

**SUPREME COURT OF CANADA**

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| **Citation:** Reference re *Assisted Human Reproduction Act*,  2010 SCC 61, [2010] 3 S.C.R. 457 | **Date:** 20101222  **Docket:** 32750 |

**Between:**

**Attorney General of Canada**

Appellant

and

**Attorney General of Quebec**

Respondent

- and -

**Attorney General of New Brunswick,**

**Attorney General for Saskatchewan,**

**Attorney General of Alberta, Michael Awad,**

**Canadian Conference of Catholic Bishops**

**and Evangelical Fellowship of Canada**

Interveners

**Official English Translation:** Reasons of LeBel and Deschamps JJ.

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 156)  **Joint Reasons for Judgment:**  (paras. 157 to 281)  **Reasons for Judgment:**  (paras. 282 to 294) | McLachlin C.J. (Binnie, Fish and Charron JJ. concurring)  LeBel and Deschamps JJ. (Abella and Rothstein JJ. concurring)  Cromwell J. |

Reference re *Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457

**Attorney General of Canada** *Appellant*

*v.*

**Attorney General of Quebec** *Respondent*

and

**Attorney General of New Brunswick,**

**Attorney General for Saskatchewan,**

**Attorney General of Alberta, Michael Awad,**

**Canadian Conference of Catholic Bishops**

**and Evangelical Fellowship of Canada** *Interveners*

**Indexed as:**Reference re *Assisted Human Reproduction Act*

2010 SCC 61

File No.:  32750.

2009:  April 24; 2010:  December 22.

Present:  McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for quebec

*Constitutional law ― Division of powers ― Criminal law ― Assisted reproduction ― Whether ss. 8 to 19, 40 to 53, 60, 61 and 68 of Assisted Human Reproduction Act, S.C. 2004, c. 2, exceed legislative authority of Parliament under s. 91(27) of Constitution Act, 1867.*

In 1989, the federal government established the Royal Commission on New Reproductive Technologies (the “Baird Commission”) to study assisted human reproduction. In its report, the Baird Commission expressed concern about certain practices in the field and pressed for legislation. Between 1993 and 1995, the federal government consulted with the provinces, the territories and independent groups for advice on the issue, and the result was the passage of the *Assisted Human Reproduction Act* in 2004. The Act contains prohibitions and other provisions designed to administer and enforce them. It is set up as follows:

(1) Sections 5 to 9 prohibit human cloning, the commercialization of human reproductive material and the reproductive functions of women and men, and the use of *in vitro* embryos without consent. (2) Sections 10 to 13 prohibit various activities unless they are carried out in accordance with regulations made under the Act, under licence and in licensed premises. These “controlled activities” involve manipulation of human reproductive material or *in vitro* embryos, transgenic engineering and reimbursement of the expenditures of donors and surrogate mothers. (3) Sections 14 to 19 set up a system of information management related to assisted reproduction. (4) Sections 20 to 39 establish the Assisted Human Reproduction Agency of Canada. (5) Sections 40 to 59 charge the Agency with administering and enforcing the Act and regulations, and authorize it to issue licences for certain activities related to assisted reproduction. (6) Sections 60 and 61 provide for penalties, (7) ss. 65 to 67 authorize the promulgation of regulations, and (8) s. 68 gives the Governor in Council power to exempt the operation of certain provisions if there are equivalent provincial laws in force that cover the field.

The Attorney General of Quebec accepted that some of the provisions were valid criminal law, but challenged the constitutionality of the balance of the Act in a reference to the Quebec Court of Appeal. According to the Attorney General of Quebec, ss. 8 to 19, 40 to 53, 60, 61 and 68 are attempts to regulate the whole sector of medical practice and research related to assisted reproduction, and are *ultra vires* the federal government. The Quebec Court of Appeal held that the impugned sections were not valid criminal law since their pith and substance was the regulation of medical practice and research in relation to assisted reproduction.

*Held*: The appeal should be allowed in part.

Sections 8, 9, 12, 19 and 60 of the Act are constitutional.

Sections 10, 11, 13, 14 to 18, 40(2), (3), (3.1), (4) and (5), and 44(2) and (3) exceed the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*.

Sections 40(1), (6) and (7), 41 to 43, 44(1) and (4), 45 to 53, 61 and 68 are constitutional to the extent that they relate to constitutionally valid provisions.

*Per* McLachlinC.J. and Binnie, Fish and Charron JJ.: The Act is essentially a series of prohibitions, followed by a set of subsidiary provisions for their administration. While the Act will have beneficial effects and while some of its effects may impact on provincial matters, neither its dominant purpose nor its dominant effect is to set up a regime that regulates and promotes the benefits of artificial reproduction. The fact that the Baird Commission may have referred to positive aspects of assisted reproduction technology in its report does not establish that these benefits were the focus of Parliament’s efforts. Furthermore, while the Act employs both a penal and regulatory form, Parliament may validly employ regulations as part of a criminal law provided it targets a legitimate criminal law purpose.

Here, the matter of the statutory scheme, viewed as a whole, is a valid exercise of the federal power over criminal law. The dominant purpose and effect of the legislative scheme is to prohibit practices that would undercut moral values, produce public health evils, and threaten the security of donors, donees, and persons conceived by assisted reproduction. While this initiative necessarily touches on provincial jurisdiction over medical research and practice, these fields are the subject of overlapping federal and provincial jurisdiction. Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on persons like donors and mothers. The Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants. Overlapping with the morality concerns are concerns for public health and security which may be properly targeted by criminal law. These are valid criminal law purposes.

The prohibitions in ss. 8 to 13 come within the scope of the federal criminal law power and are valid criminal law. The provisions are related to ss. 5 to 7, which are conceded to be valid criminal law. Section 8 prohibits the use of reproductive material for the artificial creation of embryos, unless the donor has consented in accordance with the regulations. This relates to the fundamental importance ascribed to human autonomy. Section 9 prohibits persons from obtaining reproductive material from underage donors, except for the purpose of preserving the sperm or ovum or for the purpose of creating a human being that the person reasonably believes will be raised by the donor. This provision seeks to protect vulnerable youth from exploitation and undue pressure. It is an absolute prohibition like ss. 5 to 7, without any accompanying regulations.

Sections 10 and 11 buttress the prohibitions in s. 5. In essence, s. 10 prohibits dealing with human reproductive material without a licence. It targets health risks and moral concerns related to the artificial creation of human life. Section 11 prohibits transgenic engineering unless permitted by the regulations and performed by a licence‑holder. By using a selective prohibition to broaden the absolute prohibitions in s. 5 on the creation of chimeras and hybrid entities, s. 11 recognizes that mixing human and non‑human genetic material can raise moral concerns long before such experiments result in the creation of a new life form. Working together, licensing and regulation provide for enforceable, tailored prohibitions, which leave the provinces free to regulate the beneficial aspects of genetic manipulation.

Section 12 prohibits reimbursement of donors and surrogate mothers except in accordance with the regulations and with a licence. This provision is rooted in the same concerns as ss. 6 and 7, which prohibit the commercialization of reproduction. Section 13 is an absolute prohibition on the performance of licensed activities in unlicensed premises, backed by a penalty. The artificial creation of human life in clandestine facilities would pose serious health risks to those involved. Ensuring that the facilities of assisted human reproduction are properly supervised also relates to Parliament’s moral concerns.

Together with ss. 5 to 7, ss. 8 to 13 form a valid prohibition regime that is consistent with the objectives of the Act as a whole. These provisions contain prohibitions, backed by penalties, and are directed in pith and substance to valid criminal law goals. Although some of the prohibitions impact on the regulation of medical research and practice, the impact is incidental to the legislation’s dominant criminal law purpose and limited to those ends. Furthermore, subject to the Act’s prohibitions, the provinces are free to enact legislation promoting beneficial practices in the field of assisted reproduction.

While not criminal law in pith and substance, the administrative, organizational, and enforcement provisions in ss. 14 to 68 are integrated into the prohibition regime set up by ss. 5 to 13. Some of these ancillary provisions are criminal in nature and do not significantly intrude on provincial powers, such as the provisions for enforcement (ss. 45 to 59), promulgation of regulations (ss. 65 to 67), and imposition of penalties (ss. 60 and 61). The organizational provisions in ss. 20 to 39 are also essentially part of the criminal prohibitions in ss. 5 to 13. The information management provisions in ss. 14 to 19 and the administrative provisions in ss. 40 to 44 represent a minor incursion on provincial powers. They generally fall under the provincial powers over property and civil rights and matters of a merely local or private nature. However, since these are very broad heads of power, the intrusion is less serious. Moreover, the provisions do not purport to create a substantive right, but function merely to assist in enforcing the Act. Without the prohibition regime in ss. 5 to 13, they would serve no purpose. Furthermore, the provisions are designed to supplement, rather than exclude, provincial legislation. Finally, Parliament has a history of administering and enforcing statutes addressing issues of morality, health and security by way of licensing bodies. Since the ancillary provisions constitute a minor incursion on provincial jurisdiction, the rational and functional connection test should be applied to determine whether they are valid under the ancillary powers doctrine.

Sections 14 to 68 support the legislative scheme in a way that is rational in purpose and functional in effect. Sections 14 to 19 define standards of consent and privacy, charge the Agency with managing personal health information, and establish rules for the medical profession. These provisions harness the flow of information, first to deal appropriately with consent and related privacy issues, and second to facilitate compliance with the Act. Sections 40 to 44 relate to the issuance of licences for controlled activities, and are directly related to prohibiting harmful and immoral conduct while excepting beneficial activity. The provisions relating to inspection and enforcement found in ss. 45 to 59 are also part and parcel of the scheme prohibiting immoral and potentially harmful uses of human reproductive material. Sections 60 and 61, which provide penal sanctions, are necessary for criminal law provisions. Finally, s. 68 permits the Governor in Council to declare provisions of the Act inapplicable in a province where a provincial law contains similar provisions, pursuant to an agreement with that province. This provision recognizes the fact that assisted human reproduction is an area of overlapping jurisdiction, and allows provincial schemes to govern exclusively where provincial laws are equivalent to the federal scheme. The ancillary provisions are thus valid under the ancillary powers doctrine.

*Per* LeBel, Deschamps, Abella and Rothstein JJ.: Sections 8 to 19, 40 to 53, 60, 61 and 68 of the Act exceed the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*. The provisions of the Act concerning controlled activities, namely those involving assistance for human reproduction and related research activities, do not fall under the criminal law power, but belong to the jurisdiction of the provinces over hospitals, property and civil rights, and matters of a merely local nature.

The first step of the constitutional analysis involves identifying the pith and substance (purpose and effects) of the impugned provisions. Those provisions must be considered separately before considering their connection with the other provisions of the Act, since the purposes and effects of a statute’s many provisions can be different. It is also important to identify the pith and substance of the impugned provisions as precisely as possible, since a vague characterization could lead not only to the dilution of and confusion with respect to the constitutional doctrines, but also to an erosion of the scope of provincial powers as a result of the federal paramountcy doctrine. If the pith and substance of the provisions falls within the jurisdiction of the other level of government, it is necessary first to assess the extent of the overflow in light of the purpose of the provisions and to weigh their effects. It must then be determined whether the provisions form part of an otherwise valid statute. Finally, the impugned provisions must be considered in the context of the entire statute in order to determine whether they are sufficiently integrated with the other provisions of the otherwise valid statute. This review must make it possible to establish a relationship between the extent of the jurisdictional overflow and the importance of the provisions themselves within the statute of which they form a part. There are two applicable concepts: functionality and necessity. The more necessary the provisions are to the effectiveness of the rules set out in the part of the statute that is not open to challenge, the greater the acceptable overflow will be. Care must be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis.

In this case, the purpose and the effects of the impugned provisions relate to the regulation of a specific type of health services provided in health‑care institutions by professionals to individuals who for pathological or physiological reasons need help to reproduce. Their pith and substance is the regulation of assisted human reproduction as a health service. In the Act, substantive and formal distinctions are drawn between prohibited activities and controlled activities. This dichotomy appears clearly from Parliament’s statement of principles in s. 2 and from the titles used in the Act itself. Furthermore, whereas the category of controlled activities concerns services that are available to persons in need of assistance because of an inability to reproduce and that are used by professionals who provide the required help, the activities that are prohibited completely do not involve techniques used in assisted human reproduction. The impugned provisions do not have the same purpose as the unchallenged provisions. They were enacted to establish mandatory national standards for assisted human reproduction. As can be seen from the legislative history, this was how Parliament believed that the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general could be most effectively secured. When it decided to regulate what are called “controlled” activities, Parliament took into account the concerns expressed about the ethical and moral aspects and the safety of assisted reproductive activities. And in so doing it intended to implement a recommendation from the Baird Commission in order to ensure that Canadians could have access to assisted reproduction services. Regarding the activities that are prohibited completely, Parliament responded to what was presented to it as a consensus that they are reprehensible. Those prohibitions are therefore intended to prevent activities and the use of technologies that do not form part of the process of genetic research or assisted human reproduction.

A review of the effects of the provisions of the Act confirms that the impugned scheme seriously affects the practice of medicine and overlaps or conflicts with many Quebec statutes and regulations. The impugned provisions have a direct impact on the relationship between physicians called upon to use assisted reproductive technologies, donors, and patients. Section 8 sets out rules on consent for the removal and use of human reproductive material, even though rules on consent already exist in the *Civil Code of Québec*. Similarly, s. 12 implicitly authorizes surrogacy contracts, whereas the *Code* provides that such contracts are null. Moreover, ss. 10, 11, 13, 40(1) and 42 require researchers and physicians who engage in activities related to treatments for infertility to obtain licences from the Federal Agency even though other Quebec legislation already requires them to obtain permits. Sections 14 to 19 establish a system for the management and disclosure of information relating to assisted reproductive activities, but Quebec already has its own rules governing the use of assisted reproductive technologies by health‑care institutions and physicians, and the disclosure of confidential information is also subject to provisions of several Quebec statutes and regulations. Finally, the oversight by the Federal Agency under ss. 45 to 53 duplicates the oversight provided for in other Quebec statutes.

The impugned provisions, viewed from the perspective of their pith and substance, are not connected with the federal criminal law power. The criminal law power does not give Parliament an unconditional right to take action to protect morality, safety and public health. To be connected with this federal head of power, a law or a provision must (1) suppress an evil, (2) establish a prohibition and (3) accompany that prohibition with a penalty. It is not enough to identify a public purpose that would have justified Parliament’s action. That purpose must also involve suppressing an evil or safeguarding a threatened interest. The evil must be real and the apprehension of harm must be reasonable. This requirement constitutes an essential element of the substantive component of the definition of criminal law, and it applies with equal force where the legislative action is based on morality. Recourse to the criminal law power cannot be based solely on concerns for efficiency or consistency, as such concerns, viewed in isolation, do not fall under the criminal law. In the case at bar, although a connection can be made between the pith and substance of the absolute prohibitions and a risk of harm, the same cannot be said of the regulation of the other activities and of the regulatory scheme that is established in the Act. Nothing in the record suggests that the controlled activities should be regarded as conduct that is reprehensible or represents a serious risk to morality, safety or public health. A review of all the work of the Baird Commission and the evidence confirms that, where the impugned provisions are concerned, Parliament’s action did not have the purpose of upholding morality and was not based on a reasoned apprehension of harm, but was instead intended to establish national standards for assisted human reproduction.

The impugned provisions represent an overflow of the exercise of the federal criminal law power. Their pith and substance is connected with the provinces’ exclusive jurisdiction over hospitals, property and civil rights, and matters of a merely local nature. The impugned provisions affect rules with respect to the management of hospitals, since Parliament has provided that the Act applies to all premises in which controlled activities are undertaken. Furthermore, the fact that several of the impugned provisions concern subjects that are already governed by the *Civil Code of Québec* and other Quebec legislation is an important indication that in pith and substance, the provisions lie at the very core of the provinces’ jurisdiction over civil rights and local matters.

Given the extent of the overflow in this case, it cannot be found that an ancillary power has been validly exercised unless the impugned provisions have a relationship of necessity with the rest of the statute. However, the scheme established by the prohibitory provisions does not depend on the existence of the regulatory scheme. As well, it is clear from the legislative history that the prohibitory provisions were in fact always considered to stand alone and that the regulation of certain activities did not depend on the prohibition of other activities. It must be inferred from this that in setting up the regulatory scheme, Parliament’s intention was to enact legislation in relation to a matter outside its jurisdiction.

The provisions pursuant to which the Federal Agency is responsible for implementing the regulatory scheme are purely ancillary and have no independent purpose. They are invalid. Furthermore, the constitutional defects are not remedied by s. 68, which authorizes the Governor in Council to declare certain provisions inapplicable if the federal minister and the government of a province so agree, as the jurisdictional overflow remains just as great as long as regulation of the activities in question remains dependent on the will of the federal government. Finally, if the principle of subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces’ jurisdiction over local matters, not with the criminal law power.

*Per* Cromwell J.: The matter of the impugned provisions is regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction. The matter of the challenged provisions is best classified as relating to the establishment, maintenance and management of hospitals, property and civil rights in the province and matters of a merely local or private nature in the province. Sections 10, 11, 13, 14 to 18, 40(2), (3), (3.1), (4) and (5), and 44(2) and (3) exceed the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*. However, ss. 8, 9 and 12 in purpose and effect prohibit negative practices associated with assisted reproduction and fall within the traditional ambit of the federal criminal law power. Similarly, ss. 40(1), (6) and (7), 41 to 43, and 44(1) and (4) set up the mechanisms to implement s. 12 and, to the extent that they relate to provisions of the Act which are constitutional, were properly enacted by Parliament. Sections 45 to 53, to the extent that they deal with inspection and enforcement in relation to constitutionally valid provisions of the Act, are also properly enacted under the criminal law power. The same is true for ss. 60 and 61, which create offences. Section 68 is also constitutional, although its operation will be limited to constitutional sections of the Act. Given that the other provisions establishing the Assisted Human Reproduction Agency of Canada are not contested, there is no constitutional objection to s. 19.

**Cases Cited**

By McLachlin C.J.

**Referred to:** *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669; *Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206; *Attorney‑General for Alberta v. Attorney‑General for Canada*, [1947] A.C. 503; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Reference re Anti‑Inflation Act*, [1976] 2 S.C.R. 373; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *R. v. Furtney*, [1991] 3 S.C.R. 89; *RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Hydro‑Québec*, [1997] 3 S.C.R. 213; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191; *Proprietary Articles Trade Association v. Attorney‑General for Canada*, [1931] A.C. 310; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *Boggs v. The Queen*, [1981] 1 S.C.R. 49; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *R. v. Malmo‑Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Butler*, [1992] 1 S.C.R. 452; *Russell v. The Queen* (1882), 7 App. Cas. 829; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Papp v. Papp*, [1970] 1 O.R. 331; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Lord’s Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497.

By LeBel and Deschamps JJ.

**Referred to:** *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *R. v. Furtney*, [1991] 3 S.C.R. 89; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004; *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753; *Attorney‑General for Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570; *Smith v. The Queen*, [1960] S.C.R. 776; *Attorney‑General for Ontario v. Attorney‑General for the Dominion*,[1896] A.C. 348; *Attorney‑General of Ontario v. Attorney‑General for the Dominion of Canada*, [1894] A.C. 189; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Papp v. Papp*, [1970] 1 O.R. 331; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721; *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191; *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Malmo‑Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Hydro‑Québec*, [1997] 3 S.C.R. 213; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Workmen’s Compensation Board v. Canadian Pacific Railway Co.*, [1920] A.C. 184; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226.

By Cromwell J.

**Referred to:** *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641.

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*Act respecting health services and social services*, R.S.Q., c. S‑4.2, ss. 9 *et seq.*, 17 *et seq.*, 79 *et seq.*, 339 *et seq.*, 413.2, 414, 437.

*Act respecting medical laboratories, organ, tissue, gamete and embryo conservation, and the disposal of human bodies*,R.S.Q., c. L‑0.2, s. 31.

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*Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007‑137.

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Bill C‑247, *An* *Act to amend the Criminal Code (genetic manipulation)*, 1st Sess., 36th Parl., 1997.

Bill C‑336, *An Act to amend the Criminal Code (genetic manipulation)*, 1st Sess., 37th Parl., 2001.

*Canadian Charter of Rights and Freedoms*, s. 1.

*Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), s. 34(6).

*Civil Code of Québec*, R.S.Q., c. C‑1991, arts. 10 to 25, 541.

*Code of ethics of physicians*, R.R.Q., c. M‑9, r. 4.1, ss. 20, 21, 28, 29, 49.

*Constitution Act, 1867*, ss. 91, 92.

*Court of Appeal Reference Act*, R.S.Q., c. R‑23.

*Criminal Code*, R.S.C. 1906, c. 146, ss. 207, 303, 306.

*Criminal Code*, R.S.C. 1927, c. 36, ss. 207, 303, 306.

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*Criminal Code*, S.C. 1953‑54, c. 51, ss. 150, 237.

*Criminal Code, 1892*, S.C. 1892, c. 29, ss. 179, 271, 272.

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APPEAL from a judgment of the Quebec Court of Appeal (Gendreau, Chamberland and Rayle JJ.A.), 2008 QCCA 1167, 298 D.L.R. (4th) 712, [2008] R.J.Q. 1551, [2008] Q.J. No. 5489 (QL), 2008 CarswellQue 9848, in the matter of a reference concerning the question whether some sections of the *Assisted Human Reproduction Act* are *ultra vires* the Parliament of Canada. Appeal allowed in part.

René LeBlanc, Peter W. Hogg and Glenn Rivard, for the appellant.

Jocelyne Provost and Maude Randoin, for the respondent.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Graeme G. Mitchell, Q.C., for the intervener the Attorney General for Saskatchewan.

Lillian Riczu and Randy Steele, for the intervener the Attorney General of Alberta.

Written submissions only for the intervener Michael Awad.

Written submissions only by William J. Sammon, *Don Hutchinson* and *Faye Sonier* for the interveners the Canadian Conference of Catholic Bishops and the Evangelical Fellowship of Canada.

