislation falling between the two paradigms may be inferred from the pattern of outcomes in previously decided cases, and the reasons given for those outcomes.

At least four principles appear to be useful for the classification of the impugned provisions of the *AHRA*.

life of the public of the control and the exactions for which [the prohibited agreements] provide").

⁶¹ *Labatt*, *supra* note 49 at 934

First, a federal law cannot be upheld as criminal legislation without its being determined that its purpose is to suppress some harmful or dangerous conduct. This principle is a way of stating the requirement that the legislation concern a public wrong. In at least two cases, this principle has been the ground on which a federal law was held not to come within the criminal law power. One of the cases was, of course, the *Margarine Reference*, in which the Judicial Committee adopted Rand J's observation that "there is nothing of a general or injurious nature to be abolished or removed: it is a matter of preferring certain local trade to others."⁶² In the other case, *Boggs v R*,⁶³ the Supreme Court invalidated the *Criminal Code* offence of driving while under suspension on the ground that a driver's licence could be suspended by a province for reasons having nothing to do with road safety, and that the prohibition was therefore "wholly inarticulate" as to the harm it sought to prevent.⁶⁴

Second, prohibitions may be defined in subordinate legislation. We have seen that criminal legislation involves the suppression of harmful or dangerous conduct. The legislation may prohibit the harmful or dangerous conduct directly; or, where particular conduct is not harmful or dangerous in all of its forms, the legislation may delegate to the Governor-in-Council the authority to determine the harmful or dangerous forms of conduct and may prohibit the forms of conduct designated under such authority. As previously discussed, this is the principle on which *Hydro-Quebec* was decided and it underpins the conventional understanding that the federal hazardous products scheme is valid criminal legislation.

Third, Parliament may not "assume control" over an activity which is not in itself harmful or dangerous in order to prevent the harmful or dangerous forms of the activity. This point is clearly made in *Re Reciprocal Insurance Legislation*,⁶⁵ in which it was held to be beyond federal powers conferred by section 91(27) to make it an offence to "mak[e] or carr[y] out ... an insurance contract in the absence of a licence from the Minister of Finance issued pursuant to the ... Insurance Act of Canada." Duff J, sitting on the Judicial Committee, wrote:

It is one thing ... to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable

⁶² *Supra* note 3 at para 16.

⁶³ [1981] 1 SCR 49 at 65.

⁶⁴ Another way of explaining the result is that the federal provision appeared to be directed at the enforcement, through the imposition of a punishment, of provincial driver licensing laws. Thus, it came within s 92(15), a class of subjects carved out from s 91(27) and conferred exclusively upon the provinces.

⁶⁵ [1924] AC 328 (PC) [*Reciprocal Insurance*].

under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.⁶⁶

In other words, there is no harm per se in making or carrying out an insurance contract. The federal Parliament could not, therefore, submit the activity to federal licensing, though it could prohibit the harmful forms of the activity.

The second and third principles do not contradict one another. The environmental protection legislation was upheld in *Hydro-Quebec* on the assumption that the acts proscribed – the emission of substances in quantities, concentrations or circumstances defined by regulation – were harmful. There is, by contrast, no suggestion that the conduct proscribed in *Reciprocal Insurance* – the making or carrying out of an insurance contract without a federal licence – was harmful.

Fourth, the third principle does not preclude the assumption of control by Parliament over harmful or dangerous activities. Thus, for instance, in the *Firearms Reference*, the Court's determination that Parliament regarded guns as intrinsically dangerous was critical to its conclusion that the possession of firearms may be subjected to a requirement of federal licensing under the criminal law power.⁶⁷

A related notion is that an activity considered harmful or socially undesirable by Parliament may be conditionally tolerated or conditionally prohibited by legislation under the criminal law power. It is on this basis that provisions that, in some sense, assume control over the procurement of abortions, by prescribing the conditions under which that activity would not be criminal, were upheld in the 1976 decision in *R v Morgentaler*.⁶⁸ Similarly, in *RJR-Macdonald*, the fact that the sale of a product that “kills” is tolerated does not prevent Parliament from making it a crime, in essence, to “induc[e] Canadians to consume” it.⁶⁹

⁶⁶ *Ibid* at 343.

