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RESEARCH ARTICLE/ARTICLE DE RECHERCHE

Decriminalizing Paid Surrogacy in Canada: Intended Parents' Perspectives*

Stefanie Carsley

Common Law Section, Faculty of Law, University of Ottawa, Canada
Email: stefanie.carsley@uottawa.ca

Abstract

This article explores what intended parents think about the *Assisted Human Reproduction Act*—a federal law that criminalizes paid surrogacy in Canada. Canadian scholars have long debated the merits of the AHRA's prohibitions and, in recent years, lawmakers have proposed decriminalization. However, interviews with Canadian intended parents reveal that few support decriminalizing paid surrogacy in the absence of regulations and policies that provide protection for surrogates and intended parents. This piece will interest scholars and law and policymakers advocating for evidence-based responses to surrogacy. It challenges longstanding assumptions that decriminalizing payment—and leaving provinces to decide whether to introduce regulations—would support family building through surrogacy.

Keywords: assisted reproduction; surrogacy; reproductive technologies; law and policy; *assisted human reproduction act*

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Résumé

Cet article examine ce que les parents d'intention pensent de la *Loi sur la procréation assistée* —une loi fédérale qui criminalise la gestation pour autrui commerciale au Canada. Les chercheuses et chercheurs débattent depuis longtemps du bien-fondé des interdictions prévues par cette loi, et, plus récemment, des parlementaires ont proposé la décriminalisation de la gestation pour autrui commerciale. Cependant, des entretiens menés auprès de parents d'intention canadiens révèlent que peu d'entre eux appuient cette décriminalisation en l'absence de règlementation et de politiques assurant la protection adéquate, tant des personnes porteuses que des parents d'intention. Cet article intéressera les chercheuses et chercheurs ainsi que les juristes et les législateurs qui prônent une approche fondée sur des données probantes en matière de gestation pour autrui. L'article remet en question la croyance tenace voulant que la décriminalisation de la rémunération de la gestation pour autrui, tout en laissant aux provinces le soin de décider d'adopter ou non des règlementations, serait favorable aux Canadiens souhaitant fonder une famille de cette manière.

Mots-clés: procréation assistée; gestation pour autrui; technologies de reproduction; droit et politiques; *loi sur la procréation assistée*

I. Introduction

Canadian scholars have long criticized the *Assisted Human Reproduction Act* (AHRA)—a federal law that makes it illegal to pay a surrogate to carry a child. However, little attention has been paid to the voices and experiences of Canadians who engage in surrogacy and who are subject to the AHRA's criminal prohibitions. This article provides new insight into what intended parents (people who build their families through surrogacy) think about the AHRA and recent proposals to decriminalize paid surrogacy. In-depth qualitative interviews with intended parents across Canada reveal that, while some agree that payment for surrogates should be permitted, few support proposed reforms to repeal the AHRA without clear regulations and policies to protect surrogates and intended parents.

Part II provides legal and social context for the study. Part III describes my approach, methods and sample. Parts IV and V present and discuss my findings. This piece contributes to academic and law-and-policy conversations about whether to decriminalize and regulate commercial surrogacy. It will interest scholars and law and policymakers advocating for evidence-based responses to surrogacy. It challenges long-standing assumptions that decriminalizing payment—and leaving provincial governments to decide whether to introduce regulations—would support family building through surrogacy.

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II. Context

The AHRA prohibits commercial surrogacy in Canada.[1] It is illegal to pay, offer to pay or advertise to pay a surrogate to carry a child.[2] Surrogates may be reimbursed for their out-of-pocket expenses associated with the surrogacy or may receive compensation for lost work-related income; however, they are not permitted to benefit or profit from acting as a surrogate and are required to furnish receipts or provide other documentation to receive these reimbursements.[3] Intended parents who violate the AHRA's prohibitions on payment may receive a fine of up to $500,000 or ten years' imprisonment.[4]

Canadian scholars and lawmakers have long debated the appropriateness of these prohibitions. Proponents of the AHRA have argued that paid surrogacy commercializes and commodifies reproduction and human life[5] and runs counter to Canadian values.[6] They have argued that allowing payment could lead to

[1] *Assisted Human Reproduction Act*, SC 2004, c 2, ss 6, 12, 60 (hereafter "AHRA"). For discussion of the history of the AHRA, see e.g., Alison Harvison Young, "Let's Try Again … This Time with Feeling: Bill C-6 and New Reproductive Technologies," *UBC Law Review* 38 (2005): 123–45; Alana Cattapan, "Rhetoric and Reality: 'Protecting' Women in Canadian Public Policy on Assisted Human Reproduction," *Canadian Journal of Women and the Law* 25, no. 2 (2013): 202–20; Erin L. Nelson, "Gestational Surrogacy in Canada," in *Handbook of Gestational Surrogacy*, ed. E. Scott Sills (Cambridge University Press, 2016); Dave Snow, *Assisted Reproduction Policy in Canada: Framing, Federalism, and Failure* (University of Toronto Press, 2018); Stefanie Carsley, "Regulating Reimbursements for Surrogate Mothers," *Alberta Law Review* 58, no. 4 (2021): 811–36.

[2] AHRA, s 6(1). Pursuant to s 6(2) and (3), it is also illegal to pay intermediaries (i.e., agencies) "to arrange for the services of a surrogate mother" and for intermediaries to accept payment for matching surrogates with intended parents.

[3] Ibid., s 12; Canada, *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193 (hereafter "AHR Reimbursement Regulations"). For further discussion of these regulations and their development, see e.g., Carsley, "Regulating Reimbursements"; Louise Langevin, *Le droit à l'autonomie procréative des femmes: entre liberté et contrainte* (Éditions Yvon Blais, 2020), 206–13; Angel Petropanagos, Vanessa Gruben, and Angela Cameron, "Should Canada Implement a Flat-Rate Reimbursement Model for Surrogacy Arrangements? Legal and Ethical Recommendations for a Revised Approach to Reimbursement," in *Surrogacy in Canada: Critical Perspectives in Law and Policy*, ed. Vanessa Gruben, Alana Cattapan, and Angela Cameron (Irwin Law, 2018); Dave Snow, Françoise Baylis, and Jocelyn Downie, "Why the Government of Canada Won't Regulate Assisted Human Reproduction: A Modern Mystery," *McGill Journal of Law and Health* 9, no. 1 (2015): 1–15.

[4] AHRA, s 60.

[5] See e.g., "Bill C-47, Human Reproductive and Genetic Technologies Act," 2nd Reading, *House of Commons Debates*, 35-2, No 089 (23 October 1996) at 5616–17 (Joseph Volpe); "Bill C-56, An Act Respecting Assisted Human Reproduction," *House of Commons Debates*, 37-1, No 188 (21 May 2002) at 11523 (Anne McLellan); Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Minister of Government Services Canada, 1993), 683–84; see also Trudo Lemmens, "The Commodification of Gametes: Why Prohibiting Untrammelled Commercialization Matters," in *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction*, ed. Trudo Lemmens et al. (University of Toronto Press, 2017); Carolyn McLeod, "For Dignity or Money: Feminists on the Commodification of Women's Reproductive Labour," in *The Oxford Handbook of Bioethics*, ed. Bonnie Steinbock (Oxford University Press, 2009).