The reasons of McLachlin C.J. and Binnie, Fish and Charron JJ. were delivered by

The Chief Justice —

I. Introduction

1. Every generation faces unique moral issues. And historically, every generation has turned to the criminal law to address them. Among the most important moral issues faced by this generation are questions arising from technologically assisted reproduction — the artificial creation of human life. Parliament has passed a law dealing with these issues under its criminal law power. The question on appeal is whether this law represents a proper exercise of Parliament’s criminal law power. I conclude that it does.
2. Since time immemorial, human beings have been conceived naturally. Human beings have sought to enhance this process, to be sure; fertility rites, prayers and various medical and quasi-medical prescriptives to enhance fertility are part of human history. Human beings have also sought to constrain the process, through rules governing sexual conduct and marriage. These rules are deeply embedded in morality, which speaks to our conception of how human beings should behave for their own good and the greater good of society. Through morality, often abetted by the criminal law, society has traditionally found collective answers to reproductive issues. Yet, until recently, the fundamental processes by which new human beings were conceived remained largely beyond technological manipulation.
3. This changed in the latter part of the 20th century, with the development of technology that allowed ova and sperm to be captured and united to form a zygote outside the human body. Refining the process even further, scientists found ways to disassemble and recombine genetic material within the ovum. Implantation techniques allowed couples and surrogate mothers to carry pregnancies created in a petri dish to term. At the far end of the spectrum lay the possibility of combining animal and human forms or reproducing an individual through cloning.
4. These new techniques raise important moral, religious and juridical questions. The new questions do not fit neatly within the traditional legal frameworks that have developed in a world of natural conception. These challenges have opened a dialogue between ethicists, religious leaders and the public. Different people have taken different moral views on the issues. Fears have been expressed as to the possibility that some may abuse the new techniques in ways that might damage individuals — both existing and yet to be conceived — and ultimately society. Traditional criminal law imposed no obvious restraints and offered no clear answers to these questions.
5. It was against this background that Parliament decided to act. It did not act precipitously. Rather, it established the Royal Commission on New Reproductive Technologies (the “Baird Commission”) to study the matter and make recommendations. The Baird Commission expressed concern about certain practices in the field of new reproductive technologies and pressed the government to pass legislation to limit their use: see *Proceed with Care:* *Final Report of the Royal Commission on New Reproductive Technologies* (1993) (the “Baird Report”).
6. Between 1993 and 1995, the federal government consulted with the provinces, the territories and independent groups, including researchers, men and women dealing with infertility problems, persons with disabilities, religious denominations and physicians. It also asked a group of experts in philosophy, sociology, anthropology, medicine and law for their advice on the issue of human embryo research. The result of these consultations was the ultimate passage of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2 (also referred to as the “Act”), enacted in March 2004, as an exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*.
7. The Act contains a prohibition regime, supported by provisions designed to administer and enforce its prohibitions. The Attorney General of Quebec accepted that some of the prohibitions were valid criminal law, but challenged the constitutionality of the balance of the Act in a reference to the Quebec Court of Appeal. According to the Attorney General of Quebec, ss. 8 to 19, 40 to 53, 60, 61 and 68 were attempts to regulate the whole sector of medical practice and research related to assisted reproduction, including the doctors and hospitals involved. In June 2009, Quebec passed its own law on the subject, entitled the *Act respecting clinical and research activities relating to assisted procreation*, R.S.Q., c. A-5.01*.*
8. On June 19, 2008, the Quebec Court of Appeal accepted the argument of the Attorney General of Quebec that the impugned sections were not valid criminal law: 2008 QCCA 1167, 298 D.L.R. (4th) 712. The Court of Appeal held that their real character — their pith and substance — was the regulation of medical practice and research in relation to assisted reproduction. Parliament’s purpose, it concluded, was not only to prohibit wrongful acts, but also to assure that desirable aspects of assisted reproduction were encouraged and correctly regulated. The provisions were thus declared unconstitutional.
9. The Attorney General of Canada now appeals to this Court.
10. My colleagues LeBel and Deschamps JJ. conclude that the impugned sections of the Act, in pith and substance, constitute an attempt to regulate hospitals and medical research, and thus are *ultra vires* the federal Parliament. I respectfully disagree. The prohibitions in ss. 5 to 7 are conceded to be valid criminal legislation. In my view, the remaining prohibitions in ss. 8 to 13 are also valid criminal law. Although some of these prohibitions impact on the regulation of medical research and practice, all matters within provincial jurisdiction, the impact is incidental to the legislation’s dominant criminal law purpose and limited to those ends. Finally, while not criminal law in pith and substance, the administrative, organizational, and enforcement provisions in ss. 14 to 68 are integrated into this prohibition regime, and hence they are valid under the ancillary powers doctrine. I would therefore allow the appeal.

II. The Legislation

1. The prohibitions are of two types. Sections 5 to 9 are cast in absolute terms. In those sections, the Act prohibits:

(a) human cloning (s. 5(1)(*a*)) and the use, manipulation and transplantation of reproductive material of a non-human life form, chimera or hybrid, in order to create a human being (s. 5(1)(*g*) to (*j*));

(b) the creation of an *in vitro* embryo for any purpose other than creating a human being or improving or providing instruction in assisted reproduction procedures (s. 5(1)(*b*));

(c) the creation of an embryo from a cell taken from an embryo or foetus (s. 5(1)(*c*)) or the maintenance of such an embryo outside of the body after the fourteenth day of its development (s. 5(1)(*d*));

(d) the determination of an embryo’s sex for non-medical reasons (s. 5(1)(*e*));

(e) the alteration of the genome of an *in vitro* embryo or cell of a human being such that the alteration is capable of being transmitted to descendants (s. 5(1)(*f*));

(f) the commercialization of the reproductive functions of women and men, particularly the payment of consideration to surrogate mothers (s. 6) and the purchase and sale of *in vitro* embryos or the purchase of human reproductive material (s. 7);

(g) any use of *in vitro* embryos unless the donor has given written consent, as well as the use and posthumous removal of human reproductive material unless the donor has given written consent, when the purpose of the use or removal is the creation of an embryo (s. 8); and

(h) the removal or use of sperm or ova from a donor under 18 years of age, except for the purpose of preserving the sperm or ova or for the purpose of creating a human being where it is reasonable to believe that the human being will be raised by the donor (s. 9).

1. Other prohibitions, referred to in the Act as “controlled activities”, are found in ss. 10 to 13. These sections prohibit various activities, unless they are carried out in accordance with regulations made under the Act, under licence, and in licensed premises. The activities in question involve:

(a) altering, manipulating, treating, obtaining, storing, transferring, destroying, importing and exporting human reproductive material or *in vitro* embryos for certain purposes (s. 10);

(b) combining any part of the human genome with any part of the genome of another species (s. 11);

(c) reimbursing a donor for an expenditure incurred in the course of donating sperm or ova and a surrogate mother for an expenditure incurred by her in relation to her surrogacy (s. 12);

(d) undertaking a controlled activity in an unlicensed facility (s. 13).

1. The prohibition regime is followed by provisions that do not in themselves purport to create criminal offences, but are directed to administering and enforcing the primary criminal law prohibitions. These include a mechanism for gathering and storing information related to assisted reproduction procedures, the establishment of an administrative agency (the Assisted Human Reproduction Agency of Canada (“Agency”)), the power of the Governor in Council to make regulations respecting the Act (s. 65), and the power of the Governor in Council to exempt the operation of certain provisions if there are equivalent provincial laws in force that cover the field (s. 68).
2. Only the validity of certain sections of the Act is at issue in this appeal. With the exception of the regulations under s. 8, no regulations have yet been promulgated.

III. The Issues

1. The Attorney General of Quebec concedes that the absolute prohibitions found in ss. 5 to 7 are valid criminal law. This leaves the following issues:
2. The validity of the legislative scheme as a whole
3. The validity of the “controlled activities” prohibitions
4. The validity of the administrative provisions under the ancillary powers doctrine

IV. Analysis

A. *The Validity of the Legislative Scheme as a Whole*

1. Since the Attorney General of Quebec is challenging individual provisions of the federal scheme, this Court must examine the whole scheme and the impugned provisions separately (*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641,at p. 666). Ordinarily, this Court would begin by examining the impugned provisions in order to determine if and to what extent they intrude on the provincial sphere of competence: see *Kirkbi AG v. Ritvik Holdings Inc.*,2005 SCC 65, [2005] 3 S.C.R. 302, at para. 21; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 58. The advantage of this order of analysis is that if the impugned provisions are not found to intrude at all, “then the investigation need go no further” (*General Motors*, at p. 667). While courts may nonetheless examine the whole scheme in such cases, we have tended to end the analysis if the individual provisions are not found to be problematic: see *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569.
2. However, in the case at bar it is necessary to examine the whole scheme first before we can make sense of the challenged provisions. This Court has often underlined that the impugned provisions must be considered in their proper context (see, e.g., *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at paras. 17-35). In this case, the Attorney General of Quebec is challenging the bulk of the *Assisted Human Reproduction Act*. While it concedes that ss. 5 to 7 of the Act are valid, it challenges almost all the remaining operative provisions. Under these circumstances, it is impossible to meaningfully consider the provisions at issue without first considering the nature of the whole scheme.
3. Therefore, the first question is whether the matter of the statutory scheme, viewed as a whole, is a valid exercise of federal power. The second question is whether its individual provisions are also valid. If the scheme as a whole is valid, but some of its provisions invalid, the invalid provisions are severed, leaving the remaining provisions intact. As Dickson J. (as he then was) explained in *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, at p. 270, “[i]t is obvious at the outset that a constitutionally invalid provision will not be saved by being put into an otherwise valid statute”. Severance may not be possible if bad provisions are so inextricably bound up with good provisions that the legislature would not have enacted one without the other: *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518.

(1) Characterizing the Legislative Scheme

1. There are two steps to determining whether a law is valid: characterization and classification. First the dominant “matter” or “pith and substance” of the law must be determined: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 25. Once the “matter” is thus characterized, the second step is to determine if it falls under a head of power assigned to the enacting body: *Kitkatla Band*, at para. 52. In this case, the enacting body is federal, and the Attorney General of Canada has decided to limit his arguments on the validity of the Act to a single head of jurisdiction: the criminal law power in s. 91(27) of the *Constitution Act, 1867*. If the scheme, properly characterized, falls within that power, it is valid, subject to a closer look at particular provisions. If not, it is invalid. See *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 450; *Kitkatla Band*.
2. The parties disagree on the proper characterization of the *Assisted Human Reproduction Act*. The Attorney General of Canada says that the dominant purpose and effect of the legislative scheme is to prohibit practices that would undercut moral values, produce public health evils, and threaten the security of donors, donees, and persons conceived by assisted reproduction. The Attorney General of Quebec, focussing mainly on the effects of the Act, says that its dominant characteristic is the regulation of reproductive medicine and research. These different characterizations of the scheme lead to different results at the second step. The Attorney General of Canada says the law is valid federal legislation under the criminal law power, while the Attorney General of Quebec says it is an illegal scheme to regulate health concerns that fall under provincial powers.
3. The issue is as follows: Is the *Assisted Human Reproduction Act* properly characterized as legislation to curtail practices that may contravene morality, create public health evils or put the security of individuals at risk, as the Attorney General of Canada contends? Or should it be characterized as legislation to promote positive medical practices associated with assisted reproduction, as the Attorney General of Quebec contends? In pith and substance, what is this legislation about? Controlling and curtailing the negative impacts associated with artificial human reproduction? Or establishing salutary rules to govern the practice of medicine and research in this emerging field?
4. To determine which characterization is correct, one must consider the purpose and effect of the legislative scheme. One must ask, “[w]hat in fact does the law do and why?”: D. W. Mundell, “Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin” (1955), 33 *Can. Bar Rev*. 915, at p. 928.
5. I turn first to purpose. The Attorney General of Canada, as stated, says that the purpose of the Act is to prohibit improper practices associated with assisted reproduction — practices that may undermine fundamental moral precepts, lead to public health evils and threaten the security of individuals. By contrast, the Attorney General of Quebec argues that the purpose of the Act is to legislate on health, a matter generally within provincial jurisdiction. The question at this point is therefore whether the dominant purpose of the Act is to prohibit reprehensible conduct, as the Attorney General of Canada alleges, or to regulate health, as the Attorney General of Quebec alleges.
6. The text of the Act suggests that its dominant purpose is to prohibit inappropriate practices, rather than to promote beneficial ones. It is true that the Act establishes a scheme to control assisted reproduction on a national level, and this initiative necessarily touches on provincial jurisdiction over medical research and practice. However, the dominant thrust of the Act is prohibitory, and the aspects that concern the provision of health services do not rise to the level of pith and substance. As s. 2 of the Act explains, the purpose of the Act is to *safeguard against* practices that may offend fundamental values and rights and harm human health, safety and dignity. The emphasis is on *preventing* practices that offend these values and produce this harm.
7. The Act accomplishes its purpose of prohibiting reprehensible conduct by imposing sanctions. The Act is essentially a series of prohibitions, followed by a set of subsidiary provisions for their administration.
8. The Attorney General of Quebec concedes that the prohibitions in ss. 5 to 7 of the Act are valid criminal law. In my view, the prohibitions in ss. 8 to 13 advance the same criminal law purpose. Sections 8 to 13, viewed in context, are not aimed at promoting the beneficial aspects of assisted reproduction. While they distinguish the beneficial from the reprehensible, it is only for the purpose of carving out the latter. In this sense, the prohibitions in ss. 5 to 13 all advance a common purpose, but do so in a manner tailored to the conduct that they address. Conduct that is always reprehensible is prohibited absolutely (ss. 5 to 9). Conduct that is reprehensible in particular situations is prohibited selectively; thus, ss. 10 to 13 prohibit only the harmful aspects of the conduct at issue. In other words, they prohibit conduct, subject to exceptions for practices that Parliament does not consider to be harmful. These prohibitions do not prevent the provinces from enacting legislation promoting beneficial practices in the field of assisted reproduction. Subject to the Act’s prohibitions, the provinces are free to regulate these practices. The scheme of the Act is to carve out from the broader field of assisted reproduction conduct that Parliament considers criminal. These prohibitions give the Act its content and define its purpose.
9. In support of the Attorney General of Quebec’s position that the Act should be characterized as health legislation, LeBel and Deschamps JJ. argue that the Act has a two-fold purpose: (1) the prohibition of reprehensible practices; and (2) the promotion of beneficial practices. Criminal law, they argue, is concerned with prohibiting undesirable conduct, and cannot extend to promoting the beneficial aspects of assisted reproduction. In their view, Parliament’s desire to promote beneficial practices proves that the Act is intended to create a national scheme for the regulation of assisted reproductive technologies.
10. My colleagues rely on the Baird Report as proof of Parliament’s intention to impose national medical standards under the guise of criminal law, e.g., at para. 206:

It is clear that the Baird Commission wanted certain activities to be denounced and prohibited because, in its view, there was a consensus that they were reprehensible. But the Commission also wanted assisted human reproduction and related research activities to be regulated for the purpose of establishing uniform standards that would apply across Canada. Thus, it can be seen that the distinction drawn in the [Act] between prohibited activities and controlled activities corresponds to the two distinct categories of activities for which the Baird Commission recommended two distinct approaches with different purposes. [Emphasis added.]

Prohibition, the argument continues, may be the proper domain of the criminal law, but the promotion of beneficial health practices is the domain of the provinces. The Act impermissibly gathers both purposes under the broad umbrella of the criminal law. On the argument advanced by my colleagues, it follows that large parts of the Act are invalid.

1. The first response to this argument is to note that it treats the Baird Report as proof of the purpose behind the *Assisted Human Reproduction Act*. But that is to ignore what the Baird Report was about. The Baird Commission was writing a policy analysis (not a constitutional law paper) on a subject thought to raise serious issues of morality. Its enquiry into moral issues surrounding assisted reproduction established the validity of these concerns and impelled Parliament to adopt the Act, as discussed more fully below. However, the fact that the Baird Commission may have referred to positive aspects of assisted reproduction technology — benefits all acknowledge — does not establish that these benefits were the focus of Parliament’s efforts.
2. The second response to this argument is that it rests on an artificial dichotomy between reprehensible conduct and beneficial practices. The Act certainly employs both a penal and regulatory *form*, however Parliament may validly employ regulations as part of a criminal law provided they target a legitimate criminal law purpose. Prohibiting or regulating bad conduct may in fact produce benefits. This is a common consequence of many criminal laws. What matters for purposes of constitutionality is not whether a criminal law has beneficial consequences, but whether its *dominant* *purpose* is criminal. The *Assisted Human Reproduction Act* does not have two objects, the first to prohibit reprehensible conduct, the second to promote beneficial effects. It targets conduct that Parliament has found to be reprehensible. In so doing, it incidentally permits beneficial practices through regulations. But that does not render it unconstitutional.
3. Turning to the effects of the Act, this legislation clearly has an impact on the regulation of medical research and practice, and hospital administration. Researchers, practitioners and hospitals will be subject to both the Act and the regulations it contemplates.
4. However, the doctrine of pith and substance permits either level of government to enact laws that have “substantial impact on matters outside its jurisdiction”: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 15-9. The issue in such cases is to determine the *dominant* effect of the law. Viewed as a whole, the dominant effect of the Act is to prohibit a number of practices which Parliament considers immoral and/or which it considers a risk to health and security, not to promote the positive aspects of assisted reproduction. The dominant effect of the prohibitory and administrative provisions is to create a regime that will prevent or punish practices that may offend moral values, give rise to serious public health problems, and threaten the security of donors, donees, and persons not yet born.
5. In sum, while the Act will have beneficial effects — one hopes all criminal laws will have beneficial effects — and while some of its effects may impact on provincial matters, neither its dominant purpose nor its dominant effect is to set up a regime to regulate and promote the benefits of artificial reproduction in hospitals and laboratories.
6. I conclude that the pith and substance of the Act is properly characterized as the prohibition of negative practices associated with assisted reproduction.

(2) Does the Matter of the Act Come Within Section 91(27)?

1. Having characterized the matter to which the Act relates, the next question is whether it comes within the scope of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. In order to answer this question, we must consider whether the matter satisfies the three requirements of valid criminal law: (1) a prohibition; (2) backed by a penalty; (3) with a criminal law purpose: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 (“*Firearms Reference*”), at para. 27.
2. As already discussed, the Act, properly characterized, imposes prohibitions backed by penalties, thereby fulfilling the first two requirements of a valid criminal law. Admittedly, some of the provisions permit exceptions. However, the criminal law does not require absolute prohibitions: *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *R. v. Furtney*, [1991] 3 S.C.R. 89; *RJR-MacDonald Inc. v. Canada (Attorney General)*,[1995] 3 S.C.R. 199. To be sure, a large portion of the scheme is regulatory. However, it is open to Parliament to create regulatory schemes under the criminal law power, provided they further the law’s criminal law purpose. The complexity of modern problems often requires a nuanced scheme consisting of a mixture of absolute prohibitions, selective prohibitions based on regulations, and supporting administrative provisions. Such schemes permit flexibility, vital in a field of evolving technologies, and they have repeatedly been upheld as valid criminal law: *RJR-MacDonald*; *R. v. Hydro-Québec*, [1997] 3 S.C.R*.* 213. To take but one example, the list of toxic substances capable of harming the populace is ever-changing. It is unrealistic to expect Parliament to enact new laws every time a change occurs, and the criminal law power does not require it to do so. The same logic applies to the present case.
3. My colleagues LeBel and Deschamps JJ. take issue with the provisions of the Act that prohibit activities unless conducted in accordance with federal regulations. As noted above, they argue that these provisions are designed to promote beneficial practices, while I view them as carve-outs from prohibition. They further argue that since the doctrine of paramountcy allows federal legislation to prevail over provincial legislation in the case of conflicts, finding the regulatory provisions *intra* *vires* would effectively oust provincial power over health.
4. In my view, the requirement that a criminal law contain a prohibition prevents Parliament from undermining the provincial competence in health. The federal criminal law power may only be used to prohibit conduct, and may not be employed to promote beneficial medical practices. Federal laws (such as the one in this case) may involve large carve-outs for practices that Parliament does not wish to prohibit. However, the use of a carve-out only means that a particular practice is *not* prohibited, not that the practice is positively *allowed* by the federal law. This has important implications for the doctrine of federal paramountcy. If a province enacted stricter regulations than the federal government, there would be no conflict in operation between the two sets of provisions since it would be possible to comply with both. Further, there would be no frustrations of the federal legislative purpose since federal criminal laws are only intended to prohibit practices. A stricter provincial scheme would complement the federal criminal law. See *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 22; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 964-65; and *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5. There may be a conflict between a criminal law and a *less* strict provincial scheme. However, in such a case, Parliament’s stricter scheme would be acting as a prohibition. In this way, the prohibition requirement for criminal laws acts as a major limitation on the effect of s. 91(27).

(3) Does the Act Serve a Valid Criminal Law Purpose?

1. Having determined that the Act imposes prohibitions backed by penalties, it remains to be determined whether it does so in the service of a criminal law objective. The Attorney General of Canada asserts that the Act serves broad criminal law purposes centred around morality, health, and security. The Attorney General of Quebec suggests that the real purpose of the law is not criminal, but regulatory — namely, to establish a system to regulate assisted reproduction. In turn, it contends that such a scheme is provincial turf.
2. Much judicial ink has been spilled in attempting to elucidate a precise definition of a valid criminal law purpose. The early cases swung from the extreme of a precisely defined “domain” of criminal law (*In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191 (P.C.), at pp. 198-99), to the opposite extreme of any “act prohibited with penal consequences” (*Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (P.C.), at p. 324).
3. The modern conception of a valid criminal law objective is grounded in the *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the “*Margarine* *Reference*”), where Rand J. decided that a criminal prohibition must serve “a public purpose” like “[p]ublic peace, order, security, health, morality” (p. 50), stopping short of pure economic regulation. It has been held that highway regulation bearing no relation to public safety falls beyond the scope of the federal criminal law power: *Boggs v. The Queen*, [1981] 1 S.C.R. 49. On the other hand, prohibitions aimed at combatting the “public health evil” of tobacco consumption have been found to fall within the ambit of the criminal law power (*RJR-MacDonald*, at paras. 32-33), as have prohibitions directed at protecting the public from environmental hazards (*Hydro-Québec*), dangerous and adulterated food and drug products (*R. v. Wetmore*, [1983] 2 S.C.R. 284), illicit drugs (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571), and firearms (*Firearms Reference*).
4. The Attorney General of Canada relies on these cases to argue that prohibiting the detrimental aspects of assisted reproduction constitutes a valid criminal law purpose under the objectives of morality, health, and security, including the protection of vulnerable groups. The Attorney General of Quebec criticizes this approach, arguing that it represents a virtually unlimited extension of the criminal law power, which would threaten the constitutional division of powers between the federal and provincial governments.
5. There is merit in both positions. On the one hand, the jurisprudence properly recognizes that confining the criminal law power to precise categories is impossible. The criminal law must be able to respond to new and emerging matters of public concern that go to the health and security of Canadians and the fundamental values that underpin Canadian society. A crabbed, categorical approach to valid criminal law purposes is thus inappropriate. On the other hand, a limitless definition, combined with the doctrine of paramountcy, has the potential to upset the constitutional balance of federal-provincial powers. Both extremes must be rejected. To constitute a valid criminal law purpose, a law’s purpose must address a public concern relating to peace, order, security, morality, health, or some similar purpose. At the same time, extensions that have the potential to undermine the constitutional division of powers should be rejected.
6. Whether a federal law falls within Parliament’s criminal law power under s. 91(27) of the *Constitution Act, 1867*, is a question of *which level* of government has jurisdiction to enact this law. This question relates to the powers of one level of government *vis-à-vis* the other, and it is resolved by determining the law’s pith and substance. The degree to which the Act may impact on individual liberties is not relevant to this inquiry. The Attorney General of Quebec has not challenged the *Assisted Human Reproduction Act* on the basis that it constitutes an unjustified infringement of individual liberty. That would raise the question of whether *any level* of government could enact this law, an issue which turns on the state’s authority *vis-à-vis* the individual: see *R. v. Butler*, [1992] 1 S.C.R. 452, and *Malmo-Levine*. Rather, the Attorney General of Quebec challenges the Act on the basis that it wrests turf from the provinces.
7. It follows that this case does not require us to balance the impact of the Act on liberty against the importance of Parliament’s legislative objective. The only question is whether the Act comes within the scope of s. 91(27). In this respect, I differ from my colleagues LeBel and Deschamps JJ., who argue that there is insufficient societal consensus to justify the restrictions that the Act imposes on individual liberties. With respect, the language of justification has no place in the pith and substance analysis.
8. Criminal law objectives, such as peace, order, security, morality, and health do not occupy separate watertight compartments. The question in each case is whether the matter of the legislation at issue relates to one or more of the recognized criminal law purposes, or a similar objective. Criminal laws will often engage more than one objective, and the objectives may overlap with each other.
9. In this case, the Attorney General of Canada relies mainly on the objectives of upholding morality and avoiding or containing potential public health evils. Mingled with these are overtones of security insofar as the practices may harm participants and offspring. It has been recognized that morality, public health evils and security are, in principle, capable of supporting criminal laws. We are not therefore confronted with the need to determine whether a new type of objective can be recognized as a valid criminal law purpose. The question is simply whether the legislative scheme falls within the ambit of the objectives that the Attorney General of Canada has identified.
10. I turn now to consider the scope of the criminal law purposes that Parliament has identified. I conclude that upholding morality is the principal criminal law object of the Act. What is at stake is not merely two competing health schemes, but Parliament’s power to enact general norms for the whole of Canada to meet the pressing moral concerns raised by the techniques of assisted reproduction. The objects of prohibiting public health evils and promoting security play supporting roles with respect to some provisions. Taken together, these objects confirm that the Act serves valid criminal law purposes. In reaching this conclusion, moreover, I do not intend to broaden the scope of the criminal law power, but rather apply this Court’s jurisprudence.

