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LAWS OF CONCEPTION: A QUEER GENEALOGY OF CANADA'S ASSISTED HUMAN REPRODUCTION ACT

Stu Marvel*

INTRODUCTION

This symposium on reproductive justice is both welcome and timely. My work has long been interested in how law and policy around assisted reproductive technology (“ART”) impact the lives, bodies, families, and communities of marginalized peoples, and, in particular, the lives of lesbians, gays, bisexuals, and trans and queer (“LGBTQ”) people.¹ Questions of access to reproductive technology, materials, and labor are obviously critical for LGBTQ families seeking to have genetically-related children, even as the language of fertility assistance for queer people has rested uneasily within a reproductive rights model.² The framework of reproductive justice may thus offer a helpful mode through which to explore the structural conditions that produce and foreclose different forms of family, and the reproductive lives which may be lived (or not) under the institutional conditions presently set by law and medicine in North America.³

* Lecturer in Law, University of Leeds. I would like to thank the student organizers of this symposium and journal volume on reproductive justice, and in particular Helen Sayers, Gisselle Perez, Gabriel Glasser, and Rebecca Bovinet. I am also tremendously grateful to Cyra Akila Choudhury for the invitation to participate in this discussion, as well as my co-panelists Aziza Ahmed, Seema Mohapatra, Rachel Rebouché, and Lisa Kelly.

¹ For more about the specific ways in which the Canadian legal regime affects LGBTQ people seeking reproductive assistance, see Stu Marvel, “*Tony Danza is My Sperm Donor?*”: *Queer Kinship and the Impact of Canadian Regulations Around Sperm Donation*, 25 CAN. J. WOMEN & L. 222 (2013).

² For a discussion of the network of legal and medical regulation that shapes access to assisted reproduction in Canada for LGBTQ people, and the inadequacy of a rights model to respond to this complex and shifting nexus, see *Stu Marvel et al., Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Material, Services and Facilities*, in REGULATING CREATION: THE LAW, ETHICS, AND POLICY OF ASSISTED HUMAN REPRODUCTION 406 (Trudo Lemmens et al. eds., 2017). For a treatment of rights-based language around procreation and the potential pitfalls it may engender, see Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065 (2016).

³ Reproductive justice describes the effort to shift away from individual autonomy, control, privacy, and liberty, toward identifying and addressing group-based and community-level constraints and possibilities produced through structural power. This movement has been driven largely by women of color, who were frustrated by the rhetoric of individual rights and choice that inform demands to, for example, formal gender equality or access to abortion. Instead reproductive justice focuses on broader questions of racial, economic, cultural, and structural constraints on power. See, for example, Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* (2004); *SISTERSONG WOMEN OF COLOR REPRODUCTIVE HEALTH COLLECTIVE AND THE PRO-CHOICE*

To move forward this conversation on reproductive justice, however, I wish to take a step back into the past, and reflect upon more than three decades of struggle to regulate assisted human reproduction and genetic research in Canada. Told for its own sake this history is a remarkable one, uniquely inflected by feminist voices and conflicting positions on how best to handle the governance of a range of biotechnologies.⁴ Yet I believe this slice of Canadian history also holds useful lessons for reproductive justice scholars and activists in the United States and beyond. Canada is often held up as a model site for ART regulation by those interested in advancing reproductive justice; such admiring references point to the “integral role of feminist groups in Canada . . . in drafting and supporting the law” and approvingly cite the preamble to the Assisted Human Reproduction Act (“AHRA”) as focused on “safeguarding the health of women and children, and preventing discrimination and the commercial exploitation of reproduction.”⁵

To some extent, these admiring commentators are right—there was strong input from the feminist movement in Canada when such laws were being drafted. However, not only were such perspectives far from unified, they were often in thorny opposition. In tracking this rocky process of public decision-making and consultation, my paper will trace the arc of multiple and overlapping feminist positions from the early 1980s to the mid-1990s: radical feminists who called for bans against the gendered exploitation they perceived as inherent to ART; liberal feminists who sought increased capacity for individual and infertile women to make reproductive choices; and lesbian feminists who were both concerned about the reproductive needs of gay and lesbian communities being ignored, and focused on obtaining sexual freedom and the state recognition of same-sex relationships. In so doing, I will explore how a set of contested feminist

PUBLIC EDUCATION PROJECT, REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE (2007), <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051>; REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT, TWO SIDES OF THE SAME COIN: INTEGRATING ECONOMIC AND REPRODUCTIVE JUSTICE; Loretta J. Ross et al., *The “SisterSong Collective”: Women of Color, Reproductive Health and Human Rights*, 17 AM. J. HEALTH STUD., no. 2, 2001, at 79; Rebecca J. Cook & Bernard Dickens, *From Reproductive Choice to Reproductive Justice*, 106 INT’L J. GYNECOLOGY & OBSTETRICS 106 (2009).

⁴ This is well-traveled terrain, with many other academic and popular commentators having traced this tale across the arcs of a convoluted history. Such texts will form many of the touchstones of this article, most notably the MISCONCEPTIONS books published in the wake of the controversies around the Royal Commission of New Reproductive Technology, *infra* note 11. For a new look at these debates, see a recently published anthology on reproduction and women’s rights in Canada, FERTILE GROUND: EXPLORING REPRODUCTION IN CANADA (Stephanie Paterson et al. eds., 2014). However, none have taken up the lens of queer family and reproductive justice to tell this story.

⁵ Emily Galpern, *Assisted Reproductive Technologies: Overview and Perspective Using a Reproductive Justice Framework*, REPROD. HEALTH & HUM. RTS. GENDER & JUST. PROGRAM, CENTER GENETICS & SOC’Y 18 (2007), <https://www.geneticsandsociety.org/downloads/ART.pdf>.

positions were instrumental in producing today's regulatory framework for reproductive technology in Canada. This is, I believe, of interest not merely as a historical curiosity, but offers real insight into the relationship between advocacy, law, medicine, and power that can be instructive for those committed to promoting reproductive justice today.

First, there are lessons to be learned in regard to how different ideological positions can manifest into advocacy stances and political goals. Particularly as different, and sometimes conflicting, feminist movements are brought into coalition through a shared belief in reproductive justice, historical memory is important to frame our project.⁶ This article explores how, despite the shared goal of developing a federal reproductive policy that would respect female bodies and autonomy, disparate feminist groups were woefully unable to agree on the design and implementation of such a policy.

Second, this telling is not just about "feminisms at war" but about the types of positions that most readily find their way into forms of governance, and those modes of advocacy which become entrenched in law and policy. This analytical approach has been developed by Janet Halley and a cadre of scholars working under the rubric of "governance feminism,"⁷ and is interested in charting "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power."⁸ This brings into focus the political valence of how certain feminist ideas circulate and (crucially) adhere within legal domains, allowing us to account for internal fractures within feminist movements, as well as the process of consensus-building required to produce more formal materials such as organizational briefs and policy statements. As we will see, a diverse set of strategies emerged from the political and legal terrain in Canada in the 1980s and 1990s, as feminists sought to influence federal policy around reproductive technology. This rich spectrum of debate was increasingly channeled through national women's organizations and official government channels as the decades wore on, eventually coming to

⁶ For useful reflections on the conflicted history of reproductive rights movements, both in local and transnational contexts, see: DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* (2003); RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* (2007); Rosalind P. Petchesky, *Negotiating Reproductive Rights: Women's Perspectives Across Countries and Cultures*, 6 *REPRODUCTIVE HEALTH MATTERS*, no. 11 (1998).

⁷ For the text which launched the concept of governance feminism as a term of art, see Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *HARV. J.L. & GENDER* 336, 346, 364 (2006).

⁸ *Id.* at 340.

coalesce in large part around tools of criminal enforcement.⁹

Third, and this represents the other side of that prosecutorial coin, we might wish to explore which positions do *not* get taken up, and what institutional responses are *not* provoked by feminist movements. To quote again from Halley: “some parts of feminism participate more effectively than others; some are not players at all.”¹⁰ It is worth noting that official reports of the time made explicit account of both “feminist” and “mainstream” ideological positions expressed through public and private consultation.¹¹ This neat conceptual binary obscured the roiling tensions within local and national feminist movements, as well as the failure of multiple strands of communitarian, lesbian, and anti-carceral perspectives to find political purchase on the official record. The recalcitrance of Canada’s legal and clinical ART regime to such perspectives may offer an instructive history for contemporary reproductive justice advocates who also favor grassroots and community-based modes of legal and political engagement;¹² for such readers, the “successes” of feminist organizing are perhaps less interesting than its “failures.” As this paper argues, those voices which proved most legible to government interests soon found themselves echoed down two intersecting and complementary regulatory channels—medicalization and criminalization.

⁹ This is very much in keeping with Halley’s thesis about the forms of power that are legible to techniques of governance. As Halley argues, governance feminism “emphasizes criminal enforcement. It speaks the language of total prohibition. It envisions the legal levers it pulls as activating a highly monolithic and state-centered form of power.” *Id.* at 341. Our historical retelling is rife with these abolitionist modes, as certain feminist vanguards targeted and were absorbed by the federal criminal power as a locus for political advocacy and policy creation.

¹⁰ *Id.*

¹¹ This discursive binary between “feminist” and “mainstream” thinkers is one that settled in the work of the Royal Commission on New Reproductive Technologies, as discussed below. For example, the Commission included thirteen proposed studies of embryo/fetal tissue research, five of which were divided into a request for “one mainstream study, one feminist study.” This epistemological framing creates an obvious tension between feminist perspectives and so-called “popular” thinking without indicating how or why such perspectives might differ. Such tension was evident not only in these forms of knowledge production, but across the makeup of the Commissioners themselves, who were later rent through internal divisions into “feminists” and “everybody else.” Judy G. Morrison, *Delivery Delayed: The Royal Commission on New Reproductive Technologies* (June 5, 1997) (unpublished M.A. thesis, Simon Fraser University) (on file with author).

¹² The relationship between liberatory and emancipatory feminist movements, on the one hand, and the repressive control exerted by state institutions, on the other, is structured by multiple and conflicting forms of power. An interesting treatment by Mimi Kim argues that such relationships tend towards the inherently paradoxical, as the more successful the social movement, the more likely its goals will be undermined by subordination to institutional power—a kinetic process that Kim dubs “the carceral creep.” Mimi Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973–1986*, ISSI GRADUATE FELLOWS WORKING PAPER SERIES 2013–2014.70 (U. Cal., Berkeley, Sch. Soc. Welfare Working Paper, October 14, 2015).

TWIN REGULATORY CHANNELS: MEDICALIZATION AND CRIMINALIZATION

The concept of *medicalization* describes a process “in which nonmedical problems become defined and treated as medical problems, usually in terms of illnesses or disorders.”¹³

In our history, we will see how the medicalization of reproduction has involved the growth and professionalization of medical dominance under the auspices of the state, alongside the “regulation and management of populations and bodies in the interests of a discourse which identifies and controls that which is normal.”¹⁴ In regard to reproductive technology, the baseline of “normal” which emerges from this process is a white, heterosexual, middle-class, able-bodied reproductive couple—the standard—bearer of the family form. This branch of our story thus aims to offer a window into the relationship between public health policy and family law, and the ways in which the medicalization of human fertility has contributed to the promotion of certain forms of (genetically-related) family.¹⁵

The other stream, that of *criminalization*, is reflected by the history of feminist organizing in Canada around (what were called at the time) new reproductive technologies or “NRTs”. We will trace how radical feminist¹⁶ concerns around reproductive technology in the 1980s exerted real impact upon legal reform in Canada, encouraging a mode of feminist engagement which hinged upon a criminal law power and a top-down mode of centralized control. This second branch of our story will illustrate how the injection of certain feminist perspectives into the construction of public health policy encouraged the criminalization of paid gamete donors and surrogates, while paying scant attention to the needs of queer and poor people seeking to have children through ART. Thus, certain modes of

¹³ BRYAN S. TURNER, *MEDICAL POWER AND SOCIAL KNOWLEDGE* 208 (2d ed., 1995).