[6] See e.g., Françoise Baylis and Alana Cattapan, "Paying Surrogates, Sperm and Egg Donors Goes against Canadian Values," *The Conversation*, April 2, 2018, theconversation.com/paying-surrogates-sperm-and-egg-donors-goes-against-canadian-values-94197; Françoise Baylis, "The Regulation of Assisted Human Reproductive Technologies and Related Research: A Public Health, Safety and Morality Argument," in *Regulating Creation*, ed. Lemmens et al., 498; Angela Campbell, "A Place for

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the exploitation or coercion of vulnerable individuals who might engage in surrogacy for money.[7] Critics of the AHRA have argued that allowing surrogates to be remunerated would support Canadians' reproductive autonomy and would recognize and value gestation as labour.[8] They maintain that decriminalizing payment would support family building through surrogacy[9] and increase the number of individuals willing to act as surrogates.[10] They have also questioned presumed links between exploitation and payment, pointing out that surrogates may be subject to pressure or mistreatment even if they are not paid.[11] They have argued that criminalization drives paid surrogacy underground, where surrogates are more likely to be subject to abuse,[12] and pushes Canadians to seek out surrogates in other jurisdictions where payment is permitted and where surrogates might be mistreated.[13]

Criminal Law in the Regulation of Reproductive Technologies," *Health Law Journal* 10 (2002): 84; Angela Campbell, "Defining a Policy Rationale for the Criminal Regulation of Reproductive Technologies," *Health Law Review* 11, no. 1 (2002): 27; see also Dave Snow, "Criminalising Commercial Surrogacy in Canada and Australia: The Political Construction of 'National Consensus'," *Australian Journal of Political Science* 51, no. 1 (2016): 1–16.

[7] See "Bill C-13, Assisted Human Reproduction Act," *House of Commons Debates*, 37-2, No 72 (18 March 2003) at 4349 (Hedy Fry); Royal Commission on New Reproductive Technologies, *Proceed with Care*, 683–84; Felicia Daunt, "Exploitation or Empowerment—Debating Surrogate Motherhood," *Saskatchewan Law Review* 55 (1991): 415–28; Kristin Lozanski, "Transnational Surrogacy: Canada's Contradictions," *Social Science & Medicine* 124 (2015): 384–87.

[8] See e.g., Ubaka Ogbogu, "Missing Concerns and Considerations in the Law and Policy Discourse on Paid Surrogacy and Oocyte Donation," *Health Law in Canada Journal* 39, no. 4 (2019): 78–79; Erin Nelson, *Law, Policy and Reproductive Autonomy* (Bloomsbury Publishing, 2013), 330–34; Marie-France Bureau and Edith Guilhermont, "Maternité, gestation et liberté: réflexions sur la prohibition de la gestation pour autrui en droit Québécois," *McGill Journal of Law and Health* 4 (2010): 67–69; but see Alana Cattapan, Vanessa Gruben, and Angela Cameron, "When Women Are Surrogate Mothers: Is that Work?" *Impact Ethics*, July 27, 2017, https://impactethics.ca/2017/07/27/when-women-are-surrogate-mothers-is-that-work/.

[9] See Erin Nelson, "Surrogacy in Canada: Toward Permissive Regulation," in *Surrogacy in Canada*, ed. Gruben, Cattapan, and Cameron, 192.

[10] See e.g., Maneesha Deckha, "Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding," *McGill Law Journal* 61, no. 1 (2015): 63.

[11] See especially Rakhi Ruparelia, "Giving Away the Gift of Life: Surrogacy and the Canadian Assisted Human Reproduction Act," *Canadian Journal of Family Law* 23 (2007): 11–54; Alana Cattapan, "Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation," *Canadian Journal of Law and Society* 29, no. 3 (2014): 361–79; see also Young, "Let's Try Again," 141; Karen Busby and Delaney Vun, "Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers," *Canadian Journal of Family Law* 26 (2010): 13–93.

[12] See e.g., Erin Nelson, "Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy," *Journal of Law, Medicine and Ethics* 41, no. 1 (2013): 248; Alison Harvison Young and Angela Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies," *Health Law Journal* 6 (1998): 246; Government of Canada & Canadian Institutes of Health Research, "CIHR Best Brains Exchange: A Path Forward for the Assisted Human Reproduction Act," March 13, 2018, 19, cihr-irsc.gc.ca/e/documents/ahr-bbe-report-2018-en.pdf; Mariana Valverde and Lorna Weir, "Regulating New Reproductive and Genetic Technologies: A Feminist View of Recent Canadian Government Initiatives," *Feminist Studies* 23 (1997): 421.

[13] See especially Deckha, "Situating Canada's Commercial Surrogacy Ban"; Lozanski, "Transnational Surrogacy"; Katy Fulfer, "Self-Sufficiency for Surrogacy and Responsibility for Global

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Since 2018, Canadian lawmakers have introduced a series of bills proposing decriminalization.[14] Although not enacted, they generated considerable scholarly and public debate[15] and CBC News reported that the then prime minister, Justin Trudeau, agreed that it is time for Canada to consider decriminalizing paid surrogacy.[16] These bills proposed to repeal prohibitions on payment for surrogates and surrogacy agencies,[17] but would have maintained the requirement that surrogates be over the age of twenty-one.[18] They also would have made it illegal to "counsel or induce" a surrogate or "perform any medical procedure" to assist a surrogate, "knowing or having reason to believe that she is [...] incapable of consenting to become a surrogate mother" or is "being coerced by a third party to become a surrogate mother."[19]

These bills' sponsors, Member of Parliament Anthony Housefather and Senator Lucie Moncion, explained that laws that criminalize payment are outdated[20] and exacerbate surrogates' and intended parents' potential vulnerabilities.[21] They argued that allowing payment would better support Canadians'

Structural Injustice," in *Surrogacy in Canada*, ed. Gruben, Cattapan, and Cameron; Young and Wasunna, "Wrestling with the Limits of Law," 270.

[14] Bill C-404: *An Act to Amend the Assisted Human Reproduction Act*, 1st Sess, 42nd Parl, 2018 (first reading 29 May 2018); Bill S-216, *An Act to Amend the Assisted Human Reproduction Act*, 1st Sess, 43rd Parl, 2020 (first reading 20 February 2020); Bill S-202, *An Act to Amend the Assisted Human Reproduction Act*, 2nd Sess, 43rd Parl, 2020 (second Reading 8 June 2021).