(a) *Morality*

1. Morality has long been recognized as a proper basis for the exercise of the criminal law power. In one of the first cases to consider the ambit of s. 91(27), Sir Montague E. Smith wrote that the criminal law power includes laws “designed for the promotion of public order, safety, or morals”: *Russell v. The Queen* (1882), 7 App. Cas. 829 (P.C.), at p. 839. Similarly, in the *Margarine Reference*, Rand J. included morality in his famous definition of valid criminal law purposes.
2. Criminal law may target conduct that Parliament reasonably apprehends as a threat to our central moral precepts: *Malmo-Levine*, at para. 78. Moral disapprobation is itself sufficient to ground criminal law when it addresses issues that are integral to society. Different people hold different views about issues such as the artificial creation of human life. However, under federalism analysis, the focus is on the importance of the moral issue, not whether there is societal consensus on how it should be resolved. Parliament need only have a reasonable basis to expect that its legislation will address a moral concern of fundamental importance, even if hard evidence is unavailable on some points because “the jury is still out”: *Malmo-Levine*, at para. 78. Whether the law violates the *Canadian Charter of Rights and Freedoms* guarantees of individual liberty is another issue.
3. In summary, morality constitutes a valid criminal law purpose. The role of the courts is to ensure that such a criminal law in pith and substance relates to conduct that Parliament views as contrary to our central moral precepts, and that there is a consensus in society that the regulated activity engages a moral concern of fundamental importance.

(b)  *Health*

1. Health is a jurisdiction shared by both the provinces and the federal government. In order to preserve the balance of powers, Parliament’s ability to pass criminal laws on the basis of health must be circumscribed. To this end, criminal laws for the protection of health must address a “legitimate public health evil”: *RJR-MacDonald*, at para. 32; see also *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 142.
2. It has proven difficult to articulate a precise definition of a legitimate public health evil. It has been held that the federal criminal law power encompasses the regulation or prohibition of threats as diverse as tobacco (*RJR-MacDonald*); dangerous and adulterated food and drug products (*Wetmore*); illicit drugs (*Malmo-Levine*); gun control (*Firearms Reference*); and environmental degradation (*Hydro-Québec*).
3. Behind the diversity in the cases that have upheld criminal laws on the basis of public health evils lie three constant features. In each of these cases, the criminal law was grounded in (1) human conduct (2) that has an injurious or undesirable effect (3) on the health of members of the public.
4. Human conduct causing harm is the fundamental stuff of the criminal law. The element of harmful human conduct transforms a public health problem, like cancer, into a public health evil, like tobacco. The criminalization of public health evils recognizes that criminal liability is not confined to crimes like murder and fraud, where human conduct is coupled with injury to a specific person. Parliament is entitled to target conduct that elevates the *risk* of harm to individuals, even if it does not always crystallize in injury. For example, Parliament may criminalize dangerous driving, despite the fact that it creates only a risk of injury, not a certainty. Where human conduct may cause injurious or undesirable effects on the health of members of society, Parliament may prohibit it as a public health evil.
5. No constitutional threshold level of harm, as such, constrains Parliament’s ability to target conduct causing these evils. It is not apparent that the criminal law may only regulate the severest risks to individual’s health and safety, and not also prohibit less severe harms that are of public concern. In *RJR-MacDonald*,La Forest J. emphasized that the harm of tobacco consumption was “dramatic and substantial” (para. 32). However, this observation does not constrain the test he applied for whether Parliament may regulate a risk to health: “. . . the criminal law power may validly be used to safeguard the public from any injurious or undesirable effect. The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil” (para. 32 (emphasis added; internal quotation marks omitted)). This said, the need to establish a reasonable apprehension of harm means that conduct with little or no threat of harm is unlikely to qualify as a “public health evil”: *Malmo-Levine*, at para. 212, *per* Arbour J., dissenting, but not on this point.
6. My colleagues LeBel and Deschamps JJ. argue that there is little to distinguish assisted reproduction from any other emerging field of medical practice. All medical practices come with risks. This, they argue, does not bring those practices within the federal criminal law power. The answer to this argument, confirmed by the cases, is that, provided it is not a colourable intrusion upon provincial jurisdiction (i.e. one not supported by a valid criminal law purpose), Parliament is entitled to use the criminal law power to safeguard the public from conduct that may have an injurious or undesirable effect on the health of members of the public, notwithstanding the provinces’ general right to regulate the medical profession. Health is subject to overlapping federal and provincial jurisdiction, and the provinces’ power to legislate in this field does not exclude Parliament’s authority to target conduct that constitutes a public health evil: *RJR-MacDonald*, at para. 32.

(c) *Security*

1. Security is relied on only peripherally in this case. Yet the Attorney General of Canada raises morality and health concerns that have significant implications for personal security. It is beyond dispute that one of the most fundamental purposes of criminal law — indeed its most fundamental purpose — is the protection of personal security. To preserve human life and security is the state’s most fundamental concern. Traditionally, the criminal law has played a central role in the pursuit of this objective. This extends to life before birth; control over the termination of pregnancy has long been recognized as a valid criminal law subject: see *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616. It is beyond the scope of the present appeal to decide whether such laws infringe individual liberties in a manner that is unconstitutional. In the context of the federalism analysis, it suffices that the protection of vulnerable groups has been recognized as a valid criminal law purpose.

(d) *Is the Legislative Scheme Grounded in a Valid Criminal Law Purpose?*

1. As discussed earlier, the purposes of the criminal law overlap. Morality, public health evils and security may focus on the same concerns. In exercising its criminal law power, Parliament is not confined to a single purpose or a given combination of purposes. What is required is that the legislation, properly characterized and considered in light of the various objectives advanced, serves legitimate criminal law purposes.
2. For the reasons that follow, I conclude that the *Assisted Human Reproduction Act*, viewed as a whole, is grounded in valid criminal law purposes.
3. Assisted reproduction raises weighty moral concerns. The creation of human life and the processes by which it is altered and extinguished, as well as the impact this may have on affected parties, lie at the heart of morality. Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on persons like donors and mothers. Taken as a whole, the Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants. This is a valid criminal law purpose, grounded in issues that our society considers to be of fundamental importance.
4. Overlapping with the morality concerns are concerns for public health. As discussed above, acts or conduct that have an injurious or undesirable effect on public health constitute public health evils that may properly be targeted by the criminal law. The question is whether the threats to donors of sperm or ova, surrogate mothers and persons created through misuse of the techniques of assisted reproduction, fall within this principle. In my view, they do. It is not difficult to project serious physical and psychological harms to the affected individuals. How assisted reproduction techniques are used can mean the difference between life and death, health and sickness. Conduct that abuses these processes poses risks to the health of the population and may legitimately be considered a public health evil to be addressed by the criminal law.
5. Overlapping with the concerns of upholding morality and addressing public health evils is a final concern — security. The Attorney General of Canada argues that reproductive techniques, improperly used, threaten the security of those involved in the processes and those born as a result of their application. While the record does not detail these concerns, again they are easy to envision.
6. I conclude that the legislative scheme is not directed toward the promotion of positive health measures, but rather addresses legitimate criminal law objects. As discussed above, the other two elements of criminal law, prohibition and penalty, are established on the face of the Act. I therefore conclude that the *Assisted Human Reproduction Act*,viewed as a whole, is valid criminal legislation.
7. It may be appropriate at this point to address the arguments relied on by LeBel and Deschamps JJ. in support of their view that the criminal law must be circumscribed to prevent trenching on provincial powers to regulate health.
8. My colleagues argue that the law generally regulates “a specific type of health services provided in health‑care institutions by health‑care professionals” (para. 227). They characterize the Province’s power under s. 92(16) (“Generally all Matters of a merely local or private Nature in the Province”) as a residual power. They go on to paint a picture of provincial health law being in conflict with the federal criminal law power, and conclude that the federal criminal power must be circumscribed to accommodate the Quebec regulatory scheme.
9. My colleagues’ conclusion takes them into untravelled constitutional territory. “Double occupancy” of a field of endeavour, such as health, is a permanent feature of the Canadian constitutional order. It leads to a standard “double aspect” analysis under which both aspects subsist side by side, except in case of conflict, when the federal power prevails: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, at para. 11. In holding that the double aspect doctrine does not apply to this field of double occupancy, my colleagues assert a new approach of provincial exclusivity that is supported by neither precedent nor practice. Canadian constitutional jurisprudence has consistently granted wide latitude to the federal criminal law power, despite the fact that much of the criminal law has a provincial regulatory counterpart. For example, most provinces have drug and pharmaceutical laws, but these do not preclude federal criminal legislation to control narcotics.
10. The *Constitution Act, 1867*, allocates to Parliament jurisdiction over the criminal law precisely to permit Parliament to create uniform norms. Circumscription of the ambit of the criminal law to avoid trenching on provincial regulation runs counter to this purpose. Criminal norms of necessity often touch on matters that are regulated by the provinces. This must be so, in the interest of uniform criminal law norms throughout Canada.
11. In support of their contention that the criminal law must be circumscribed to preserve space for provincial regulation, my colleagues repeatedly refer to the principle of subsidiarity (e.g., para. 273). The idea behind this principle is that power is best exercised by the government closest to the matter. Since the provincial governments are closest to health care, the argument goes, they should exercise power in this area, free from interference of the criminal law. Subsidiarity therefore favours provincial jurisdiction.
12. Despite its initial appeal, this argument misconstrues the principle of subsidiarity. As L’Heureux-Dubé J. explained in *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3, in an area of jurisdictional overlap, the level of government that is closest to the matter will often introduce complementary legislation to accommodate local circumstances. In *Spraytech*, for example, the town supplemented federal pesticide controls by further restricting the use of certain substances. L’Heureux-Dubé J. decided that the town could adopt higher standards for pesticide control because the local law complemented, rather than frustrated the federal legislation. She took this as an example of subsidiarity. Moreover, as developed above, a carve-out to a criminal law would not be paramount to stricter provincial regulations.
13. Additionally, the federal-provincial equivalency provision found at s. 68 of the Act answers the argument that Quebec already regulates the subject matter of the Act, and is better placed to do so: if this is the case, an arrangement between the federal government and Quebec may occur, in which case the Quebec law would be enforced by officials of the Quebec government.
14. More fundamentally, subsidiarity does not override the division of powers in the *Constitution Act, 1867*. L’Heureux-Dubé J. cautioned that “there is a fine line between laws that legitimately complement each other and those that invade another government’s protected legislative sphere” (*Spraytech*, at para. 4), and she noted that subsidiarity allows only the former. Subsidiarity might permit the provinces to introduce legislation that complements the *Assisted Human Reproduction Act*, but it does not preclude Parliament from legislating on the shared subject of health. The criminal law power may be invoked where there is a legitimate public health evil, and the exercise of this power is not restricted by concerns of subsidiarity.
15. Nor can I accept my colleagues’ argument that recognition of the Act as valid criminal law will place us on a slippery slope leading to federal dominion over a vast array of risky medical practices. My colleagues write that:

In the end, if we were to adopt the Attorney General of Canada’s interpretation and accept that the fact that a technology is “novel” justifies, on its own, resorting to the criminal law power, nearly every new medical technology could be brought within federal jurisdiction. This view of the criminal law is incompatible with the federal nature of Canada; it not only upsets the constitutional balance of powers in the field of health, but also undermines the very definition of federalism. [para. 256]

1. It is not the degree of risk that brings a medical procedure within s. 91(27), but a genuine criminal law purpose, whether grounded in morality, a public health evil, or security. “Playing God” with genetic manipulation engages moral concerns that my colleagues’ example of risky cardiac bypass surgery does not. Different medical experiments and treatments will raise different issues. Few will raise “moral” issues of an order approaching those inherent in reproductive technologies. The federal criminal law at issue in this case does not threaten “the constitutional balance”.
2. Nor can I accept my colleagues’ suggestion that the beneficial aspects of assisted reproduction oust the possibility of a valid criminal law purpose. At several points in their reasons my colleagues draw attention to the desirable aspects of assisted reproduction. The suggestion seems to be that something so good cannot be the subject matter of criminal law:

. . . the evidence also shows that the same authorities recognized that some assisted reproductive technologies are beneficial to society and should accordingly be supported, although they also need to be regulated. [para. 211]

Assisted human reproduction was not then, nor is it now, an evil needing to be suppressed. In fact, it is a burgeoning field of medical practice and research that, as Parliament mentions in s. 2 of the [Act], brings benefits to many Canadians. [para. 251]

1. As I explained earlier, I do not share the view that the Act can be characterized as legislation in relation to the positive aspects of assisted reproduction. However, my colleagues’ argument on this point raises a more fundamental issue. Their reasoning, with respect, substitutes a judicial view of what is good and what is bad for the wisdom of Parliament. Similar arguments have been rejected in other contexts. In *Malmo-Levine*, for example, it was argued that use of marijuana benefits many Canadians and not just those in medical need. My colleagues break new ground in enlarging the judiciary’s role in assessing valid criminal law objectives. It is ground on which I respectfully decline to tread.
2. For the foregoing reasons, I cannot subscribe to the picture of Canadian federalism painted by my colleagues, where the federal criminal law power would be circumscribed by provincial competencies. I share their view that the criminal law cannot be used to eviscerate the provincial power to regulate health. Our Constitution prevents this from occurring, however, by requiring that criminal laws further a valid criminal law objective, and that they adopt the form of a prohibition. These requirements allow for the nationwide criminal norms that the Constitution intended, while ensuring adequate space for provincial regulation.

B. *Do the Prohibitions in Sections 8 to 13 of the Act Constitute Valid Criminal Law?*

1. The federalism analysis does not end merely because it has been determined that a law, viewed as a whole, is valid criminal legislation. Even if a law is in pith and substance criminal legislation, it may nevertheless contain provisions which are neither valid criminal prohibitions, nor ancillary to valid criminal prohibitions. An invalid legislative provision is not rendered valid merely because it is included in a legislative scheme that, viewed globally, is valid: *General Motors*. In each case, the question is whether the provision, considered in the context of the larger scheme of the Act, is valid criminal legislation, in terms of prohibition, penalty and criminal law purpose.
2. The Attorney General of Quebec accepts that ss. 5 to 7 are valid criminal law, reflecting pressing moral concerns. These sections ban a variety of conduct, including cloning human beings, creating an embryo from genetic material taken from another embryo or a foetus, maintaining an embryo outside the body of a woman more than 14 days after fertilization (ectogenesis), creating a chimera, paying consideration to surrogate mothers, and purchasing sperm or ova.
3. The challenged prohibitions in ss. 8 to 13 generally engage the same morality, health, and security issues as the prohibitions in ss. 5 to 7, as discussed more fully below. Sections 10 and 11 amplify the scope of the prohibitions in s. 5, and s. 12 addresses the pecuniary issues that arise in ss. 6 and 7. The Attorney General of Quebec’s main challenge to these provisions is based on the form they take. The Attorney General of Quebec places great emphasis on the fact that some of the prohibitions in ss. 8 to 13 are subject to exceptions, and many of them operate against the backdrop of regulations and a licensing scheme, which remain to be fully articulated. The Attorney General of Quebec contends that the “controlled activities” prohibitions in ss. 10 to 13 promulgate a scheme to regulate medicine and research in the area of assisted reproduction. It takes a similar view of the prohibitions in ss. 8 and 9. Consequently, the Attorney General of Quebec argues that none of these provisions are valid criminal law.
4. As discussed earlier in connection with the legislative scheme viewed as a whole, the cases establish that criminal prohibitions may permit exceptions, and that the exceptions may take the form of a regulatory scheme. Thus, the form of ss. 8 to 13 is itself insufficient to remove these sections from the scope of the federal criminal law power.
5. The Attorney General of Quebec’s argument appears to be that the *extent* of the regulation and the *unpublished nature of the regulations* distinguishes this case from cases like *RJR-MacDonald* and the *Firearms Reference*,where regulatory schemes were upheld as valid criminal law.
6. I turn first to the fact that the regulations have not yet been published. It is difficult to see how the unpublished nature of the regulations could take an otherwise valid criminal regulatory scheme outside the federal criminal law power. The suggestion is that the regulations, when published, will effectively hijack provincial competencies with respect to hospitals and the medical profession.
7. However, the issue in the present appeal is the validity of the Act, not the regulations. In a case where regulations have been passed, it may be appropriate to scrutinize them to ascertain the true intent of the legislature (see, e.g., *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 35, *per* Deschamps J.). In the absence of regulations, however, the only question is whether the “controlled activities” provisions are a valid exercise of Parliament’s legislative authority. Any regulations passed under the enabling statute will be valid only insofar as they further valid criminal law goals, and they will be subject to challenge to the extent that they do not.
8. This brings us to the extent of the regulatory scheme. The first point is that the extent or comprehensiveness of a criminal law regulatory scheme does not affect its constitutionality. Provided a regulatory scheme reflects and furthers proper criminal law goals, it remains securely anchored in the federal criminal law power. Extensive and comprehensive regulatory schemes were found to be valid criminal law in *RJR-MacDonald* and the *Firearms Reference*.
9. The Attorney General of Quebec’s real point appears to be that the regulatory scheme imposed by ss. 8 to 13 is of such magnitude that medical and research regulation becomes the dominant character, or pith and substance, of these provisions, notwithstanding the criminal prohibitions they purport to create.
10. This argument, to the extent it gains any traction, requires that the prohibitions in ss. 8 to 13 be viewed in isolation from the rest of the Act (and it ignores the fact that s. 9 is truly an absolute prohibition like ss. 5 to 7, without any accompanying regulations). The Attorney General of Quebec sees these prohibitions as a stand-alone regulatory scheme divorced from ss. 5 to 7, which are conceded to be valid criminal laws. I agree with the Attorney General of Quebec that the proper approach is to rigorously scrutinize what each provision says and does. But it must be scrutiny in context, which takes into account the relationship between the absolute and selective prohibitions, as well as the other provisions of the Act.
11. Viewed in the context of the legislative scheme as a whole, the dominant character of the prohibitions in ss. 5 to 7 is to criminalize conduct that Parliament has found to be fundamentally immoral, a public health evil, a threat to personal security, or some combination of these factors. A detailed examination of ss. 8 to 13 supports the conclusion that, like ss. 5 to 7, these provisions contain a prohibition, backed by a penalty, and are directed in pith and substance to valid criminal law goals. I consider each section in turn.

(1) Section 8

1. Section 8 prohibits the use of reproductive material for the artificial creation of embryos, unless the donor has consented in accordance with the regulations: *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137 (June 14, 2007). It is backed by penalties, specified in s. 60 of the Act.
2. Section 8 is grounded in valid criminal law purposes. As the Baird Report put it, “gamete donors . . . have a unique moral interest in the use of their genetic material” (p. 639). This morality interest stems from the danger that reproductive material may be used against a donor’s will to create a human being, as well as from the possibility that an embryo, donated with the intent of creating a human being, could be used for different purposes, such as research. At the heart of s. 8 lies the fundamental importance that we ascribe to human autonomy. The combination of the embryo’s moral status and the individual’s interest in his or her own genetic material justify the incursion of the criminal law into the field of consent. There is a consensus in society that the consensual use of reproductive material implicates fundamental notions of morality. This confirms that s. 8 is valid criminal law.

(2) Section 9

1. Section 9 prohibits a person from obtaining sperm or ova from donors under 18 years of age, except for the purpose of preserving the sperm or ovum or for the purpose of creating a human being that the person reasonably believes will be raised by the donor. This is an absolute prohibition, and it takes the same form as the prohibitions in ss. 5 to 7, which are conceded to be valid criminal law. Like s. 8, it is backed by penalties set out in s. 60. The only question is whether it is grounded in a valid criminal law purpose.
2. The Attorney General of Canada argues that the purpose of s. 9 is to protect vulnerable youth from exploitation and undue pressure to donate reproductive material for the benefit of third parties. The protection of vulnerable groups is a long-standing concern of the criminal law: *Malmo-Levine*, at para. 76; *Morgentaler v. The Queen*. Coupled with the moral interest in controlling the use of one’s genetic material, this places the s. 9 prohibition securely within the scope of the criminal law.

