

# Gestational Surrogacy in Canada

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## Introduction: A Brief History of Surrogacy and Reproductive Technology Regulation in Canada

To understand the story of surrogacy regulation in Canada, one must go back a quarter of a century to the appointment of the Royal Commission on New Reproductive Technologies (Royal Commission) [1,2]. In keeping with international practice, Canada's strategy was to undertake a thorough study of assisted reproduction, including surrogacy – its practice, its effects, and the attitudes and fears it provokes – before settling on a regulatory approach [1]. To that end, the Royal Commission was appointed in 1989 with a mandate to explore the social, ethical, legal, and economic implications of new reproductive technologies and to recommend a suitable sociolegal response [1,2].

Canada's Royal Commission was established a few years after the birth of Louise Brown, which signaled the dawning realization of the power and potential of reproductive technologies. New medical technologies commonly evoke feelings of fear and revulsion, and the new reproductive technologies were no exception in that regard. But these technologies are exceptional in that they not only make it possible for infertile heterosexual couples to conceive, but they also make imaginable all kinds of new reproductive and familial arrangements. In addition, then, to the anxiety related to a new technology with the potential to advance medicine and science, there was distinct unease about the social meaning of these new technologies [1].

Canada is not remarkable for deciding to study reproductive technologies and their implications for society before adopting a regulatory approach, but the

trajectory and timing of Canada's regulatory history deserve some attention. As noted, the Royal Commission was appointed in 1989. It reported on its findings and recommendations in 1993, after four years of discord and disagreement. Canada did not pass its first law aimed at regulating reproductive technologies (including surrogacy) until 2004 (the Assisted Human Reproduction Act [AHR Act]) [3]. The intervening 11 years between the Royal Commission's report and the AHR Act involved debate and critique, as well as four failed attempts to legislate.

One reason for the long interval between the Royal Commission's work and the enactment of legislation is Canada's constitutional structure. Canada is a federal jurisdiction, meaning that constitutional responsibility for making laws is shared between the federal government, on the one hand, and provincial and territorial governments, on the other [1,2,4]. Although jurisdiction over "health" is not explicitly granted to provinces and territories by the Constitution, healthcare regulation is widely understood to be within the area of responsibility of these regional governments. The Royal Commission recognized this but was unequivocally committed to the view that Canada needed a uniform national response to the legal and ethical concerns generated by reproductive technologies [1,2]. Because the federal government lacks the power to regulate in the areas of health and healthcare, the only legitimate way to ground federal governance was through the federal criminal-law power. These constitutional considerations, in part, explain why Canada has had so much difficulty regulating in this area at all. They also shed light on the decision to adopt a regulatory model that involves a significant criminal-law component, as detailed later in this chapter.

The Royal Commission looked to the criminal law for another key reason as well – its acute concern about the ethical implications of reproductive technologies, including surrogacy [2]. The Royal Commission perceived surrogacy to be potentially exploitative of and degrading to women and believed that it commodifies children and reproduction. The Royal Commission was not alone in its concerns about surrogacy; these views were widely held in the early days of *in vitro* fertilization (IVF) and the ability to separate genetic and gestational motherhood [1]. Indeed, modern surrogacy has been cause for concern on the part of many diverse groups, including feminists and social conservatives, both because it disrupts our traditional ideas about family and motherhood and because of the threat some see it posing to women and children [1,2,4].

Given the pace and magnitude of change in the practice of fertility medicine since 1993, one would expect to see similarly striking changes in the legal response to reproductive technologies, including surrogacy. As will become clear from the discussion in this chapter, this has not been the case in Canada. Surrogacy regulation in Canada is underpinned by the views and concerns articulated in the Royal Commission's now 23-year-old report [1,2]. The law is incomplete, out of date, and in urgent need of reform.