[15] For discussion of this public debate, see Anne-Isabelle Cloutier, "Decriminalizing Payment of Gamete Donors and Surrogates in Canada: An Analysis of Factors Influencing the Public Debate in Light of Bill C-404," *Health Reform Observer* 7, no. 3 (2019): 1–18. For opinion editorials published in response to these bills, see e.g., Françoise Baylis and Alana Cattapan, "Argument of Paying for Surrogacy, Sperm and Eggs Based on Misinformation," *Toronto Star*, May 1, 2018, thestar.com/opinion/contributors/argument-of-paying-for-surrogacy-sperm-and-eggs-based-on-misinformation/article_42d34d00-500d-54de-941b-ea05795d51f4.html; Louise Langevin, "Féminisme, mères porteuses et femmes pauvres: un amalgame douteux," *Le Devoir*, March 30, 2018, www.ledevoir.com/opinion/idees/524106/feminisme-meres-porteuses-et-femmes-pauvres-un-amalgame-douteux; Vida Panitch, "Time to Decriminalize Payment for Sperm, Ova and Surrogacy," *Ottawa Citizen*, May 10, 2018, ottawacitizen.com/opinion/columnists/panitch-time-to-decriminalize-payment-for-sperm-ova-and-surrogacy; Sarah Sahagian and Alexandra Kimball, "Why Surrogate Moms Deserve to be Paid," *Toronto Star*, August 20, 2018, thestar.com/opinion/contributors/why-surrogate-mothers-deserve-to-be-paid/article_f8cc7800-03d1-5852-b561-4c15c17aeaf9.html.

[16] See Kathleen Harris, "Trudeau Says it's Time for Canada to Debate Decriminalizing Fees for Surrogate Moms," *CBC News*, April 4, 2018, cbc.ca/news/politics/trudeau-says-it-s-time-for-canada-to-debate-decriminalizing-fees-for-surrogate-moms-1.4605201.

[17] These prohibitions are found at subsections 6(1), 6(2) and 6(3) AHRA.

[18] AHRA, s 6(4). These bills also would have repealed the AHRA's prohibitions on payment for sperm and egg donors. For discussion of egg donors' concerns about the AHRA, see Kathleen Hammond, "Not Worth the Wait: Why the Long-Awaited Regulations under the AHRA Don't Address Egg Donor Concerns," *Canadian Journal of Law and Society* 37, no. 1 (2022): 113–133.

[19] Bill C-404, s 2; Bill S-216, s 2; Bill S-202, s 2.

[20] *House of Commons Debates*, 42-1, vol 148, No 303 (29 May 2018) at 19779 (Hon Anthony Housefather); *Debates of the Senate*, 43-2, vol 152, No 40 (25 May 2021) at 1474–77 (Hon Lucie Moncion).

[21] *Debates of the Senate*, 43-1, vol 151, No 16 (12 March 2020) at 437–43 (Hon Lucie Moncion); Anthony Housefather and Sara Cohen, "Our Fertility Laws Can Criminalize People Trying to Start a Family: It's Time for an Overhaul," *The National Post*, April 9, 2018, https://nationalpost.com/opinion/our-fertility-laws-can-criminalize-people-trying-to-start-a-family-its-time-for-an-overhaul.

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reproductive autonomy[22] and would enable more Canadians to build their families.[23] They also clarified that provincial governments could regulate paid arrangements and introduce restrictions on the amount that surrogates could receive as compensation.[24]

In discussing his Bill C-404, MP Housefather proclaimed that the "laws need to work for people who are most directly impacted" and "the vast majority" of surrogates and intended parents agree that the "law needs to be revised."[25] Yet, despite Housefather's comments, little data exists about surrogates' and intended parents' views of the AHRA. In reporting the results of her study with surrogates and gay intended parents, Sophia Fantus noted that participants "advocated for progressive and inclusive legislative change to the AHRA" but did not expand upon this point.[26] Samantha Yee's study with Canadian surrogates showed that some surrogates supported unpaid surrogacy while others supported a paid model. The data provided about surrogates' reasoning is limited but suggests that surrogates wished for compensated surrogacy to be regulated.[27] During Bill S-202's second reading, its sponsor, Senator Moncion, also acknowledged that, prior to undertaking reform, lawmakers ought to conduct "a comprehensive study"[28] on the implications of amending the AHRA. This article is the first to explore in detail intended parents' views of the AHRA. In so doing, it aims to inform academic and law-and-policy debates about potential decriminalization and regulation.

III. Approach, methods and sample

The research presented in this article is part of a larger qualitative study that explores intended parents' experiences pursuing surrogacy in Canada and their views of Canadian surrogacy laws.[29] Informed by feminist and new legal realist scholarship,[30] this project explores how the ideas and assumptions driving

[22] Ibid.

[23] *Debates of the Senate*, 43-1, vol 151, No 16 (12 March 2020) at 437–43; Anthony Housefather, "Paying for Surrogacy, Sperm and Human Eggs Should Not Be a Crime," *Toronto Star*, May 1, 2018, https://www.thestar.com/opinion/contributors/2018/05/01/paying-for-surrogacy-sperm-and-human-eggs-should-not-be-crime.html.

[24] See *House of Commons Debates*, 42-1, vol 148, No 303 (29 May 2018) at 19779.

[25] Housefather, "Paying for Surrogacy."

[26] Sophia Fantus, "A Report on the Supports and Barriers of Surrogacy in Canada," *Journal of Obstetrics and Gynaecology Canada* 42, no. 6 (2020): 805.

[27] Samantha Yee, Shilini Hemalal, and Clifford L. Librach, "'Not My Child to Give Away': A Qualitative Analysis of Gestational Surrogates' Experiences," *Women and Birth* 33, no. 3 (2020): e260.

[28] *Debates of the Senate*, 43-2, vol 152, No 46 (8 June 2021) at 1716 (Hon Judith G. Seidman and Hon Lucie Moncion).

[29] See also Stefanie Carsley, "Surrogacy Agencies in Canada: Intended Parents' Experiences," *Canadian Journal of Family Law* 36, no. 2 (2025): 61–104.

[30] See e.g., Martha Albertson Fineman, "Gender and Law: Feminist Legal Theory's Role in New Legal Realism," *Wisconsin Law Review* 2005, no. 2 (2005): 405–31; Bryant Garth and Elizabeth Mertz, "Introduction: New Legal Realism at Ten Years and Beyond," *UC Irvine Law Review* 6 (2016): 121–35; Mark C. Suchman and Elizabeth Mertz, "Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism," *Annual Review of Law and Social Science* 6, no. 1 (2010): 555–79.

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Canadian law-and-policy responses to surrogacy align or diverge with intended parents' lived experiences and perspectives. I received Research Ethics Board approval in December 2021 and recruited participants through social media and snowball sampling. To be eligible, intended parents needed to be working with a surrogate in Canada at the time of the interview[31] or have worked with a surrogate since January 2016. Between April and June 2022, I conducted thirty-five in-depth, semi-structured interviews with forty-two intended parents across Canada (twenty-eight individuals and seven couples). Interviews were conducted over Zoom and typically lasted between sixty and ninety minutes (average: eighty-two minutes; range: thirty-eight to 137).