(3) Section 10

1. Section 10 prohibits altering, manipulating, treating, obtaining, storing, transferring, destroying, importing or exporting human reproductive material or *in vitro* embryos for certain purposes, unless these activities are performed in accordance with the regulations and a licence. The prohibition is backed by penalties set out in s. 61. In essence, s. 10 prohibits dealing with human reproductive material without a licence.
2. The Attorney General of Quebec’s first objection to s. 10 is that it sets up a scheme supported by yet-to-be-pronounced regulations. It argues that when the regulations are eventually promulgated, they will seize control of areas falling under provincial jurisdiction, namely, hospitals and the medical profession.
3. The Attorney General of Quebec’s concern is understandable in light of the broad wording of the section. Section 10 of the Act is the most problematic of the impugned provisions. By prohibiting all the listed medical procedures unless they are performed by a licence holder in compliance with regulations, this section allows for federal oversight of research and medical practice. The ultimate impact of the provision will be determined by the future regulations. If the federal government were to implement regulations enacting a complete code of conduct for doctors, and regulating every component of the delivery of fertility services, the regulations would be *ultra vires*. However, as noted above, a finding that s. 10 is *intra vires* would not mean that the future regulations promulgated under this section will necessarily be valid as well. Should future regulations go too far, they will be *ultra vires*. The only question before us now is whether s. 10 itself falls under the criminal law power.
4. The Attorney General of Quebec’s second objection to s. 10 is that its dominant purpose, or pith and substance, is the regulation of hospitals and medical practice and research, which come within the province’s jurisdiction over health. Against this, the Attorney General of Canada argues that the criminal law purpose underlying s. 10 is “a mix of concerns about health protection, morality and ethics” (Factum, at para. 88), and thus serves valid criminal law purposes. The Attorney General of Canada contends that licensing is the only means of identifying where suspect practices are performed, and by whom. In turn, the regulations introduced under s. 10 provide a flexible means with which to carve out those aspects of genetic manipulation that are unacceptable from the perspective of morality, health, or security. Working together, licensing and regulation provide for enforceable, tailored prohibitions, which leave the provinces free to regulate the beneficial aspects of genetic manipulation.
5. The Attorney General of Canada identifies a number of health risks that it seeks to target with s. 10. Sperm and ova from infected donors pose grave risks to the health of both the women who receive them and the resulting offspring. Retrieval of ova may cause serious health problems for women, as the process uses drugs that can induce ovarian hyperstimulation syndrome, a potentially dangerous condition. Multiple pregnancies, a common outcome of assisted reproduction, may pose health risks to women (high blood pressure, kidney trouble and difficult delivery) and to resulting offspring (cerebral palsy, poor eyesight and breathing problems). Additionally, the Baird Commission found that alterations to the genetic material of embryos, either for therapeutic reasons or to enhance certain physical characteristics, puts offspring at an elevated risk of developing deformities, functional disturbances, and cancer (Baird Report, at p. 943). Conduct that creates a serious risk of these problems arguably rises to the level of a public health evil, and Parliament is entitled to criminalize it.
6. The health aspects of s. 10 are buttressed by morality concerns. The Attorney General of Canada argues that the alteration, manipulation and treatment of human reproductive material is a quintessential moral concern capable of grounding criminal law, as attested by the historic treatment of contraception and abortion (see, e.g., *Criminal Code, 1892*, S.C. 1892, c. 29, ss. 179, 271 and 272; *Criminal Code*, R.S.C. 1906, c. 146, and *Criminal Code*, R.S.C. 1927, c. 36, ss. 207, 303 and 306; *Criminal Code*, S.C. 1953-54, c. 51, ss. 150 and 237). Social mores have changed over time on these issues, but that is not the point. The point is simply that s. 10 touches on important moral concerns that have long been held to fall within the s. 91(27) criminal law power. These concerns have not disappeared. If anything, the new reproductive technologies have complicated and magnified them, underscoring the moral concern that Parliament apprehended.
7. Conception no longer occurs by necessity within a woman’s body, but may, through *in vitro* fertilization technologies, take place outside of it. Life, traditionally “created” by sexual reproduction, may now be created by the asexual replication technique of cloning. The genetic make-up of offspring, once determined by the natural process of DNA recombination, may now be artificially altered through genetic manipulation and germ cell line intervention. And the sex of a child may be determined at early stages of development, creating attendant moral concerns (see, e.g., M. Somerville, “Reprogenetics: Unprecedented Challenges to Respect for Human Life” (2005), 38 *Law/Tech. J.* 1).
8. These developments raise the prospect of novel harms to society, as the Baird Report amply documents. The “commodification of women and children” (p. 718); sex-selective abortions (p. 896); cross-species hybrids; ectogenesis with the potential to “dehumanize motherhood”; “baby farms” (p. 637); saviour siblings (a child whose primary purpose is to cure another child suffering from a genetic disorder); devaluation of persons with disabilities; discrimination based on ethnicity or genetic status (p. 28); and exploitation of the vulnerable — these are but some of the moral concerns raised in the Report. While the ethical acceptability of these techniques is, of course, debatable (see, e.g., S. Sheldon and S. Wilkinson, “Should selecting saviour siblings be banned?” (2004), 30 *J. Med. Ethics* 533), it cannot be seriously questioned that Parliament is able to prohibit or regulate them.
9. Had Parliament wished to prohibit absolutely the practices targeted in s. 10 — the altering, manipulation and treatment of human reproductive material — it could have done so (see, e.g., *Report of the Departmental Committee on Human Artificial Insemination* (1960), in which the Scottish Home Department concluded against criminalization, but only for practical reasons: paras. 259-63). The imposition of a selective, rather than an absolute prohibition reflects the fact that some uses of human reproductive material may be beneficial. Acting under s. 10, the executive may prohibit reprehensible conduct, while leaving the positive aspects of assisted reproduction untouched. This does not mean that s. 10 of the Act may be characterized as a law in relation to these exceptions. Rather, the main thrust of s. 10 is to separate the moral and beneficial from the immoral and harmful, and to prohibit the latter.
10. Section 10 must also be read in light of s. 68 of the Act, which lifts the application of the federal law in any province “if the Minister and the government of that province agree in writing that there are law [*sic*] of the province in force that are equivalent to those sections and the corresponding provisions of the regulations”. This provision suggests that Parliament’s object when enacting s. 10 was to establish “minimum federal safety and ethical standards” for fertility services, while leaving the provinces in charge of regulating and monitoring the medical profession (Expert Report by F. Baylis (August 2006), A.R., at p. 7000). Parliament has adopted a form of legislation akin to the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), upheld in *Hydro-Québec*: it established the licensing and regulation scheme itself, but also established an arrangement whereby similar or identical provincial regulations could govern (s. 68 of the *Assisted Human Reproduction Act* and s. 34(6) of the *Canadian Environmental Protection Act*). As stated by La Forest J. when reviewing the *Canadian Environmental Protection Act* in *Hydro-Québec*, “in enacting the legislation in issue here, Parliament was alive to the need for cooperation and coordination between the federal and provincial authorities. . . . In particular, . . . Parliament has made it clear that the provisions of this Part are not to apply where a matter is otherwise regulated under other equivalent federal or provincial legislation” (para. 153).
11. The Attorney General of Quebec submits that, rather than establishing the regulations itself and allowing equivalent provincial rules to govern, Parliament should have prohibited all fertility treatments [translation] “unless they were regulated properly, and specifically, by the provinces” (transcript, at p. 39). The Attorney General of Quebec approves of the approach used in the criminal regulation of lotteries, which prohibits lotteries unless they are conducted in accordance with provincial regulations (s. 207(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46; *Furtney*; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 35). Parliament establishes certain requirements for these provincial lottery schemes, but does not enforce the regulations itself. As noted by the Attorney General of Quebec, adopting this form of legislation in the *Assisted Human Reproduction Act* would result in a prohibition of fertility services in the provinces that have not enacted the minimum standards required by Parliament. It would also result in temporary prohibitions every time the federal government identifies a new concern requiring new regulations.
12. I cannot accept that if Parliament wishes to prevent the problematic outcomes of otherwise beneficial medical treatments, it must prohibit the treatment until the provinces are able to act. Parliament came to the conclusion that it would be inappropriate to prohibit all fertility treatments in a province that had not yet adopted sufficient oversight. It was willing to do so in the case of gambling, but in the context of medical treatments, such an absolute ban would have imposed major hardships on individuals. Further, the form of legislation adopted in this case reflects the fact that assisted reproduction is a developing field, and that Parliament may need to enact further regulations to meet newly discovered criminal concerns. This is not the case for gambling. By regulating fertility services itself, in conjunction with s. 68, Parliament allows the enjoyment of the beneficial aspects of fertility treatments in the interim between the promulgation of new federal regulations and the adoption of similar rules by the provinces. Section 68 is only relevant to my analysis because it confirms that Parliament had a valid criminal law purpose for enacting s. 10. Equivalency provisions would not save federal laws that are *ultra vires*.
13. I conclude that s. 10 is valid criminal legislation.

(4) Section 11

1. Section 11 prohibits a person from combining the human genome with the genomes of other species — transgenic engineering — unless permitted by regulations and licence. Like s. 10, it is a prohibition backed by penalties, set out in s. 61.
2. Again, the question is whether the prohibition is grounded in a valid criminal law purpose. The Attorney General of Canada argues that transgenic science “could result in a combination of genes that would make it possible to create an entity with both human and animal characteristics” (Factum, at para. 73). This, it argues, has “profound ethical and moral implications . . . for our idea of what a human being is and the integrity of intrinsic human characteristics” (*ibid.*). Transgenic science has been associated with other harmful techniques of assisted reproduction, such as human cloning and the commodification of reproductive materials (see, e.g., A. Campbell, “Defining a Policy Rationale for the Criminal Regulation of Reproductive Technologies” (2002), 11 *Health L. Rev.* 26). These risks support the use of the criminal law to control transgenic research.
3. In essence, s. 11 uses a selective prohibition to broaden the absolute prohibitions in s. 5(1)(*h*), (*i*) and (*j*) on the creation of chimeras and hybrid entities. Section 11 recognizes that mixing human and non-human genetic material can raise moral concerns long before such experiments result in the creation of a new life form. The Attorney General of Quebec accepts that Parliament has a valid moral interest in banning the harms caught by s. 5(1)(*h*), (*i*) and (*j*). It is difficult to argue that s. 11’s broader focus on transgenic manipulation does not invoke the same moral concerns.
4. I conclude that s. 11 is valid criminal law.

(5) Section 12

1. Section 12 prohibits reimbursing donors for expenditures incurred in the course of donating sperm or ova, for the maintenance or transport of an *in vitro* embryo, or for expenditures incurred by a surrogate mother — except in accordance with the regulations and a licence. The section also prohibits reimbursement for expenditures without receipts, and the reimbursement of surrogate mothers for the loss of work-related income without medical certification that work may pose a risk to her health or that of the embryo. The prohibitions in s. 12 are backed by the penalties in s. 61.
2. The question is whether s. 12 has a criminal law purpose. Section 12 is complementary to ss. 6 and 7, which are conceded to be valid criminal law. Sections 6 and 7 prohibit the commercialization of reproduction. These prohibitions are based on the Baird Report, which stated: “To allow commercial exchanges of this type [buying and selling embryos, use of financial incentives, etc.] would undermine respect for human life and dignity and lead to the commodification of women and children” (p. 718). Section 12 addresses the related issue of permitted expenses. It seeks to ensure that credited expenses are confined to actual outlays, and do not cross the line into commercialized reproductive activities. This is the line that prohibits that which is considered inappropriate commodification, and permits that which is considered acceptable reimbursement. The act of drawing this line raises fundamental moral questions. Though there are differing views on where the line should be drawn, it is difficult to argue that the criminal law power does not permit Parliament to prohibit that which falls on the wrong side of it.
3. I conclude that s. 12 is rooted in the same concerns as ss. 6 and 7 and is valid criminal law.

(6) Section 13

1. Section 13 is an absolute prohibition on the performance of licensed activities in unlicensed premises, backed by a penalty set out in s. 61. The only issue is whether it is grounded in a valid criminal law purpose.
2. The purpose of s. 13 is to confine activities relating to the artificial production of human life to places which have been licensed to perform such activities. It imposes controls not on what is done, but on where it is done. The mechanism used is licensing, on the basis of yet-to-be-adopted regulations.
3. On one hand, the Attorney General of Quebec argues that it is for the provinces, not the federal government, to regulate the facilities in which medical procedures are performed. In its view, the establishment of standards for assisted reproduction facilities comes within provincial jurisdiction.
4. On the other hand, the Attorney General of Canada contends that it is essential to restrict the places in which the practice of assisted reproduction takes place. The Attorney General of Canada explains that s. 13 is aimed at preventing the artificial creation of human life in clandestine laboratories, on shoddy operating tables, and in shuttered basements, where human reproductive material might be imperilled, unhampered by regulatory supervision. It prohibits this and imposes a penalty.
5. The location where assisted reproduction takes place is important. The facilities must be equipped and staffed to properly care for donors, donees, and delicate life forms produced by artificial means. The suitability of assisted reproduction facilities is vital to avoiding harms related to morality and health. In turn, these facilities must be identified so that they can be subject to inspection and control. As with ss. 10 to 12, licensing provides the only practical means of enacting a prohibition on substandard facilities.
6. The production of human life in clandestine facilities may well constitute a public health evil. The conduct involved can pose serious health risks to those involved. Inadequate equipment, unsterilized facilities, unqualified staff, inappropriate emergency protocols — all of these factors and more may pose grave risks to the health of donors, mothers, and the future human beings who are the object of the exercise.
7. These health-related objectives overlap with the moral concern of ensuring that assisted reproduction facilities are subject to supervision. The Baird Report concluded that human reproductive material attracts special moral concerns. These concerns come to the fore in the creation and preservation of life by artificial means. Parliament is entitled to prohibit the performance of assisted reproduction procedures in secret, lest human reproductive material be manipulated and put to purposes that are considered immoral. Parliament is also entitled to prohibit the performance of assisted reproduction procedures in facilities that are unable to appropriately support human life. For example, it would cheapen human life to permit artificially created newborns to die simply because a facility was not equipped to meet their special needs. These prohibitions speak to our fundamental notions of humanity. Consequently, the morality interest validates the use of criminal sanctions to prevent assisted reproduction from being practised in unsuitable venues. In turn, this objective is actualized by way of licensing.
8. The prohibition on unlicensed facilities does not oust the ability of the provinces to designate the facilities in which assisted reproduction procedures are performed. Section 13 does not confine these activities to any specific facilities. The hospitals and research centres where these procedures take place will be subject to concurrent provincial licensing. Section 13 does not displace this provincial oversight, but merely requires a supplementary federal licence certifying that assisted reproduction processes can be carried out in the laboratory or hospital in question. Further, if the province and the federal government reach an equivalency agreement under s. 68, the province alone would issue and enforce licences under s. 13. This prohibition does not seek to usurp the provinces’ role in regulating hospitals and research centres, but rather to prevent specific practices from being carried out in unsuitable facilities.
9. I conclude that s. 13 addresses serious harms both to society and the individuals involved in assisted reproduction procedures. It is valid criminal law.

(7) Summary

1. I conclude that, in pith and substance, the prohibitions in ss. 8 to 13 come within the scope of the federal criminal law power and are valid criminal law. Together with ss. 5 to 7, these provisions form a valid prohibition regime that is consistent with the general pith and substance of the *Assisted Human Reproduction Act* as a whole.
2. I turn now to the validity of the administration and enforcement provisions in the remainder of the Act.

C. *Are the Administrative Provisions of the Act (Sections 14 to 61 and 65 to 68) Ancillary to the Prohibition Regime in Sections 5 to 13?*

1. The criminal prohibitions in ss. 5 to 13 are followed by a number of sections that provide for their administration and enforcement. Sections 14 to 19 set up a system of information management. Sections 20 to 39 of the Act establish the Assisted Human Reproduction Agency of Canada. Sections 40 to 59 charge the Agency with administering and enforcing the Act and regulations, and authorize it to issue licences for certain activities related to assisted reproduction. Finally, ss. 60 and 61 provide for penalties, ss. 65 to 67 authorize the promulgation of regulations, and s. 68 addresses the equivalency agreements with the provinces.
2. In pith and substance, many of these provisions do not come within Parliament’s criminal law power. However, the Attorney General of Canada argues that these provisions (the “ancillary provisions”) support the criminal law prohibitions in ss. 5 to 13 of the Act and are valid under the doctrine of ancillary powers (also known as the ancillary doctrine: see *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 45).
3. The ancillary powers doctrine holds that legislative provisions which, in pith and substance, fall outside the jurisdiction of the government that enacted them, may be upheld on the basis of their connection to a valid legislative scheme. This doctrine addresses the reality in federal states that one level of government will often be unable to legislate effectively on matters within its jurisdiction without trenching on subjects that belong to the other level of government. At the same time, however, the doctrine of ancillary powers seeks to maintain the basic division of federal and provincial powers established by the *Constitution Act, 1867.*
4. The Court has developed a rational, functional test to describe the required connection, with the caveat that a test of necessity will apply where the encroachment on the jurisdiction of the other level of government is substantial: *General Motors*, at pp. 667-70; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at pp. 469-70; *Kirkbi AG v. Ritvik Holdings Inc.* The idea of proportionality underlies the idea of a rational and functional standard for some cases and standard of necessity for others. The more an ancillary provision intrudes on the competency of the other level of government, the higher the threshold for upholding it on the basis of the ancillary powers doctrine. Though this test has been criticized as too dependent on a subjective classification of the severity of the intrusion (see Hogg, at p. 15-43), for the purposes of this decision it need not be revisited.
5. In *General Motors*, Dickson C.J. noted a number of factors that would determine the severity of an extrajurisdictional incursion. These factors may be summarized as follows.
6. The first factor concerns the *scope of the heads of power in play* — whether they are broad or narrow. Dickson C.J. focussed on the head of power that validates the scheme in which the impugned provision appears. Broad heads of power lend themselves to jurisdictional overlap, and are “therefore less likely to give rise to highly intrusive provisions” (*General Motors*, at p. 671). This stands in contrast to narrow heads of power, which are “quite susceptible to having provisions ‘tacked-on’ to legislation which is validated under them” (*ibid.*). Dickson C.J. thus concluded that the intrusion on the powers of the other level of government will usually be less serious where the impugned provision appears in a legislative scheme that is validated under a broad head of power. This logic suggests that it is also important to consider the head of power that the impugned provision is said to infringe. If it intrudes upon a broad head of power, the intrusion will generally be less serious because it does not overwhelm the jurisdiction of the other level of government. Conversely, an intrusion on a narrow legislative competency will be more serious because it threatens to obliterate that head of power.
7. The second factor concerns *the nature of the impugned provision*. In *General Motors*, Dickson C.J. considered the intrusion on provincial powers less serious because the nature of the impugned provision in that case was remedial. The provision was designed “to help enforce the substantive aspects of the Act, but it [was] not in itself a substantive part of the Act” (p. 673). Dickson C.J. also noted that the incursion on the jurisdiction of the other level of government would be less serious where the impugned provision was limited in scope, and did not create general rights. Another relevant aspect of the nature of the impugned provision is whether it is intended to replace legislation introduced by the other level of government, or merely supplement it. An intrusion will be less serious when the impugned provision is meant to coexist with legislation enacted by the other level of government.
8. Finally, Dickson C.J. considered whether the impugned provision’s enacting body had a *history of legislating on the matter in question*. A history of legislation in the area supports the legitimacy of the impugned provisions and suggests they will not prove unduly intrusive on the other level of government. Thus the enacting body is “not constitutionally precluded” from enacting similar legislation “where such measures may be shown to be warranted” (p. 673). In *General Motors*, it sufficed that Parliament had a history of intruding on provincial jurisdiction by creating rights of civil action. This track record demonstrated that the inclusion of such a right was “not constitutionally fatal” (p. 674).
9. Dickson C.J.’s list of factors did not purport to be exhaustive, and the assessment of the seriousness of an intrusion must ultimately be grounded in the facts of each case. However, the *General Motors* factors align well with the facts of the present appeal.
10. Before turning to the question of how seriously the ancillary provisions intrude on provincial jurisdiction, it is useful to describe the nature of the intrusions. Some of the ancillary provisions are criminal in nature and do not significantly intrude on provincial powers. The provisions for enforcement (ss. 45 to 59), promulgation of regulations (ss. 65 to 67), and imposition of penalties (ss. 60 and 61) are essentially part of the criminal prohibitions in ss. 5 to 13. Indeed, many of them are rough analogues to provisions in the *Criminal Code*. The organizational provisions in ss. 20 to 39 are similar in nature. However, other provisions intrude directly on provincial powers. Of particular significance are the information management provisions in ss. 14 to 19, which define standards of consent and privacy, charge the Agency with managing personal health information, and establish rules for the medical profession. Additionally, the administrative provisions in ss. 40 to 44 endow the Agency with broad powers to grant licences that affect the who, where, when, and how of assisted reproduction.
11. The question is whether these provisions, taken as a whole, represent a minor incursion on provincial powers, or a substantial one. The first consideration is the scope of the provincial head of power in play. In the present appeal, the ancillary provisions generally fall under the provincial powers over property and civil rights (s. 92(13)) and matters of a merely local or private nature (s. 92(16)). Both of these heads of power are very broad, and they are often seen as sources of residual jurisdiction: see Hogg, at pp. 17-2 and 17-3. The breadth of these heads of power renders the intrusion less serious.
12. This brings us to the second factor, the nature of the ancillary provisions. None of these provisions purport to create a substantive right. Rather, as explained below, they function merely to assist in enforcing the Act. Without the prohibition regime in ss. 5 to 13, these provisions would serve no purpose; they would establish an agency with nothing to enforce. Consent is obtained, information flows, and privacy is protected — all to ensure the smooth functioning of the criminal prohibitions. Moreover, the ancillary provisions are tailored to a small corner of the vast topography of the provincial power over health: namely, the harmful aspects of assisted human reproduction, insofar as they are specifically targeted by the Act and regulations. The impact of the law on provincial powers is real, but it is confined in a manner consistent with the purpose of the Act. Furthermore, the ancillary provisions are designed to supplement, rather than exclude, provincial legislation. The Act imposes federal rules on the practice of assisted reproduction, but it does not prevent the provinces from regulating this field, especially for the promotion of its beneficial aspects. This conclusion is underscored by the equivalency provision in s. 68, which provides that the Governor in Council may consent to suspending certain portions of the Act and regulations in favour of equivalent provincial laws. The nature of the ancillary provisions points in the direction of a minor intrusion on provincial powers.
13. Finally, I turn to Parliament’s history of legislating in the field occupied by the ancillary provisions. Parliament has long sought to address issues of morality, health, and security. As discussed above, it has also invoked the criminal law power to uphold regulatory schemes. Of particular relevance is Parliament’s history of administering and enforcing these statutes, often by way of licensing bodies like the Agency: see *Firearms Reference*; *Hydro-Québec*. These historical comparisons suggest that the ancillary provisions constitute only a minor intrusion on provincial powers.
14. In light of these factors, I conclude that the ancillary provisions constitute a minor incursion on provincial jurisdiction. Accordingly, the rational and functional connection test should be applied in this case.
15. The rational and functional connection test assesses the relationship between the ancillary provisions and the otherwise valid legislative scheme in which they appear. The ancillary provisions must support the scheme in a way that is rational in purpose and functional in effect. This means that they must “complement rather than supplement” the legislative scheme: *Papp v. Papp*, [1970] 1 O.R. 331 (C.A.), at p. 336. It also means they must be appropriately tailored to fill “gaps” in the legislative scheme that might otherwise lead to inconsistency, uncertainty, or ineffectiveness: *Kirkbi AG v. Ritvik Holdings Inc.* It need not be shown that the scheme would fail without the ancillary provisions; that would be a test of necessity. Rather, the ancillary provisions must themselves perform a function that complements the other provisions in the scheme, and they cannot have been tacked on merely as a matter of convenience.
16. The rational, functional connection test recognizes the need to protect the supremacy of each level of government in the areas of jurisdiction assigned to it by the *Constitution Act, 1867*. However, it also recognizes that these heads of power are no longer watertight. The complexity of modern legislation will often render it impossible for one level of government to fulfill its constitutional mandate without trespassing on the jurisdiction of the other level. The Court’s endorsement of a flexible, cooperative approach to federalism suggests that this kind of pragmatic lawmaking should be encouraged: see Dickson C.J. in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18; *Canadian Western Bank v. Alberta*, at para. 42.
17. The final question is whether the ancillary provisions are rationally and functionally connected to the valid criminal law provisions in ss. 5 to 13 of the Act.