⁶⁷ *Supra* note 23; see e.g. para 33 (“Parliament views firearms as dangerous and regulates their possession and use on that ground”); para 42 (“Guns are restricted because they are dangerous”); para 43 (“Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms”).

⁶⁸ [1976] 1 SCR 616 at 627 [*Morgentaler 1976*] (“What is patent on the face of the prohibitory portion of s.251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment.”)

⁶⁹ *Supra* note 29 at para 32. It may be that the fourth principle is not needed in order to account for the results in *Morgentaler 1976* and *RJR-Macdonald*. In each of

4) *Should There be Requirements as to the Type or Magnitude of Public Harm?*

Some have suggested that the purpose requirement entails, or ought to entail, requirements as to the type or magnitude of harm to the public.⁷⁰ I do not share this view. I have argued that the concept of criminal law refers to a sphere of law defined in opposition to property and civil rights. It is a plenary power defined by the concept of a public wrong; it is not a power conferred only in relation to certain types of public wrong.

In *RJR-Macdonald*, Major J attempted to introduce a requirement that the conduct targeted by the legislation “pose a significant, grave and serious risk of harm.”⁷¹ This proposal was not endorsed by the majority and, in my view, with good reason. The premise of Major J’s proposal is that criminal prohibition is a more muscular intervention than non-criminal regulation; lesser means should be used for lesser threats. However, this assumption does not stand up to scrutiny. Severe sanctions, such as imprisonment, are equally available under our constitution for the enforcement of so-called regulatory laws, including provincial laws. And it is simply not the case that all criminalized conduct is necessarily more serious than conduct which is “merely” subject to regulatory penalties: a petty theft, for instance, is not intrinsically more serious than a workplace safety violation.

In *R v Malmo-Levine*, the Court flirted with a different threshold; the Court’s reasons for concluding that the criminal restrictions on marijuana were valid included the observation that Parliament was entitled to “act upon a reasoned apprehension of harm.”⁷² In their reasons in the *AHRA Reference*, LeBel and Deschamps JJ attempted to transform this observation into a legal requirement.⁷³ Yet, there is no legal requirement of a “reasoned basis” for the exercise by the provinces of the property and civil rights power. The argument for such a requirement in the case of the criminal law power rests on the assumption that the power is intrinsically disruptive of the division of powers between the federal and provincial

these cases, the legislation could be characterized simply as prohibiting a behaviour deemed to be socially harmful (this suffices to make it criminal law). It is immaterial that a more broadly defined offence – an unqualified prohibition against abortion, or a prohibition against the sale of tobacco – would also have qualified as criminal law.

⁷⁰ See e.g. Mark Carter, “Federalism Analysis and the Charter” (2011) 74 Sask L Rev 5 at 7.

⁷¹ *Supra* note 29 at paras 201-202.

⁷² *Supra* note 42 at para 78.

⁷³ *Supra* note 1 at para 236.

governments,⁷⁴ whereas the power is better thought of as one of its pillars. The preferable view is that reasonableness is not a legal requirement but, at most, a practical evidentiary burden: the absence of a reasonable apprehension of harm may entitle a court to conclude that the prevention of such harm was not the true purpose of the legislation.⁷⁵

In *Ward v Canada*, the Court, having held that a ban on the commercial sale of certain types of seals was valid under the federal fisheries power, added that it was not criminal legislation because it was directed at a fisheries management purpose, not at “public peace, order security [or] morality.”⁷⁶ The reasoning is not fully articulated, presumably because the entire analysis is *obiter*. Bearing in mind, however, that the impetus for the ban was the threat posed to the export market for Canadian fisheries products generally by protests, mainly in other countries, against the perceived cruelty of the seal hunt, there are at least two ways of interpreting the *Ward* decision. One possibility is that harm to the value of a public resource is not the right type of harm for criminal legislation. Alternatively, the prohibited act is not a wrong because it is not in itself socially undesirable, but only becomes so because of the anticipated reactions of the consumers of other fish products, and legislators in other countries.