In addition to collecting demographic information, I asked participants about their experiences in pursuing surrogacy and about their perspectives on Canadian surrogacy laws and policies. Of relevance to this article, I asked what they thought about the AHRA and whether they supported proposals to decriminalize paid surrogacy. I also asked whether the government should regulate or place a cap on the payment surrogates receive if payment were to be legalized.

All interviews were recorded with participants' permission. My research assistants and I transcribed the interviews verbatim, using OtterAI for the first draft and then verifying and correcting the transcripts while listening to the audio recordings. We redacted identifying information and replaced participants' names with numbers and pseudonyms. Using NVivo software, we coded the data according to the main questions in my interview guide and highlighted themes and patterns that emerged. I interpreted the data by using qualitative content analysis and abductive methods.[32] I started with deductive analysis: I looked to the interview data to test assumptions and preexisting narratives about surrogacy and about intended parents' experiences and perspectives. I then proceeded to inductive analysis and explored new and unanticipated ideas that emerged from the data and their implications.

The participants lived in six provinces: Ontario, Alberta, British Columbia, Quebec, Nova Scotia and Manitoba. Of the thirty-five individuals or couples interviewed, twenty-two worked with surrogates who resided in a different province to them (surrogates lived in Ontario, Alberta, British Columbia, Quebec, Nova Scotia, Saskatchewan and New Brunswick). The intended parents' median age was thirty-nine (range: twenty-eight to fifty-three). Their median estimated annual household income was $200,000/year; however, there was a significant range between the lowest and highest reported incomes ($20,000–700,000).[33]

[31] "Working with" meant that they had matched with a surrogate and had moved forward with the arrangement. Some surrogates were pregnant, other surrogates were undergoing fertility treatments and a few intended parents were working with a lawyer who was preparing their surrogacy agreement.

[32] See e.g., Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice*, 4th ed. (Sage Publications, 2014), 541–59; Stefan Timmermans and Iddo Tavory, *Data Analysis in Qualitative Research: Theorizing with Abductive Analysis* (University of Chicago, 2022); Jamie Thompson, "A Guide to Abductive Thematic Analysis," *The Qualitative Report* 27, no. 5 (2022): 1410–21.

[33] Participants' median household income was well above the median income for Canadian economic families, which, according to Statistics Canada, was $120,200 before taxes in 2022. However, four participants reported household income well below the national median ($20,000–80,000), three

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Of forty-two participants, twenty-six were in opposite-sex relationships, fourteen were men in same-sex relationships and two were single men who identified as LGBTQ2S+. Thirty participants self-identified as Caucasian, White or English. Two identified as Indigenous (First Nations, Métis), four as Asian (Chinese, Taiwanese, East Asian), two as Latin American (Latino, Mexican), four as Jewish (Ashkenazi), two as Italian and one as Eastern European.

Of the thirty-five individuals or couples interviewed, twenty-two had one or more children born through surrogacy. The remaining thirteen did not yet have children through surrogacy but were working with a surrogate at the time of the interview. Nearly all participants worked with "gestational surrogates" who conceived, or planned to conceive, using the intended parents' eggs or embryos or donated genetic material. One participant worked with a "traditional surrogate" who had a genetic connection to the child.

These interviews provide novel insight into what some intended parents think about the AHRA and prospective reforms. Nonetheless, there are limits to what can be learned from this study. As is common with qualitative research, there is a risk of sampling bias; those who volunteered to participate in this study may be predisposed to specific views and their responses might not be representative of a larger sample of intended parents. In turn, while this data can inform future discussions about decriminalization, other stakeholders—most notably surrogates—may have different views of the AHRA that ought to also be considered in determining the appropriateness of law reform.[34]

IV. Intended parents' perspectives

The intended parents had varied perspectives on the AHRA and on whether lawmakers ought to decriminalize paid surrogacy. Of forty-two participants, ten were strongly in favour of decriminalizing payment, while nine were against decriminalization. Twenty-three were ambivalent; they were "torn," "conflicted," "were of two minds" or had "mixed" feelings[35] about the AHRA, and identified benefits and limitations of legalizing payment for surrogates.

Participants advanced three main arguments in support of reforming the AHRA. First, they argued that surrogates should be paid in recognition of the work and risks associated with pregnancy. Second, they expressed that the

were just below the median ($120,000) and an additional six reported income between $130,000 and $150,000. Many participants indicated that pursuing surrogacy was a significant economic investment for them and several noted that they had difficulty affording its significant costs, which can exceed $100,000. See Statistics Canada, "Table 11-10-0191-01 *Income Statistics by Economic Family Type and Income Source*," https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110019101.

[34] Further research on surrogates' experiences and perspectives is forthcoming. I am a co-investigator for a SSHRC-funded project involving interviews with Canadian surrogates. We are currently in the process of analyzing the data from this study and will be writing up the study results in 2026–2027; See "Surrogates' Voices: Exploring Surrogates' Experiences and Insights," https://surrogatesvoices.webflow.io.

[35] Lauren had "mixed feelings"; Rachel had "mixed thoughts"; Charles had "mixed emotions"; Samuel had "mixed opinions."

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AHRA's prohibitions are an inappropriate and ineffective response to concerns about surrogacy. Third, they suggested that allowing payment might increase the number of people willing to act as surrogates.

However, most interviewees—including many who favoured decriminalization—also expressed concern about proposed reforms to the AHRA. They worried that repealing the AHRA's prohibitions—particularly without any caps or restrictions on payment—could make surrogacy prohibitively expensive and further restrict who can afford to build their families. They also feared that allowing payment could affect surrogates' motivations and negatively impact relationships between surrogates and intended parents. Most participants felt that the state should regulate, oversee and potentially subsidize surrogacy arrangements. The following subsections explore these themes in detail.

1. Surrogates should be paid

Many participants argued that surrogates should be paid some amount beyond their reimbursable expenses.[36] Some explained that surrogates are providing a "service" in carrying a child for the intended parents or are providing "labour" or "work" that merits compensation. For instance, Jonathan said: "I would be in support of paying surrogates, you know, fees in addition to just reimbursing [...] why shouldn't they be compensated for the service that they provide?" Participants noted that being a surrogate is "hard work," "a lot of work," a "big deal," a "huge commitment" or a "huge sacrifice." A few also felt that surrogacy should be treated as a "job" and, as such, should be paid. For instance, Isabel asked:

> How do we decide that surrogacy is one job where people don't get paid? Is this because of the bodily risk involved? There are lots of professions where there's risk. If you are a firefighter, you could die, and we're not saying firefighters should be altruistic [...] how is this any different? It just doesn't make sense to me.

Other participants argued that surrogates are putting their health, their bodies and their families at risk by subjecting themselves to fertility treatments, pregnancy and childbirth, and should consequently be compensated. For instance, Caroline explained:

> The laws have to change because yes [...] they should be reimbursed for expenses, but they should also be paid for the bruises that they get, and for the pain and the suffering, and for the—what their body goes through, for the risk of dying during childbirth [...] all of that needs to be factored in.

Ariana similarly pointed out: "Some surrogates have died. Like they're putting their families and bodies at risk. Can you imagine like a husband losing their wife? [...] They definitely do deserve [payment]." Xavier maintained that the

[36] More than half of my participants held this view.