(1)Sections 14 to 19

1. The first set of ancillary provisions are ss. 14 to 19, which address access to information. These provisions harness the flow of information, first to deal appropriately with consent and related privacy issues, and second to facilitate compliance with the Act. Both these goals are rationally connected to the scheme in ss. 5 to 13. The only purpose of these information management provisions is to further the scheme. Functionally, they fill gaps that would otherwise undermine the operation of the prohibition regime.
2. Consent is central to the scheme established by the Act. Section 2(*d*) declares that “the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies”. This concern is reflected in the consent provisions of s. 8, which bar the use of human reproductive material to create an embryo, or the use of an *in vitro* embryo, unless the donor consents. The importance of consent is intimately tied to moral concerns, as discussed earlier.
3. Sections 14 to 19 contain a number of provisions to ensure that participants give consent, have sufficient information to make this consent meaningful, and that their privacy is protected throughout. These provisions ensure that donors are aware of the requirements and protections of the Act and have adequate counselling services so as to give full and informed consent (s. 14(2)). Additionally, they provide for disclosure of relevant health information to participants in, and offspring of the processes (s. 18(3), (4) and (7)) so that they, too, will have the necessary information to manage their own reproductive lives. Furthermore, the information management provisions provide for the withdrawal of consent, requiring the destruction of personal information and reproductive material (s. 16(2) and (3)). Finally, these provisions also protect privacy interests, so that the laudable ends of informed consent do not unduly compromise human dignity (ss. 15(1) and 18(2)).
4. Compliance is also central to the operation of the Act, because a prohibition regime would be useless if it did not have a mechanism to ensure that its provisions are respected. Sections 14 to 19 achieve this end by coordinating information sharing between the relevant actors: donors, practitioners, the Agency, and the public. With regard to donors, s. 14(2) provides that they will be informed of the prohibitions and protections of the Act, ensuring that they have sufficient information to comply with the Act and demand compliance of practitioners. As for practitioners and other licensees, s. 14(1) provides that they will have sufficient information about donors to avoid contravening the prohibitions in the Act (e.g., by accepting a donation of reproductive material from an underage donor, in contravention of s. 9). Sections 15 and 16 cover the disclosure of personal information to the Agency, the courts and insurers, while s. 17 charges the Agency with maintaining a personal health information registry to assist in administering and enforcing the Act (see also s. 18(1)). Finally, s. 19 gives the public a right to access certain information about the Agency’s activities, thereby promoting compliance by subjecting enforcement of the Act to public scrutiny.
5. It is not difficult to see how the collection of information will help to ensure that the Act’s prohibitions are respected and, if defied, that such conduct will be effectively prosecuted.
6. I conclude that ss. 14 to 19 are closely tied to the valid criminal prohibitions in ss. 5 to 13. These prohibitions fill a gap by addressing the practical considerations inherent in the functioning of the legislative scheme. Because they do so in a tailored manner, they constitute a proper exercise of ancillary powers.

(2)Sections 20 to 59 and 65 to 67

1. The organizational provisions in ss. 20 to 39, the administrative provisions in ss. 40 to 44, the enforcement provisions in ss. 45 to 59, and the regulatory provisions in ss. 65 to 67 are clearly ancillary to the criminal prohibition regime in ss. 5 to 13, furthering it in both purpose and functional effect. All of these provisions present the necessary rational connection to the valid criminal law prohibitions in the Act. I consider each set of provisions in turn.
2. The organizational provisions in ss. 20 to 39 merely establish the Agency to administer and enforce the federal Act, and, as such, the constitutionality of this portion of the legislation is entirely subsidiary to the constitutionality of the prohibitions in ss. 5 to 13. Indeed, the Attorney General of Quebec does not claim that these provisions are unconstitutional.
3. The administrative provisions in ss. 40 to 44 are concerned with the issuance of licences for controlled activities (s. 40). This is directly related, as discussed above, to prohibiting harmful and immoral conduct, while excepting beneficial activity. Licensing helps to ensure that selective prohibition targets morally reprehensible conduct, and does so in a flexible manner that can adapt to changing circumstances. It does so by restricting and supervising the use of technologies associated with the artificial creation of human life. In this situation, licensing is about separating good from bad, not about promoting or encouraging the positive aspects of assisted reproduction. Sections 41 to 44 are collateral to this purpose.
4. The provisions relating to inspection and enforcement of the Act found in ss. 45 to 59 also constitute a valid exercise of ancillary powers. They are part and parcel of the scheme by which Parliament prohibits immoral and potentially harmful uses of human reproductive material, while permitting beneficial uses to continue. Without inspection and enforcement provisions, the prohibitions of ss. 5 to 13 would be ineffective. The manipulation of human reproductive material happens in the privacy of laboratories, requiring special rules for inspection and enforcement. In essence, these provisions are analogous to the search and seizure powers in the *Criminal Code*, narrowly tailored to the special exigencies of enforcing the *Assisted Human Reproduction Act*.
5. Finally, the regulatory provisions in ss. 65 to 67 permit adaptations as required by changing circumstances in the rapidly evolving field of assisted reproduction. Section 65 lists a number of topics on which the Governor in Council may enact specific rules to more precisely tailor the prohibition regime to the particular demands of the moment. This regulatory power is merely the mechanism by which a set of selective prohibitions addresses an ever-changing subject. The Attorney General of Quebec does not seek to have these provisions declared unconstitutional.

(3)Equivalency Provisions

1. Section 68 of the Act permits the Governor in Council to declare provisions of the Act inapplicable in a province where a provincial law contains similar provisions, pursuant to an agreement with that province. This provision recognizes the fact that assisted human reproduction is an area of overlapping jurisdiction, and it provides for harmonization and the avoidance of duplication where provincial laws cover the same matters as the Act. Section 68 provides a flexible approach to federal-provincial cooperation, which is appropriate to modern federalism, where matters will frequently attract concurrent legislative authority.
2. This provision is not seriously attacked, although the Attorney General of Quebec argues that its presence is indicative of the predominantly regulatory nature of the legislation. This is an old argument, and it has been soundly rejected in the jurisprudence. The mere fact that a matter comes within provincial jurisdiction does not preclude it from coming under federal jurisdiction as well. As noted above, this Court has upheld as constitutional provisions that allow the provinces to limit the scope of federal legislation under cooperative schemes: *Lord’s Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497, *Furtney* and *Hydro-Québec*.
3. I conclude that s. 68 is constitutional.

(4)Sections 60 and 61

1. These provisions are not seriously attacked. They simply provide the penal sanctions that are necessary for criminal law provisions. Like the penal provisions of the *Criminal Code* of Canada, they are valid.

V. Conclusion

1. I conclude that the impugned sections of the Act are valid. The prohibitions in ss. 8 to 13 fall within the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. The remaining sections are ancillary to this criminal law scheme. Consequently, I would allow the appeal and answer the constitutional question as follows:

Do ss. 8 to 19, 40 to 53, 60, 61 and 68 of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, exceed, in whole or in part, the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*?

Answer: No.

English version of the reasons of LeBel, Deschamps, Abella and Rothstein JJ. delivered by

1. LeBel and Deschamps JJ. — In 2001, Health Canada estimated that every 100th baby in the industrialized world was being conceived through the application of some kind of assisted human reproduction technology (*Proposals for Legislation Governing Assisted Human Reproduction: An Overview* (May 2001)). The popularity of assisted human reproduction was bound to increase, as it corresponded to a need. The same department reported in 2009 that one in eight Canadian couples experienced problems related to infertility. This appeal does not concern the appropriateness or wisdom of the decision to regulate assisted human reproduction, or even the validity of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2 (“*AHR Act*”), as a whole. Rather, the dispute relates to the connection between certain provisions of the *AHR Act* and the federal criminal law power. The Attorney General of Canada is appealing as of right from an opinion of the Quebec Court of Appeal on a reference under the *Court of Appeal Reference Act*, R.S.Q., c. R‑23. The following constitutional question was stated:

Do ss. 8 to 19, 40 to 53, 60, 61 and 68 of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, exceed, in whole or in part, the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*?

1. For the reasons that follow, we would answer this question in the affirmative, except to the extent that the offences provided for in ss. 60 and 61 relate to provisions that are not in dispute. The provisions of the *AHR Act* concerning controlled activities, namely those involving assistance for human reproduction and related research activities, do not fall under the criminal law power, but belong to the jurisdiction of the provinces over hospitals, civil rights and local matters. We would therefore dismiss the appeal.

I. Introduction

1. Connecting the impugned provisions with the heads of power relied on by the parties — criminal law, on the one hand, and property and civil rights, education, hospitals and local matters, on the other — is a particularly delicate exercise because the scopes of certain of these powers are not clearly defined. As we will see, however, even though defining the scopes of certain powers may seem difficult, the powers in question do have real limits and the courts retain a role in reviewing compliance with those limits. To determine whether the government that enacted the impugned provisions has complied with the limits, we will need to review the history of the *AHR Act* and the doctrines of Canadian constitutional law.

II. History of the *Assisted Human Reproduction Act*

1. In 1989, the federal government, which was already concerned about the stakes of genetic manipulation, struck the Royal Commission on New Reproductive Technologies (the “Baird Commission”) to inquire into the existing situation and foreseeable scientific and medical advances in the area of new reproductive technologies. The Baird Commission was mandated to inquire both into the impact of these technologies on health and research and into their ethical, social, economic and legal implications and their impact on the general public. In November 1993, it tabled its final report entitled *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies* (the “Baird Report”). The Baird Commission made two key recommendations in its report:

1 - that legislation be enacted to prohibit, with criminal sanctions, certain aspects of new reproductive technologies; and

2 - that a national regulatory body for reproductive technologies be established. (See Executive Summary, at p. xxxii.)

1. After the Baird Report was tabled, the federal government initiated a process to implement its recommendations. This process would prove to be particularly long and arduous. Several bills were introduced before the *AHR Act*. They can be divided into two groups. The scope of the first group of bills was limited to the prohibition of certain activities: Bill C‑47, *An Act respecting human reproductive technologies and commercial transactions relating to human reproduction*, 2nd Sess., 35th Parl., 1996; Bill C‑247, *An Act to amend the Criminal Code (genetic manipulation)*, 1st Sess., 36th Parl., 1997; Bill C‑336, *An Act to amend the Criminal Code (genetic manipulation)*, 1stSess., 37th Parl., 2001. The second group of bills purported to regulate certain activities associated with assisted human reproduction and to create an agency that was to be responsible for administering the Act. The purpose of each of the bills in the second group was to implement both the recommendations of the Baird Report: Bill C‑56, *An Act respecting assisted human reproduction*, 1st Sess., 37th Parl., 2001‑2002; Bill C‑13, *An Act respecting assisted human reproduction*, 2nd Sess., 37th Parl., 2002.
2. All five of these bills died on the Order Paper at the end of the sessions of Parliament in which they were introduced.
3. Finally, Bill C‑6, *An Act respecting assisted human reproduction and related research*, 3rd Sess., 37th Parl., the source of the current legislation, was introduced on February 11, 2004. It passed through every stage of parliamentary scrutiny and received Royal Assent on March 29, 2004. To this date, the only regulations that have been made pursuant to this Act are the *Assisted Human Reproduction (Section 8 Consent) Regulations*,SOR/2007‑137.

III. Structure and Content of the *Assisted Human Reproduction Act*

1. The *AHR Act* is formally divided into 17 parts of varying importance. We will focus on the parts of the Act that will enable us to determine the objectives Parliament was pursuing in enacting it. To this end, it will be helpful to reproduce s. 2 of the *AHR Act*, in which Parliament stated the principles that guided it:

**2.**[Declaration] The Parliament of Canada recognizes and declares that

(*a*) the health and well‑being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;

(*b*) the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;

(*c*) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well‑being of women must be protected in the application of these technologies;

(*d*) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;

(*e*) persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;

(*f*) trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition; and

(*g*) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.

1. After this statement of principles, the Act contains a series of definitions, which are followed by a number of provisions divided into two classes: Prohibited Activities and Controlled Activities. The parts under these headings represent two distinct branches of activities related to genetic manipulation.
2. Sections 5 to 9 list the prohibited activities. The Baird Commission stated that most of these activities or technologies were considered to be unacceptable, mainly for ethical or moral reasons, but also in some cases because of a lack of knowledge of the health risks they might entail (Baird Report, at p. 108). A voluntary moratorium on nine of these activities and technologies had been announced in 1995, after the Baird Report was tabled (Health Canada, News Release 1995‑57). The prohibited activities are: cloning human embryos (s. 5(1)(*a*)); creating *in vitro* embryos for any purpose other than creating a human being or conducting research (s. 5(1)(*b*)); manipulating embryos to create children whose parents never existed genetically (s. 5(1)(*c*)); maintaining embryos outside a woman’s body after the 14th day following fertilization (s. 5(1)(*d*)); engaging in sex selection for non‑medical reasons (s. 5(1)(*e*)); altering the genome of a cell such that the alteration is capable of being transmitted to descendants (s. 5(1)(*f*)); creating animal‑human chimeras or hybrids (s. 5(1)(*g*), (*h*), (*i*) and (*j*)); entering into pre-conception or surrogacy arrangements for a fee (s. 6); and purchasing or selling ova, sperm and/or embryos (s. 7). Removal and use of human reproductive material without consent (s. 8) are also dealt with in the part on prohibited activities. However, unlike most of the other activities listed in this part, which the Act prohibits completely, the removal and use of such material are permitted if consent is given in the form prescribed by regulations. As well, obtaining any sperm or ovum from a minor is prohibited by s. 9, except to enable the minor to become a parent. The constitutionality of the absolute prohibitions, that is, of those provided for in ss. 5 to 7, is not in issue here, but the validity of the prohibitions in ss. 8 and 9 is being challenged.
3. The controlled activities are set out in ss. 10 to 13 of the *AHR Act*. These provisions are being challenged. They concern both assisted human reproduction and related research.
4. When it decided to regulate what are called “controlled” activities, Parliament clearly took into account the concerns expressed about the ethical and moral aspects and the safety of assisted reproductive activities. And in so doing it clearly intended to implement the Baird Report’s second recommendation in order to ensure that Canadians could have access to assisted reproduction services. In Chapter 4 of the report, the Commission had stated that,

• if safe, ethical, and effective means are available to help Canadians achieve the goal of having a healthy child, then as a caring society we should consider how to devote our collective resources to doing so;

• if procedures have been demonstrated to be safe and effective, and if we have determined as a society that they should be available, then we must be prepared to commit public resources to their provision through the health care system; to do otherwise would be to ignore Canadians’ values with respect to non-commercialization of reproduction and equity and fairness in access to treatment, and, as we will show in subsequent chapters, to undermine the publicly funded health care system by imposing uncontrollable burdens on it; and

• if a procedure is to be provided through the public health system, access to it must be determined by medical criteria and in accordance with the principles established in the *Canada Health Act*, the *Canadian Charter of Rights and Freedoms*, and human rights legislation. [Emphasis added; p. 86.]

At the end of its work, the Commission had noted a near‑total consensus on certain activities:

• *in vitro* fertilization and assisted insemination are legitimate medical responses to infertility; internationally, the trend has been to institutionalize this response through some form of national accreditation or licensing and record keeping for assisted conception research and treatment; [and]

. . .

• internationally, there is general agreement that the use of donated gametes or zygotes is permissible . . . . [Emphasis added; p. 140.]

1. It can thus be seen that the Commission was of the opinion that assisted reproductive activities and related research should be permitted. This means that it considered them morally and socially acceptable (Baird Report, at p. 109).
2. Section 10 concerns obtaining, storing, transferring, destroying, importing or exporting embryos or human reproductive material for the purpose of creating an embryo (s. 10(3)); creating embryos (s. 10(1)); and using, altering or manipulating *in vitro* embryos (s. 10(2)).
3. Section 11 requires compliance with regulations on transgenic research. Section 65(1)(*d*) establishes a power to specify parts or proportions of the human genome that may be used in conjunction with all or parts of the genome of another species.
4. Section 12 regulates the reimbursement of expenditures related to the donation, maintenance and transport of reproductive material and to the pregnancy of surrogate mothers. Its provisions shed light on the real purpose of the prohibitions set out in ss. 6 and 7, as it prohibits only the commercialization of the provision of genetic material or of surrogacy.
5. Section 13 regulates the use of any premises for a controlled activity.
6. A separate part of the Act deals with the collection and disclosure of personal information and the provision of counselling services (ss. 14 to 19).
7. Sections 20 to 39 define the responsibilities of the Minister of Health and establish the structure of the Assisted Human Reproduction Agency of Canada (the “Federal Agency”). Sections 40 to 59 concern the Federal Agency’s powers of enforcement and administration. These powers relate primarily to the controlled activities (see, e.g., s. 40(1)). Sections 60 and 61 provide for penal sanctions for violating the Act, and ss. 62 to 64 address certain procedural issues. The power to make regulations is granted in ss. 65 to 67. Sections 68 and 69 provide for the making (and termination) of equivalency agreements between the Minister and provincial governments pursuant to which the Governor in Council may declare that ss. 10 to 16, 46 to 53 and 61 do not apply. In this regard, it should be mentioned that ss. 40 to 53, 60, 61 and 68 are being challenged. However, although ss. 60 and 61 are being challenged as a whole, they should not be declared unconstitutional in their entirety even if the position of the Attorney General of Quebec is accepted, because the offences they establish relate not only to the impugned provisions, but also to the provisions that are not being challenged. In such a case, they should therefore be read down rather than being simply declared invalid.
8. We will return to the different parts of the *AHR Act* below. For now, we will simply note that substantive and formal distinctions are drawn between prohibited activities and controlled activities. The dichotomy between dangerous activities and activities that benefit society appears clearly from Parliament’s statement of principles in s. 2 and from the titles used in the Act itself. Furthermore, whereas the category of controlled activities concerns services that are available to persons in need of assistance because of an inability to reproduce and that are used by professionals who provide the required help, the activities that are prohibited completely do not involve techniques used in assisted human reproduction.
9. In sum, the substantive and formal distinctions between controlled activities and activities that are prohibited completely stem from the legislative history, from the nature of the activities and from how they are presented in the *AHR Act*. The Chief Justice interprets the *AHR Act* very differently. She disregards its legislative history, even criticizing us for attaching importance to the Baird Report. She takes no account of the distinction the Commission drew in its report between prohibited activities and controlled activities. In this regard, she asserts that the fact that the Commission recognized the positive aspects of assisted human reproduction does not mean that Parliament shared the Commission’s concerns. We can only emphasize that there is no factual basis whatsoever for the Chief Justice’s interpretation. Her approach is contrary to the usual approach to constitutional analysis. In conducting such analyses, this Court gives considerable weight to the legislative facts. Moreover, in an affidavit filed in evidence during the hearing in the Court of Appeal, Francine Manseau, Senior Strategic Policy Advisor, Assisted Human Reproduction Implementation Office, Department of Health Canada, clearly stated that the mandate received from the Minister had been [translation] “to analyse the *Baird Report* and develop policy statements consistent with its recommendations and findings” (A.R., at p. 6961). We therefore prefer to keep the legislative history and the distinctions between prohibited and controlled activities in mind. We will now review the parties’ positions on the issues.

IV. Positions of the Parties

1. The Attorney General of Canada describes assisted human reproduction as a “novel” reality, as a technique of “artificial creation of human life”. He views it as a single set of activities, which means that a comprehensive approach must be taken in determining whether the Act is constitutional and that the provisions of the Act can in this way be linked to the criminal law. The purpose of the scheme is to protect morality, safety and public health in the “novel” context of the artificial creation of human life. The adoption of prohibitions with exemptions and conditions makes it possible to take a systematic and integrated approach to the problems raised by the various aspects of assisted human reproduction, and to the complexity of the issues it raises. The Attorney General of Canada submits that the *AHR Act* does not encroach on the field of medical practice because its provisions have little or nothing to do with the practice of medicine. On the other hand, it cannot be denied that they have a connection with the protection of public health, which is a legitimate purpose of the criminal law power.
2. The Attorney General of Quebec does not question the action taken by Parliament with respect to the activities prohibited by ss. 5 to 7. As regards the provisions on consent and on the controlled activities, however, he considers that Parliament is regulating the entire field of medicine connected with assisted human reproduction and related research. In his view, the pith and substance of the provisions is the regulation of the practice of medicine in the field of medically assisted human reproduction. He points out that the activities in question are neither harmful nor morally reprehensible; on the contrary, they are desirable from a health standpoint. He submits that the practice of medicine in the field of assisted human reproduction does not differ from the practice of medicine in any other area in regard to the professional qualifications of the practitioners, to the respect they must show patients and to compliance with the ethical, disciplinary and administrative rules governing the practice of medicine in general. Subjecting this field of medical practice to the control and oversight of a national agency represents, in this case, a major overflow of the exercise of federal legislative jurisdiction into matters within the provinces’ authority. The Attorney General of Quebec does not deal with the *AHR Act* as a whole. Rather, he submits that the impugned provisions cannot be based on the federal criminal law power, because their purpose is not to suppress or prevent an evil, while a statutory provision cannot be criminal in nature without having that as its purpose. To hold these provisions to be constitutional would be to distort the principles of Canadian federalism.

V. Opinion of the Quebec Court of Appeal, 2008 QCCA 1167, 298 D.L.R. (4th) 712

1. The Attorney General of Quebec referred a question to the Quebec Court of Appeal under the *Court of Appeal Reference Act* in order to obtain its opinion on the constitutionality of the impugned provisions. In its decision, the Court of Appeal expressed the opinion that the *AHR Act* [translation] “reveals the legislative intent to cover the entire field of assisted reproduction, with respect to both clinical practice and research” (para. 122). It noted that in this regard the *AHR Act* [translation] “may be characterized as comprehensive and exhaustive legislation on the subject, just as the Baird Commission wished” (*ibid.*). The Court of Appeal held that the impugned provisions could not be considered to be criminal law legislation (at paras. 137 and 138):

[translation] However valid these intentions [namely the setting of national standards] are, they do not have the effect of conferring a criminal law purpose on the control of assisted reproductive activities. The question is not whether the Act is good or bad, or whether it achieves its objectives or not, but whether its purpose is criminal in nature. In the present case, with the exception of the outright prohibitions, the record reveals no “evil” that needs to be repressed. Rather, it establishes the intent to control the clinical and research aspects of a medical activity in order to create a uniformity that is considered to be desirable. The appropriateness of a single piece of legislation applying to Canada as a whole and regulating a permitted and recognized activity is not a purpose that confers criminal law jurisdiction.

To sum up, the fundamental and dominant purpose of the impugned part of the Act is the safeguarding of health and not the elimination of an “evil”.

1. The Court of Appeal did not discuss the connection between the provisions that are being challenged and those that are not. It simply concluded that the impugned provisions lay beyond the scope of Parliament’s criminal law power and did not discuss the ancillary powers doctrine.