¹⁴ *Id.* at 210; see also Peter Conrad, *Medicalization and Social Control*, 18 ANN. REV. SOC. 209, 209 (1992).

¹⁵ I have discussed the role of genetic (and non-genetic) relatedness in creating queer biokinsship at length in other work. My argument is that the intrinsically messy parenting projects of assisted reproduction demand a re-thinking of the alignments and arrangements pursued under the frame of biological kinship. A queer perspective allows us to de-naturalize the procreative certainty of erotic heterosexual coupling and determine where, how and on what grounds that questions of access to assisted reproduction should be staked. See Stu Marvel, *Polymorphous Reproductivity and the Critique of Futurity: Toward a Queer Legal Analytic for Fertility Law*, in *NEW INTIMACIES, OLD DESIRES: LAW, CULTURE AND QUEER POLITICS IN NEOLIBERAL TIMES*, (Oishik Sircar & Dipika Jain eds., 2017).

¹⁶ Competing ideologies within the women’s movement sought to influence the development of state policy around these technologies, with particular influence resting in the Canadian arm of a global network of radical feminists; a position which rejected reproductive technology as an instantiation of patriarchal control over women’s bodies.

feminism, and particularly those which lodge within the carceral state, have moved us further away from reproductive justice and related questions of access and reproductive entitlement.

My focus in this work is on LGBTQ communities, and the ways in which this political history has shaped current possibilities for queer family in Canada. I hope thereby not merely to understand the regulatory channels through which feminist contestation may produce certain governance outcomes, although this is an important theoretical project. By foregrounding queer lives within this history, I aim to center the material ramifications for families who have been and remain underserved by the legislative and clinical regulation of ART in Canada. I believe this provides valuable insight into how the privileging of an idealized form of “normal” reproduction—predicated upon the two-parent, heterosexual, biological family—alongside the privileging of a criminalized regulatory response to ART, has created tangible effects for those who fall outside normative models of kinship. Such an insight can better recognize the needs of all families to provide a richer account of who can and cannot reproduce through ART, toward the protection and promotion of reproductive justice for all.

OUTLINE OF PAPER

Section One of this paper will lay out a background to local and international feminist perspectives on reproductive technology in the 1980s and 1990s, and will conclude with the creation of a Canadian government commission tasked with a mandate to explore public sentiment around genetic and reproductive technologies. Section Two will discuss the stakeholders who addressed this task force and the different advocacy positions taken up, and overview the findings produced in the final report. Section Three will explore some of the legislative results (and non-results) that emerged in the wake of the commission’s report, and track these bills into law and the constitutional challenges that soon advanced. Section Four will conclude by discussing the gaps in representation and imagination that have impacted LGBTQ people today, and suggest some lessons for those concerned with ensuring access, resource support, and the creation of multiple family forms toward the goal of promoting reproductive justice.

SETTING THE SCENE: ANXIETIES OVER NEW TECHNOLOGY

Today, nearly thirty years after the first government commission was struck to examine the issue of new reproductive technologies, Canada still lacks many guidelines for their regulation and provision. As bioethicist

Francoise Baylis has protested in frustration at this long series of regulatory failures and disappointments:

Since the mid-1980s Canadians have advocated for the regulation of reproductive and genetic technologies. In 1993, the final report of the Royal Commission on New Reproductive Technologies recommended federal legislation. In 2004, after many failed attempts, legislation was passed. And, in 2010 much of that legislation was found to be unconstitutional.¹⁷

How did we get here? And what went wrong along the way? Such a genealogy must begin with the first challenge faced by regulators who sought to bring law and policy to bear in the laboratory: the difficulty of even *defining* what these new innovations were. When biotechnologies initially began to receive national press, particularly research in assisted reproduction and *in vitro* fertilization (“IVF”), they were often framed as elements of a strange and frightening scientific order. Surrogacy, test tube babies, cloning, and other reproductive technologies “became a pervasive theme in horror films and science fiction fantasies” as these new innovations “appeared to promise both amazing new control over nature and terrifying dehumanization.”¹⁸ Such dehumanization was soon understood to have specifically gendered effects.

Indeed, perhaps nowhere have women’s bodies been more medically managed than in terms of their relationship to reproduction.¹⁹ As a site of anxiety for the disruption of the natural order, as Marcia Inhorn has explained in relation to studies of infertility, such projects make clear that “women’s bodies are considered the locus of ‘disease’, and hence the site of anxious surveillance and intervention.”²⁰ This concern over the gendered nature of medicalization and its specific effects on female bodies has long been a central feminist concern, and one which animated much of the response to ART in the early 1980s. This section traces a variety of early feminist responses to reproductive technology, including both international

¹⁷ Françoise Baylis, *The Demise of Assisted Human Reproduction Canada*, 34 J. OBSTETRICS & GYNAECOLOGY CAN. 511, 513 (2012).

¹⁸ Dorothy Nelkin & M. Susan Lindee, *Cloning in the Popular Imagination*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 145, 145 (1998); see Karen Busby & Delaney Vun, *Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13 (2010), for a discussion of how Margaret Atwood’s popular novel fueled second-wave feminist concerns around women’s exploitation.

¹⁹ Michelle Walks, *Breaking the Silence: Infertility, Motherhood, and Queer Culture*, 9 J. ASS’N FOR RES. ON MOTHERING 2 (2007).

²⁰ Marcia C. Inhorn & Daphna Birenbaum-Carmeli, *Assisted Reproductive Technologies and Culture Change*, 37 ANN. REV. ANTHROPOLOGY 177, 178 (2008). The process of diagnosing a pathology requires its marking as deviance from the norm, thereby affirming a certain set of bodies and conditions as “healthy” and designating others as “unhealthy” and in need of treatment.

and distinctively Canadian movements.

INTERNATIONAL RADICAL FEMINIST MOVEMENT

An early and vocal response to these dystopian imaginings was offered by radical feminist scholars through their suspicion of the potential for technological domination over women's bodies. While this group comprised a diverse set of authors without consensus on many issues, their stance may roughly be characterized by the presumption of a foundational link between new reproductive technology and patriarchal culture.²¹ At the time, NRTs were viewed as an intensification of male scientific rationale directed toward dominion over female reproduction.²² From the position of many commentators, these were dangerous and untested procedures that were being forced upon women's bodies as guinea pigs of experimental science.²³ Such technologies were thus a force to be resisted and critiqued, and many radical feminists expressed suspicion of other women who willingly undertook procedures such as IVF; as collaborators with the patriarchal reproductive order, these women were hoodwinked pawns who doubted their own power.²⁴

But sometimes women also collude because we have been brainwashed. The information and education we get is one-sided and male-centered and the hidden conviction creeps into our own minds that men and their technology must be better than our own body and our own experiences with it.²⁵

Unease with new reproductive technologies coalesced into a remarkably global feminist movement in the mid-1980s, with the

²¹ Sarah Franklin, *Transbiology: A Feminist Cultural Account of Being After IVF*, in *CRITICAL CONCEPTIONS: TECHNOLOGY, JUSTICE, AND THE GLOBAL REPRODUCTION MARKET 1* (Rebecca Jordan-Young ed., 2011). See, for example, the founding anthology of feminist debates over new reproductive technology: *TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD?* (Rita Arditti et al. eds., 1984). For a review of early feminist work on new reproductive technologies, see Sarah Franklin & Maureen McNeil, *Reproductive Futures: Recent Literature and Current Debates on Reproductive Technologies*, 14 *FEMINIST STUD.* 545, 545–61 (1988).

²² *Transbiology: A Feminist Cultural Account of Being After IVF*, *supra* note 21; see also MARY O'BRIEN, *THE POLITICS OF REPRODUCTION* (1981).

²³ Rebecca Albury, *Who Owns the Embryo?*, in *TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD?* (Rita Arditti et al. eds., 1984).

²⁴ Yet, as Sarah Franklin helpfully points out, this was by no means the only position among radical feminists (and certainly not among the feminist community at large). This easy equivocation of reproductive technology with patriarchy was also resisted by many. *Transbiology: A Feminist Cultural Account of Being After IVF*, *supra* note 21.

²⁵ Renate Duelli Klein, *What's "New" About the "New" Reproductive Technologies?*, in *MAN-MADE WOMEN: HOW NEW REPRODUCTIVE TECHNOLOGIES AFFECT WOMEN 65* (Gena Corea et al. eds., 1987).

development of a network representing women from more than thirty countries.²⁶ FINRRAGE, or the Feminist International Network of Resistance to Reproductive and Genetic Engineering, consisted of prominent social critics Gena Corea, Janice Raymond, Renate Klein, and Patricia Spallone, among many others. FINRRAGE was perhaps the most vocal wing of a movement concerned with guarding the “natural” reproductive functions of women from male control, and produced literature, analysis, and organized conferences to bring these issues to the fore. As the FINRRAGE manifesto states:

We, women, declare that the female body, with its unique capacity for creating human life, is being exploited and dissected as raw material for the technological production of human beings. For us women, for nature, and for the exploited peoples of the world, this development is a declaration of war. Genetic and reproductive engineering is another attempt to end self-determination over our own bodies.²⁷

Radical feminists understood the expansion of reproductive technology within a patriarchal order as necessarily leading to women being exploited for their biological capacities. Drawing a parallel with prostitution and the commodification of female body parts through sexual labor, Corea envisioned a dystopic future in which the reproductive elements of a woman’s body would be stripped away and sold piecemeal:

Just as the patriarchal state now finds it acceptable to market parts of a woman’s body (breast, vagina, buttocks) for sexual purposes in prostitution . . . so it will soon find it reasonable to market other parts of a woman (womb, ovaries, egg) for reproductive purposes.²⁸

Many members of FINRRAGE were deeply concerned with the issue of surrogate motherhood, and predicted that expanded reproductive technology would lead to the commodification of women as factories of reproductive labor. This outcome would impact women from lower socio-economic brackets in particular, who would be reduced to “breeders” in this

²⁶ Gena Corea et al., *FINRRAGE: The Struggle Over New Reproductive Technology*, <http://www.finrrage.org/wp-content/uploads/2016/03/FINRRAGE.pdf>; see also *Prologue to MADE TO ORDER: THE MYTH OF GENETIC AND REPRODUCTIVE PROGRESS*, 1–12 (Patricia Spallone & Deborah Lynn Steinberg eds., 1987).

²⁷ Renate Duelli Klein, *Genetic and Reproductive Engineering—The Global View*, in *THE BABY MACHINE: THE COMMERCIALISATION OF MOTHERHOOD* 258 (Jocelyn A. Scutt, ed., 1988).

²⁸ Gena Corea, *The Reproductive Brothel*, in *MAN MADE WOMEN: HOW NEW REPRODUCTIVE TECHNOLOGIES AFFECT WOMEN* 42 (Gena Corea & Renate D. Klein eds., 1987).

new economy.²⁹ As shaped by race and nationality, women of color and those of precarious legal status would be unable to resist the patriarchal imperative to reproduce for (male) profit. Yet white women were also seen as cogs in this patriarchal machine, forced to produce eggs of “superior” value to be incubated by bodies of color. Corea again was a powerful oracle on the matter, imagining a site of commerce she called the “reproductive brothel” where women both white and black would be used as breeding machines for the patriarchy:

As I envision it, most women in a reproductive brothel would be defined as “nonvaluable” and sterilized and, in this way, their progeny culled. . . . Certainly women of color would be labeled “nonvaluable” and used as breeders for the embryos of “valuable” women. The white women judged genetically superior and selected as egg donors would be turned into machines for producing embryos. Through superovulation, “valuable” females as young as 2 years and some as old as 50 or 60 could be induced to produce eggs.³⁰

There were of course many other feminist positions taken on the subject of new reproductive technologies,³¹ some of which explicitly sought to counterbalance the vivid prophesies of writers like Corea and Klein. For example, Naomi Pfeffer and Anne Woollett published an early 1983 account of female infertility that was sympathetic to the issues faced by women in response to the oppositional tactics of more radical commentators.³² From the mid-1980s onward other FINRRAGE members also produced works on how and why women were accessing IVF and other reproductive technologies, seeking to moderate the “hard line” of feminist opposition to technology “which increasingly, to some, resembled a caricature of radical feminist goals.”³³

²⁹ GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* (1985).