## Current Regulation in Canada

### Surrogacy and the Criminal Law

In its originally proposed form, the law that would later become the AHR Act was little more than a list of prohibited practices with accompanying potential penalties [2]. While the version that was ultimately passed as the AHR Act evolved significantly between its introduction in 1996 and its adoption in 2004, the law maintains a significant criminal-law focus. Several activities are prohibited, including paying a woman for surrogacy services [3]. More specifically, it is a criminal offense to pay consideration (or to offer or advertise such payment) to a woman to act as a surrogate mother and/or to pay or accept payment for arranging the services of a surrogate mother [3]. The ban on commercial surrogacy is backed by substantial penalties: offenders face a maximum fine of \$500,000 or up to 10 years imprisonment or both [3].

Surrogacy itself is not illegal, as long as consideration (exchange for value) is not provided to the

surrogate mother or to a third party who arranges for the services of the surrogate mother. In other words, only commercial surrogacy is prohibited [2,4]. And the acceptance of payment by a woman for surrogacy services is not a criminal offense, only the payment (or offer) to her is caught by the law. This reflects a deliberate choice by Canadian lawmakers to refrain from criminalizing the behavior of the surrogate herself [1].

Although commercial surrogacy is proscribed, the AHR Act does permit some money to change hands in the course of a surrogacy arrangement, in that the surrogate mother is entitled to be reimbursed for expenditures she makes in relation to her pregnancy [3]. The types of expenses that may be reimbursed were intended to be detailed in regulations. To date, however, no formal regulations have been developed to spell out exactly which expenses may be reimbursed and which may not. This leaves open the question as to whether *any* expenses can permissibly be reimbursed because the section that prohibits payment is in force, but the section that permits reimbursement will not come into force until regulations are in place [1,4]. According to Health Canada (the federal authority responsible for administering and enforcing the AHR Act), however, a surrogate can currently be reimbursed for “out-of-pocket costs directly related to her pregnancy” without the payer risking criminal liability [5]. The types of costs for which a woman can be reimbursed include purchase of maternity clothes, medications, and travel or parking costs for medical appointments related to the surrogacy arrangement [5]. Payment for lost wages is also permitted if the surrogate is on medically advised bed rest and her physician confirms the need for bed rest in writing [5].

In addition to prohibiting surrogacy and a number of other assisted reproductive technology (ART)-related activities, the AHR Act also created a category of controlled activities [3]. The majority of the AHR Act was devoted to the regulation of these activities. The act included provisions respecting regulation of privacy and access to information, establishing an arm's-length regulator (Assisted Human Reproduction Canada [AHRC]), and providing for the administration and enforcement of the law [1,2].

In 2008, the AHR Act was challenged by the government of Québec on the basis that the federal

government lacked jurisdiction to legislate in relation to the noncriminal aspects of the regulatory scheme. While conceding the prohibitions to be a valid exercise of the federal criminal-law power, Québec argued that the noncriminal aspects of the Act amounted to an attempt to regulate the entire field of medical practice in assisted reproduction. Ultimately, the Supreme Court of Canada was asked for its opinion as to the constitutional validity of the legislation [6]. As a result of the Supreme Court's split decision, the vast majority of the AHR Act was repealed [1]. What remains – the prohibitions and a few closely related provisions – is still only partially in force.

A review of the Canadian regulatory picture suggests a lack of enthusiasm on the part of the federal government in terms of its role in surrogacy regulation. This condensed explanation of Canada's regulatory approach to surrogacy reveals some noteworthy inconsistencies between the law on the books and the law in action. Canada has among the most restrictive approaches to commercial surrogacy seen in Western democracies. The clear intent of the prohibitions (and associated immense penalties) is to discourage surrogacy, ostensibly because of the risk of harm it engenders. Yet, despite that intent, this decade-old statute has resulted in only minimal enforcement.

The government's ambivalence with respect to surrogacy policy comes into sharp focus when one reflects on the single AHR Act prosecution in Canada. This case involved Leia Picard and her business, Canadian Fertility Consultants (CFC). To begin with, it is difficult to square the very existence of for-profit surrogacy consultancies with Canadian law. It is a criminal offense in Canada to accept payment in exchange for arranging the services of a surrogate mother. Even if a consultant provides a number of related services, it seems that the very point of engaging a surrogacy consultant must be for purposes of arranging the services of a surrogate mother. But the charges against Picard had nothing to do with her typical consulting services and instead focused on a few specific practices: purchasing ova from donors, paying consideration to surrogates, and accepting consideration for arranging the services of a surrogate [7]. The final charge on the list related to payments Picard received from Hilary Neiman, a former US fertility lawyer who was convicted for her role in what US authorities referred to as an international baby-selling ring. Picard and CFC pled

guilty to the charges and paid a combined fine of \$60,000 [7].