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surrogate is "investing her life on this [...] I wish we could—she would get a little more compensated." Giovanni explained:

> My partner and I would have been happy to have given our surrogate a few thousand dollars more [...] for, you know, a woman to go through [...] almost a year long process and to put her body through that and to take certain risks, however low—if they can make a little more money out of this, great.

Daniella commented that the surrogate is "donating their body to experiments in fertility medicine and carrying somebody else's child" and "that deserves to be paid and compensated."

Participants felt that the government is unjustifiably interfering with Canadians' reproductive autonomy by prohibiting surrogates from being paid. Giovanni remarked that the law "sounds very paternalistic telling, you know, people what they can do with [...] their own bodies and their own DNA." Ross similarly believed that a surrogate "should be allowed to have agency over her own body" and questioned whether it is right for the state to be saying that "you can't be paid for what you want to do with your body." Kyle and Ryan went further, suggesting that there should be no restrictions on payment because "no other profession is being told what to get paid" and what a surrogate receives as payment "should be up to her to decide."[37]

Several intended parents also argued it is "unfair" or "not right" that third parties are profiting from surrogacy arrangements but that surrogates cannot. They explained that, while surrogacy is "unpaid" in Canada, everyone aside from the surrogate is profiting from the surrogacy arrangements. For instance, Ross insisted:

> I think that the surrogate should also get something out of it. Like, why are we paying $60,000 to the fertility clinic, $15,000 to the lawyer, $15,000 to the agency and then, when you get to the surrogate, they're left with like ... and they're doing most of—all the work! [...] They have the hardest job, and they seem to get the least and that doesn't really seem fair.

Giovanni also pointed out that "everyone gets rich, except the surrogate. You mentioned the lawyers, you have the surrogacy agencies, you have the clinics. Everyone's taking a quite sizable amount of money along the process." Rachel observed:

> When you're in the transfer room [at the clinic], every single person in that room is getting paid or benefiting. I'm benefiting, everybody else is being paid, except for the altruistic surrogate and that doesn't seem right to me at all. So, I still think that [...] they should be paid in some way.

[37] It is worth noting that Kyle and Ryan were among the more affluent intended parents who participated in the study, reporting an annual estimated household income of approximately $550,000.

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Several interviewees also maintained that surrogates are more "deserving" of payment than these third parties[38] and noted that they would rather pay the surrogate a portion of the clinics', lawyers' or agencies' fees.[39]

2. *Criminalization is inappropriate and ineffective*

Several participants felt that the AHRA's prohibitions on payment and potentially steep fines and penalties were an inappropriate response to lawmakers' concerns about surrogacy. Jeffrey maintained that it is "horrible" to "criminalize someone making a family" and that "no one should have to fear going to jail or paying [half] a million dollars, like just to have a family." Edward described the AHRA as "unnecessarily punitive" while Rachel viewed the AHRA as a "truly ridiculous way to regulate an area like this." Alicia spoke about how fears of the AHRA made the surrogacy process more stressful:

> [Surrogacy is] taxing and scary and just emotionally draining and exhausting. And then you add this element of, "oh, my goodness, you know, don't help the surrogate in any way, don't make them comfortable, don't overcompensate them because you'll be fined and you could go to prison for 10 years." It just seems so ludicrous [...] I get anxious thinking about that part of it.

A few participants worried they would inadvertently break the law and feared possible consequences. For instance, Katie recounted: "I was like extremely scared. Like, you know, you're—you want to have a child so much, I don't want to go to jail after I have her. So, like we were extremely scared about all of this."[40]

Intended parents also explained that some surrogates are benefiting or profiting from engaging in surrogacy—despite the AHRA's prohibitions. It has become common for Canadian lawyers to include clauses in surrogacy agreements that indicate a maximum amount a surrogate can claim in reimbursements per month. At the time of my interviews, this amount typically ranged between $2,000 and $3,500/month for 10 months.[41] "Experienced" or "second-time" surrogates could command a higher monthly amount for reimbursements than "first-time" surrogates and some contracts allowed additional amounts for maternity clothes, travel, time off work, a c-section or pregnancy with twins, triplets or other multiples.[42]

[38] For example, Vanessa explained: "the poor surrogate really only got $30,000—like she, she actually deserves more, you know, because she did all the hard work." Daniella said: "if anyone deserves compensation it's the surrogate [...] not everybody else."

[39] For instance, Ryan said: "surrogates [...] deserve to be compensated. And when, you know, when the fertility clinics and the [agencies ...] make almost as much as they do, it seems crazy. I would much rather give the money to the surrogate."

[40] Relatedly, Isabel felt like she was operating in "some weird black market" while Grace and Nina spoke about being worried about breaking the law by giving their surrogates gifts.

[41] See also Carsley, "Surrogacy Agencies."

[42] See Stefanie Carsley, "Surrogacy in Canada: Lawyers' Experiences and Practices," *Canadian Journal of Women and the Law* 34, no. 1 (2022): 41–81.

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Some intended parents reported that their surrogates claimed few reimbursements and were consistently below their monthly maximums. However, others indicated that their surrogates—often with the assistance or encouragement of surrogacy agencies—claimed reimbursement for expenses they did not incur or that were unrelated to the pregnancy so that they could obtain the full monthly amount in their contract.[43] For instance, while Amy's surrogate claimed very little in expenses, she was aware that this was not always the case:

> So right now, our surrogate can charge up to $2,000 a month [...] and so I guess the agency kind of looks at that amount and says like "well, here's how you're going to get it without it being illegal." But she [our surrogate] has not even been close, so I think it just depends on the person. Like I do know other surrogates out there, that would reach their maximum amount every month, because they would feel like that's what they are entitled to.

Edward explained:

> Even under the current laws, there are surrogates who are benefiting from this. We talked earlier about some of these agencies that seem to be able to, um, not necessarily skirt the law but produce fake receipts or invoices to help the surrogate sort of maximize what they're getting. So, in that sense it's like okay well, people are doing this anyway.

Other participants similarly pointed out that payment is "already happening," "happening anyway" and that "essentially, you can" pay a surrogate. Monica questioned the accuracy of referring to Canada's regime as "altruistic" or "unpaid" because her surrogate claimed the full $2,000 per month set out in her contract:

> Let's like call a spade a spade—surrogacy in Canada is not altruistic. You can call it altruistic all you want, it's not altruistic. Because it didn't cost me [...] $24,000 to be pregnant. Like it, it doesn't, so [...] part of me is like, maybe we should just make it commercial so that it's like on the up and up and people know what they're paying for.

Participants suggested that lawmakers may wish to decriminalize and potentially regulate payment, as this would allow greater "transparency" and "honesty" about the potential costs of surrogacy. Some also felt that allowing payment would make surrogacy easier and more "straightforward" for surrogates and intended parents. For instance, Lauren explained that, while her surrogate did not seek to make money from their arrangement, it was difficult to calculate the hourly wage that was needed to cover the surrogate's time off work to ensure that she would not be out-of-pocket. She felt that allowing payment could "simplify" the surrogacy process. Giovanni similarly felt that

[43] For examples and further discussion, see Carsley, "Surrogacy Agencies."