³⁰ *Id.* at 278–79.

³¹ Scholars like Donna Haraway were also writing during this period, using a Marxist feminist analysis to understand the relationship between technology and reproduction. In a slightly different forum, corporeal feminists such as Luce Irigaray, Moira Gatens, Gayatri Spivak, Hélène Cixous, and Elizabeth Grosz had been developing an understanding of the body itself as the site of inquiry, and a site produced through social systems of meanings and discourse. LUCE IRIGARAY, *SPECULUM OF THE OTHER WOMAN* (Gillian C. Gill trans., 1974).

³² NAOMI PFEFFER & ANNE WOOLLETT, *THE EXPERIENCE OF INFERTILITY* (1983).

³³ *Transbiology: A Feminist Cultural Account of Being After IVF*, *supra* note 21, at 2.

FEMINIST MOVEMENTS IN CANADA

In Canada during this period, the women's movement had been galvanized by the 1982 patriation of the Constitution, including the development of a Charter of Rights and Freedoms that had seen sustained lobbying for constitutional reforms from organized movements in regard to Aboriginal rights and Québécois distinct society. Emerging from the same era was a campaign for women's rights that drew speakers and leaders from across the country, as "a collective and highly focused campaign, a campaign in which many women who were lawyers played some of the key roles as advisors and strategists."³⁴

This campaign successfully lobbied for the inclusion of a guarantee of equality in the wording of Section 15 of the new Charter, entrenching rights to protection of the law free from discrimination based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."³⁵ The inclusion of "sex" in Section 15 marked an important milestone for the nascent Canadian women's movement,³⁶ while successful organization and activism around the lobbying effort had resulted in the establishment of the Women's Legal Education and Action Fund ("LEAF")—a body which continues to exert a considerable influence on women's rights in Canada.³⁷

³⁴ M.J. Mossman, *The Paradox of Feminist Engagement with the Law*, in FEMINIST ISSUES: RACE, CLASS AND SEXUALITY 180, 182 (Nancy Mandell ed., 2d ed. 1998). See also CONSTITUTE THIS! (International Women's Rights Project 1998) for archival footage of the era and the complex debates which pushed the Canadian women's movement forward.

³⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Sexual orientation was not included in this list of grounds, despite an amendment that called for its enumeration proposed by then-Member of Parliament Svend Robinson. A parliamentary committee rejected the amendment by twenty-two votes against and two for, with then Minister of Justice, Jean Chrétien, saying, "We have explained that there are other grounds of discrimination that will be defined by the courts. We wanted to have an enumeration of grounds and we do not think it should be a list that can go on forever." Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits*, 49 MCGILL L. J. 1145, 1146 (2004); *see also Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 1st Sess., 32d Parl., Issue No. 48 at 48:20–1, 48:31–4.

³⁶ This remains the case, no matter how limited the actual gains from the *Charter* may have been. See Bruce Ryder's work on Charter equality provisions, including: Bruce Ryder et al., *What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions*, 24 SUP. CT. L. REV. 1 (2004); Bruce Ryder & Taufiq Hashmani, *Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989–2010*, 51 SUP. CT. L. REV. 505 (2010). See also Margot Young's critical work in this area, including: Margot E. Young, *Blissed Out: Section 15 at Twenty*, 33 SUP. CT. L. REV. 45 (2006); Margot E. Young, *Unequal to the Task: "Kapp"ing the Substantive Potential of Section 15*, 50 SUP. CT. L. REV. 183 (2010).

³⁷ LEAF is a national, charitable, non-profit organization, founded in 1985. LEAF works to advance the substantive equality rights of women and girls in Canada through litigation, law reform, and public education using the Canadian Charter of Rights and Freedoms. LEAF works to ensure Canadian courts provide the equality rights guaranteed to women and girls by Section 15 of the Canadian Charter,

Another federal organization representing women's issues at the time was the National Action Committee on the Status of Women ("NAC"), which came out of the Charter debates as a strong force in dialogue with the government. NAC would soon mature into a central player in advocating against the widespread and uncritical adoption of new reproductive technologies.

Indeed, issues of reproductive technology were already on the map in Canada by the time of the Charter discussions. The 1978 birth of Louise Brown in Britain as the world's first successful IVF baby had global impact, indicating the potential for heretofore unseen ethical issues in human reproduction. Four years later, in 1982, there was a much-publicized case of a couple from a small town in Ontario arranging a contract with a surrogate from Florida.³⁸

The absence of government regulation over these types of negotiations became a cause of concern for many Canadian feminists, with local perspectives heavily impacted by the international discussion. Many echoed FINRRAGE in expressing a range of fears regarding the exploitation of women's bodies. Sunera Thobani, for example, argued that these technologies would:

[S]erve to increase the control by the racist, patriarchal, scientific and medical communities over women's reproductive abilities. The control of women's reproductive ability and sexuality, the control of women's bodies, is a cornerstone of patriarchal power. We are seeing the extension of this patriarchal control over women's bodies through the development of this technology.³⁹

Lesbian scholar Somer Brodribb, in a 1986 paper in the *Canadian Journal of Women and the Law*, echoed many of these concerns. Brodribb also expressed worry about "the ways in which patriarchal jurisprudence is moving to absorb and direct medical developments in reproductive technology."⁴⁰ As a Canadian contact for FINRRAGE, she rejected the use of NRTs as a patriarchal strategy of dominance aimed at removing

and is a frequent intervener in Supreme Court cases involving gender issues.

³⁸ The couple paid \$20,000 to the woman, and in exchange she came to Canada, gave birth to the child, and left the country shortly afterward. Although the child was initially seized by the Metro Toronto Catholic Children's Aid Society, the baby was eventually returned to the couple, with the Ontario Supreme Court ruling that the Scarborough man was the legal and biological father. Somer Brodribb, *Off the Pedestal and Onto the Block? Motherhood, Reproductive Technologies, and the Canadian State*, 1 CAN. J. WOMEN & L. 407, 415 (1986); see Ellie Teshler, "I Need Laws on Surrogate Motherhood," *Judge Says*, TORONTO STAR (June 26, 1982); *Judge Rules "Surrogate" Has Right to Keep Baby*, TORONTO GLOBE & MAIL (June 6, 1981).

³⁹ Sunera Thobani, *More than Sexist . . .*, HEALTHSHARING, Spring 1991, at 10, 13.

⁴⁰ Brodribb, *supra* note 38, at 407, 417.

reproductive autonomy from the hands of women, arguing that “the masculinist, racist, and classist nature of scientific rationality, and its consequent devastation of women and nature, demonstrates that these technologies are not neutral.”⁴¹ Brodribb was particularly concerned that any governmental push to regulate NRTs would be motivated by the perceived threat to fatherhood, and therefore to patriarchy, and would result in a slew of court cases that were likely undermine the future potential of legal recognition for gay and lesbian parents.⁴²

Discourses of commercialization and fears of Corea’s “reproductive brothels” coming to pass were also prevalent. The high cost of interventions such as IVF were viewed as a mechanism to keep them out of the grasp of anyone but white middle-class women, thereby ensuring the sterility of the disabled, non-white, and lower classes.⁴³ There was seen to be real potential for a new eugenics movement, with a belief that “NRTs are actually just new ways to reproduce OLD inequalities.”⁴⁴

As with the global setting, of course, many other feminist voices emerged during the 1980s and early 1990s, some of which took a positive stance on ART and saw them as useful options for women and their families. These perspectives emerged powerfully from the infertility community, with women arguing for the coverage of IVF cycles within Canada’s framework of socialized medicine.⁴⁵ Nevertheless the dominant discourse remained strongly inflected by a radical feminist critique which stood wary of the harmful effects of commercialization on women’s bodies. A concern for inequality as exacerbated by medical expertise, the biotechnology industry, and scientific research came to the fore, creating a national discourse that “successfully forged an inextricable link . . . between

⁴¹ Brodribb’s position as both an out lesbian and a member of FINNRAGE illustrates the slippery nature of ideological positions, and the imprecision of creating feminist taxonomies that would bracket radical feminism from lesbian feminism. *Id.* at 408.

⁴² *Id.*

⁴³ Anthropologist Sari Tudiver, for example, wrote of the negative effects on women and children already being wrought by a global economy. She predicted that new reproductive technologies would only exacerbate and expand existing inequalities, with embryos being harvested for organs and tissues and women being sold into reproductive slavery. Women who chose not to have children, or who could not conceive, would be labeled as deviant or selfish as the social value of women was narrowed down to their biological capacity to reproduce. Tudiver feared that ART was thereby poised to reinforce a white, middle-class ableist concept of motherhood as well as entrenching women’s social role as mother, while threatening to legitimize discrimination based on race, gender, class, and ability. Sari Tudiver, *Canada and the Global Context of the New Reproductive Technologies: A Cautionary Essay*, in *MISCONCEPTIONS: THE SOCIAL CONSTRUCTION OF CHOICE AND THE NEW REPRODUCTIVE AND GENETIC TECHNOLOGIES* 67–70 (Gwynne Basen et al. eds., 1993).

⁴⁴ Tannis Doe, *The New Reproductive Technologies: Discriminating Misconceptions of Choice*, HERIZONS, Spring 1994, at 45.

⁴⁵ Mavis Jones & Brian Salter, *Proceeding Carefully: Assisted Human Reproduction Policy in Canada*, 19 PUB. UNDERSTANDING SCI. 426, 426 (2010).

the profit potential of human reproductive technologies and the systemic oppression of women.”⁴⁶

Concerns over commodification, male oppression, and exacerbated inequality thus provided the main drivers in the feminist community. By the mid-1980s, groups such as NAC had taken up Corea’s reproductive brothel framework, arguing that new reproductive technologies would turn women into “breeders” of the human race. Drawing upon Canadian author Margaret Atwood’s popular dystopian novel, about a future where a fertile underclass of women are compelled to act as reproductive servants, or “handmaids,” to a non-fertile elite, such nightmare scenarios gave a uniquely Canadian spin on what would come to be if ART was not adequately regulated.⁴⁷

STEPS TOWARD REGULATION IN CANADA

The case of the small-town couple who had commissioned an American surrogate, and the flurry of media surrounding it, was generally viewed as a driver behind a 1982 request to the Ontario Law Reform Commission to develop a report on the legal implications of NRTs. The next year, the Ontario Law Reform Commission produced their *Report on Human Artificial Reproduction and Related Matters* (“*Report*”) to no small degree of consternation. According to a 1986 critique by Mary Anne Coffey, the *Report* was not an examination of the technologies so much as a social prescription for their control.⁴⁸ She also soundly criticized the document for taking a patriarchal and heterosexist worldview which limited access to heterosexuals and heterosexual relationships, “while female reproductive and social independence from men is penalized or rendered problematic.”⁴⁹ The *Report* also left control entirely in the hands of medical and legal professionals, without apparent concern for women’s issues and knowledge about their own bodies.⁵⁰ As Coffey wrote with urgency, these were vital matters that needed to be addressed by feminist thinkers and political actors:

For feminists concerned with the social effects of reproductive technology, this is therefore a crucial time: technical knowledge and applications are advancing much

⁴⁶ *Id.*

⁴⁷ Indeed, NAC even took the title of Atwood’s book as the title of their submission to the forthcoming Royal Commission on New Reproductive Technologies. NAC, *A Technological Handmaid’s Tale: Executive Summary*, CWMA NAC fond X10-24, box 651 file 5, ii.