Rather than clarifying the boundaries of permissible surrogacy practice in Canada, this prosecution has produced more questions than answers. Why was Picard not charged for the typical surrogacy consulting services she provided, given the prohibition on accepting payment for arranging for the services of a surrogate mother? And why was the fine so low, relative to both the amounts that changed hands and the maximum fine provided for in the Act? It seems that the Canadian government believes that there is utility in maintaining restrictions backed by harsh penalties in the hope of discouraging surrogacy but is nevertheless prepared to turn a blind eye to the reality that surrogacy is occurring in Canada, possibly often in a way that violates the law.

## Surrogacy in Contract and Family Law

### Contract Law

As discussed earlier, in Canada, responsibility for different areas of law rests with distinct levels of government. The federal government is responsible for criminal law and therefore defines the lawfulness of surrogacy from that perspective. There are other aspects to surrogacy regulation as well – contract law and family law – and these areas are within the jurisdiction of provincial and territorial governments.

The AHR Act specifically provides that the Act does not affect the legitimacy of surrogacy agreements [3], meaning that the provinces and territories must provide guidance on the validity and enforceability of surrogacy contracts. In most Canadian jurisdictions, however, there is no settled law on the question; in fact, most do not have laws explicitly addressing the legal status of surrogacy agreements [1,4,8]. Québec law does address this issue; the law unambiguously states that surrogacy agreements are null and void [9]. But the Québec Court of Appeal nevertheless recently permitted the adoption of a child born pursuant to such an agreement on the basis that the invalidity of a surrogacy contract does not preclude adoption of the child by the intended parents who were parties to that contract [9]. In reflecting on its decision – which appears in effect to uphold the intentions of the parties to an invalid contract – the court referred to the outcome as representing the “least unsatisfying solution” [9]. In essence, we have no answer in Canadian

law as to whether surrogacy contracts are valid and enforceable.

### Family Law: Legal Parentage

Once a child has been born as a result of a surrogacy arrangement, the legal issues shift from questions about the rights and responsibilities of the surrogate mother and intended parents and instead revolve around the legal status of the child. In particular, this requires a determination of the child's legal parentage. Defining legal parentage is a critical step in confirming that the social arrangements a family has made are reflected in law. Should parents need to make healthcare- or education-related decisions for their child, they must have the legal status to do so.

Here again, there is much uncertainty in Canadian law. Most provinces and territories do not have laws that address parentage after surrogacy [1,4,8]. Those that have been explicit about parentage after surrogacy have taken differing approaches [1,4]. Thus there is no uniform national "Canadian" law on this matter; rather, there are various laws in different parts of the country. The variations are significant enough that it is difficult to generalize about how the process works, and readers are referred to other sources for the details [1,4]. In very general terms, most provincial and territorial laws presume the birth mother (i.e. the surrogate) to be the child's mother. In order to change the child's legal parentage so that the intended parents become the legal parents, a judicial process is required [1,4], although one Canadian province has taken a different approach. British Columbia has recently passed legislation that recognizes the intended parents as the child's legal parents at birth as long as the following statutory conditions are met: the parties have entered into a written agreement from which no one has withdrawn, the surrogate mother has given her consent, and the child has been taken into the care of the intended parents [4].

## Surrogacy in Practice: The Current Picture in Canada

One consequence of the current underdeveloped law on surrogacy is that Canadians cannot know with any degree of certainty how much interest there is in surrogacy in their country, nor can they accurately estimate the frequency with which those

who wish to be parents rely on surrogacy to achieve that objective [4]. This lack of data, including the absence of any ability to collect data, was not a deliberate result of the federal government's regulatory strategy. The AHR Act did establish a national oversight body (AHRC), one function of which was to be the collection and evaluation of information respecting national and international developments in ART practice [3]. AHRC was established in 2006 and remained in operation for approximately six years, during which time it was beleaguered by controversy and conflict among its members [1]. As a result of its internal politics, AHRC accomplished almost nothing during that six-year period; it was eventually wound down after the Supreme Court invalidated almost all the provisions of the AHR Act that related to its mandate [1].