VI. Applicable Constitutional Principles and Doctrines

1. Before discussing the legislative powers relied on in this case, we must emphasize the existence and the scope of certain constitutional principles that shape Canadian federalism. The Court considered these principles in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. It identified four principles that underlie our Constitution as a whole, and its evolution: constitutionalism and the rule of law, democracy, the protection of minorities, and federalism (paras. 48‑82). Of particular interest to us in the case at bar is federalism. According to this principle, the powers of the different levels of government in a federation are co‑ordinate, not subordinate, powers. Federalism implies that a government does not encroach on the powers of the other level of government (para. 56).
2. In that reference, the Court also commented that the proper operation of Canadian federalism sometimes requires the application of a principle of subsidiarity in the arrangement of relationships between the legislative powers of the two levels of government. According to this principle, legislative action is to be taken by the government that is closest to the citizen and is thus considered to be in the best position to respond to the citizen’s concerns (on the application of this principle in public law, see *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3). In *Reference re Secession of Quebec*, the Court expressed the opinion that “[t]he federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity” (para. 58). In taking this position, the Court recognized the possibility inherent in a federal system of applying the principle of subsidiarity, thereby enhancing its democratic dimension and democratic value added. Moreover, in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, the majority warned against the asymmetrical effect of the doctrine of interjurisdictional immunity, observing that this doctrine could be seen as undermining the principle of subsidiarity (para. 45). In their view, the powers assigned in the *Constitution Act, 1867* to the provinces on the one hand and the central government on the other are largely consistent with the principle of subsidiarity. According to Professor Hogg, the broad interpretation that the Privy Council and this Court generally gave the provincial jurisdiction over property and civil rights is explained by their acceptance of the principle of subsidiarity (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 5‑13). This principle is therefore an important component of Canadian federalism.
3. In performing their function as interpreters of the law in the context of Canada’s federal system, the Canadian courts have developed a number of doctrines based on constitutional principles, two of which could apply in the instant case: the double aspect doctrine and the ancillary powers doctrine. Because it can be difficult to legislate effectively within a rigid, formal framework, these two doctrines introduce a measure of flexibility that enables governments at different levels to co‑operate in pursuing their legislative mandates. The constitutional analysis required by these two doctrines involves identifying the *pith and substance* of the impugned statute or provisions. The identification of the pith and substance focusses on the rule applicable to the facts or conduct. The pith and substance is identified by considering both the rule’s purpose and its effects: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 53‑54. Several expressions have been used to describe the purpose of a rule: “dominant purpose” (*RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29), “leading feature or true character” (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 481‑82), and “dominant or most important characteristic” (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 62-63). We will use the expression “dominant purpose”, which incorporates all the necessary nuances.
4. Activities, acts or conduct can sometimes be viewed from different normative perspectives, one relating to a federal power and the other to a provincial power. Where this is the case, the double aspect doctrine is engaged: *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 22; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *R. v. Furtney*, [1991] 3 S.C.R. 89; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, at p. 1074; *Robinson v. Countrywide Factors Ltd.*, [1978] 1 S.C.R. 753; *Attorney‑General for Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570; *Smith v. The Queen*, [1960] S.C.R. 776; *Attorney‑General for Ontario v. Attorney‑General for the Dominion*,[1896] A.C. 348 (P.C.); *Attorney‑General of Ontario v. Attorney‑General for the Dominion of Canada*, [1894] A.C. 189 (P.C.); *Hodge v. The Queen* (1883), 9 App. Cas. 117 (P.C.); *Papp v. Papp*, [1970] 1 O.R. 331 (C.A.).
5. Where the pith and substance of a rule set out in a statute considered as a whole is connected with an exclusive power of the other level of government, the statute is necessarily invalid.
6. Where the connection with a power is challenged in respect of only one or more provisions of the statute, the court must inquire into whether another doctrine — the ancillary powers doctrine — applies. The analytical approach to applying this doctrine has been well established in Canadian law since *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, in which Dickson C.J. proposed and justified the approach in the following words:

The steps in the analysis may be summarized as follows: First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent (if it does not intrude, then the only possible issue is the validity of the act). Second, the court must establish whether the act (or a severable part of it) is valid; in cases under the second branch of s. 91(2) this will normally involve finding the presence of a regulatory scheme and then ascertaining whether that scheme meets the requirements articulated in *Vapor Canada*, *supra*, and in *Canadian National Transportation*, *supra*. If the scheme is not valid, that is the end of the inquiry. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers, in order to decide on the proper standard for such a relationship. If the provision passes this integration test, it is *intra vires* Parliament as an exercise of the general trade and commerce power. If the provision is not sufficiently integrated into the scheme of regulation, it cannot be sustained under the second branch of s. 91(2). I note that in certain cases it may be possible to dispense with some of the aforementioned steps if a clear answer to one of them will be dispositive of the issue. For example, if the provision in question has no relation to the regulatory scheme then the question of its validity may be quickly answered on that ground alone. The approach taken in a number of past cases is more easily understood if this possibility is recognized. [pp. 671‑72]

This test was restated in *Kitkatla Band*, at para. 58, and in *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302, at para. 21.

1. As a result of some clarifications made in *Canadian Western Bank*, at para. 32, regarding the doctrine of interjurisdictional immunity, we now prefer ― rather than speaking of an “encroachment”, as in *General Motors*, *Kirkbi* and *Kitkatla Band* ― to use the word “overflow” when discussing the ancillary powers doctrine. As this Court noted in *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, laws may validly overflow from the jurisdiction of the government that enacted them so long as the overflow remains ancillary. Because the word “encroachment” evokes the effects of a statute or of provisions on a purpose falling within the core of a power of the other level of government, it is more appropriately linked with the doctrine of interjurisdictional immunity, which concerns the applicability of laws, not their validity.
2. According to the approach adopted in *General Motors*, the first step is to identify the pith and substance (purpose and effects) of the impugned provisions. If the pith and substance falls within the jurisdiction of the other level of government, the extent of the overflow must be assessed. It must then be determined whether the provisions that overflow from the jurisdiction of the government that enacted them form part of an otherwise valid statute. Finally, the impugned provisions must be considered in the context of the entire statute in order to determine whether they are sufficiently integrated with the other provisions of the otherwise valid statute.
3. It is important to identify the pith and substance of the impugned provisions as precisely as possible. A vague or general characterization of the pith and substance could have perverse effects on more than one level: first on the connection with an exclusive power and then on the extent of the overflow. For example, a finding that a provision is in pith and substance in relation to health or to the environment would be problematic. Those subjects are so vast and have so many aspects that, depending on the angle from which they are approached, they can support the exercise of legislative powers of either level of government. It is therefore necessary to take the analysis further and determine what aspect of the field in question is being addressed. Logically, except in cases of highly specific powers, the pith and substance of a provision or a statute will be less general than that of the power itself. If the characterization of the pith and substance of a provision is too general, there is a danger of its being superficially connected with a power of the other level of government. Moreover, in such a case, because of the numerous aspects of the more general subject matters, the extent of the overflow will also necessarily be exaggerated. The identification of the pith and substance of a provision or a statute is therefore subject to the same requirement of precision as the identification of the purpose of a provision establishing a limit in the context of the infringement of a right in an analysis under s. 1 of the *Canadian Charter of Rights and Freedoms*. In both cases, properly identifying the purpose forms the cornerstone of the analysis (see *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, at para. 21). If vague characterizations of the pith and substance of provisions were accepted, this could lead not only to the dilution of and confusion with respect to the constitutional doctrines that have been developed over the years, but also to an erosion of the scope of provincial powers as a result of the federal paramountcy doctrine.
4. In sum, the need for precision in characterizing the pith and substance of a statute or a provision assumes greater importance where a connection must be made with a power whose limits are imprecise. In the event of uncertainty, it becomes necessary to turn to the broader, unwritten rules that serve as the basis of and provide a framework for Canadian federalism, and the crucial role of which we have already noted.
5. Despite its importance, the identification of the pith and substance remains only one part of the first step in applying the ancillary powers doctrine. It is also necessary to assess the extent of the overflow. This assessment becomes particularly important at the final step of the analysis because, if the provisions ― considered in isolation ― would be *ultra vires* the legislature that enacted them, the court must review the extent to which they are integrated into the otherwise valid statute of which they form a part. This review must make it possible to establish a relationship between the extent of the jurisdictional overflow and the importance of the provisions themselves within the statute of which they form a part. There are two applicable concepts: rationality ― or simple functionality, to use the language from *General Motors* ― and necessity.
6. The need to maintain the balance resulting from the division of legislative powers provided for in the *Constitution Act, 1867* justifies the adoption of a variable test. In the words of Dickson C.J. in *General Motors*, “[a]s the seriousness of the [overflow into] provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained” (p. 671). Thus, although the fact that a provision is functionally integrated into valid legislation is enough for a finding of validity in the case of provisions that, viewed in isolation, overflow only slightly from the legislative authority of the government that enacted them, provisions that greatly exceed that authority would have to meet the test of necessity. In other words, the more necessary the provisions are to the effectiveness of the rules set out in the part of the statute that is not open to challenge, the greater the acceptable overflow will be.
7. The Attorney General of Canada does not follow the approach established in *General Motors*, according to which the impugned provisions must be considered first. Instead, he proposes beginning with an analysis of the legislation as a whole. He had proposed this same approach in *General Motors* (p. 666): to begin by reviewing the legislative framework established in the *Combines Investigation Act* and then to analyse the impugned provision itself. The Court rejected that approach (pp. 666‑67). Nevertheless, the Chief Justice takes it in the case at bar. With all due respect, the approach in question does not make it possible to identify the pith and substance of the impugned provisions. In our view, the *General Motors* test is grounded in logic. As Dickson C.J. wrote, “in answering this initial question the court is considering the provision on its own and not assessing the act” (p. 667). The purpose of one provision may very well be to prohibit cloning whereas the purpose of another is the regulation of insemination. Since the purposes and effects of a statute’s many provisions can be different, it is important to consider the impugned provisions separately before considering their connection with the other provisions of the statute.
8. The Chief Justice applies three criteria to justify the overflow from federal jurisdiction. In *General Motors*, Dickson C.J. did in fact identify three factors that justified the impugned overflow in that case: the provision was a remedial one, such overflows were not unprecedented, and the overflow in that case was limited. We do not believe that these factors can be applied automatically without reference to the context, however. Indeed, it would be surprising if a past overflow from the jurisdiction of one level of government could serve to justify subsequent overflows without eroding the heads of power concerned. It is necessary in every case to take into account the observable tangible effects of the impugned provisions on the relevant heads of power.
9. In short, care must be taken to maintain the constitutional balance of powers at all stages of the constitutional analysis. Be it in identifying the pith and substance of a statute or a provision or in reviewing the limits of an assigned power or of the exercise of an ancillary power, the courts must bear the importance of the unwritten constitutional principles in mind and must adhere to them.
10. Having reviewed the constitutional principles that may apply in the instant case, we will now analyse the impugned provisions, which will require us to review the case law concerning the various heads of power being relied on by the parties.

VII. Analysis of the Impugned Provisions

1. The constitutional question posed by the Attorney General of Quebec refers to ss. 8 to 19, 40 to 53, 60, 61 and 68 of the *AHR Act*. At first glance, one might think that the Attorney General of Quebec has carved up the *AHR Act*. However, a closer examination of his submissions shows that the question he posed relates to the provisions that do not impose an absolute prohibition and the ones concerning the application of those provisions.

A. *Pith and Substance of the Impugned Provisions*

1. In accordance with the principles discussed above, this step in the constitutional analysis involves identifying the pith and substance of the impugned provisions. The pith and substance can be drawn from the purpose and the effects of the provisions. But this is only the first step. If this initial step of the analysis raises doubts regarding the validity of the impugned provisions, the analysis must be taken further so as to consider the connection between the provisions that are being challenged and those that are not. The Attorney General of Canada and the Attorney General of Quebec take diametrically opposed positions with respect to the pith and substance of the impugned provisions.
2. It should be noted that, in the view of the Attorney General of Canada, all the provisions of the *AHR Act* pertain to “facets of the same novel reality, the artificial creation of human life” (Factum, at para. 41). The *AHR Act* contemplates “a range of practices that are all related to that activity, and that all pose risks to the fundamental values of public morality and health underlying this mix of concerns” (para. 46). The context of the creation of life transcends the field of medical practice. According to the Attorney General of Canada, most of the provisions held by the Court of Appeal to be invalid have nothing to do with the practice of medicine, and none of them solely concern it.
3. The Attorney General of Quebec states that what the Attorney General of Canada regards as an “exemption regime” amounts, on the contrary, to the regulation of an entire area of medicine and research in order to define its evolving framework and ensure safe, accessible health care. According to the Attorney General of Quebec, the impugned provisions affect the health-care services needed to treat infertility, the regulation of health-care specialists who provide those services, the doctor‑patient relationship and the rights and obligations arising out of that relationship. In his opinion, all these matters fall indisputably within the provinces’ power to make laws in relation to hospitals, education, civil rights and matters of a local or private nature.

(1) Purpose of the Provisions

1. The words of the statute itself can of course be of assistance in the identification of the purpose of impugned provisions. However, the context of the enactment of the statute often reveals as much as, if not more than, the words used. It is both appropriate and necessary to review the context as part of the statutory interpretation process, in constitutional as well as in other matters (*Reference re Firearms Act*, at para. 17). We must therefore go back to the Baird Commission’s studies and the extensive work that followed, as well as to the bills that preceded the enactment of the *AHR Act*. It should be borne in mind that the Baird Commission had a very broad mandate. It was asked to “report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest” (P.C. 1989‑2150). To appreciate the scope of the subjects it addressed in its work, one need only name a few of the topics it discussed: the costs of new reproductive technologies, the appropriate allocation of resources, monitoring of the quality of care, research into risk factors and the prevention of infertility, and a study on adoption systems in Canada.
2. The Baird Commission made recommendations that would require action by a large number of stakeholders, including the federal government, provincial and territorial governments and certain professional organizations. It first recommended that the federal government use its criminal law power to prohibit activities that are fundamentally incompatible with the values of Canadian society:

We have judged that certain activities conflict so sharply with the values espoused by Canadians and by this Commission, and are so potentially harmful to the interests of individuals and of society, that they must be prohibited by the federal government under threat of criminal sanction. [p. 1022]

1. Regarding the controlled activities, the Baird Commission considered that national standards were required. It took the view that Parliament could rely on the peace, order and good government power to act in this regard (p. 19). It summarized its position as follows:

In summary, the significance of research, development, and use of new reproductive technologies for Canadian society as a whole; the national as well as international character of the issues involved; the inter‑relatedness of their intra- and extraprovincial dimensions; and the potential effects of provincial failure to regulate the intraprovincial aspects of the subject, taken together, indicate the need for national uniformity in legislative treatment rather than provincial or regional diversity. To safeguard the individual and societal interests involved, we believe that regulation of new reproductive technologies must occur at the national level, although provincial and professional involvement will be essential to the success of this endeavour. Only then will it be possible to overcome an increasing fragmentation of regulatory control and the difficulty of monitoring as practices and technologies expand and multiply.

The Commission therefore proposes that federal legislation be passed making some uses of the technologies illegal, thus establishing boundaries around what Canada considers acceptable use. [p. 22]

1. The Baird Commission also recommended that the federal government set up a national body to oversee activities in the field of assisted human reproduction. According to its report, such a body would have to permit the creation and implementation of comprehensive and effective nationwide standards and monitoring devices. Such a system was considered preferable to a piecemeal federal reform carried out by individual departments. It would also be preferable to relying on individual responses by each province and territory, or on non‑governmental or self‑regulatory initiatives (pp. 112‑13).
2. It is clear that the Baird Commission wanted certain activities to be denounced and prohibited because, in its view, there was a consensus that they were reprehensible. But the Commission also wanted assisted human reproduction and related research activities to be regulated for the purpose of establishing uniform standards that would apply across Canada. Thus, it can be seen that the distinction drawn in the *AHR Act* between prohibited activities and controlled activities corresponds to the two distinct categories of activities for which the Baird Commission recommended two distinct approaches with different purposes.
3. The concern the Baird Commission expressed about the prohibited activities reappeared at every stage of the process leading up to the enactment of the *AHR Act*. Thus, in 1995, Health Canada announced a moratorium on certain reproductive technologies and practices (News Release 1995‑57). The moratorium applied to many of the activities that would subsequently be prohibited in the *AHR Act*. A few months after the announcement of the moratorium, a discussion group on embryo research that had been set up by the federal government submitted a report to Health Canada. This group recommended that the criminal law be used to prohibit certain activities, but that other activities simply be regulated. In its report, it gave the following justification for the alternative approach it was proposing for those other activities:

This form of legislative intervention is best suited to precise, yet flexible control of an activity where the objective is to set standards of activity (as distinguished from standards of behavior).

(*Research on Human Embryos in Canada* (1995), at p. 26)

1. The first bill on assisted human reproduction was introduced in 1996 (C‑47). It included the main prohibitory provisions now found in the *AHR Act*. For example, payment for surrogacy was prohibited, but there was no provision like the one that exists today to the effect that a surrogate mother could be reimbursed for her expenditures. As well, the use of genetic material without the donor’s consent was prohibited, but the terms of consent were not regulated. The next two bills took the form of proposed amendments to the *Criminal Code* (C‑247, C‑336). Like the one that preceded them, these bills provided only for prohibitions.
2. When considered in parallel with the adoption of a moratorium and the tabling of three successive bills that related to only certain of the prohibited activities, the statements by the Baird Commission and the 1995 discussion group that the objective in regulating assisted reproductive activities was to establish national standards confirms that the purpose of the current legislative provisions concerning the prohibited activities must be distinguished from that of the provisions concerning the controlled activities. The former concern what were considered to be reprehensible activities that fell within the ambit of the criminal law, while the latter concern activities that were not to be prohibited, since they were considered acceptable or even legitimate (Baird Report, at pp. 86, 109 and 140). However, these last activities were to be subject to national standards.
3. The way the *AHR Act* is drafted makes it clear that the dichotomy between reprehensible activities and desirable ones is embodied in the coexistence of two distinct schemes and that Parliament therefore adopted the two recommendations of the Baird Commission unconditionally. From this perspective, there appears to be a perfect correspondence between the recommendations and the legislation. The principles that supposedly guided Parliament and that are set out in s. 2 include the formal statement that certain practices “raise health and ethical concerns that justify their prohibition” (para. (*f*)). Parliament also declared (at para. (*b*)) that

the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;

1. The Act contains, on the one hand, a list of prohibited activities. The evidence shows that Parliament could consider these activities unacceptable on the basis of the Baird Report, the discussion group’s comments on embryo research and the work of Health Canada. As we mentioned above, these activities include human cloning (s. 5(1)(*a*)) and creating an embryo for any purpose other than creating a human being (s. 5(1)(*b*)). Moreover, although both the prohibited and the controlled activities involve the manipulation of genetic material, most of the prohibited activities cannot be considered to be acts connected with assisted human reproduction. On the other hand, the evidence also shows that the same authorities recognized that some assisted reproductive technologies are beneficial to society and should accordingly be supported, although they also need to be regulated. Finally, some of these technologies, such as transplanting sperm into a woman’s body and *in vitro* fertilization, have been used for over 25 years.
2. Both the Attorney General of Canada and the Attorney General of Quebec filed excerpts from Hansard and expert reports dating from after the enactment of the *AHR Act* that describe how the social context and assisted human reproductive technologies have evolved since the time of the Baird Commission and the discussion group. Several reports show clearly that assisted human reproduction has now grown more important. For example, Dr. Jeff Nisker explains that the need to have recourse to these technologies has increased because many women now put off the decision to have children until they are in their 30s or 40s, that is, at a stage in their lives when their fertility may be reduced owing to physiological or environmental factors (*Quebec Challenge to Assisted Human Reproduction Act* (2006), at pp. 12‑13). Dr. François Bissonnette (*La procréation médicalement assistée au Canada et au Québec —* *Survol et enjeux* (2006), at p. 7) also discusses the history of assisted human reproductive technologies, and he notes that the scientific community regards infertility as a pathological problem (p. 4). He adds that the first sperm banks date back to the early 1960s. He reports that, as of 2006, nearly 300,000 births worldwide could be attributed to the use of such technologies. Thus, the witnesses do not see assisted human reproductive technologies as a social “evil”, but as a “solution” to reproductive problems caused by pathological or physiological factors.
3. In short, while it is true that certain groups in Canadian society are opposed to assisted human reproductive technologies and fundamentally challenge their legitimacy, the evidence shows that assisted human reproduction is usually regarded as a form of scientific progress that is of great value to individuals dealing with infertility problems. The same attitudes are adopted with respect to research into reproductive technologies. For the purposes of this appeal, there is no need to summarize the evidence on every field of research into new reproductive technologies. Suffice it to observe that no one has denounced research into assisted human reproduction on the basis that it is reprehensible. Despite the agreement that technologies related to assisted human reproduction need to be regulated, it is clear from the evidence that research into such technologies is considered to be not only desirable, but necessary. Thus, Dr. Roger Gosden, in testifying before the Standing Committee on Health on May 17, 2001 (at 11:40 (online)), stressed the important role that research plays in enhancing our understanding of the causes of infertility, improving the success rate of infertility treatments and avoiding inherited diseases.
4. In the course of the debate in Parliament, particular attention was devoted to research involving transgenics. Some members suggested that such research be prohibited rather than being regulated (as it is under s. 11 of the *AHR Act*). In responding to two proposed amendments, Health Canada representatives explained that such an approach would not be desirable.
5. Regarding a proposal for a total ban on transgenics, the chair of the Standing Committee on Health asked Rodney Ghali, a science policy analyst from the Special Projects Division of the Department of Health, what the impact of prohibiting all transgenic research would be. Mr. Ghali answered that research in this huge field, which is beneficial for all Canadians, included research into cancer, Huntington’s disease and other diseases of the nervous system. The proposed amendment was rejected (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Health*, No. 013, 2nd Sess., 37th Parl., December 9, 2002, at 10:25‑10:35 (online)).
6. Similarly, in response to a motion to amend that would have resulted in a ban on transgenics, Jeannot Castonguay, the Parliamentary Secretary to the then Minister of Health, explained in the House of Commons that such a ban “would have the effect of immediately, and permanently, putting an end to the efforts of numerous Canadian researchers and laboratories to develop therapies for the treatment of a number of dread diseases, among them cancer and Alzheimer’s” (*House of Commons Debates*, vol. 138, No. 072, 2nd Sess., 37th Parl., March 18, 2003, at p. 4335).
7. We therefore cannot agree with the Attorney General of Canada that the impugned provisions concerning the controlled activities have the same purpose as the unchallenged provisions concerning the prohibited activities. Parliament responded to what was presented to it as a consensus that some of the prohibited activities are reprehensible. Those prohibitions are therefore intended to prevent activities and the use of technologies that do not form part of the process of genetic research or assisted human reproduction. Parliament clearly showed that its intention was to prohibit them, and they are in fact prohibited completely. It showed no such intention with respect to the activities that are not prohibited completely. As can be seen from the legislative history, the technologies and activities included among the controlled activities are very different in nature from the activities that are prohibited completely. These are technologies and activities to which professionals working in the field commonly have recourse. Parliament did not indicate that it intended to prohibit or even limit them. The purpose of the impugned provisions is instead to set up a national scheme to regulate the activities in question. In light of s. 2(*b*) of the *AHR Act*, we would add that this was how Parliament believed that “the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured” (see also S. Bordet, S. Feldman and B. M. Knoppers, “Legal Aspects of Animal-Human Combinations in Canada” (2007), 1 *M.H.L.P.* 83, at p. 85).