⁴⁸ Mary Anne Coffey, *Of Father Born: A Lesbian Feminist Critique of the Ontario Law Reform Commission Recommendations on Artificial Insemination*, 1 CAN. J. WOMEN & L. 424, 431 (1985–86).

⁴⁹ *Id.*

⁵⁰ *Id.* at 433.

more rapidly than corresponding social definition and ordering, which means that public policy is in a state of flux and is likely to remain so for some time to come. New systems of socio-ethical interpretation and legal regulation are currently under construction in many jurisdictions or have only recently been formulated in law. Newly enacted statutes may be difficult to amend, but the current proposals for Canadian federal and provincial legislation are still subject to public debate and as such can be influenced by feminist criticism and lobbying efforts.⁵¹

Coffey was especially concerned for the inclusion of lesbian perspectives in these critical and lobbying efforts, for as she saw it: “If proposed legislation does not meet the material needs of all women, including lesbian women, it must be countered with informed dissent and active resistance by feminists.”⁵² Despite the presence of deep and growing tensions within the feminist movement—largely framed by a disjuncture between more liberal perspectives which sought to provide women (including lesbians) with reproductive choices, and those which sought a moratorium on access to all forms of ART—there developed an awareness that government regulation should not be allowed to pass without comment.

Notwithstanding a suspicion of the patriarchal state, the goal of the movement soon became one of *additional* regulation and engagement as a way to reign in the medicalization of women’s bodies: “Feminist activists feared that scientists and doctors, as the perceived traditional enforcers of women’s reproductive roles, would increase their control over women’s reproductive health unless the federal government took steps to set national standards over NRTs and impose restrictions on certain practices.”⁵³ It was demanded that government, not just the medical and research communities, take control of regulation to ensure the safety of women.⁵⁴

FINRRAGE had studied a series of governmental reports, which were commissioned to provide advice on the management of new reproductive technologies.⁵⁵ These included the aforementioned report from the Ontario Law Reform Commission, as well as the Warnock Report and the Waller

⁵¹ *Id.*

⁵² *Id.*

⁵³ Tanya Daley, *The Politics of “Choice”: Canadian Feminism and the Royal Commission on New Reproductive Technologies* (2011) (unpublished M.A. thesis, University of Ottawa) (on file with author); see also Ann Pappert, *Can Feminism Survive Test-Tube Revolution?*, in *THE REPRODUCTIVE REVOLUTION: SPECIAL REPORT BY ANN PAPPERT* (1989).

⁵⁴ Jones & Salter, *supra* note 45.

⁵⁵ Patricia Spallone, *Reproductive Technology and the State: The Warnock Report and its Clones*, in *MADE TO ORDER: THE MYTH OF REPRODUCTIVE AND GENETIC PROGRESS* 167 (Patricia Spallone & Deborah Lynn Steinberg eds., 1987).

Report. All had been deemed to lack a clear feminist research agenda.⁵⁶ Patricia Spallone, a prominent FINRRAGE member, described these documents as capitulations by government to the interests of scientific capital which failed to protect women's needs and integrity.⁵⁷

Canadian feminists concluded that without their participation, it was likely that any emergent legislation would simply reinforce patriarchal value systems.⁵⁸ Worried that a federal study would follow in the footsteps of the United Kingdom and Australia, not to mention the Ontario Law Reform Commission, it was seen as vital that a feminist approach be part of any analysis of the emergence of NRTs.⁵⁹ Thus, a collection of feminist activists, academics, and health advocates came together in the spring of 1987 to form the Canadian Coalition for a Royal Commission on New Reproductive Technologies under the guidance of sociologist Margrit Eichler, with the goal of heightening public awareness and sparking a federal investigation of the impact of reproductive technologies.⁶⁰ Of course this position was not shared by all within the broader women's community, with some speaking against the Commission format as a process which would remain inaccessible to feminist influence.⁶¹

A Royal Commission was nevertheless the targeted vehicle for a feminist-led inquiry into new reproductive technology, due to its substantial budget, research staff, ability to foster public debate, and the perceived success of a Royal Commission on the Status of Women which had run from 1967 to 1971.⁶² The Royal Commission was to be the access point for feminists to the state, and they sought to define its mandate from the start.⁶³ As Mavis Jones and Brian Salter describe: "By framing the policy problem as one of protecting the vulnerable from exploitation, they brought the social and ethical implications of genetic technologies into sharp relief."⁶⁴

After two years of sustained lobbying, the Coalition's efforts were successful. In the autumn of 1989, the government announced the

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Margrit Eichler, *Frankenstein Meets Kafka: The Royal Commission on New Reproductive Technologies*, in MISCONCEPTIONS: THE SOCIAL CONSTRUCTION OF CHOICE AND THE NEW REPRODUCTIVE AND GENETIC TECHNOLOGIES 196–222 (Gwynne Basen et al. eds., 1993).

⁵⁹ Jones & Salter, *supra* note 45.

⁶⁰ Eichler, *supra* note 58.

⁶¹ Annette Burfoot, *In-appropriation—A Critique of Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*, 18 WOMEN'S STUD. INT'L F. 499, 500 (1995); see Somer Brodribb & Louise Vandelac, *Panel Three: Ethics of the Body L'ethique du Corps*, in FEMINIST ETHICS 60–68 (Kathleen Martindale ed., 1987).

⁶² Burfoot, *supra* note 61.

⁶³ Lorna Weir & Jasmin Habib, *A Critical Feminist Analysis of the Final Report of the Royal Commission on New Reproductive Technologies*, 52 STUD. POL. ECON. 137, 147 (1992).

⁶⁴ Jones & Salter, *supra* note 45, at 12.

appointment of a Royal Commission on New Reproductive Technologies (“RCNRT”) which would not consider biotechnology as solely a matter of interest to economic policy. Instead the RCNRT would operate on a mandate:

[T]o examine current and potential scientific and medical developments related to reproductive technologies, but also to go beyond them to consider:

- the impact of the technologies on society as a whole;
- their impact on identified groups in society, specifically women, children, and families; and—
- the ethical, legal, social, economic, and health implications of these technologies.⁶⁵

A pediatrician and medical geneticist named Patricia Baird was tapped to lead, and provided with a budget of \$24.7 million to fulfill this sweeping mandate. Commissioners included two self-identified feminists as well as a lesbian named Dr. Grace Marion Jantzen,⁶⁶ a professor of religion who was Canadian-born, but living and lecturing in London, England.⁶⁷ There was, however, no representation from the heterosexual infertile community, or other patient-advocacy groups who might be expected to hold concern for questions of access and state-funding for reproductive technology.⁶⁸ Nor was there any representation by people of color, Aboriginal people, or members of the disability community. Nevertheless, hopes for the RCNRT were high.

⁶⁵ ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 3 (1993) [hereinafter PROCEED WITH CARE].

⁶⁶ Interestingly, most of the feminist writings about the Royal Commission, and especially the rift that was to occur between Baird and certain Commissioners, do not mention Jantzen’s lesbianism nor her feminist scholarship. Yet Jantzen, a Quaker and a leading voice in the feminist philosophy of religion, would later bring the work of Irigaray, Lacan, Foucault, and Derrida to feminist theology and the philosophy of religion, and challenge the preoccupations of male-dominated Western philosophy which Jantzen saw as driven by a concern with death. Her work with the RCNRT in particular had demonstrated to Jantzen the “glaring interconnection between power and gender” in the study of new reproductive technologies, and she reflected on her time with the Royal Commission as a period in which she “began to take serious notice of who are the beneficiaries and who are the victims of systems of power/knowledge. In the case of new reproductive technologies, the beneficiaries are those with powerful vested interests: pharmaceutical companies, big science, big business. The victims, too often, are women, children, aboriginal people, disabled people, ethnic minorities.” GRACE M. JANTZEN, POWER, GENDER AND CHRISTIAN MYSTICISM xv (1995). See also a eulogy written upon her death in 2006: Jeremy Carrette, *Grace Jantzen: A Feminist Voice Expanding the Philosophy of Religion*, GUARDIAN (May 11, 2006).

⁶⁷ PROCEED WITH CARE, *supra* note 65, at 3.

⁶⁸ As Tanya Daley notes in her M.A. thesis on infertility communities, due to the treatment of infertility as a private issue, there was little public discussion at the time on the topic, and the infertile were not recognized as a distinct community in the way cultural/racial minorities and LGBTQ communities were. Daley, *supra* note 53, at 69.

THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES

The Commission's progress was never smooth, and continued delays in appointing key staff, organizing research plans and coordinating public consultations resulted in frustration both inside and outside the RCNRT. There were allegations of irregular research ethics and a lack of transparency, and the Commission kept data, protocols, and selection of personnel under wraps with research shielded from peer review.⁶⁹ Nevertheless, nationwide public hearings eventually commenced, and women's groups took the lead in responding.⁷⁰

⁶⁹ Weir & Habib, *supra* note 63.

⁷⁰ The Commission also undertook a series of public polls, including a survey on the topic of "Social Values and Attitudes," which included a section on gay and lesbian families. Conducted by phone and in writing between December 1991 and July 1992, this survey purported to gain a greater understanding of Canadians' general outlook with regard to a sense of tolerance and equality. To this end, it included "several items asking about the principle of equality; attitudes toward immigration and the extent to which Canadians welcome others to our society; tolerance levels for homosexual relationships; and general attitudes toward women and women's role in society." PROCEED WITH CARE, *supra* note 65, at 28.

The survey found that 90% of participants agreed with the gender equality provisions in Section 15 of the *Charter*, with over two-thirds in strong agreement. Similarly, a majority felt that equality between men and women had not been achieved (69%), and that women gaining more power in society would have a positive impact overall (76%). However, when it came to the matter of "homosexual relationships" the answers were scattered widely, with 35% expressing acceptance, 21% having no opinion, 16% saying they were unacceptable, and 27% finding such relationships totally unacceptable. PROCEED WITH CARE, *supra* note 65, at 29. In another part of the survey it was asked whether a homosexual couple with children constituted a family. Thirty-seven percent of respondents answered in the affirmative, while just 13% considered a childless homosexual couple to be a family. *Id.* at 43.

When it came to reproductive technology and gays and lesbians, the responses were even more polarized. According to survey results, 74% of respondents supported reproductive technology to help an infertile heterosexual couple conceive. The specific scenario of a single woman using anonymous donor sperm was supported by 30% of respondents, while a lesbian couple using donor sperm was supported by just 11%. *Id.* at 43. The scenario of a gay male couple using a surrogate was not raised.

It is important to note that the polls themselves were not without criticism, with concern coming even from within the RCNRT's ranks. Commissioner Louise Vandelac spoke out publicly against the methodology as the only social scientist with extensive experience with surveys and opinion polls, expressing worry that the use of polls as a route to determine public policy was a dangerous and flawed course. Louise Vandelac, *From Bird to Baird: The Royal Commission ne Suivent Mais ne Suivent Mais ne se Resembleur pas*, Presentation at the Association Nationale de la Femme et du Droite, Vancouver, BC (Feb. 19–21, 1993). As Vandelac made clear, polls were seen to be questionable instruments for a variety of reasons: they may be carried out by companies who may lack expertise in the particular subject matter; they may be executed with flawed or inadequate background information; they may be financed by potentially biased organizations; they lack direct contact with the individual, which may be particularly inappropriate for sensitive topics such as NRTs; they may contain leading or misleading questions; complex responses are difficult if not impossible to capture; poll results are sometimes difficult to interpret; and polling overall leads to the impression of wide public engagement when such consultation is far from meaningful.