It is worth noting that even with an oversight body in place to monitor developments in reproductive technology, accurate statistics about surrogacy trends and its frequency are hard to find. Most countries do not track surrogacy incidence, focusing instead on ART practice more generally (in particular success rates of various ART techniques) [4]. In any case, it is difficult to imagine that a jurisdiction that sought to monitor surrogacy trends would be able to obtain accurate numbers. While surrogacy arrangements are increasingly formal and medicalized, informal arrangements remain a possibility. In jurisdictions where surrogacy's legal status is uncertain or proscribed, intended parents and surrogates may be more likely to pursue surrogacy informally, as well as more likely to keep quiet about their participation.

Another factor to consider in relation to the availability of accurate statistics on surrogacy is the fact that many Canadian patients who seek to become parents through surrogacy do so in jurisdictions other than where they live [1,4]. In recent years, an international surrogacy market has begun to flourish owing to both legal and financial considerations. In jurisdictions where the law constrains any aspect of surrogacy – including by limiting access to donor gametes, prohibiting commercial surrogacy, and declining to recognize surrogacy agreements – intended parents have significant incentives to seek surrogacy services outside their home jurisdictions [4]. Likewise, the high cost of surrogacy (especially where donor gametes are used) encourages intended

parents to explore less expensive alternatives. Again, this can often mean pursuing surrogacy in another jurisdiction, usually in a developing nation.

With this background, it is possible to piece together some information about surrogacy in Canada based on anecdotal and indirect sources. There is certainly interest in surrogacy in Canada; in February 2015, one of Canada's national newspapers ran a series of articles covering this issue, including comments from women who have acted as surrogates, people who have had children through surrogacy, and lawyers who work in fertility law (in part, negotiating surrogacy arrangements) [10]. News accounts have also begun to emerge relating the stories of intended parents who have sought surrogacy services outside of Canada and who are facing immigration obstacles or out-of-country healthcare costs after the child's birth [4]. But apart from this purely anecdotal information, not much is available to assemble a comprehensive picture of surrogacy practice in Canada.

Canada's surrogacy consultancies are another potential source of data on surrogacy practice. Canadian Surrogacy Options, a "surrogacy consulting service," claims to have helped close to 900 couples become parents through surrogacy [11]. The other surrogacy consultants in Canada, Surrogacy in Canada Online and CFC, do not post specific information about numbers, but CFC claims to have helped "hundreds of couples" become parents.

In addition to the anecdotal information about surrogacy interest and practice arising from popular media accounts and claims by related businesses, a few provinces have made changes to their family-law legislation to reflect what happens in the surrogacy context. In all, it seems clear that there is interest in surrogacy and that it is occurring in Canada. But, as will be elaborated on in the next section, it is occurring in circumstances that lack transparency and give rise to a number of potential concerns.

## Law and Practice in Canada: Justifying Canada's Legal Regime?

Canada's out-of-date and incomplete regulatory approach leaves little doubt that its aim is to discourage surrogacy. Commercial surrogacy is prohibited, and there is nothing in either federal or provincial law that facilitates altruistic surrogacy. In view of the fact that surrogacy is taking place in Canada and abroad,

with Canadians as both intended parents and surrogates, it is essential to reflect on both the purposes and the effects of Canada's regulatory approach.

