

The Demise of Assisted Human Reproduction Canada

Françoise Baylis, PhD

Professor and Canada Research Chair in Bioethics and Philosophy, Faculty of Medicine, Dalhousie University, Halifax NS

It is customary in obituaries to eulogize the deceased—to fondly remember their accomplishments, even if these were few and fleeting. Were I to write an obituary for Assisted Human Reproduction Canada (AHRC)¹—the federal agency established “to protect and promote the health and safety, and the human dignity and human rights, of Canadians and to foster the application of ethical principles”²—it might read as follows:

Since 2007, AHRC has networked with scientists, clinicians, patients, and others who use assisted human reproductive technologies. It has established a number of working groups, developed educational products (a few brochures and a website), and hosted various workshops including an international meeting on cross-border reproductive care. It has also implemented the “consent to use” regulation. Unfortunately for AHRC, these accomplishments (such as they are) came at too high a price (\$10.5 million a year³).

On March 29, 2012, the federal government tabled the budget. In Chapter 5 on “Responsible Management to Return to Balanced Budgets,” it announced that it would “introduce legislation to wind down Assisted Human Reproduction Canada, with final closure of operations by March 31, 2013.”⁴ That legislation was introduced in Parliament April 26, 2012 (Bill C-38).⁵ In this way, the government officially sounded the death knell for AHRC.

Few (if any) will mourn the passing of this agency. Why? Because AHRC did not deliver on its major responsibilities, which included “promoting compliance with and enforcing the *Assisted Human Reproduction Act* (*AHR Act*) related to the prohibitions” as well as “implementing and administering a licensing framework for controlled activities.”²

On March 29, 2004, the *AHR Act* received Royal Assent. In the eight years since then, there has been only one reported RCMP investigation into alleged violations of the

prohibitions on payment for surrogacy⁶ and no reported RCMP investigations into alleged violations of the prohibition on payment for eggs.⁷ This is hardly a stellar report card for AHRC in relation to its responsibility to promote compliance with and enforce the prohibitions. As for the responsibility to license clinics to perform controlled activities, no fertility clinic in Canada has ever been granted a license by AHRC.

Now there are ways in which AHRC can legitimately deflect blame for each of these dramatic failings. Action in relation to the prohibitions is ultimately the responsibility of the RCMP, not AHRC. Secondly, AHRC could not implement and administer a licensing and inspection program for controlled activities, because Health Canada never produced the relevant regulations.

With these facts in mind, there is reason to think that the Harper government has been tolling the bell for AHRC for some time now, in which case the 2012 budget is really the last nail in the coffin, not the death knell. From this perspective, other bad omens come into sharp focus—the delays in setting up AHRC and its board of directors, the problems with the selection of board members, the failure to introduce required regulations, and the failure to undertake the mandated parliamentary review.

Although the *AHR Act* received Royal Assent in March 2004, AHRC was only established in January 2006. The President of AHRC and members of the board of directors of AHRC were only named in December 2006. The President only took office in February 2007, and the first AHRC Board meeting was only held in March 2007. No principled reason for these delays has ever been provided.

The membership of the AHRC board of directors did not respect the original expert selection process.⁸ Only two of the 25 candidates short-listed by the expert committee were

among those named to the board. For reasons that remain unclear, the government eschewed the recommendations of the expert selection committee in favour of political appointments.

Further, the original board of directors did not include among its members a patient representative. Meanwhile, the legislation clearly stipulated that board membership “must reflect a range of backgrounds and disciplines relevant to AHRC’s objectives.”² No explanation has ever been provided for the government’s original decision to exclude the patient perspective from the AHRC board.

The introduction of the *AHR Act* did not change the status quo with respect to clinical practice. Practice continued more or less as before, with the federal government seemingly happy to have fertility clinics provide services as before, and eventually in accordance with the “grandfathering” provision (section 71) instead of “in accordance with the regulations and a licence.”² Section 71 of the *Act* allows, until a day fixed by the regulations, persons to undertake a controlled activity without a license provided they had undertaken this activity at least once in the year prior to the coming into force of the relevant provision.

Between April 2004 and December 2010, only one of the 30 regulations anticipated in the *AHR Act* (section 65) “for carrying into effect the purposes and provisions” of the *Act* was introduced.² In December 2007, the “consent to use” regulation came into effect.

Over the years, Health Canada has offered two explanations for the excessive delay in introducing regulations. A first, bafflegab explanation is that:

Health Canada must follow the Cabinet Directive on Streamlining Regulation in developing options and recommendations for Assisted Human Reproduction. The Directive is designed to protect and advance the public interest by working with Canadians and other governments to ensure that its regulatory activities result in the greatest overall benefit to current and future generations of Canadians. The Directive includes clear requirements for the development, implementation, evaluation and review of regulations. The Government must weigh the benefits of alternatives to regulations—and of alternative regulations—against their cost, and focus resources where they can do the most good.⁹

A later explanation suggested that regulations would not be introduced in accordance with the respect owed to the Supreme Court of Canada:

Health Canada has decided to delay the republication of draft regulations in *Canada Gazette*, Part I, until an opinion is provided by the Supreme Court of Canada on the constitutionality of parts of the *Assisted Human Reproduction Act* (*AHR Act*). Work continues unabated to develop proposed regulations under the Act.¹⁰

The Supreme Court of Canada rendered its decision on the constitutionality of the *AHR Act* December 22, 2010.¹¹ Ultimately, most of the controlled activities were found to be unconstitutional. However, section 12 on reimbursement of expenditures was held to be constitutionally valid, as were other sections inasmuch as they were required to implement section 12. In the 18 months since the Supreme Court of Canada decision was rendered, no new regulations have been introduced to deal with the remaining federal functions (despite the earlier claim that the development of proposed regulations continued unabated).

Finally, section 70 of the *AHR Act* stipulated that within three years of section 21 coming into force the administration of the *Act* was to be reviewed “by any committee of the Senate, the House of Commons or both Houses of Parliament that may be designated or established for that purpose.”² Section 21, which concerned the establishment of AHRC, came into force January 12, 2006. Parliament did not review the *AHR Act* at any time in 2009, nor did it undertake a review of the *AHR Act* at any time since then.

So it is that more than 30 years of hard work by dedicated Canadians committed to promoting and protecting the interests of those who use, and are born of, assisted reproduction has come to naught. 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.¹² In 2004, after many failed attempts, legislation was passed. And, in 2010 much of that legislation was found to be unconstitutional.^{11,13}

The federal government has promised that “Health Canada will take over responsibility for any remaining federal functions such as compliance and enforcement, and outreach.”⁴ How much confidence can Canadians have in this promise, however, given the federal government’s demonstrated lack of interest in the business of regulating assisted human reproduction?

DISCLOSURE

Françoise Baylis was a member of the board of directors of Assisted Human Reproduction Canada from December 2006 to March 2010.

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