REPRESENTATION BY RADICAL FEMINIST GROUPS SEEKING PROHIBITION

Over fifty women's groups made submissions to the Royal Commission from 1990 to 1992.⁷¹ Overwhelmingly, these groups called for the regulation of NRTs from a feminist perspective, asking the government to understand the political, social, and economic factors that shaped women's realities. The social construction of motherhood was especially critiqued, with groups calling attention to the way that these technologies served to institutionalize women's "natural" role as wife and mother. A group from Laval University, *Le Groupe de Recherche Multidisciplinaire Feminist*, argued that women were no longer under pressure from the clergy and law to have children, yet Western society was perpetuating the idea that real womanhood was not achieved unless women gave birth, thus forcing them to seek the status of birth mother.⁷²

NAC came down even more strongly against these technologies, calling for a halt on the construction of new IVF clinics, a ban on all commercial trade in sperm and ova, and a ban on commercial surrogacy.⁷³ NAC also sought to ban sex-selection testing and to preclude court-ordered obstetrical interventions. In a brief which took its title and inspiration from Atwood's novel *The Handmaid's Tale*, about a captive "breeder" class of women, NAC argued that:

[T]hese technologies represent the wrong direction in society's attempt to solve the problems of infertility. We believe that, on balance, the new reproductive technologies are oppressive to women. They are not effective in preventing or curing infertility or disability but will contribute to economic and social trends that erode women's overall rights, well-being, and social standing.⁷⁴

Instead, they suggested a focus on the prevention of infertility and maternal support programs to address the causes of infant disability, as well as research into the emotional and physical impact of IVF on mothers and children.⁷⁵

Representation by Liberal Feminists Seeking Improved Choices

In the opposite camp, infertility associations were some of the best-

⁷¹ PROCEED WITH CARE, *supra* note 65.

⁷² Daley, *supra* note 53.

⁷³ NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN, THE NEW REPRODUCTIVE TECHNOLOGIES: A TECHNOLOGICAL HANDMAIDS TALE: A BRIEF PRESENTED TO THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES (1991).

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 29–30.

organized national voices arguing against the prohibition of reproductive technologies. Such groups were largely represented by the Infertility Awareness Association of Canada, who had placed a call to its members in developing a submission to the RCNRT.⁷⁶ The potential for federal restrictions on ART was a cause for concern, and the IAAC responded with panic.⁷⁷ The IAAC's brief was also focused on the social construction of motherhood and the pressures of a pro-natalist society, but from the perspective of infertile citizens who demanded entrance into this culture.⁷⁸ The brief discussed the social pressure felt by the infertile and their sadness, loss, anger, guilt, and feelings of exclusion from the fundamental identity of parenthood.⁷⁹

The submission included a statement from Marie Morrissey of the IAAC, who declared that the infertile heterosexuals of society perceived themselves as isolated, marginalized, and even excluded from the health care system because they were viewed as having "unimportant problems."⁸⁰ Access to ART would allow the infertile to overcome their disability⁸¹ and participate in society. Regulatory focus was thus trained not on the looming potential for danger created by an autocratic patriarchy, but for unrestricted access to fertility services and, crucially, the funding of such services under provincial healthcare regimes.⁸² Representatives from the IAAC publicly opposed the position staked out by NAC, out of fear that NAC's campaign could substantially limit their future access to reproductive assistance.⁸³

This pivotal disagreement over issues of access to ART, and the claims of infertile women to reproductive autonomy and the choice of IVF, led to a bitter rift within the feminist community.⁸⁴ Some women left NAC because of its position on the strict regulation of all reproductive technology, including the ban on surrogate motherhood. Indeed, as Tanya Daley reports, the pages of the IAAC newsletter and the IAAC submission to the Royal Commission depict not only the pain of being childless, but also the sadness and anger felt by those women who had been part of a feminist movement

⁷⁶ Daley, *supra* note 53, at 82.

⁷⁷ *Id.*

⁷⁸ Infertility Awareness Association of Canada ("IAAC"), Submission to the Royal Commission on New Reproductive Technologies, LAC RCNRT RG33-154, file no. PH-9-OT (Apr. 30, 1992), at 1.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Infertile people identified themselves as reproductively disabled, with 53.5% of the IAAC's surveyed membership affirming that "infertility is a disability." Paula Timmons & Trish Maynard, *IAAC's Royal Commission Survey*, INFERTILITY AWARENESS, May, 1991, at 1, 11.

⁸² *Id.*

⁸³ Nancy Jackson, *The Royal Commission—It's Time to Speak Out!*, INFERTILITY AWARENESS, May/June, 1989, at 6.

⁸⁴ *Id.*

that they now perceived as excluding them. As described by Karen Woolridge, a regular contributor to *Infertility Awareness*: “I mourned the loss of friends in the women’s movement and the loss of the support of the community itself.”⁸⁵ During these transitions IAAC was silent on the issue of gays and lesbians and their access to reproductive technology, as its focus remained only on heterosexual couples suffering from infertility.

REPRESENTATION OF GAYS AND LESBIANS SEEKING RECOGNITION OF SAME-SEX RELATIONSHIPS

Gay and lesbian groups were represented directly at the Royal Commission, although at this point in the movement the focus was primarily on fighting for the legal recognition of same-sex relationships. In the submission to the RCNRT by Equality for Gays and Lesbians Everywhere (“EGALE”), a national advocacy organization based in Ottawa, the group stated that the gay and lesbian community had chosen to stay out of this debate until the fundamental issue of the legal recognition of same-sex relationships was addressed.⁸⁶ However, they did warn against the potential restriction of insemination to heterosexual couples as “morally wrong.”⁸⁷ As they explained, to ban gays and lesbians from access to reproductive technologies and materials would further constrict the legal definition of the family as a heterosexual entity, thereby seriously compromising the struggle for equal rights.⁸⁸

While NAC made one reference in its brief to the reproductive needs of lesbians (in regard to the barriers faced in accessing IVF), they made no mention of gay men. Members of the group were certainly aware that same-sex female couples were far more likely to use assisted insemination with a known or anonymous donor than IVF, yet the language remained focused on technological provision rather than access to gametes.⁸⁹ Nor was the barring of lesbians from fertility clinics flagged as a concern by either EGALE or NAC, despite the fact that the brief coincided with a period of history in which same-sex couples faced substantial hurdles in accessing reproductive technology. As testified before the RCNRT a few years later, a study from that era had found that nineteen out of thirty-three surveyed clinics reported an intent to deny services to women who identified as

⁸⁵ Karen Woolridge, *Feminism at the Conference*, INFERTILITY AWARENESS, July/Aug., 1991, at 12.

⁸⁶ EGALE, Brief Presented to the Royal Commission on New Reproductive Technologies by Les McAfee and Cecelia McWilliams, LAC RCNRT RG33-154, file no. PH-15-OT.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Coffey, *supra* note 48.

lesbian.⁹⁰ A case from British Columbia, which began in 1993, indicated that such refusals were not an uncommon part of clinical practice.⁹¹

Commissioners for the RCNRT also heard from single women and lesbians who described the forms of discrimination they had experienced in the traditional medical setting.⁹² Some witnesses told the Commission that the “over-medicalization of assisted insemination using donor sperm has created a situation in which medical practitioners have become gatekeepers,” enforcing what they perceive to be community standards about family formation by establishing access criteria that exclude single or lesbian women.⁹³ For example, a representative from the Halifax Lesbian Committee on New Reproductive Technologies expressed concern about the categorization of donor insemination as a medical technology: “[A] problematic . . . recommendation is a designation of alternative insemination as the practice of medicine. . . . This would make self-insemination subject to legal prosecution.”⁹⁴

Similarly, other women expressed concern that the utilization of new reproductive technologies not be limited to married heterosexual couples. Drawing upon a feminist framework that stressed inclusion over restriction, historian Katherine Arnup testified to the RCNRT as a private citizen, urging that broad access to ART be granted to all Canadians:

Increasingly the use of all of the new reproductive technology is being limited to married or at least cohabiting

⁹⁰ PROCEED WITH CARE, *supra* note 65, at 454.

⁹¹ The dispute arose after Dr. Korn, a Vancouver fertility specialist, had been obliged to provide expert witness testimony to a custody and support case involving two lesbians—a former patient and her partner. (The case was *Anderson v. Luoma* (1986), 50 R.F.L. 2d 127 (Can. B.C. Sup. Ct.)). While the names of the women were protected, Korn’s was not, and he received unwanted publicity for his role in the case, including telephone calls criticizing him for providing artificial insemination to lesbians. He subsequently announced his refusal to provide reproductive assistance to all lesbian women, although he would still provide other medical services. Pursuant to this policy he refused to provide assisted insemination to a same-sex couple who had sought out his medical practice in April 1993, instead referring them to other physicians. The women lodged an unsuccessful complaint with the College of Physicians and Surgeons of British Columbia asking that Korn be disciplined for unethical actions. They then lodged another complaint with the British Columbia Council of Human Rights, which found that Korn did not have justification to deny them services under the *British Columbia Human Rights Act*. The grounds of this complaint were that Korn denied the women “a service or facility customarily available to the public” due to “sexual orientation and/or family status, contrary to s.3 of the *Human Rights Act* of British Columbia.” A judicial review of the decision by the British Columbia Supreme Court found that the human rights complaint had been decided correctly, with Korn indeed in violation of the Act. As the first case to be decided after “sexual orientation” was added as a protected ground in the *British Columbia Human Rights Code* in 1992, this was a major victory for lesbians seeking access to donor sperm in British Columbia. See *Korn v. Potter* (1996), 22 B.C.L.R. 3d 163 (Can. B.C. Sup. Ct.).

⁹² PROCEED WITH CARE, *supra* note 65, at 385.

⁹³ *Id.*

⁹⁴ M. Patrell, Halifax Lesbian Committee on New Reproductive Technologies, Public Hearings Transcripts, Halifax, Nova Scotia (Oct. 17, 1990), in PROCEED WITH CARE, *supra* note 65.

heterosexual couples. Single women, whether they are heterosexual or lesbian, find themselves denied access to fertility treatment and to artificial insemination (“AI”). And I am here today to suggest that it is critical that these technologies not be limited to a select population. I believe that access to AI should not be influenced by race, class, physical disability, marital status or sexual orientation.⁹⁵

The Commission also learned about what was termed self-insemination (“SI”), through studies based on the experiences of lesbian women who had used SI and others who had been involved in its provision.⁹⁶ Women who chose SI reported a desire to have control over the process, to avoid intercourse, to avoid unnecessary medications, or to avoid having to justify their wish to be a parent to clinical staff.⁹⁷ The majority of women who chose SI used anonymous donors for fear of legal complications and from a desire to raise the child without the involvement of the donor. Although some said they were able to get safe frozen sperm from “friendly MDs,” this was the exception, not the rule.⁹⁸

Primarily lesbian-organized assisted insemination networks were also discussed, as was their aim of providing knowledge, resources, and access to donor sperm.⁹⁹ Reports indicated that these networks were mainly using fresh sperm, with little information available about the donors; at the time of the proceedings, only one group of women in Ontario had their own equipment to cryopreserve sperm.¹⁰⁰ The issue of fresh sperm was beginning to emerge as a site for medical regulation, due largely to the ballooning AIDS crisis and an impression that lesbians were frequently relying upon gay men to act as donors.¹⁰¹ The Commission heard how HIV testing and screening for STDs was fairly rare, as “in interviews with 19 women involved in SI networks, only 9 reported that donors were tested for HIV, and only 7 used frozen sperm.”¹⁰² As we will see, these concerns about health screening and data-keeping protocols were to be reflected directly in the RCNRT final report, with the regulatory goals of medicalization and criminalization taking precedence over lesbian-

⁹⁵ K. Arnup, Private Citizen, Public Hearings Transcripts, Toronto, Ontario (Nov. 20, 1990), in *PROCEED WITH CARE*, *supra* note 65.