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the reimbursement model fails to "provide practical protections to anybody" and simply makes the surrogacy process "a lot more cumbersome."

3. Decriminalization could improve access to surrogacy

Some participants posited that allowing payment could increase the number of people willing to act as surrogates in Canada. Ariana and Charles both noted that there is a "shortage" of surrogates in Canada and that allowing payment "would encourage" or could be an "incentive" for more Canadians to act as surrogates. Chandler believed that, if payment were allowed, then there "would be more surrogates," while Lauren noted that this "would increase the amount of surrogacy available." Giovanni similarly indicated that the AHRA "creates some disinterest in [...] women who might otherwise be interested in the process," while Edward questioned whether Canada might "be better served [...] by allowing commercial surrogacy in some way, like the US, because there are so many intended parents looking."

Interviewees also spoke about how, if payment were allowed, then this not only could increase the number of surrogates, but also could lead to "more suitable" candidates than are currently available. Some intended parents explained that surrogacy agencies sent them profiles of prospective surrogates who were in poor health, who were overweight, who were smokers or who were not well suited for surrogacy for a variety of reasons.[44] They speculated that, if payment were permitted, then there would be more people who would step up to be surrogates and, consequently, there would be "better candidates." For instance, Isabel reasoned:

> If people get paid, there will be more people who are willing to do this work [...] I think that if we move towards a commercial model, there will be a lot of people willing to do this, because this would be a good source of income for people, this will allow people to—will be enough motivation for people to, to engage in this, for people who are perhaps better candidates.

Caroline noted that, if payment were allowed, then this could ensure that "healthy women are coming forward to help." Hannah added that, in the United States, agencies and clinics are more willing to "screen out" surrogates who have a high body mass index or who are experiencing physical or mental health issues because there are more people who wish to act as surrogates.

4. Decriminalization could impede access to surrogacy

While some intended parents believed that decriminalization could improve access, others were concerned that allowing payment would make surrogacy more expensive and out of reach for much of the population. Participants noted that payment could make surrogacy "less accessible for everyone" and

[44] Ibid.

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"unaffordable for everyday IPs"[45] and could make it such that "only the wealthiest can afford" surrogacy. Nina observed that surrogacy in Canada is "expensive enough as it is, even without [surrogates] being paid" and that "if they can be paid, then it would be almost impossible financially for a lot [...] of families." James commented that surrogacy in Canada is "already a high-income sport" and a "very high barrier for low-income Canadians who want to build their families" and that "just because we're not paying surrogates, we're reimbursing surrogates, it doesn't mean that this journey is affordable or not expensive." He remarked that "if we were to change the policy, that we allow surrogates to accept money, it's going to be a race to the top as to whom [...] can get more out of their IPs" and that he and his spouse "don't want to be in a competition against other IPs as to who's going to buy them [the surrogate] a nicer car or a better mortgage payment." Charles similarly worried that, if payment were allowed, then "people will bid" on surrogates.

Participants also compared Canada to the United States—where some states allow payment—and explained that they could not afford to pay similar fees. For instance, Olivia recounted:

> If it was like the States where we had to, you know, pay someone's wage [...] we definitely would not be able to afford it at all. With the IVF[46] and everything we barely afforded to have [our baby], right? So I think in Canada, I think, like the altruistic rule—laws are good [...] it allows more people to be able to have kids, right? And to go through the process [...] Now you don't have to have $200,000 just to have a kid.

Monica similarly hypothesized: "If surrogacy became commercial in Canada, I think it would be more like US prices, which would then be out of reach [...] had commercial surrogacy been a thing when we were looking I don't—like we wouldn't have been able to afford [surrogacy in] Canada." Hannah commented that surrogacy in the United States is "very prohibitive to many people" and that, while it is "a little bit less prohibitive" in Canada, it is nonetheless expensive.

5. *Payment could affect motivations and relationships*

Participants also expressed concern about how payment might affect surrogates' motivations. Several explained that Canadian surrogates are engaging in surrogacy for the "right reasons"—because they want to help build families. They worried that, if payment were to be permitted, then some would engage in surrogacy for the "wrong reasons"—principally to make money. For instance, Nina asked whether allowing payment would change surrogates' motivations and the culture of surrogacy in Canada:

> It seems like some surrogates just love to be surrogates just because they're kind people and they like being pregnant and they want, you know, they

[45] IPs refers to intended parents.
[46] IVF refers to *in vitro* fertilization.

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> want to help out families. [...] if it was paid, I'm just thinking like from a motivational point of view, like would you have different types of people being surrogates? Would it take away that kind of "gifting" aspect of surrogates who just do it out of kindness? You know, would it be a whole different environment or whole different [...] culture?

She also questioned whether allowing payment could make "surrogates more vulnerable" or could result in "coercive" situations.

Other intended parents worried that legalizing payment could result in individuals deciding, or being pressured, to act as surrogates primarily for financial reasons. For instance, Michael speculated that, if payment were permitted, then "folks who otherwise would not ever want to pursue this as an option" might act as surrogates "because they need the money." Some participants therefore questioned whether surrogates would be making autonomous, informed decisions to engage in surrogacy. They worried that allowing payment could result in surrogates being "exploited" or "taken advantage of" by third parties or "getting abused or forced into surrogacy."[47]

Intended parents also feared that, if people act as surrogates for financial reasons, then this could have negative health implications for the surrogate and the child she is carrying. For instance, Estelle spoke about surrogates in the United States engaging in surrogacy multiple times—even if this might be detrimental to their health. Edward worried that, if surrogates are acting "for money," then they might not take proper care of themselves or the fetus during the pregnancy.

Participants were also concerned that allowing payment could affect surrogates' relationships with intended parents. Katie spoke about how altruistic surrogacy fosters "really great relationships" between surrogates and intended parents. She explained that, currently, people act as surrogates because "they want to see the look on your face when your baby is born." Rachel "like[d] the altruistic model" because it "created such a beautiful situation" and intimated that this might change if surrogacy were regarded as "a job." Amy felt that paid surrogacy could result in situations in which the surrogate "is not taking your family and your feelings into consideration" and is "just doing it to be paid." James recounted that, in the United States, surrogacy is "very transactional" and felt that it "hurts the relationship between IPs and surrogates when there's that kind of money being exchanged." Thomas also worried that payment could "change the relationship" with the surrogate into "more of a transaction" and could result in intended parents seeking to exercise greater control over the surrogate's behaviour or decisions.

6. Reform and regulation

Given these concerns about access to surrogacy and surrogates' motivations, few intended parents supported decriminalizing payment without regulation or oversight over paid arrangements. Nearly all intended parents felt that the

[47] Lauren similarly worried about "human trafficking" and selling surrogates' bodies.