Unfortunately, neither of these interpretations of the *Ward* *obiter* reveals it to rest on a satisfactory principle.⁷⁷ It is not a desirable principle

⁷⁴ An analogy can be made to the requirement of a “rational basis” for a judgment by Parliament that the circumstances warrant the use of its emergency power; see *Reference re Anti-Inflation Act*, [1976] 2 SCR 373. A concern about disruption to the balance of powers is manifest in *AHRA Reference*, *supra* note 1 in the reasons of both LeBel and Deschamps JJ at paras 238-40, and McLachlin CJC at para 43.

⁷⁵ In *ibid* at para 43, the McLachlin CJC suggested that, when combined with the doctrine of paramountcy, an insufficiently confined criminal law power might “upset the constitutional balance of federal-provincial powers.” In the *Firearms Reference*, *supra* note 23, however, the McLachlin Court was unmoved by a similar argument; there, it observed at para 52 that “the most important jurisdictional effect of [legislation restricting an activity under s 91(27)] is [to] eliminat[e] the ability of the provinces to not have any regulations [on this activity].” The fact that Parliament has the discretion to prohibit none, some or all of the forms of a harm-causing activity under the criminal law power does not prevent the provinces from legislating as to any forms which are not prohibited.

⁷⁶ 2002 SCC 17 at paras 55-56, 1 SCR 569 [*Ward*].

⁷⁷ A third interpretation which has the merit of avoiding these unfortunate principles is to read the case as analogous to *Margarine*, that is, as a case involving legislation directed at protecting the interests of some fisheries traders at the expense of others (sealers). Unfortunately, this would be a strained reading of the *Ward* decision. The Court nowhere suggests that the seal ban was motivated by anything other than a legitimate public interest in the economic value of the fisheries

that the harmed public interest must be of a particular type (moral, for example, as opposed to economic) in order for behaviour causing the harm to be deemed to be socially undesirable and designated a public wrong. As a doctrinal matter, of course, economic wrongs have been upheld under the criminal law power.⁷⁸ And the criminal law is not limited to acts which are intrinsically wrong; whether a given act is or is not socially undesirable often depends on the context. In the circumstances of *Ward*, in light of conditions in the market for fisheries products, the commercial sale of seals could be understood to be a socially undesirable activity.⁷⁹ For these reasons, the *Ward* obiter should be treated with caution.⁸⁰

To reject the idea that only certain categories of public wrong come within section 91(27) is not to endorse a “limitless” criminal law power. As previously discussed,⁸¹ laws may be judged to fall outside the criminal sphere to the extent that they more closely resemble the paradigm examples of legislation about civil rights, such as legislation about contracts, than the paradigm of a public wrong. This is why laws that prescribe standard contractual terms or product names so as to reduce bargaining costs do not come within section 91(27). And the provinces possess the exclusive power to punish violations of their own laws by virtue of section 92(15), which is carved out from section 91(27) in the same way that federal jurisdiction over marriage, negotiable instruments and bankruptcy is subtracted from section 92(13). Finally, within the “debatable penumbra,” decided cases constrain the classification process.

⁷⁸ See e.g. *PATA*, *supra* note 58 (participation in a combine); *Section 498a Reference*, *supra* note 42 (price discrimination).

⁷⁹ Also, the presence in the causal chain of intervening acts by consumers and foreign legislators does not prevent the commercial sale of seals from being designated as harmful, any more than the intervening decision of a consumer whether or not to purchase and use cigarettes prevented tobacco advertising from being treated as harmful in *RJR-Macdonald*.

⁸⁰ In addition to the relevant analysis being obiter, it should be noted that *Ward* is a special case because it concerns a choice between the criminal law power and the fisheries power, not the property and civil rights power. The fisheries power conferred by s 91(12) is a jurisdiction subtracted from, among others, the general federal power over criminal law. For instance, the Supreme Court has described s 91(12) as being “concerned with the protection and preservation of fisheries as a public resource ... [and] to monitor or regulate undue or injurious exploitation;” see *Co-operatives Limited et al v The Queen*, [1976] 1 SCR 477 at 495 cited in *Fowler v R*, [1980] 2 SCR 213 at 223. This definition of s 91(12) makes it possible to conclude that the designation of certain activity to be a public wrong in order to prevent damage to the fisheries as a resource comes within the fisheries power and is withdrawn from the general criminal law power. However, it does not follow that conduct harmful to public resources other than the fisheries could not be proscribed under the criminal law power.