⁹⁶ *PROCEED WITH CARE*, *supra* note 65, at 459.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Brodribb similarly describes how a group of unmarried and lesbian women in Windsor, Ontario, established the first Canadian women’s artificial insemination service in June 1982. Brodribb, *supra* note 38, at 415.

¹⁰⁰ *PROCEED WITH CARE*, *supra* note 65.

¹⁰¹ *Id.*

¹⁰² *Id.*

articulated questions of access and grassroots support.

These were the complex and often competing messages conveyed to the RCNRT, with the “feminist” position that became dominant throughout the hearings roughly typified as one of prohibition, especially in regard to commercial surrogacy, commercial trade in gametes and expanded access to IVF.¹⁰³

PUBLICATION OF PROCEED WITH CARE

When *Proceed With Care*, the final report of the Baird Commission, was finally released in late 1993, it spanned 1275 pages housed in two volumes, was supported by fifteen volumes of research findings, and put forth 293 recommendations. It was also nearly two years late and three million dollars over budget.¹⁰⁴ While some initially responded with relief at its apparent gender sensitivity,¹⁰⁵ others were disappointed that the

¹⁰³ Even as these messages churned slowly through the wheels of the RCNRT, frustration with its operations and lack of transparency had reached a boiling point. Despite the Commission’s origin as being “born of lobbying by feminist groups, it had been rapidly disowned by women’s organizations.” Charlotte Gray, *The Report on New Reproductive Technologies: Will it Lead to Change, or Gather Dust?*, CAN. MED. ASS’N J. 266 (1994). Indeed, by late 1991 the head of NAC at the time, Judy Rebick, had publicly declared a lack of confidence in the Commission and in the apparent hostility of Chairperson Baird to the inclusion of feminist perspectives. DAVID LEYTON-BROWN, CANADIAN ANNUAL REVIEW OF POLITICS AND PUBLIC AFFAIRS 46 (1991). Of particular suspicion was the autocratic role being played by Baird herself, and the lack of confidence in her leadership of the RCNRT. Four fellow commissioners, including two of the most prominent feminist voices, attempted to take Baird to court to force her to share details of the gathered research. *Id.* at 114. After a public falling-out, the dissenting commissioners were fired.

¹⁰⁴ Baird had already been under fire for other reasons during this time. She had taken particular heat from some members of the disability rights movement for an article she had co-authored in 1982, in which she discussed the benefit of extending the prenatal diagnosis program in British Columbia to detect Down Syndrome and neural tube defects in the unborn. Baird and her co-author maintained that the cost of providing prenatal diagnosis and abortion for defective fetuses was far lower than providing extra medical and social services for disabled individuals over their lifetimes. In a radio interview, she explained: “I can tell you in our prenatal diagnosis program in the last few years we’ve detected 62 abnormal fetuses [she is referring to unborn babies with spinal bifida]. The parents have elected in every single case to terminate. So, that is 62 individuals who would have been seriously handicapped and a burden on the health-care system even if you figured they only lived on the average five years.” Donald DeMarco, *Canada’s Commission on Reproduction*, INTERIM: CAN.’S LIFE & FAM. NEWSPAPER (July 1, 1990, 2:02 PM), <http://www.theinterim.com/issues/canada%E2%80%99s-commission-on-reproduction/>. For more on the subject please see the scholarly article in question, A. D. Sadovnick and P. A. Baird, *A Cost-benefit Analysis of Prenatal Diagnosis for Neural Tube Defects Selectively Offered to Relatives of Index Cases*, 12 AM. J. MED. GENETICS 63–73; as well as a scathing critique of the economic reckoning involved in Baird’s analysis, John P. Moore, *The Tragic Mistreatment of Down Syndrome Babies*, INTERIM: CAN.’S LIFE & FAM. NEWSPAPER (Jan. 29, 1995, 9:50 AM), <http://www.theinterim.com/issues/abortion/the-tragic-mistreatment-of-down-syndrome-babies/>.

¹⁰⁵ Weir & Habib, *supra* note 633, at 149. They note: “The Royal Commission responded to the sites that feminists had constituted as politically sensitive, but failed to extend the critique into areas that had not been problematized or only weakly addressed by feminists. Thus, bioscience other than clinical

Commission had not been more transparent in its operations.¹⁰⁶

Still, the Commission concurred with many of the diverse points flagged by feminists as politically sensitive. There were multiple chapters devoted to the issue of infertility, including suggestions to focus money and research on preventing infertility and supporting maternal health.¹⁰⁷ There were also recommendations to license only those clinics that conducted sex-selection testing for medical reasons, and to ban court-ordered obstetrical interventions.¹⁰⁸ All of these matters had been primary concerns of the feminist platform.

Key among the recommendations made by *Proceed with Care* was a call for revisions to the *Criminal Code* in order to criminalize several aspects of new reproductive technologies. Of special concern was the sale of human reproductive material, including eggs and sperm, as well as actions taken by intermediaries to bring about a preconception arrangement, the receipt of payment or any financial or commercial benefit for acting as an intermediary, and/or making payment for a preconception arrangement.¹⁰⁹ The report suggested that commissioning parents and any brokers be subject to criminal sanction, although the surrogate herself should not be penalized for participating in the arrangement.

Under the terms of the report, these proscriptions were to be enforced by a newly created federal watchdog. The Commission encouraged the federal government to “establish a regulatory and licensing body—a National Reproductive Technologies Commission (NRTC)—with licensing required for the provision of new reproductive technologies.”¹¹⁰ The NRTC would be composed of at least 50% female members and charged with regulating the lawful use of assisted reproductive technologies. While the system of regulation was unclear, the aim was to ensure a uniform country-

medicine, genetics, the biotechnology industry and other forms of capital were left untouched by feminist perspectives.”

¹⁰⁶ Many of the women who had originally pushed for the Commission had criticized what they perceived as Commissioner Baird’s opaque dealings. Margrit Eichler, who had headed the original Canadian Coalition for a Royal Commission on New Reproductive Technologies, was one of the Commission’s fiercest critics. “We are in the position of the horrified parents who find their child horrendously transformed,” she declared in 1993. Eichler, *supra* note 58, at 217. Eichler joined forces with other frustrated feminist leaders, including some who had been working inside the Commission, to publish an appraisal of the RCNRT even before the report’s release. *Id.* Some accounts of the internal workings of the Commission were published in the anthology *MISCONCEPTIONS* under anonymous pseudonyms due to a “gag-order” that had been imposed by Chairperson Baird. See Anonymous, in *MISCONCEPTIONS: THE SOCIAL CONSTRUCTION OF CHOICE AND THE NEW REPRODUCTIVE AND GENETIC TECHNOLOGIES* (Gwynne Basen et al. eds., 1993). They found that the conduct of the Commission and its staff, as well as its research and its evaluation of the issues, were largely deficient.

¹⁰⁷ *PROCEED WITH CARE*, *supra* note 65.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1022.

¹¹⁰ *PROCEED WITH CARE*, *supra* note 65, at xxxii.

wide system.

MEDICALIZATION AND CRIMINALIZATION OF LESBIAN-ORGANIZED DONOR INSEMINATION GROUPS

While, as mentioned, the report did take up a concern with infertility funding and maternal health, the central role of medical professionals in providing NRTs was accepted as a given. Arguments for women's autonomy and the ability to avoid medical gatekeeping through, for example, home self-insemination, had fallen to the wayside. Indeed, the kinds of feminist positions that were (and were not) able to find purchase within the RCNRT report are nicely illustrated by the treatment given to grassroots networks that had developed around access to donor sperm. One on hand, the report paid careful attention to the reproductive needs of lesbians in regard to donor insemination ("DI"), within a section that intoned:

Perhaps the most controversial aspect of the practice evident in testimony before the Commission was the use of DI by single women and lesbians. . . . Many respondents were of the view that because DI gives women without a male partner the chance to have children, it devalues the role of males in relation to their children and deprives children of a father.¹¹¹

Yet despite the controversy posed by fatherless households, the report concluded that donor insemination should not be restricted only to heterosexuals but provided in a fair and equitable manner to all. Single women and lesbians should not be denied access to safe donor sperm, as they "essentially have the same diagnosis as married women—lack of a male partner who is fertile and a strong wish to have a child."¹¹² Equality principles, the Commission continued, therefore dictated that lesbians should not be barred from forming a family. While this may certainly appear a progressive stance, not least given the situation at the time in other countries,¹¹³ it was through increased medicalization and surveillance that such reproductive methods were to be made "safe". Rather than, for example, recommending a strengthened support of the women's networks that had already sprung up around teaching and access to donor sperm, the

¹¹¹ *Id.* at 430.

¹¹² *Id.*

¹¹³ For example, Ingrid Lüttichau has outlined the fierce battles that racked the Danish national legislature in 1997, within the context of a relatively progressive Scandinavian state, over the lesbian use of donor insemination. Ingrid Luttichau, *We Are Family: The Regulation of "Female-Only" Reproduction*, 13 SOC. & LEGAL STUD. 81 (2004).

Commission suggested the establishment of an Assisted Insemination Sub-Committee with responsibility for licensing the collection, storage, distribution, and use of sperm in connection with assisted insemination.¹¹⁴

The compulsory licensing requirements would apply to any individual or facility engaged in “the assisted insemination of a woman other than the social partner of the sperm donor.”¹¹⁵ According to this framework, known donors (such as a friend or intended co-parent) would be subject to the same rigorous and demanding regulatory regime as anonymous donor sperm. Under the mandate of keeping women “safe,” the RCNRT recommended that all licensed facilities ensure the screening of donors and testing of donor sperm for infectious diseases, “including a six-month quarantine on donated sperm to allow for human immunodeficiency virus (“HIV”) testing of donors.”¹¹⁶ Gay men had been referred to as frequent sperm donors for lesbian women in public hearings before the Commission, and the report’s specific reference to screening for the AIDS virus, and no other, may be read as a reaction to the fears of viral contamination understood as circulating within the gay community.

This medicalization was further ensured by a suggested ban upon fresh sperm (“only frozen sperm from licensed storage and distribution facilities should be used”), a ban on sperm imports, and the suggestion that “a license is required to perform insemination at any site other than the vagina even if the recipient is the social partner.”¹¹⁷ The move to bring donor insemination within the ambit of medical licensing and treatment would not only mean that a lesbian could no longer inseminate her partner, it also drew lesbians into closer proximity to a culture of pharmaceuticals and hormones. These proscriptions, when taken together, meant that local women’s organizations, which had been developing expertise in sperm donation, access, insemination and storage, would no longer be able to provide lesbians access to fresh sperm. Nor would they be able to assist in procedures such as intra-uterine insemination and the deposit of sperm directly into the cervix.

Thus, under the mantle of equality principles and the inclusion of liberal and lesbian feminist perspectives, the RCNRT laid the foundation for a system that assumed the HIV-positive status of gay donors and effectively shut down grassroots women’s organizations aimed at supporting lesbians and single women. At the same time, as described in more detail below, the criminal prohibitions that had been suggested by

¹¹⁴ PROCEED WITH CARE, *supra* note 65, at 1025.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1026.

radical feminists found purchase in the report's suggestions to revise the *Criminal Code*. The RCNRT recommended the application of criminal penalties to a range of actions such as the provision of compensation for donor sperm, egg donation, and surrogacy.¹¹⁸ Even as known donor sperm was brought under the wing of medical professionalization and quarantine, a criminal ban would be imposed upon payment to anonymous donors. That the likely effects of this twin regulatory mandate would be felt most deeply by those dependent on donor sperm to create their families—lesbians and single women—seems not to have occurred to the Commission.