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AHRA should be reformed; indeed, most participants who were against decriminalization still felt that prohibitions on payment should be less punitive or restrictive. However, participants disagreed about what these reforms should look like and identified limitations of different models.

Some felt that lawmakers should amend the AHRA to allow intended parents to provide surrogates with gifts without fearing criminal sanctions. For instance, Katie explained:

> You're not allowed to give any kind of like gifts to your surrogate, right? [...] that's kind of weird because like, you can gift things to your friend [...]. Essentially if you're like following it [the AHRA], like to a T, you would not be allowed to give her like flowers or [...] bath bombs, or whatever, right? Like you cannot do any of those things. But I feel like that needs to be clarified, right? Like small gifts should be fine.

Estelle noted: "I don't think it's wrong to want to be able to give a gift to someone —like they are giving a gift to you, you want to give a gift back to them—so I think that [...] there is room for change." Grace wanted to "see clarification on what would be considered a reasonable gift" because she worried about being charged for breaching the AHRA:

> Most people—like IPs, surrogates and agencies—seem to agree that like a perishable (like a box of cookies or some tulips that are cut) like that's not an issue. And everyone seems to agree that, like a mortgage payment is definitely inappropriate compensation. But there's definitely a grey area [...] it would even be nice to see in the law, you know "perishables are allowed". Because then [...] if I want to send her flowers, you know, I'm not going to worry that someone's going to report me and then I'm going to be spending my, my baby's like birth in jail.

Nina similarly spoke about how she provided her surrogate (who was a close friend) with gifts during and following the pregnancy, and felt that it was unclear whether this was illegal.

Others felt that paid surrogacy should be legalized, but that lawmakers should place a cap on the amount that is permitted as compensation. For instance, Rachel explained: "I think that's what I would suggest. An amount a surrogate could receive above reimbursement. It doesn't have to be a lot—like, you know, it could be $10,000 [...] it could be $20,000 [...] I wouldn't want it to be $70,000." She suggested that all surrogates should be entitled to receive the same flat fee above reimbursements so that the surrogate is not going to the "highest bidder" and so the amount for compensation is a "reasonable amount." Samuel felt that payment should be capped because "you don't want it to be [...] Chinese billionaires that are buying Canadian surrogates," while Jonathan commented that if "you open the market [...] there's the fear that this becomes too commercialized" and might "drive up the costs, such that it's only the rich who are able to pay."

However, some participants acknowledged that allowing capped compensation would not stop some surrogates from also profiting from "reimbursements."

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In other words, they explained that surrogates might seek to negotiate a high monthly amount for expenses in their surrogacy contract, above and beyond the cap for compensation. They suggested that perhaps intended parents should be allowed to pay surrogates a fixed amount that would include reimbursements, as this could allow intended parents to better anticipate and plan for the costs associated with their surrogacy arrangement. However, Lauren worried that this approach might result in situations in which surrogates are not adequately reimbursed because expenses and lost wages can vary significantly among surrogates. Kyle and Ryan worried that caps on compensation would become "outdated" quickly, but suggested that there should be some form of government oversight to ensure that the amounts surrogates receive are "reasonable."

A few participants were concerned that payment, even if capped, could still be out of reach for intended parents. For instance, Thomas explained that pursuing surrogacy is already "too much for lots of people" and had been "a struggle" financially for him and his spouse. As a result, he worried about the implications of adding even an additional $10,000–15,000 to existing costs. Michael similarly acknowledged that capped payment would nonetheless "tip the scale a little [...] towards making an already extremely expensive process even more financially prohibitive for folks seeking to build families through surrogacy."

Participants also suggested that law and policymakers take additional steps to address concerns about affordability and potential exploitation. For instance, Victor recommended that the government should provide public funding for surrogacy to mitigate increased costs for lower-income intended parents. Edward felt that there should be "supports in place to make sure that, even though someone is being paid for it, they're still doing it for the right reasons" and that "the money is a reward rather than [...] the intrinsic reason behind them doing it." Xavier similarly felt that there should be better screening of surrogates to ensure that they are not being exploited or pressured to enter surrogacy arrangements.

V. Discussion and conclusion

Intended parents' narratives offer new insights that contribute to ongoing academic and law-and-policy discussions about whether to decriminalize paid surrogacy. While many intended parents supported legalizing payment or gifts for surrogates, most also expressed concern about the potential negative implications of decriminalization—particularly in the absence of regulation or oversight.

Participants advanced similar arguments to those of academics in favour of decriminalizing payment. Some intended parents felt that allowing payment would better recognize surrogates' labour[48] and reproductive autonomy.[49]

[48] See e.g., Ogbogu, "Missing Concerns," 78–79; Louise Langevin, "Réponse jurisprudentielle à la pratique des mères porteuses au Quebec: une difficile réconciliation," *Canadian Journal of Family Law* 26 (2010): 198.

[49] See e.g., Nelson, *Law, Policy and Reproductive Autonomy*, 330–34; Busby and Vun, "Revisiting The Handmaid's Tale," 85.

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Others pointed out that the AHRA has not prevented payment from occurring and that criminalization is an unnecessarily punitive response to concerns with surrogacy.[50] Intended parents also argued that allowing payment could facilitate family building and encourage more Canadians to act as surrogates.[51]

However, participants also drew on their lived experiences to raise a series of concerns about decriminalization. Notably, some feared that legalizing payment could raise the costs of surrogacy such that they, and other prospective parents, would be unable to afford to build their families. Participants also worried about surrogates deciding to carry a child primarily for financial reasons and about how this might affect surrogates' behaviour and relationships with intended parents. Several felt that their positive relationship with their surrogate and the care their surrogate demonstrated towards them and their child could be attributed to surrogates' altruistic motives.

Nearly all participants felt that the AHRA should be reformed, but they disagreed about whether payment should be decriminalized or whether prohibitions on payment should be modified to be less restrictive. Only three out of the forty-two participants would have supported prior bills in the Senate and House of Commons that proposed to repeal the AHRA's prohibitions on payment and leave provinces to decide whether to introduce regulations. Most intended parents felt that, if paid surrogacy is legalized, then it should be regulated and potentially subsidized by the state.[52]

One barrier to regulation at the federal level is the division of powers. When the AHRA was introduced in 2004, it sought to prohibit and regulate a variety of activities relating to the use of assisted reproduction.[53] However, less than a year following the AHRA's enactment, the Quebec government initiated a reference before the Quebec Court of Appeal, asking whether parts of the AHRA exceed federal jurisdiction over criminal-law matters.[54] The Quebec Court of Appeal responded affirmatively and the Attorney General of Canada appealed to the Supreme Court of Canada. In 2010, the Supreme Court struck down much of the AHRA, finding that most of its regulatory provisions were *ultra vires* federal jurisdiction.[55]

[50] See e.g., Young, "Let's Try Again," 126.

[51] See e.g., Nelson, "Surrogacy in Canada," 192; Deckha, "Situating Canada's Commercial Surrogacy Ban," 63.

[52] Many academics similarly have argued that the state should regulate paid arrangements; see e.g., Nelson, "Surrogacy in Canada"; Busby and Vun, "Revisiting The Handmaid's Tale."