Canadian law on surrogacy was introduced when ART practice was in its infancy. The language used by the Royal Commission, by witnesses who spoke to the commission, and by politicians and those who testified to parliamentary committees as the law was being drafted and debated, suggests that worries about potential harm to women and children were paramount [1,2]. In the end, Canada's legal stance (consistent with other countries, including the United Kingdom and Australia) is to permit altruistic surrogacy while criminalizing commercial surrogacy [1,4]. This implies that it is the exchange of money for surrogacy services that is perceived as especially problematic, whether because of the power of money to induce women to participate in surrogacy when they otherwise would not or because of the perceived treatment of women's reproductive labor and/or of children as commodities. Arguably, however, the same concern about inducing women to participate in surrogacy against their autonomous wishes is present in altruistic arrangements where a woman feels pressured to help a family member or close friend [1,2]. In terms of the threat of commodification of children, the same worries seem present in the adoption context, given the ever-increasing cost of that route to parenthood [2]. And in any event, these worries are misplaced.

No doubt the concerns that many have expressed about the potential effects of surrogacy are genuinely held. But are these potential effects real? In other words, is there a legitimate foundation for Canada's regulatory approach? When the Royal Commission did its work more than two decades ago, there was little empirical evidence about the results (including the potential harms) of surrogacy, commercial or otherwise [1,2]. We still have limited evidence about the impact of surrogacy on women and children, but we do have some. And that evidence suggests that the concerns highlighted by those opposed to surrogacy are overblown, at least in the domestic surrogacy context in developed nations [8].

As to women's experiences of surrogacy, research findings paint a very different picture than that offered by opponents. The research shows that women who provide surrogacy services are generally positive about their experiences and that the decision to act as a surrogate is grounded in a desire to help

infertile couples [8]. The evidence suggests that women's motivations are primarily altruistic and that they are not engaging in surrogacy because they feel pressured or coerced, nor because they are financially desperate [8]. Studies show that women who act as surrogates perform within normal ranges in standardized psychological testing [8]. They are capable of making the decision in advance to relinquish the infant they will carry and deliver and of following through with that decision without experiencing regret or distress [8].

Those opposed to surrogacy also claim that it harms children. Again, however, the evidence does not bear this assertion out. Studies of children conceived via ART (including surrogacy) consistently demonstrate that these children develop and function normally and that their psychosocial and cognitive development is consistent with that of their naturally conceived peers [12]. The most recent research into the psychosocial functioning of families created via ART concludes that children born through surrogacy show normal levels of adjustment, although there is some evidence that at around age seven these children may experience some adjustment difficulties when compared with similarly aged donor-conceived children [12]. The history of surrogacy is too brief and the evidence too limited to permit a confident conclusion at this stage that there is no risk of harm to children as a result of this nontraditional form of conception. However, the research provides no reason to believe that surrogacy is harmful to children. What seems to be a far more important determinant of children's well-being and adjustment than the story of their conception and birth is the quality of the relationships they enjoy with their families [12].

Admittedly, there is still limited evidence about the effects of surrogacy on women, children, and family functioning. And there is no evidence yet that speaks to the long-term implications of family formation through surrogacy. In any event, no amount of evidence can entirely rule out the possibility of exploitation or harm as a result of surrogacy arrangements. There is no question that surrogate mothers, intended parents, and children can be exploited and harmed. But the evidence seems fairly clear that this is not the norm, at least not in relatively affluent jurisdictions such as Canada.

In keeping with the concerns that shaped Canada's existing surrogacy laws, one objective of Canada's ART law is to protect the health,

well-being, dignity, and rights of those who seek ART treatment [3]. While this purpose is laudable, it is difficult to conclude that the effects of the law are in keeping with its objectives, at least in terms of safeguarding the interests of those who participate in surrogacy arrangements or the children who are born as a result. The law fails to articulate clear legal boundaries, is minimally enforced, and has generated uncertainty about the permissibility of certain practices. In turn, the potential for exploitation is intensified compared with a more liberal regime with careful regulation.

Indeed, as argued elsewhere, anecdotal reports point to the development of a "gray market" for surrogacy services in Canada [1,4]. In this respect, the law seems to have an effect that is inimical to its fundamental principles and aims [4]. In seeking to protect women and children from harm, the law has instead enhanced the risks they face by ensuring that surrogacy takes place in conditions of silence and uncertainty. Although the law does not criminalize the actions of a woman who accepts payment for surrogacy services, it does clearly prohibit commercial surrogacy. Women providing surrogacy services may be unsure of their legal rights and obligations and therefore might not be comfortable coming forward to complain about their treatment if they fear that their participation in surrogacy might lead to legal consequences. Intended parents are also left vulnerable by the lack of clarity in the law, which is framed in such a way that the legal risks for intended parents are actually far higher than those faced by the surrogate herself. A surrogate mother or surrogacy consultant could potentially take advantage of the precarious legal position of intended parents.