In general, the use of feminist language throughout the report was at best viewed as lacking a grounding in the social reality of women's lives, and at worst seen as a willful appropriation of rhetoric that lacked underlying substance.¹¹⁹ Diana Majury accused the report of taking a "Polyanna approach to equality" wherein racism, sexism, oppression, and "lesbian hatred" are framed as matters of individual opinion rather than as systemic and institutionalized discrimination.¹²⁰ Anne Burfoot argued that while a passing attempt at a range of opinions had been attempted, "important considerations of differences among women's voices—especially those who resist new reproductive technologies for various reasons—are lost in the Commission's Report."¹²¹ According to Burfoot, radical feminist voices had been decontextualized and removed from their political grounding, simultaneously appropriating the language of resistance and denying it an actual platform.¹²²

While the patriarchal critique had been stripped away, the residue of ban and prohibition remained in full, joined by a new protectionist language

¹¹⁸ These effects were to be felt profoundly by gay men in the years to come. Such a framework has obliged (for example) gay male commissioning parents to seek out altruistic gestational surrogates and ova donors, or track down altruistic traditional surrogates who would agree to use their own eggs. Any payment that might be exchanged is thus driven underground, with the commissioning parents subject to severe criminal penalties for the provision of monetary compensation for reproductive labor. For more on the impact on gay men in particular, see: *Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Material, Services and Facilities*, *supra* note 2.

¹¹⁹ Critiques in this vein came from diverse sources, including: Shannon E. Ash, *The Royal Commission on NRTs: Less . . . in 1,200 Pages*, KINESIS, Feb., 1994, at 4; Anonymous 1-6 & Louise Vandelac, *The Baird Commission: From "Access" to "Reproductive Technologies" to the "Excesses" of Practitioners or the Art of Diversion and Relentless Pursuit*, in MISCONCEPTIONS: THE SOCIAL CONSTRUCTION OF CHOICE AND THE NEW REPRODUCTIVE AND GENETIC TECHNOLOGIES (Gwynne Basen et al. eds. 1993); Christine Massy & Judy Morrison, *Women and NRTs: Beyond the Report*, KINESIS, Feb., 1994, at 8-9; National Action Committee on the Status of Women ("NAC"), *The Regulation of Reproductive Technology* (Working Paper); Margrit Eichler, *The Construction of Technologically-Mediated Families*, 27 J. COMP. FAM. STUD. 281-308 (1996).

¹²⁰ Diana Majury, *Is Care Enough? Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, 17 DALHOUSIE L.J. 279, 285 (1994).

¹²¹ Burfoot, *supra* note 61, at 500.

¹²² *Id.*

that took the guise of public health policy. These initial recommendations proposed by the RCNRT, and the logics of criminalization and increased medicalization which infused it, were to have a long-lasting effect upon the regulations which would eventually be promulgated. In the absence of a clear platform expressed by LGBTQ stakeholders, either through groups like EGALE or through NAC, the needs of non-heterosexual families wishing to have children were lost. Lesbians were ushered in on vague equality principles, while the needs of gay men, trans people, and bisexuals were not contemplated. Instead, the infertile heterosexual couple emerged as the exemplary service user of this new form of regulated, sanitized, economized, and engineered form of technological reproduction.

NEXT PHASE OF DEVELOPMENT

It would, however, be some time until these recommendations found their way into law. Shortly after the report of the Royal Commission on New Reproductive Technologies was released, a federal election was called. The Liberal government of Jean Chretien, newly elected to office, shelved the report. He then directed Federal Minister of Health Diane Marleau to call for a voluntary moratorium on nine reproductive and genetic technologies and practices, including commercial surrogacy arrangements, the buying and selling of eggs, sperm and embryos, and egg donation in exchange for IVF services.¹²³ This moratorium was touted as the first phase of a comprehensive federal response to the Commission report and proposed as an interim strategy until a permanent management regime could be implemented.¹²⁴ It was widely unsuccessful and openly flouted.¹²⁵ This was followed by an Advisory Committee on Reproductive and Genetic Technologies, convened in January 1996 in order to advise on compliance and track new developments.¹²⁶

Strict provisions against sperm donation were tabled by Parliament in early 1996, reflecting many of the concerns of HIV and “safety” the RCNRT had identified.¹²⁷ Bill C-47 emerged in June of that year, following in the deep traces of the Baird Commission, suggesting a federal criminal

¹²³ Press Release, Health Canada, News Release 1995-57, Health Minister Calls for Moratorium on Applying Nine Reproductive Technologies and Practices in Humans (July 27, 1995).

¹²⁴ NANCY MILLER CHENIER & MARILYN PILON, LEGISLATIVE SUMMARY OF BILL C-47: HUMAN REPRODUCTION AND GENETIC TECHNOLOGIES ACT (1997), at i.

¹²⁵ Penni Mitchell, *New Reproductive Technology Bill Awaits Delivery*, 1 NETWORK MAG. CAN. WOMEN'S HEALTH NETWORK, Spring 1998, at 10.

¹²⁶ CHENIER & PILON, *supra* note 124, at ii.

¹²⁷ Processing and Distribution of Semen for Assisted Conception Regulations, SOR/96-254, enacted under the Food and Drugs Act, R.S.C. c. F-27.

law power and imposing extremely steep penalties for violation.¹²⁸ When the Bill was first introduced, some private fertility clinics balked at the proposed prohibitions and vowed to ignore them.¹²⁹ Meanwhile women's advocacy groups, who had been waiting nearly a decade for legislation, were disappointed at the lack of an overall education and management structure that would establish the conditions under which new tests and procedures could be introduced.¹³⁰ In April 1997, the Canadian Parliament came to a close and a federal election was called. Bill C-47 died on the order paper and, despite Jean Chretien's Liberal party winning another majority, a replacement bill would not be tabled until 2002.

CONTINUED STEPS TOWARD LEGISLATION

Under the name An Act Respecting Assisted Human Reproduction and Related Research, a series of three nearly identical bills followed. All listed a range of activities and technologies that were to be prohibited, outlined regulations for those that were to be permitted, and defined the criminal sanctions against violators of the Act.¹³¹ New Reproductive Technologies were now to be known in Canada as techniques of Assisted Human Reproduction.

Finally in 2004, eleven years after the RCNRT had submitted its report, the AHRA received Royal Assent and officially became Canadian law. Notably, the AHRA placed a dizzying criminal ban on payment for surrogacy or the purchase of gametes, with a maximum of penalty of 10 years in prison and/or a \$500,000 fine. Yet hardly had it gained passage when the Attorney General of Quebec submitted a constitutional question to the Quebec Court of Appeal challenging the validity of certain provisions of the AHRA.¹³² After a partial victory for Quebec in the Supreme Court of

¹²⁸ An Act Respecting Human Reproductive Technologies and Commercial Transactions Relating to Human Reproduction, 2nd Sess., 35th Parl. (1996) [hereinafter Bill C-47].

¹²⁹ Mitchell, *supra* note 125, at 10.

¹³⁰ *Id.*

¹³¹ Bill C-56, Assisted Human Reproduction Act, 1st Sess., 37th Parl. (2002); Bill C-13, An Act Respecting Assisted Human Reproduction and Related Research, 2nd Sess., 37th Parl. (2003); Bill C-6, An Act Respecting Assisted Human Reproduction and Related Research, 2nd Sess., 37th Parl. (2003).

¹³² In the matter of a Reference by the Government of Quebec pursuant to the Court of Appeal Reference Act, R.S.Q., c. R-23, concerning the constitutional validity of Sections 8 to 19, 40 to 53, 60, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c. 2; Att'y Gen. Quebec v. Att'y Gen. Canada, 2008 QCCA 1167. Section 1 of the Quebec Court of Appeal Reference Act, R.S.Q., c. R-23, provides that "The Government may refer to the Court of Appeal, for hearing and consideration, any question which it deems expedient, and thereupon the court shall hear and consider the same." Section 5 of that Act further provides, "The court shall send to the Government for its information its opinion duly certified upon the questions so referred, giving its reasons in support thereof, in like manner as in the case of judgments rendered upon appeals brought before the said court." Although a court's response to

Canada,¹³³ Parliament repealed the invalidated sections in June 2012 and amended the AHRA, while also abolishing the federal agency tasked with overseeing assisted human reproduction in Canada.¹³⁴ As such, the federal role relating to ART has been reduced considerably, as has the need for administrative and regulatory enforcement. All activities that were deemed to pertain to provincial jurisdiction over healthcare must now be regulated by each province, although there is no legal requirement to do so. In the words of Angela Cameron and Vanessa Gruben, the decision has “left a legal vacuum to be filled only when and how each province and territory see fit.”¹³⁵ This presents the real possibility of a heterogeneous landscape of regulation in which domestic reproductive tourism may become the norm.¹³⁶

DISCUSSION

As NRTs appeared on the horizon in the late 1970s and became a site of global feminist discussion and contention, the situation in Canada was no different. This article has tracked the broad and robust field of feminist debate in Canada during the 1980s and throughout the convening and impact of the Royal Commission on New Reproductive Technologies. A tremendous diversity of voices existed both in Canada and abroad, and by no means were all of a radical feminist stripe, firmly against the commercialization of women’s bodies in any form.¹³⁷ As a federal platform

questions posed on a reference is considered to be an advisory opinion, many legal scholars have suggested that reference opinions are in fact treated as if they were binding judgments. See, for example, Gerald Rubin, *The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law*, 6 MCGILL L.J. 168, 168–90 (1959–60).

¹³³ Reference re Assisted Human Reproduction Act, *infra* note 156. (Binnie, Fish, and Charron, JJ., concurring).

¹³⁴ Jobs, Growth and Long-term Prosperity Act, S.C. 2012, c. 19. Ss. 713–75 (Can.). Division 56 of Part 4 amends the Assisted Human Reproduction Act to respond to the Supreme Court of Canada decision in Reference re Assisted Human Reproduction Act that was rendered in 2010, including by repealing the provisions that were found to be unconstitutional and abolishing the Assisted Human Reproduction Agency of Canada.

¹³⁵ Angela Cameron & Vanessa Gruben, *Quebec’s Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women’s Reproductive Autonomy?*, in FERTILE GROUND: EXPLORING REPRODUCTION IN CANADA 2 (Stephanie Paterson et al. eds., 2014).

¹³⁶ Raywat Deonandan & Tarun Rahman, *Implications and Reflections on the 2010 Supreme Court Ruling on Canada’s AHR Act*, 3 INT’L J. WOMEN’S HEALTH 405, 406 (2011).

¹³⁷ Early forms of this counter-critique were of course raging, in Canada and abroad, through the “sex wars” which wracked second-wave feminism and called into question issues of women’s oppression, the patriarchy, and the role of sex and sexual pleasure. Emerging from an (in)famous conference on the subject, Carole Vance’s edited collection remains a touchstone of these fiery debates. PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole Vance, ed., 1984). Within new veins of postmodernist scholarship specifically about the law, a Foucauldian analysis as applied to legal feminism was soon to emerge from the writing of Carol Smart and her important 1989 text. See CAROL

for women's issues coalesced out of the Charter debates and into the discussion on NRTs, however, a remarkably consistent vision was to emerge.