[53] For discussion of the prior provisions of the AHRA, see *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

[54] *Dans l'affaire du renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, LRQ, c R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, LC 2004, c 2*, 2008 QCCA 1167.

[55] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61. For commentary on the *AHRA Reference*, see e.g., Vanessa Gruben and Angela Cameron, "Quebec's Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women's Reproductive Autonomy?" in *Fertile Ground: Exploring Reproduction in Canada*, ed. Stephanie Paterson, Francesca Scala, and Marlene K. Sokolon (McGill-Queen's University Press, 2014); Ubaka Ogbogu, "The Assisted Human Reproduction Act Reference and the Thin Line between Health and Crime," *Constitutional Forum* 22 (2013): 93–97; Snow, *Assisted*

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Should lawmakers legalize paid surrogacy, then regulation that is not tied to criminal prohibitions would fall within provincial jurisdiction. However, decriminalizing payment and leaving the provinces to introduce further regulation could result in a regulatory vacuum. Since the *AHRA Reference*, only Quebec has sought to regulate clinical and research activities relating to assisted reproduction, to replace those provisions that the Supreme Court struck down.[56] In turn, while most Canadian provinces have now amended their family-law rules to respond to surrogacy arrangements and to clarify the parentage of children born through surrogacy, it took years of advocacy work to bring about these reforms.[57] Should the federal government repeal the AHRA's prohibitions on payment, provincial responses would likely follow a similar pattern. Most, if not all, provincial governments would be slow to move to regulate payment and, over time, there would be varied degrees of regulation across the country. In the absence of regulation, market forces and informal norms would dictate the costs of surrogacy—potentially making surrogacy unaffordable for many intended parents.

An alternative solution would be to loosen prohibitions on payment. The federal government could amend the AHRA to prohibit payment beyond a predetermined amount set out in regulations. This capped amount could be established after in-depth consultation with surrogates and intended parents, indexed to inflation and adjusted as needed in the future. Such payment could be optional; surrogates and intended parents could decide on an amount that is below the cap should surrogates not wish to be paid the full amount or should intended parents be unable to afford this. Surrogates could continue to receive reimbursement for their out-of-pocket expenses—in addition to receiving compensation—and intended parents could also provide gifts if their value does not exceed the maximum. In addition, federal lawmakers could also reduce the AHRA's penalties such that intended parents will not fear jail time should they make an error and inadvertently breach the AHRA.

For this approach to be effective, federal lawmakers would need to enforce the AHRA.[58] As participants explained, some surrogates are profiting from surrogacy

Reproduction Policy in Canada; Dave Snow, "Blunting the Edge: Federalism, Criminal Law, and the Importance of Legislative History after the Reference Re Assisted Human Reproduction Act," *UBC Law Review* 48, no. 2 (2015): 541–92.

[56] See *Act Respecting Clinical and Research Activities Relating to Assisted Procreation*, CQLR c A-501; *Regulation Respecting Clinical Activities Related to Assisted Procreation*, c A-501, r 1.

[57] Alberta was the first to enact such legislation in 2010, followed by British Columbia in 2011, Ontario in 2016, Saskatchewan in 2020, Prince Edward Island in 2021, Manitoba and Quebec in 2023, Nova Scotia in 2024 and Yukon in 2025. See *Family Law Statutes Amendment Act*, 2010, SA 2010, c 16; *Family Law Act*, SBC 2011, c 25; *All Families Are Equal Act*, 2016, SO 2016, c 23; *Children's Law Act*, SS 2020, c 2; *Children's Law Act*, PEI 2021; *Family Law Act*, 2023 CCSM, c F20; National Assembly of Québec, *Bill 12: An Act to Reform Family Law with Regard to Filiation and to Protect Children Born as a Result of Sexual Assault and the Victims of that Assault as well as the Rights of Surrogates and of Children Born of a Surrogacy Project* (6 June 2023); *Birth Registration Regulations*, NS Reg 51/2024; *Inclusive Yukon Families Act*, SY 2025, c 5.

[58] Over the last two decades since its enactment, the AHRA has largely not been enforced. In 2013, an agency named Canadian Fertility Consultants (CFC) was charged with violating the AHRA; they were paying surrogates flat fees for "reimbursements" irrespective of surrogates' actual

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in contravention of the AHRA; they are receiving money for "reimbursements" that exceeds their out-of-pocket costs related to the surrogacy. If payment is permitted, then the amounts provided for reimbursements should reflect the surrogates' actual expenses. Either there should be auditing and oversight of reimbursements in accordance with existing regulations[59] or Health Canada may wish to move towards a "flat fee" reimbursement model—in which surrogates are paid a predetermined, regulated amount to cover their expenses, with only limited carveouts for "exceptional expenses" that go beyond this amount.[60]

These suggestions would not appease all intended parents: some participants did not think that surrogates should be compensated, while others did not believe the government should interfere with what surrogates are paid. As participants noted, more could also be done to address concerns about affordability. For instance, provincial lawmakers could provide further public funding for fertility treatments.[61] They could also regulate surrogacy contracts and agency fees to reduce overall costs for intended parents.[62] Further screening and counselling for prospective surrogates could also help ensure that surrogates are making informed, autonomous decisions to engage in surrogacy—irrespective of whether payment is provided. Ultimately, lawmakers would be wise to listen to intended parents' perspectives as they consider potential reforms to Canadian surrogacy laws.

out-of-pocket expenses. CFC's owner, Leia Picard, pled guilty and received a $60,000 fine. To date, this has been the sole prosecution under the AHRA, despite reports that CFC and other agencies continue to violate the AHRA. See Alison Motluk, "First Prosecution under Assisted Human Reproduction Act Ends in Conviction," *Canadian Medical Association Journal* 186, no. 2 (2014): E75–E76; Alison Motluk, "After Pleading Guilty for Paying Surrogates, Business Is Booming for this Fertility Matchmaker," *The Globe and Mail*, February 28, 2016, http://www.theglobeandmail.com/life/health-and-fitness/health/business-is-booming-for-fertility-matchmaker-leia-swanberg/article28930242/; see also Carsley, "Surrogacy Agencies."

[59] AHR Reimbursement Regulations.

[60] See Petropanagos, Gruben, and Cameron, "Should Canada Implement a Flat-Rate Reimbursement Model?"

[61] Some provinces, such as Ontario and Quebec, provide funding for one cycle of IVF. See Quebec, "Medically Assisted Reproduction Program," quebec.ca/en/family-and-support-for-individuals/pregnancy-parenthood/assisted-reproduction/medically-assisted-reproduction-program; Ontario, "Get Fertility Treatments," ontario.ca/page/get-fertility-treatments. For discussion of potential public funding for surrogacy, see Deckha, "Situating Canada's Commercial Surrogacy Ban."

[62] For discussion about regulating surrogacy contracts, see Carsley, "Surrogacy in Canada." For discussion about regulating agencies, see Carsley, "Surrogacy Agencies."

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