(2) Effect of the Provisions

1. Identifying the pith and substance of the impugned provisions involves a consideration not only of their purpose, but also of their effects. “Effects” of the provisions means the actual impact of the application of the provisions on Canadians: *Reference re Firearms Act*, at para. 18. As we mentioned above, the Attorney General of Canada submits that the impugned provisions have little or nothing to do with health and that none of them pertain either to the quality of medical procedures or to the management of health‑care institutions (Factum, at para. 92). The Attorney General of Quebec counters that the impugned scheme seriously affects the practice of medicine and overlaps or conflicts with many Quebec statutes and regulations. In our opinion, a review of the effects of the provisions of the *AHR Act* confirms the position of the Attorney General of Quebec.
2. For instance, s. 8 of the *AHR Act* sets out rules on consent for the removal and use of human reproductive material. Section 8 would appear to be very broad in scope: it applies to any removal or use of human reproductive material for the purpose of creating an embryo. This means that it applies to any manipulation of this nature. However, the purpose of the provision is to establish a framework for consent to such manipulations, not to prohibit them. But it should be noted that s. 265 of the *Criminal Code*, R.S.C. 1985, c. C‑46, already prohibits the removal of genetic material without consent (see P. Healy, “Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada” (1995), 40 *McGill L.J.* 905, at p. 941).
3. The impugned provisions have a direct impact on the relationship between physicians called upon to use assisted reproductive technologies, donors, and patients. Moreover, rules on consent already exist in the *Civil Code of Québec*, R.S.Q., c. C‑1991 (“*C.C.Q.*”) (arts. 10 to 25), the *Act respecting health services and social services*, R.S.Q., c. S‑4.2 (“*AHSSS*”) (ss. 9 *et seq*.), and the *Code of ethics of physicians*, R.R.Q., c. M‑9, r. 4.1 (ss. 28, 29 and 49). To give another example, ss. 12(1)(*c*) and 12(3) of the *AHR Act* address the reimbursement of surrogate mothers for expenditures incurred and for the loss of work‑related income. Section 12 implicitly authorizes surrogacy contracts, whereas art. 541 *C.C.Q.* provides that such contracts are null.
4. Moreover, ss. 10, 11, 13, 40(1) and 42 of the *AHR Act* require researchers and physicians who engage in activities related to treatments for infertility to obtain licences from the Federal Agency. But the *AHSSS* already requires hospital centres and specialized medical centres to obtain permits (s. 437 of the *AHSSS*). The *Act respecting medical laboratories, organ, tissue, gamete and embryo conservation, and the disposal of human bodies*,R.S.Q., c. L‑0.2, s. 31, imposes the same obligation on laboratories and on organ and tissue banks. Given that obtaining a licence from the Federal Agency is a prerequisite for undertaking a controlled activity in any premises (s. 13 of the *AHR Act*), this obligation could require compliance with conflicting requirements or could, at the very least, result in extensive duplication in the requirements of the two levels of government.
5. Sections 14 to 19 of the *AHR Act* establish a system for the management and disclosure of information relating to assisted reproductive activities. They provide for the establishment of a registry and set out rules for access to and disclosure of relevant information. But Quebec already has its own rules governing the use of assisted reproductive technologies by health‑care institutions and physicians. Moreover, the doctor‑patient relationship is protected by professional secrecy as provided for in s. 42 of the *Medical Act*, R.S.Q., c. M‑9. And the disclosure of confidential information is also subject to provisions of several Quebec statutes and regulations, including the *Code of ethics of physicians* (ss. 20 and 21) and the *AHSSS* (see, *inter alia*, ss. 17 *et seq.*).
6. Finally, under ss. 45 to 53 of the *AHR Act*, inspectors from the Federal Agency are granted broad powers to enter places or conveyances and examine and seize information or material. These provisions apply not only to physicians and researchers, but also to all health‑care institutions where assisted reproductive activities or related research activities are conducted. This oversight by the Federal Agency duplicates the oversight provided for in the *Medical Act*, the *Code of ethics of physicians*, the *Professional Code*, R.S.Q., c. C‑26, and the *AHSSS*. The *AHSSS* also includes numerous provisions that grant extensive powers of investigation to Quebec agencies created under it (see, *inter alia*, ss. 413.2 and 414 of the *AHSSS*).
7. To illustrate the scope of the provincial rules that apply to health‑care professionals and institutions, it will be helpful to review certain characteristics of Quebec’s health‑care system, which has a vertical aspect as regards supervision and sanctions and a horizontal aspect as regards the provision of health care. The Minister of Health and Social Services oversees Quebec’s health and social services agencies (ss. 339 *et seq.* of the *AHSSS*), which are in turn responsible for overseeing the application of Quebec’s standards and organizing services within their respective territories. Public health institutions, in co‑operation with private clinics and doctors’ offices, provide health services and social services (ss. 79 *et seq*. of the *AHSSS*). Moreover, health‑care professionals are regulated by their respective professional orders under the *Professional Code* and the other statutes that apply specifically to the orders in question. The same structure applies regardless of the nature of the health service in issue.
8. Thus, even though an integrated system already exists in Quebec for all medical and related research activities, including those that, from ethical, moral and medical standpoints, are similar to activities associated with assisted human reproduction, the *AHR Act* establishes a distinct framework and special rules for those associated with assisted human reproduction. As a result, the *AHR Act*’s special system for assisted reproductive activities, with all its potential for red tape, has a considerable impact on all those who participate in such activities, both professionals who undertake them and the institutions where they take place.
9. We concluded above that the purpose of the impugned provisions was to establish mandatory national standards for assisted human reproduction. A review of the practical consequences of these provisions shows that they have a significant impact on the practice of medicine. We therefore cannot agree with the Attorney General of Canada that the impugned provisions have nothing to do with the quality of services or the management of health‑care institutions.
10. Rather, the purpose and the effects of the provisions in question relate to the regulation of a specific type of health services provided in health‑care institutions by health‑care professionals to individuals who for pathological or physiological reasons need help to reproduce. Their pith and substance must be characterized as the regulation of assisted human reproduction as a health service. It would of course have been possible to say that the pith and substance of the impugned provisions relates to the regulation of research and practice associated with assisted human reproduction, but in our opinion, the effects of the provisions make a more precise characterization necessary. This approach is more consistent with the principles discussed above according to which the pith and substance should be identified as precisely as possible in light of the need to connect it with legislative powers (see para. 190). At the next step in the constitutional analysis, we must in fact establish that connection by identifying the head of power with which the impugned provisions — viewed from the perspective of their pith and substance — are connected.

B. *Connecting the Pith and Substance of the Provisions With Heads of Power*

1. It is important to bear in mind this Court’s caveat in *Reference re Firearms Act*: “The determination of which head of power a particular law falls under is not an exact science” (para. 26). A law, or one or more of its provisions, may in theory be connected with several heads of power. Despite this difficulty, it must be determined whether the pith and substance of the impugned law or of its impugned provisions results in a connection with the head of power relied on by the government that enacted them.
2. In this appeal, the Attorney General of Canada submits that the pith and substance of the *AHR Act* relates to Parliament’s criminal law power. The Attorney General of Quebec contends that this cannot be the case and that the pith and substance of the impugned provisions brings them within exclusive provincial jurisdiction. Thus, the determinative question is whether the impugned provisions fall within the head of power relied on in support of their validity by the government that enacted them. To answer this question, it will be necessary to briefly review the scope of the federal criminal law power.

(1) Scope of the Federal Criminal Law Power

1. Defining the limits of the federal criminal law power has always been a difficult task. The case law in this respect begins with *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191 (P.C.). In that case, the Privy Council declared a federal law to be invalid on the basis that its “subject matter” did not by its very nature belong to the domain of criminal jurisprudence.
2. The substantive criterion of a connection with the criminal law based on the nature of the acts to which the legislation applies was interpreted as freezing the content of the criminal law in time. In *Proprietary Articles Trade Association v. Attorney‑General for Canada*, [1931] A.C. 310 (P.C.), Lord Atkin recast the test, replacing it with an analysis based on conditions of form: there must be a prohibition accompanied by a sanction. In describing the subject matter of the prohibition, he added the following: “It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of ‘criminal jurisprudence’; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes” (p. 324). In his view, therefore, the content of the criminal law could not be frozen in time. But this new definition was too broad. It was based only on the application of formal criteria and was of no assistance in establishing the substantive limits of the federal criminal law power. The Privy Council’s approach would not have caused the same problems in a unitary state, but it became a source of unique difficulties in a federal state. Since legislative powers were in practice distributed among a number of levels of government, the federal power had to be delimited not only on the basis of the very nature of criminal law, but also in accordance with the fundamental structures of the division of powers.
3. An important clarification was accordingly made by Rand J. in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the “*Margarine Reference*”). Rand J. stressed that a substantive component was needed to justify the exercise of the federal criminal law power. However, the most frequently quoted passage from his opinion does little to clarify the content of this substantive component:

Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . . . [p. 50]

Health, which Rand J. mentioned, cannot always justify action by Parliament in relation to the criminal law. This passage must therefore also be considered in the context of Rand J.’s definition of the criminal law. It then becomes apparent that, although he disagreed with the view expressed by Lord Atkin in *Proprietary Articles Trade Association* on the question whether the criminal law could be kept within fixed bounds, he agreed with him that it had to include not only a formal component but also a characteristic substantive component (see W. R. Lederman, “Mr. Justice Rand and Canada’s Federal Constitution” (1979‑1980), 18 *U.W.O. L. Rev.* 31, at p. 39). Rand J. made the following comment:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. [Emphasis added; p. 49.]

In our view, therefore, it is not enough to identify a public purpose that would have justified Parliament’s action. Indeed, it might be hoped that Parliament does not act unless there is a public purpose that justifies its doing so. Where its action is grounded in the criminal law, the public purpose must involve suppressing an evil or safeguarding a threatened interest.

1. This view of the constituent elements of the federal criminal law power, namely that it has two components, one substantive and the other formal, continues to be valid today and was applied in, *inter alia*, the *Reference re Firearms Act* (para. 27). Three criteria have to be met to connect a law or a provision with this federal head of power, namely that it

1 - suppress an evil,

2 - establish a prohibition, and

3 - accompany that prohibition with a penalty.

1. The formal component — establishing a prohibition and accompanying it with a penalty — supports a finding that a regulatory scheme, even one that takes the form of exemptions from a prohibitory scheme, falls within the field of criminal law. However, the substantive component, the justifiable criminal law purpose — the prohibition of a real or apprehended evil, and the concomitant protection of legitimate societal interests — must also be present. The substantive criterion assumes particular importance because of the liberal interpretation given to the formal component.
2. These components permit the federal government to deal with and make laws with regard to new realities, such as pollution, and genetic manipulations that are considered undesirable. Thus, Parliament retains flexibility in making decisions to prohibit conduct it considers reprehensible and to prevent the undesirable effects of such conduct.
3. Rand J.’s reference to an evil to be suppressed or a threatened interest to be safeguarded necessarily implied that the evil or threat must be real. In the context of the *Charter*, the recognized threshold is that of the reasoned apprehension of harm. The reasoned apprehension of harm, which was accepted as a criterion in *R. v. Butler*, [1992] 1 S.C.R. 452, and in *R. v. Malmo‑Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 78, must be real and must relate to conduct or facts that can be identified and established. Although the instant case does not involve the application of the *Charter*, referring to a threshold illustrates what form a substantive component might take and helps give concrete form to the substantive component of the criminal law. It is therefore helpful for the purpose of determining whether this component cited to justify Parliament’s action is present or is simply absent (see G. Côté‑Harper, P. Rainville and J. Turgeon, *Traité de droit pénal canadien* (4th ed. 1998), at pp. 61‑62; *RJR‑MacDonald*, at para. 29, *per* La Forest J., and at paras. 201-2, *per* Major J.).
4. It must be possible to describe the risk of harm precisely enough that a connection can be established between the apprehended harm and the evil in question. In both *Butler* and *Malmo‑Levine*, the Court described the risk of harm in concrete terms, in the former as a “‘reasoned apprehension of harm’ resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations” (p. 504), and in the latter as the “protection of . . . chronic users . . . and adolescents who may not yet have become chronic users, but who have the potential to do so” (para. 77). Although the Court held in the *Reference re Firearms Act* that creating a registry and a licensing system represented a valid exercise of Parliament’s criminal law power, we observe that the substantive component was easy to establish. In the Court’s opinion, “[g]un control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety” (para. 33). Another situation in which a connection with a criminal law purpose can be seen is that of the regulation of tobacco product labelling and the prohibition on advertising and promoting such products. Even though Parliament cannot, for social policy reasons, ban the use of tobacco completely, it is faced with an “evil” that it has undertaken to combat: *RJR‑MacDonald*, at para. 44. The same observation holds true for the emission of toxic substances into the environment. In *R. v. Hydro‑Québec*, [1997] 3 S.C.R. 213, the majority of the Court held, after finding that Parliament had the power “[to prevent] pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances”, that a regulatory scheme was valid (para. 130). In short, the choice of means is a matter for Parliament, but the federal criminal law power cannot be exercised if the purpose of the legislation enacted to exercise it does not fall within the scope of the criminal law.
5. The requirement of a concrete basis and a reasoned apprehension of harm applies with equal force where the legislative action is based on morality. In establishing the basis for Parliament’s action, the Chief Justice relies heavily on the purpose of upholding public morality. In her view, to justify having recourse to the criminal law by relying on morality, Parliament need only have a reasonable basis to expect that its legislation will address a concern of fundamental importance (para. 50). If her interpretation were adopted, the decision to bring certain conduct within the criminal law sphere would never be open to effective review by the courts. The issue would simply be whether a moral concern is addressed and whether there is a consensus that the concern is of fundamental importance (para. 51). This approach in effect totally excludes the substantive component that serves to delimit the criminal law. Not only does it go far beyond morality, which as a result serves only as a formal component, but it inevitably encompasses innumerable aspects of very diverse matters or conduct, such as participation in a religious service, the cohabitation of unmarried persons or even international assistance, which, although they involve moral concerns in respect of which there is a consensus that they are important, cannot all be considered to fall within the criminal law sphere.
6. In our opinion, this goes further than any previous judicial interpretation. A definition such as this amounts to what the Chief Justice herself describes as a “limitless definition” that must be rejected because it jeopardizes the constitutional balance of the federal‑provincial division of powers (para. 43). It is true that the criminal law often expresses aspects of social morality or, in broader terms, the fundamental values of society. However, legislative action by Parliament on this basis presupposes the existence of a real and important moral problem. Yet care must be taken not to view every social, economic or scientific issue as a moral problem. In 1931, in *Proprietary Articles Trade Association*, the Privy Council rejected any conception of the criminal law that did not take into account the evolution of society. Thus, when Parliament criminalizes an act, its decision remains subject to review by the courts, which will take society’s attitude into account. And it must be borne in mind in this area that a broad range of philosophical and religious ideas coexist in a society as diverse as contemporary Canadian society. Although the rules in the *Criminal Code* have long been understood in light of the principles of Judeo‑Christian morality, societal changes have freed them from those fetters. The coming into force of the *Charter*, for example, resulted in fundamental changes that affected offences related to sex, pornography and prostitution and demonstrated the importance of the explosion of the former conceptual framework (see the former ss. 156, 157 and 158 of the *Criminal Code*, repealed by S.C. 1980-81-82-83, c. 125, s. 9, and S.C. 1987, c. 24, s. 4, and *Butler*, *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123). The judgments on the application of the *Charter* have not of course purported to define the limits of the federal criminal law power, but they do clearly illustrate what is considered to be an evil, which is a question the Chief Justice does not deal with in her analysis relating to morality. We also note that, although the existence of an evil to be suppressed is not discussed in her analysis of the moral aspect of the criminal law, it is given considerable emphasis in her analysis of the public health‑related aspect of the criminal law (paras. 52‑56 and 62).
7. In this context, absent an intention to change the law and give the federal criminal law power an unlimited and uncontrollable scope, the requirement of a real evil and a reasonable apprehension of harm constitutes an essential element of the substantive component of the definition of criminal law. Without it, the federal criminal law power would in reality have no limits. The federal government would have the authority under the Constitution to make laws in respect of any matter, provided that it cited its criminal law power and that it gave part of its legislation the form of a prohibition with criminal sanctions. This is what Rand J. wanted to prevent in the *Margarine Reference*.
8. In cases in which the purpose being relied on was the protection of public health, the courts have shown less deference to Parliament if the risk could not be easily demonstrated. They may have taken this stance because risks to health can often be established through empirical studies. For example, in the *Margarine Reference*, the fact that consuming margarine entailed no health risks explains why no connection could be established between the prohibition and the criminal law power. In *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, the failure to demonstrate a risk associated with the consumption of malt liquors accounts for the outcome of the trial. In *RJR‑MacDonald*, on the other hand, given the well‑established health risks associated with tobacco consumption, the exercise of the criminal law power was found to be justified.
9. Furthermore, the fact that certain provisions of a statute have a connection with the criminal law does not mean that the entire statute can be justified in the same manner and on the same basis. For example, in *R. v. Wetmore*, [1983] 2 S.C.R. 284, the majority clearly stated that the *Food and Drugs Act* had three distinct parts, one of which — on marketing — fell under the trade and commerce power rather than the criminal law power (p. 288). The same type of distinction was made in the *Margarine Reference*, and it resulted in a declaration that the provisions respecting the production, possession and sale of the products in question were invalid. A similar distinction can be drawn in the case at bar between the absolute prohibitions and the impugned provisions of the *AHR Act*.
10. Although a reasoned apprehension of harm necessarily constitutes a criminal law purpose, health, ethics and morality do not automatically arouse such an apprehension in every case. For an activity to fall under the criminal law, it must be found that there is an evil to be suppressed or prevented and that the pith and substance of the provisions in issue is the suppression of that evil or the elimination of that reasoned risk of harm.
11. When Parliament exercises a power assigned to it, it can establish national standards. However, administrative efficiency alone cannot be relied on to justify legislative action by Parliament (*Margarine Reference*, at p. 52). The action must be taken within the limits of an assigned head. Recourse to the criminal law power cannot therefore be based solely on concerns for efficiency or consistency, as such concerns, viewed in isolation, do not fall under the criminal law. The three criteria of the criminal law must be met.
12. The subjects set out in the lists of federal and provincial powers represent an organizational framework for constitutional powers that is designed to establish a federal scheme and enable the scheme to develop in accordance with its fundamental structures. As the Court noted in the *Reference re* *Firearms Act*, Canada’s constitutional balance of powers requires each level of government to respect the other’s jurisdiction:

Although the criminal law power is broad, it is not unlimited. Some of the parties before us expressed the fear that the criminal law power might be illegitimately used to invade the provincial domain and usurp provincial power. A properly restrained understanding of the criminal law power guards against this possibility. [para. 30]

1. The principles underlying the balance of Canadian federalism themselves require that rules that relate in pith and substance to the criminal law power be distinguished from those that, although having a regulatory aspect, are intended to govern fields falling under other — exclusive or concurrent — federal or provincial powers.

(2) Lack of a Connection Between the Pith and Substance of the Impugned Provisions and the Federal Criminal Law Power

1. In the instant case, the primary focus of the analysis is on the “evil” the impugned provisions are intended to suppress. The Attorney General of Canada relies on the fact that the criminal law has traditionally been linked to Parliament’s power to make laws in relation to safety, morality and public health. More specifically, he submits that the scheme in issue contemplates a range of activities that pose risks to the fundamental values of morality and public health, and that these risks explain the enactment of this diverse set of measures and justify the concerns expressed with respect to assisted human reproduction and the creation of life. The Chief Justice goes even further, as she departs from the Attorney General of Canada’s position. She considers that the purpose of the *AHR Act* is to prohibit conduct considered by Parliament to be reprehensible (para. 30).
2. The problem with these positions is that although a connection can be made between the pith and substance of the absolute prohibitions and a risk of harm, the same cannot be said of the regulation of the other activities and of the regulatory scheme that is established. It should be noted that the *AHR Act* prohibits, for example, altering the genome of a cell such that the alteration is capable of being transmitted to descendants (s. 5(1)(*f*)) or creating animal‑human hybrids (s. 5(1)(*h*), (*i*) and (*j*)). The Baird Commission concluded that there was a consensus in society that these activities threaten the future of the human race.
3. As for the controlled activities, they include practices such as insemination and *in vitro* fertilization using genetic material from a man and a woman who will become the parents. These are legitimate practices on which, according to the Baird Commission, a broad consensus exists (Baird Report, at p. 140). They have even been included among the basic services covered by Ontario’s health insurance plan for more than 15 years (Baird Report, at p. 82).
4. To find that the pith and substance of the impugned provisions relates to the prohibition of reprehensible conduct is therefore problematic in two ways. First, from the standpoint of morality, no evil has been identified. Second, all activities related to assisted human reproduction are regulated, not just specific ones that Parliament could theoretically have considered ― but in fact did not consider ― reprehensible. A review of all the work of the Baird Commission and the discussion group together with the Health Canada studies, the importance of which we highlighted above, confirms that, where the impugned provisions are concerned, Parliament’s action did not have the purpose of upholding morality and was not based on a reasoned apprehension of harm. The Baird Commission had drawn a fundamental distinction between the activities the prohibition of which is not being challenged and a set of activities to be regulated, the beneficial nature of which it emphasized. Finally, in its statement of principles, Parliament made it clear that it considered assisted reproduction services to be beneficial. In light of the evidence, the concerns that led Parliament to enact the impugned provisions quite simply did not include the purpose of upholding morality relied on by the Chief Justice.
5. Nothing in the record suggests that the controlled activities should be regarded as conduct that is reprehensible or represents a serious risk to morality, safety or public health. As we mentioned above, Parliament, in adopting the Baird Report’s recommendation on controlled activities, intended to establish national standards for assisted human reproduction. The purpose was not, therefore, to protect those who might resort to assisted human reproduction on the basis that it was inherently harmful. Assisted human reproduction was not then, nor is it now, an evil needing to be suppressed. In fact, it is a burgeoning field of medical practice and research that, as Parliament mentions in s. 2 of the *AHR Act*, brings benefits to many Canadians.
6. Both at the time of the Baird Commission’s work and during the parliamentary debates, questions were raised and comments made about Parliament’s authority to create such a regulatory scheme. We have already mentioned the Commission’s opinion on the prohibited activities and the controlled activities, but there is more. It is clear from the Commission’s report that its mandate and its recommendations were conducive to actions involving more than just the federal government’s legislative powers:

It is clear, then, that many sectors of society beyond the health care sector and public institutions beyond the federal government will have crucial roles to play. Concerted action and cooperation by the provinces/territories, the professions, and other key participants in the context of the proposed national framework are the only way to ensure ethical and accountable use of new reproductive technologies in Canada — now and in the future. [p. 1021]

1. Regardless of whether the Commission’s opinion on the need to rely on the general federal power to make laws for the peace, order and good government of Canada was valid, it appears to have been shared by stakeholders at that time. For example, in the news release announcing the moratorium on prohibited activities, the federal Minister of Health mentioned consultations with the provinces on the regulation of assisted human reproduction and stated that those consultations would be “extensive and complex due to the nature of the shared jurisdiction among the federal, provincial and territorial governments in this area” (p. 2). Approval for basing the regulatory scheme on the criminal law power was far from unanimous. Many of those who participated in the proceedings pointed out that many aspects of the field of assisted human reproduction fell within provincial jurisdiction. Moreover, in his testimony in 2001 before the Standing Committee on Health, which was studying the draft bill, the Minister of Health referred, in discussing the constitutional basis for federal action, not to the criminal law power, but to the “general jurisdiction to legislate where there are broad matters of health and safety and order concerning all Canadians” (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Health*, No. 013, 1st Sess., 37th Parl., May 3, 2001, at 11:35 (online); see also *House of Commons Debates*, May 21, 2002, May 27, 2002, and January 28, 2003).
2. The concerns expressed by many participants and their hesitation to base the legislative framework on the federal criminal law power should come as no surprise. Although assisted human reproduction raises moral and ethical questions, this does not necessarily mean that exercising the criminal law power is justified on the basis that there is an evil to be suppressed. Rather, both those who testified before the Baird Commission and those who participated in the parliamentary debates acknowledged that the development of assisted human reproduction amounts to a step forward for the constantly growing number of people dealing with infertility. Moreover, it represents the only option for homosexuals who wish to reproduce. The risks for the health and safety of people who resort to these technologies do not distinguish the field of assisted human reproduction from other fields of medical practice that have evolved after a period of experimentation, such as that of organ transplants or grafts.
3. Medical advances are not limited to the field of assisted human reproduction, and many such advances can raise issues related to ethics, morality, safety and public health. There is no question that the success rate of the first few attempts at heart bypass surgery was less spectacular, the technologies less sophisticated and the materials less diverse. Although heart surgery, like many other medical treatments, may raise issues related to health, safety, ethics and morality, particularly where children, senior citizens or disabled persons are involved, criminalizing the practice of cardiology is not being considered. Neither a desire for uniformity nor the very novelty of a medical technology can serve as the basis for an exercise of the federal criminal law power.
4. In the end, if we were to adopt the Attorney General of Canada’s interpretation and accept that the fact that a technology is “novel” justifies, on its own, resorting to the criminal law power, nearly every new medical technology could be brought within federal jurisdiction. This view of the criminal law is incompatible with the federal nature of Canada; it not only upsets the constitutional balance of powers in the field of health, but also undermines the very definition of federalism.
5. We cannot, therefore, accept the argument that the criminal law power gives Parliament an unconditional substantive right to take action to protect morality, safety and public health. The Attorney General of Canada has in the alternative invoked no other powers that could serve as a basis for the exercise of Parliament’s legislative authority.
6. As we explained above, in determining whether a provision is valid, the court must examine, *inter alia*, the overflow from the exclusive jurisdiction of the government that enacted it. Often, the overflow is proved by demonstrating that the rules fall within the jurisdiction of the other level of government, and the Attorney General of Quebec has in fact done so in the instant case. We will now therefore turn to the connection between the impugned provisions and the exclusive provincial power.