⁸¹ See Part 4 B)2), *supra*.

These constraints include the principle that Parliament may not assume control over a generally harmless, non-dangerous activity in order to suppress only the harmful or dangerous forms of the activity.

5. Conclusion

It is fair to say that the criminal law power is broad; this is in large part because the concept of a public wrong is broad. The power has perhaps also been enlarged as a result of *Hydro-Quebec*, which recognizes that the socially undesirable or dangerous conduct that constitutes the wrong does not even have to be defined in the statute itself; it can be defined by regulation.

On the interpretation of the criminal law power offered here, LeBel and Deschamps JJ went too far in insisting that sections 8 and 9 are invalid. Section 8, which prohibits the use of reproductive material without the donor's consent, and s. 9, which prohibits the use of reproductive material from a donor less than 18 years of age, are close to the paradigm of assault, a traditional crime.⁸²

As for sections 10 to 12, to the extent that they prohibit the carrying out of specified "controlled activities" otherwise than in accordance with regulations, the fact that the controlled activities are not in themselves dangerous or socially undesirable does not undermine the character of the prohibitions as criminal law. It is not unreasonable to conclude, as McLachlin CJC did, that the prohibited, harmful sphere of conduct is defined by regulation, as permitted under *Hydro-Quebec*.

There is, however, a problem in the requirement under sections 10-13 that the controlled activities be licensed, and in the imposition elsewhere in the Act of substantial legal obligations upon licensees: this regime is difficult to distinguish from the scheme that was deemed invalid in *Reciprocal Insurance*.⁸³ Even if one assumes that the prohibitory regulations will be directed at harmful or dangerous practices, the licensing requirements are applied to activities which, by definition, are not prohibited either by the Act or by the regulations. Sections 10 to 13 seek to license, therefore, activities which neither Parliament nor the Governor-in-Council has determined to be harmful or dangerous. To paraphrase Duff J, it is one thing to declare (including by delegated legislation) certain forms of assisted reproduction to be a criminal offence; it is another thing to

⁸² This appears to be the view taken, as well, by Cromwell J; see *AHRA Reference*, *supra* note 1 at para 289.

⁸³ *Supra* note 65.

assume control over all assisted reproduction activities by requiring them to be carried out under a federal licence.⁸⁴

McLachlin CJC's conclusion that the licensing provisions are valid depends vitally on her determination that they are incidental to the prohibitory provisions. This determination in turn rests upon the somewhat artificial observation that licensing obligations are modest next to the vastness of the property and civil rights power. The more salient question appears to be whether the licensing of controlled activities and the imposition of obligations upon licensees are a major part of what the impugned provisions do; if so, then McLachlin CJC's reasoning amounts to allowing the (prohibitory) tail to wag the (licensing) dog.⁸⁵

⁸⁴ See quotation accompanying note 66, *supra*.

⁸⁵ Of the three opinions in the Reference, Justice Cromwell's comes the closest to the outcome my analysis would recommend. One difference between the outcome recommended here and that reached by Justice Cromwell is that he upheld s 12, which prohibits the reimbursement of the expenses incurred by donors and surrogate mothers except in accordance with a licence and the regulations. In singling out s 12 from the other controlled activities provisions, Justice Cromwell described it as a "form of exemption from the strictness of the regime" imposed in ss 6 and 7, which prohibit the payment of consideration to a surrogate mother or donor (para 290; Justice Cromwell adopted, almost verbatim, the Appellant's characterization of the provision: Appellant's Factum, para 78). One way of situating Justice Cromwell's reasoning within the framework developed here is that it comes within the fourth principle: unlike the other controlled activities, the making of any payments whatsoever to donors and surrogate mothers is socially undesirable, but is tolerated under the conditions set forth in s 12, which include licensing.