The brief written by the largest women's group in the country, the National Action Committee on the Status of Women, did not address any issues specific to gay or lesbian families, despite the substantial presence of lesbians within its diverse membership. Miriam Smith has explained the tensions between lesbians and straight women in the feminist movement as rooted in the unwillingness of straight women to advocate for lesbian rights and jeopardize their political success on other matters.¹³⁸ As she writes, "The fear that participants in the women's movement would be branded as dykes played a major role in the early years of the women's movement in Canada."¹³⁹ This is affirmed by Jeri Dawn Wine, a founder of the Canadian National Lesbian Forum, who maintains that "NAC avoided the split over lesbian participation that the National Organization for Women suffered in the United States only at the cost of a decade of silence on the part of Canadian lesbians."¹⁴⁰

Instead, the diverse membership of NAC was dominated by a radical feminist position that called for prohibition over regulation in line with international groups such as FINRRAGE.¹⁴¹ Out of the fractious roil of feminist positions, it was the dystopian vision of reproductive exploitation that became refracted through a uniquely Canadian lens, producing a technosocial *Handmaid's Tale* in which real-life ART posed an unqualified danger to women. However, as time passed, and women's groups conducted research, wrote briefs, and interacted with government agencies, movements like NAC deepened their analyses and (in some cases) broke off into other groups. Canadian feminist author Heather Menzies said in 1992 that she wished a thorough discussion on reproductive technologies had occurred within the women's movement *before* the creation of the RCNRT,

SMART, FEMINISM AND THE POWER OF LAW (1989).

¹³⁸ MIRIAM SMITH, *LESBIAN AND GAY RIGHTS IN CANADA: SOCIAL MOVEMENTS AND EQUALITY-SEEKING, 1971-1995* (1999).

¹³⁹ In the United States, the National Organization for Women was publically split over the issues of lesbian rights; in Canada, NAC was able to avoid this open division, although it did not place lesbian issues on the national agenda until 1985. *Id.* at 29.

¹⁴⁰ JILL VICKERS, PAULINE RANKIN & CHRISTINE APPELLE, *POLITICS AS IF WOMEN MATTERED: A POLITICAL ANALYSIS OF THE NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN 75* (1993).

¹⁴¹ As Lorna Weir and Jasmin Habib explain, few feminist organizations in Canada had much expertise in the area of new reproductive technologies before the RCNRT, and they drew extensively upon the radical feminist position developed elsewhere: "The general understanding that preceded the Baird Commission was consonant with the international and largely radical feminist literature then extant that viewed reproductive medicine as a research agenda dominated by masculine gender interests." Weir & Habib, *supra* note 63. Note that the RCNRT was often called the "Baird Commission" after the Chair of the Commission, Patricia Baird.

thereby allowing a more nuanced set of positions to emerge.¹⁴²

Questions of relevance to lesbians, such as low-tech options using donor sperm which had long been popular within the lesbian community, were not addressed by NAC, although some worry was expressed over the medicalization of grassroots networks by fertility professionals.¹⁴³ Gay male reproduction and the potential for more equitable surrogacy contracts never emerged as a point for discussion, nor did the reproductive concerns of transgender people (although it may well be argued that such matters were not in circulation even among gay and lesbian circles at the time).¹⁴⁴ However, it is no exaggeration to say that the emphasis of the national women's movement remained squarely on the dangers posed by IVF, commercial surrogacy and the sale of eggs, sperm, and embryos. This focus was to have a material impact on the reproductive lives of Canadians in the years to come, with exacerbated effect on LGBTQ people and communities.

The framework laid out in the RCNRT report proved to be enormously influential on the multiple legislative drafts that worked their way through Parliament. When the AHRA finally passed into law it reflected the Commission's original desire for a federal governing body to regulate and oversee issues related to reproductive technology. The AHRA selected some allowable activities for medical control and licensing (such as donor insemination, screening and access to gametes, and the manipulation of *in vitro* embryos) and imposed strict criminal prohibitions on others (focused on the commercialization of reproduction including payment for eggs, sperm, and any role in the arrangement of commercial surrogacy). While the RCNRT had rejected all forms of surrogacy as a potential harm to women, the AHRA did make allowance for altruistic surrogates who would be permitted to receive the reimbursement of expenses. However, the central distinction drawn by the report, between two categories of activities for which different approaches were recommended, precisely guided the AHRA's distinction between prohibited activities and controlled activities.¹⁴⁵

At the nexus of public health policy, criminal law and family creation, the AHRA absorbed a set of ideas and influences from prominent feminist

¹⁴² As she suggests, such discussion might have allowed tensions to be worked out in private, allowing a more unified feminist front to be presented to the Commission. This paper suggests that dominant voices nevertheless found legislative purchase in the sympathetic realms of medicalization and criminalization. Heather Menzies, *Some Thoughts on Writing about Infertility*, INFERTILITY AWARENESS, Jan.-Feb., 1992, at 1.

¹⁴³ Coffey, *supra* note 48.

¹⁴⁴ Perhaps unsurprisingly, EGALE's submission to RCNRT was silent on the reproductive rights and concerns of transgender people.

¹⁴⁵ This point was also made by LeBel and Deschamps, JJ. See Reference re Assisted Human Reproduction Act, 2010 S.C.C. 457, 547 (Can.).

voices. While a diverse range of ideological positions and recommendations came out of the feminist community at the time, it was a mixture of federal regulation, criminal prohibition, and medical oversight—stripped of the original patriarchal critique—that would shape both the RCNRT report and subsequent legislation. Feminists who demanded greater state funding for infertility, sharpened attention to local needs and community engagement, and an awareness of the limits of technological “progress” to shape our social futures did not find their concerns reflected in official policy.

Instead, the AHRA adopted a protectionist and medicalized health approach, and catalogued a range of procedures and actions for fresh regulation. As nonmedical issues (such as access to sperm for lesbian women) became defined and treated as medical problems, they were newly constructed as forms of illness. The process of locating and diagnosing medical pathology requires that it be marked as deviance from a norm, affirming one set of bodies and conditions as “healthy” and designating others as in need of treatment. This is the case even when the “illness” diagnosed is access to sperm from a sexual partner. As described above, the mode of healthy normalcy that is produced in Western nations tends to represent the idealized modern citizen—white, heterosexual, middle-class, and sexually reproductive.

Thus not only were the feminist-generated solutions adopted by the state marked by criminal and medical logics, but they reflected a limited vision of family life that remained firmly grounded in heterosexual reproduction. This was partially due to the limited input from LGBTQ groups at the time—as a stakeholder community which had not yet organized around questions of reproduction and access, LGBTQ organizations were unable to question the equivocation of criminalization and sanitization with the resources, labor, and strategies required to create their children—and indicative of the restricted voice of lesbian organizers within national women’s chapters at the time. It also reveals those forms of power most amenable to adoption within structures of medical and legal governance.

CONCLUSION

The barriers faced today in Canada for LGBTQ people seeking access to ART have been shaped by two related and intersecting histories: the resonance of radical feminist ideals with governing techniques disposed to criminalization and medicalization; and the simultaneous effacement of communitarian and grassroots perspectives that were developing in response to queer reproductive needs. As discussed, the resilience of early semen-sharing organizations relied upon by lesbian and single women to

gain access to donor sperm was, when viewed through the lens of the HIV crisis, seen by the state as a vulnerable network that rationalized the protectionist health policy that soon followed.¹⁴⁶ By the same token, genuine concerns about racialized exploitation and women's pregnant bodies that radical feminists put forward in the 1980s eventually found legal purchase as a carceral regime aimed at preventing all forms of gamete compensation and drastically restricting allowable expenses for surrogacy. These policies have unduly impacted LGBTQ people, among others, as a community uniquely reliant upon ART to make their families.

The feminist history of ART regulation in Canada thereby offers us a fascinating look at how different ideological positions can manifest into advocacy stances and political goals. As I have sought to argue, this story is not just about the "true" feminist vision surfacing from within the fray and finding its way into law. Rather it provides a case study in the types of positions that most readily find their way into forms of power, and those modes of advocacy which become entrenched in law and policy. It also allows us to see those positions which do *not* get taken up, and what institutional responses are *not* provoked by feminist movements. I have grounded this analysis within a concern for the reproductive needs of LGBTQ communities, and lesbian and single women in particular, in tracing the ways in which this political history has shaped current possibilities for queer family in Canada.

In the service of telling outsider stories and challenging the vision of the "natural" that courses through the RCNRT, the AHRA, and the *Reference Case* alike, this paper has traced an important chapter in Canadian legal history, when legislation was being developed around the regulation of reproductive technology. The lack of representation by LGBTQ people allowed for a dominant narrative of heterosexual family to emerge from the debates, with the role of the state framed as a medical caretaker on one hand, and an enforcer of the moral boundaries of reproduction on the other. The feminist voices and positions expressed

¹⁴⁶ This reference to "vulnerability" invokes a specific intellectual paradigm being developed at Emory University through a network called the Vulnerability and the Human Condition Initiative ("VHC"). Following a series of related conferences and workshops, the VHC was launched at an April 2008 roundtable discussion featuring the work of Martha Albertson Fineman, Paedar Kirby, and Bryan S. Turner. The VHC currently operates as an institutional space for the investigation of vulnerability theory and its application to models of state support and legal protection that focus on the commonalities of the human condition. A growing body of scholarship is being produced through the lens of vulnerability theory. See Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 276 (2013); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY, CLIMATE, & ENV'T 98, 105–06 (2014); Jessica Dixon Weaver, *Beyond Child Welfare—Theories on Child Homelessness*, 21 WASH. & LEE J. C.R. & SOC. JUST. 16, 19 (2014).

during the RCNRT were largely denuded of political context amidst the process of policy development, while the criminal power was embraced and pressed into service to underscore a broadly federal sweep.¹⁴⁷

Despite the passage of time, a vision of the “natural family” continues to dominate as a social and cultural ideal, and people seeking gametes, surrogates, and reproductive assistance are still viewed as an exception to the “normal” system of biological reproduction. A reproductive justice understanding of queer uses of ART allows us to avoid privileging reproduction as either the site of bodily empowerment, or as an inherently exploitative relation built upon female oppression.¹⁴⁸ It would also challenge the utility of a criminal regime as the primary response to the exchange of human reproductive materials and reproductive labor, and explore a range of regulatory options beyond the carceral. Such a position allows for more complex readings of commodification, exploitation, embodiment, and resistance to emerge.

My retelling has also sought to shed light upon the relationship between advocacy, law, medicine, and power that can be instructive for those committed to promoting reproductive justice today. What emerges here is less a picture of conscious exclusion of lesbians and single women, than a case study of how techniques of power operate through the normalizing forces of medicine and law, and in collusion with feminist voices aimed ostensibly at emancipation and liberation. This insight helps us to pose contemporary questions of reproductive justice apart from the language of bare discrimination, and allows us to ask what forms of vulnerability are being exacerbated by family law and health policy models that continue to presume a singular, idealized mode of family creation and preservation. Such a project, I believe, helps us learn from the past even as we seek to bring questions of queer reproductive justice squarely into the present.

¹⁴⁷ Allison Harvison Young and Angela Wasunna have pointed out that such a “command model” is attractive for politicians because, irrespective of effectiveness, such laws are easily touted as concrete evidence of action. However, they remain deeply skeptical of the top-down approach, criticizing it as resting upon too ill-fashioned a regulatory instrument, and crudely wedged within the constitutional division of powers without regard for social realities or cultural diversities. Alison Harvison Young & Angela Wasunna, *Wrestling with the Limits of the Law: Regulating New Reproductive Technologies*, 6 HEALTH L.J. 239–42 (1998). The strategy of rooting prohibitions within the powers of criminal law also, of course, was a strategy to allow for the assertion of a federal jurisdiction.

¹⁴⁸ Of course, many same-sex couples may seek state validation as “just like” a “normal family” and therefore as equally deserving of legal recognition. The operation of power is multidimensional and not reducible to a singular narrative. As Brenda Cossman has argued, through processes of inclusion and exclusion, queer lives under the law are simultaneously “both normative and transgressive.” See Brenda Cossman, *Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms*, 40 OSGOODE HALL L.J. 223, 225 (2002).