(3) Connection With Provincial Powers

1. The Attorney General of Quebec submits that the impugned provisions fall within the provinces’ exclusive jurisdiction over hospitals, education, property and civil rights, and matters of a merely local nature (s. 92(7), (13) and (16) of the *Constitution Act, 1867*). It is clear from the record that the impugned statutory provisions fall under various provincial heads of power.
2. A lengthy review is not needed to determine that the impugned provisions affect rules with respect to the management of hospitals. Parliament has provided that the *AHR Act* applies to all premises in which controlled activities are undertaken (s. 13). Yet it is inconceivable that assisted reproductive technologies could be employed without the support of institutions under provincial jurisdiction: such institutions are where specimens are taken, diagnoses are made, materials are stored, treatment is provided and follow‑up takes place. The power of the provinces to make laws in relation to the establishment, maintenance and management of hospitals is therefore engaged, and it necessarily includes the power to establish standards for the operation of such institutions (see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 24). For the purpose of establishing a constitutional connection, there is no reason to distinguish clinics or laboratories that conduct analyses or take specimens from hospitals. All such institutions are related on the basis of a common practice, and they cannot be characterized using any term other than “hospital” merely because they are specialized or small. Thus, it is clear that the provisions that impose obligations in respect of premises where activities related to assisted reproduction take place are intended to apply to all such activities and all such institutions, without distinguishing between clinics and hospitals. In this sense, in light of the pith and substance of the impugned provisions — the regulation of assisted human reproduction as a health service ― those provisions are closely connected with the activities of hospitals and fall within the power of the provinces to make laws in relation to that matter.
3. The Attorney General of Quebec also argues that the provinces’ power to make laws in relation to education is engaged here. This argument is not convincing. The rules established in the *AHR Act* relate to this power only to the extent that the activities associated with assisted human reproduction either require certain qualifications for which special training is necessary or take place in university hospitals for research or educational purposes. Furthermore, the purpose of the Federal Agency’s authority to oversee persons and institutions licensed to engage in assisted reproductive activities is not related to training or to the framework within which training takes place. The rules do not therefore have the regulation of teaching as their pith and substance, and the provisions themselves are only indirectly connected with the provinces’ power in relation to education.
4. The other two heads of power relied on by the Attorney General of Quebec are property and civil rights, and local matters. These two powers, which are often invoked together, are broad. The expression “civil rights” is now understood in association with fundamental freedoms. In the context of s. 92(13) of the *Constitution Act, 1867*, however, it refers to the field of private law (H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008); A. Tremblay, *Les Compétences législatives au Canada et les Pouvoirs provinciaux en Matière de Propriété et de Droits civils* (1967)). More specifically, this head of power covers property, the status and capacity of persons, the family, matrimonial agreements, extracontractual and contractual liability, privileges, hypothecs, liberalities and successions, and prescription. In short, it concerns a very large number of subjects that are addressed, in the case of Quebec, in the *Civil Code of Québec* (G.‑A. Beaudoin, in collaboration with P. Thibault, *La Constitution du Canada: institutions, partage des pouvoirs, Charte canadienne des droits et libertés* (3rd ed. 2004)). Because of its broad scope, this head of power is often referred to as a partial residual jurisdiction.
5. The power to make laws in relation to property and civil rights, which is by far the most important of the provincial heads of power, has been relied on so often in challenges of federal laws that “[m]ost of the major constitutional cases have turned on the competition between one or more of the federal heads of power, on the one hand, and property and civil rights, on the other” (Hogg, at p. 21‑2). Since the founding of the Canadian federation, many government measures, including health‑related measures, have been connected with this head of power(*Workmen’s Compensation Board v. Canadian Pacific Railway Co.*, [1920] A.C. 184 (P.C.)).
6. The power of the provinces in relation to matters of a merely local or private nature — which can also be regarded as a partial residual jurisdiction — has often been relied on in conjunction with their power in relation to property and civil rights (*Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at p. 699; *Attorney General for Canada and Dupond v. City of Montreal*, [1978] 2 S.C.R. 770, at p. 792; *Siemens v. Manitoba*, at para. 22). Indeed, the courts have tended to consider the two heads of power as one. In *Schneider v. The Queen*, [1982] 2 S.C.R. 112, however, the majority of this Court held that this power to make laws in relation to matters of a merely local nature was the only source of the provinces’ general authority over health that supported a finding that the *Heroin Treatment Act, 1978*, enacted by the British Columbia legislature was valid.
7. In reviewing the effects of the impugned provisions, we observed that the provisions affect essential aspects of the relationship between a physician and persons who require assistance for reproduction. The fact that several of the impugned provisions concern subjects that are already governed by the *Civil Code of Québec*, the *AHSSS*, the *Medical Act* and the rules of ethics applicable to the professionals in question is an important indication that, in pith and substance, the provisions lie at the very core of the provinces’ jurisdiction over civil rights and local matters.
8. To say, as the Attorney General of Canada does, that the impugned provisions have nothing to do with the quality of medical procedures is to deny the medical environment in which assisted human reproduction activities take place, where the physician plays a crucial role. Not only is the physician centrally involved in making the diagnosis, but he or she is also one of the people who will provide the information the patients need to make a decision and who will act on that decision and then follow up on the treatment. Ample proof of the effect of the impugned provisions of the *AHR Act* on the practice of medicine can be found in the obligations the provisions impose not only on physicians, but also on the institutions where assisted reproduction services are dispensed. Consent to treatment and to the donation and use of genetic material for assisted human reproduction ― which forms the purpose of the regulations that are provided for ― is intimately related to property and civil rights. In addition, the regulation of the medical profession and of the relationship between service providers and persons needing assistance to reproduce are also local matters for the purposes of the division of powers. Thus, viewed from the perspective of their dominant purpose and their effects, the impugned provisions have a close connection with the power to make laws in relation to civil rights and local matters.
9. In short, the fact that the impugned provisions have a significant effect on activities that generally fall within the exclusive jurisdiction of the provinces confirms that those provisions represent an overflow of the exercise of the federal criminal law power. At this point, it might be tempting to declare that the impugned provisions are unconstitutional on this basis alone, as the Quebec Court of Appeal did. But it is necessary to complete the analysis and consider whether the ancillary powers doctrine applies. Before doing that, however, we must clarify a point regarding the double aspect doctrine, since the Chief Justice suggests that our approach represents a constitutional innovation. With all due respect, we must point out that she is not really considering the double aspect doctrine, because if she were, she would have to conclude that it applies to the absolute prohibitions, but not to the impugned provisions.
10. The double aspect doctrine can be viewed at three different levels: (1) that of the facts themselves regardless of their legal characterization; (2) that of the legal perspectives represented by the legislative rules; and (3) that of the power in the context of the constitutional division of powers. The double aspect relates primarily to the second level, that is, to the different normative perspectives that make it possible to understand certain corresponding facts at the first level. When the doctrine applies, these rules at the second level are connected, on the basis of their pith and substance, with different powers at the third level, one of which may come under federal authority while the other comes under provincial authority.
11. In the instant case, it can be seen from our review that the first level encompasses three distinct realities: (1.1) a category of activities that, according to the legislative facts, represent a social evil, namely the activities that are prohibited completely; (1.2) a second category of activities that are already found in medical practice and research and that, as a whole, form part of a health service, namely, among the controlled activities, the use of human reproductive material (s. 10 of the *AHR Act*), transgenic research (s. 11) and the regulation of the use of premises for health care and research (s. 13); and (1.3) a third category of activities governed by the provisions on consent and the use of genetic material obtained from minors (ss. 8 and 9), and on the reimbursement of expenditures incurred by a surrogate mother (s. 12).
12. At the second level, there is no question that the activities in category (1.1) could be viewed from two different normative perspectives: (2.1) that of the suppression of an evil and (2.2) that of the regulation of the practice of medicine and the delivery of health services. There is therefore a double aspect, since (2.1) can be connected with the federal criminal law power (3.1), and (2.2) can be connected with the provincial powers in relation to property and civil rights and to matters of a merely local nature (3.2). But in our opinion, in light of the legislative facts adduced in evidence, the activities in category (1.2) cannot be connected with the normative perspective of the suppression of an evil (2.1). These activities can be viewed only from perspective (2.2), which means that, unlike the activities in category (1.1), they do not have a double aspect. In other words, under Canadian constitutional law, the activities in category (1.2) — the controlled activities — can be considered from only one normative perspective that relates, because of its pith and substance, not to the federal criminal law power, but to the exclusive provincial powers we discussed above. There is therefore no double aspect in respect of category (1.2).
13. As for the activities in category (1.3), they cannot be viewed from both perspective (2.1) of the suppression of an evil and perspective (2.2) of the regulation of the practice of medicine either. Indeed, we have already concluded that the provisions governing activities and premises associated with assisted human reproduction and related research (ss. 10, 11 and 13 of the *AHR Act*) actually fall under provincial jurisdiction. Parliament’s attempt to justify its action in this area is specious. Its true objective was the one recommended by the Baird Commission that the drafters of the *AHR Act* were responsible for attaining: to establish national standards. It is in this light that the regulation of the activities in category (1.3) can be fully appreciated. Parliament has not sought to prohibit these activities as it has done with the activities in category (1.1). Rather, its intention was to establish uniform national conditions for consent, the use of genetic material obtained from minors and the reimbursement of expenditures. Moreover, it was not even necessary to include a provision in the *AHR Act* with respect to the removal of genetic material without the donor’s consent, since such an act would constitute assault under the *Criminal Code*. This shows that the attempt to deal with the activities in category (1.3) from a “federal” perspective has resulted in a specious form of legislation that is unacceptable under the constitutional principles that ground Canadian federalism.
14. Insofar as the provisions pursuant to which the Federal Agency is responsible for implementing the regulatory scheme are purely ancillary and have no independent purpose, we need not go into greater detail in order to conclude that they are invalid. However, we wish to point out that the constitutional defects are not remedied by s. 68 of the *AHR Act*, which authorizes the Governor in Council to declare certain provisions inapplicable if the federal minister and the government of a province so agree. The jurisdictional overflow remains just as great as long as regulation of the activities in question remains dependent on the will of the federal government. As we mentioned above, federal and provincial powers are co‑ordinate and not subordinate. In s. 68, Parliament has given the federal government a legal tool to impose its own standards on the regulation of assisted human reproduction. Provincial regulatory action will be tolerated only if the provinces in question adhere to the federal scheme. The federal government alone is to determine whether the two schemes are consistent. Subordinating the statutes and regulations in question in this way would be possible only if the federal legislation were itself valid because it was anchored in a specific federal power (see *Furtney*).
15. In sum, the conclusion that the impugned provisions, far from falling under the federal criminal law power, relate instead to the provinces’ jurisdiction over hospitals, property and civil rights and matters of a merely local or private nature is self‑evident. If any doubt remained, this is where the principle of subsidiarity could apply, not as an independent basis for the distribution of legislative powers, but as an interpretive principle that derives, as this Court has held, from the structure of Canadian federalism and that serves as a basis for connecting provisions with an exclusive legislative power. If subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces’ jurisdiction over local matters, not with the criminal law power (see J.‑F. Gaudreault‑DesBiens, “The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy”, in S. Choudhry, J.‑F. Gaudreault-DesBiens and L. Sossin, eds., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (2006), 185, at p. 193).

C. *The Ancillary Powers Doctrine Does Not Apply*

(1) Integration With a Valid Statute

1. Were the impugned provisions enacted pursuant to a power that is ancillary to Parliament’s criminal law power? To answer this question, we must focus our analysis on the relationship between these provisions and the provisions ― which are not challenged by the Attorney General of Quebec ― that prohibit activities. Ever since the first bills on this subject were introduced, the government’s intention has remained at all times to prohibit certain specific activities associated with the manipulation of genetic material. Moreover, the provisions concerning the prohibited activities are the ones in respect of which the pressure on the federal government to take action was most intense. Not only did the Baird Commission make a separate recommendation regarding these activities in its final report, but they were for the most part included in the Health Canada moratorium. It must therefore be determined whether the impugned provisions are sufficiently integrated with the set of provisions criminalizing certain specific acts. As we have seen, it will first be necessary to assess the extent of the overflow, since that is what determines the degree of integration required — a functional or a necessary relationship.

(2) Assessment of the Overflow

1. According to the *General Motors* test, the more serious the overflow, the closer the relationship between the impugned provisions and the otherwise valid statute must be. In the instant case, our review of the effect of the impugned provisions has already shown that, if those provisions are viewed in isolation, the overflow is serious. Given the extent of the overflow in this case, we cannot find that an ancillary power has been validly exercised unless the impugned provisions have a relationship of necessity with the rest of the statute.

(3) Absence of a Necessary Connection

1. The main observation that must be made here is that the scheme established by the prohibitory provisions does not depend on the existence of the regulatory scheme. To be effective, the absolute prohibitions do not need either the provisions regulating certain activities or the mechanisms for implementing the regulatory scheme. Moreover, those mechanisms were not included in the first bills, which contained only absolute prohibitions. This raises an initial doubt as to the strength of the relationship between these two sets of provisions.
2. A second doubt arises in light of the fact that both the Baird Commission and the discussion group that met after the Baird Report was tabled made a distinction between the two types of provisions. Furthermore, the Health Canada moratorium and the bills introduced before 2002 dealt only with the prohibited activities. It is clear from this legislative history that the prohibitory provisions did in fact stand alone and that they could apply regardless of whether a scheme regulating other activities existed. Conversely, the regulation of activities associated with assisted human reproduction did not depend on other activities being prohibited completely. Thus, even though both the impugned provisions and the unchallenged ones relate to the manipulation of genetic material, the necessary connection criterion is not met.
3. Indeed, if we were to characterize the connection, we would have to stress its artificial nature. As we mentioned above, and as Healy points out (at p. 915), reproductive technologies do not constitute a matter over which Parliament or the provinces can claim exclusive jurisdiction. Two very different aspects of genetic manipulation have been combined in a single piece of legislation. The social and ethical concerns underlying these two aspects appear to be distinct, and in some cases even divergent. While the prohibited activities are deemed to be reprehensible, the controlled activities are considered to be legitimate. Parliament has therefore made a specious attempt to exercise its criminal law power by merely juxtaposing provisions falling within provincial jurisdiction with others that in fact relate to the criminal law: *Scowby v. Glendinning*, [1986] 2 S.C.R. 226.
4. Contrary to the conclusion reached in *Reference re Firearms Act* (at para. 23), in the case at bar, the recourse to a regulatory scheme for legitimate assisted human reproduction activities cannot be justified on the basis of a legislative history that connects the provisions in issue with the criminal law. Rather, in view of the questions and divergent opinions noted by the Baird Commission, the recourse to a regulatory scheme with penalties appears to suggest that Parliament chose to emphasize the form of the Act, in full knowledge of the weakness of its position as regards the substance. It should be mentioned that in the course of the study of a draft that preceded the enactment of the *AHR Act*, the then Minister of Health was counting on the conclusion of agreements with the provinces to dispel the constitutional “concerns” (Hon. A. Rock, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Health*, May 3, 2001, at 11:30).
5. Given the legislative history of the *AHR Act*, the significant impact of the impugned provisions on provincial health systems and the fact that the matters they address are clearly connected with provincial heads of power, it must be inferred that in setting up the regulatory scheme, Parliament’s intention was to enact legislation in relation to a matter outside its jurisdiction.

VIII. Conclusion

1. For these reasons, we would answer the constitutional question in the affirmative, except to the extent that the offences provided for in ss. 60 and 61 relate to provisions that are not in dispute. We would uphold the conclusion of the Quebec Court of Appeal and dismiss the appeal with this same reservation. In the circumstances of this appeal, we would not award costs.

The following are the reasons delivered by

1. Cromwell J. — I respectfully disagree with the results proposed both by the Chief Justice and by Justices LeBel and Deschamps.
2. The main question, as I see it, is whether the federal criminal law power permits Parliament to regulate virtually all aspects of research and clinical practice in relation to assisted human reproduction. In my view, it does not.
3. I part company with my colleagues at the first step of the constitutional analysis. At this first step, the Court must determine the “matter” to which the impugned provisions relate. The “matter” (or, as it has often been called, the “pith and substance”) of the challenged provisions is the essence of what the law does and how it does it: *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, *per* Binnie J., at para. 16. To determine the “matter” of the challenged provisions, the Court must examine both their purpose and effects.
4. In my view, the essence of the impugned provisions of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, is regulation of virtually every aspect of research and clinical practice in relation to assisted human reproduction. The sweep of the regulation authorized by the impugned provisions is most vividly illustrated by reading ss. 10, 11 and 13 along with the regulation-making power in s. 65 and the licensing authority set out in s. 40. I substantially agree with the Quebec Court of Appeal’s description of the purpose and effects of the challenged provisions as set out at paras. 121-22 of its judgment (2008 QCCA 1167, 298 D.L.R. (4th) 712).
5. The Chief Justice concludes that the “matter” of this legislation is “the prohibition of negative practices associated with assisted reproduction” (para. 34). I respectfully do not agree that this reflects the essence of what the challenged provisions do or how they do it. The impugned provisions as I read them permit minute regulation of every aspect of research and clinical practice and do not simply prohibit “negative practices”. I am also of the view that the essence of the legislation goes beyond that proposed by Justices LeBel and Deschamps. As I see it, the purpose and effects of the challenged provisions are not limited, as they would hold, to “the regulation of assisted human reproduction as a health service” (para. 227); the regulation authorized by the impugned provisions goes far beyond that.
6. Having determined the essence of the law, the analysis proceeds to the second step which is to classify that “matter” by reference to the provincial and federal “classes of subjects” listed in ss. 91 and 92 of the *Constitution Act, 1867*: *Chatterjee*, at para. 24. Substantially for the reasons given by Justices LeBel and Deschamps at paras. 259‑66, I conclude that the “matter” of the challenged provisions, viewed as a whole, is best classified as being in relation to three areas of exclusive provincial legislative competence: the establishment, maintenance and management of hospitals; property and civil rights in the province; and matters of a merely local or private nature in the province. In my respectful view, the “matter” of the challenged provisions cannot be characterized as serving any criminal law purpose recognized by the Court’s jurisprudence. I underline the comment of Justices LeBel and Deschamps (at para. 244) that “[r]ecourse to the criminal law power cannot therefore be based solely on concerns for efficiency or consistency, as such concerns, viewed in isolation, do not fall under the criminal law.”
7. That does not conclude the analysis, however. It may be that not each of the impugned provisions shares the constitutional characterization which attaches to the “matter” of the impugned provisions viewed as a whole. In my view, this is the case here: see, for example, *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, at p. 270; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 665. Sections 5 to 7 are validly enacted under Parliament’s criminal law power as the Attorney General of Quebec concedes. The same is true, in my view, of ss. 8, 9 and 12. In this respect, I part company with Justices LeBel and Deschamps.
8. Sections 8 and 9 set out prohibited activities and are aimed at protecting each person’s control over the “products” of his or her own body; they focus on consent. The purpose and effect of s. 8 is to prevent use of a donor’s reproductive material or an *in vitro* embryo for purposes other than those for which the donor gave free and informed consent. Section 9 addresses the age of consent. It prohibits the use of sperm or ova from a donor under 18 years of age. In my view, the issues of consent and the age of consent to otherwise prohibited activities fall within the traditional boundaries of criminal law.
9. I reach the same conclusion with respect to s. 12. It must be read with ss. 6 and 7. Those provisions, which the Attorney General of Quebec concedes to be valid federal criminal law, prohibit various forms of commercializing the reproductive functions of women and men. Section 12 sets out an extension of the regime established by ss. 6 and 7; s. 12 is a form of exemption from the strictness of the regime which they impose and, to some extent, defines the scope of the prohibitions provided for in those sections.
10. I conclude that ss. 8, 9 and 12 in purpose and effect prohibit negative practices associated with assisted reproduction and that they fall within the traditional ambit of the federal criminal law power.
11. As I would affirm the constitutionality of s. 12 of the Act, I would also uphold the constitutionality of provisions which set up the mechanisms to implement it. I therefore conclude that ss. 40(1), (6) and (7), 41 to 43 and 44(1) and (4), to the extent that they relate to provisions of theAct, which are constitutional, were properly enacted by Parliament in accordance with the federal criminal law power. I similarly conclude that ss. 45 to 53, to the extent that they deal with inspection and enforcement in relation to constitutionally valid provisions of the Act, are also properly enacted under the criminal law power.
12. I agree with the Chief Justice and Justices LeBel and Deschamps that ss. 60 and 61 (which create offences) are constitutionally valid under the federal criminal law power to the extent that they relate to constitutionally valid provisions of the Act. I agree with the Chief Justice’s analysis and conclusion at paras. 152-54 of her reasons that s. 68 is constitutional, although its operation will of course be limited to constitutional sections of the Act. As for s. 19 of the Act, I can see no constitutional objection to it given that the other provisions establishing the Assisted Human Reproduction Agency of Canada are not contested.
13. I would therefore allow the appeal. The parties should bear their own costs. I would answer the constitutional question as follows:

Do ss. 8 to 19, 40 to 53, 60, 61 and 68 of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, exceed, in whole or in part, the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*?

With respect to ss. 10, 11, 13, 14 to 18, 40(2), (3), (3.1), (4) and (5) and ss. 44(2) and (3) I would answer yes. With respect to ss. 8, 9, 12, 19 and 60, I would answer no. With respect to ss. 40(1), (6) and (7), 41 to 43, 44(1) and (4), 45 to 53, 61 and 68, to the extent they relate to constitutionally valid provisions, I would also answer no.

*Appeal allowed in part.*

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