Canadian surrogacy law also has the potential (and, it appears, the actual) effect of encouraging Canadians to seek surrogacy services outside of Canada, which further magnifies the likelihood of harm among those who participate. Not only can international surrogacy lead to nightmarish complications related to citizenship and parentage, it also creates a substantial risk of exploitation of the women who provide surrogacy services in jurisdictions where their educational and employment opportunities are limited [4].

In response specifically to the hazards of international surrogacy, some have suggested that the best way to alleviate the risks is by extending domestic

prohibitions by explicitly providing for their extra-territorial application. This is the route that three Australian states have taken, in effect making it a crime for residents of those states to pursue commercial surrogacy anywhere [4]. In my view, this is an approach with little to commend it. Criminal prohibitions on surrogacy have failed to prevent its continued practice in domestic contexts, where the possibility of effective enforcement does exist. Surely these prohibitions will be even less useful in the international context, given the considerable barriers that authorities would face in enforcement efforts. Ultimately, extending the reach of domestic criminal laws would accomplish nothing more than to drive the practice of surrogacy underground, thereby increasing the likelihood of exploitation and harm.

There is another solution to these problems: reform the law in Canada. It is clear at this point that a national regulatory approach is not feasible in Canada, but that in no way precludes collaboration among the provinces and territories to fashion a consistent and effective legal response to surrogacy. Whatever shape that response might take, it must have as its focal point the certainty and security needed by those who participate in surrogacy arrangements.

As a first step toward reform, the provisions that criminalize commercial surrogacy should be repealed. In addition, surrogacy agreements should be made enforceable by clear provincial and territorial laws, and every Canadian jurisdiction should have straightforward, accessible mechanisms for determining and transferring legal parentage following surrogacy. Contracts between intended parents and surrogate mothers should be vetted and approved either judicially or by a regulatory body to minimize the likelihood that the agreements themselves will lead to exploitation. Agencies or organizations that facilitate surrogacy arrangements should be permitted to operate and to be paid for their services in order to improve the quality of information and advice received by the parties to a surrogacy arrangement. Such organizations will require oversight to ensure that they do not take advantage of vulnerable individuals; the same body that is responsible for evaluating surrogacy agreements could undertake this role as well.

## Conclusion

Surrogacy regulation in Canada is just one example of a failure of leadership in reproductive regulation more generally. Canadian governments have traditionally been unwilling to engage with the complex and challenging issues posed by reproductive decision making [1]. This reluctance extends beyond the obvious political risk involved in taking a clear and decisive stand on issues such as abortion, gamete donation, and surrogacy – even the executive branch of government has shown a general unwillingness to move forward with an agenda that recognizes reproductive autonomy. Canadian women lack access to many newer contraceptive drugs and products compared with European and American women in part because of a sluggish regulatory regime [1]. And the long-awaited drug mifepristone – the only drug indicated for medication abortion – will soon become available for use in Canada, after an approval process that took almost three years [13].

Given the lack of political will around reproductive rights in general, it should come as no surprise that surrogacy regulation remains inchoate (and in some respects confusing) in Canada. Perhaps for a time, Canada's lawmakers could tell themselves that there was no reason to become implicated in the unpleasant politics of reproduction because the landscape did not demand it – not many Canadians were engaging in surrogacy arrangements. But it is becoming increasingly clear that Canadians are participating in surrogacy, whether as intended parents or as surrogates. Whatever the government's reasons may have been for failing to even take the small step of drafting regulations to bring the reimbursement provisions into force, it is no longer possible to deny that this failure is having real effects on the lives of Canadian families. It is time for Canadian governments to attend to and act on the need for straightforward and effective surrogacy regulation.

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