

# Fertility Law Canada

*A Review of Legal Issues re Surrogacy and  
Egg Donation in Canada*

C.L.A.R.A.  
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# Sara R. Cohen, LL.B.

Fertility Law Canada at D2Law LLP

sara@fertilitylawcanada.com

[www.fertilitylawcanada.com](http://www.fertilitylawcanada.com)

twitter @fertilitylaw

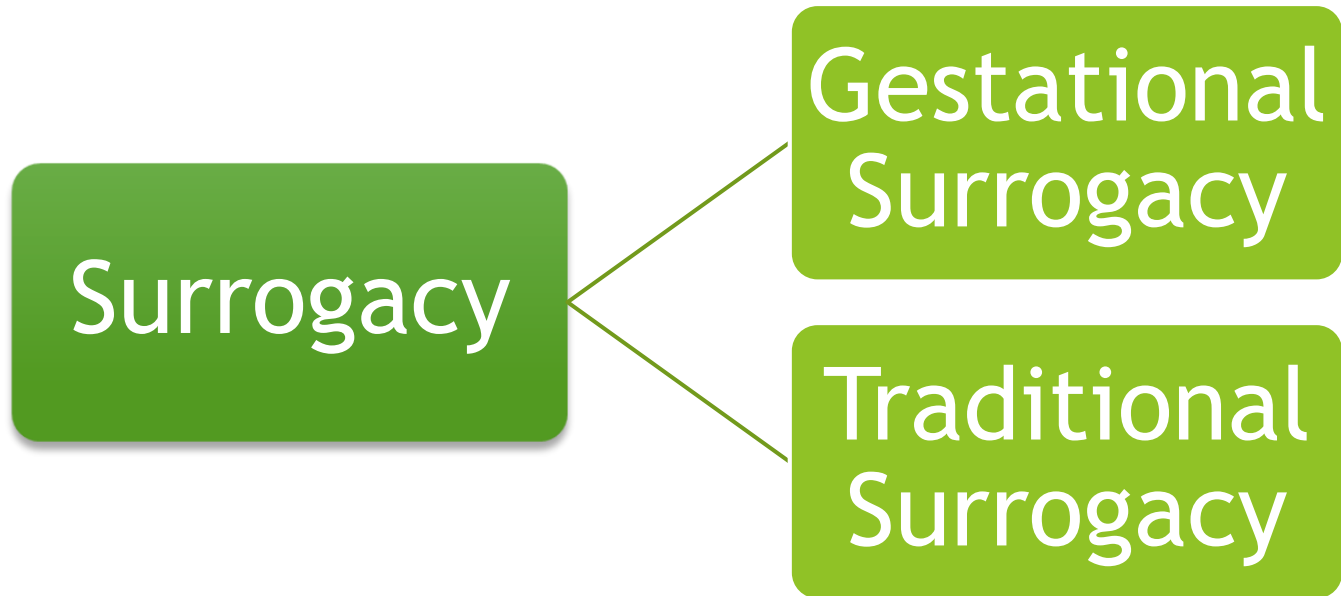
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# Part I: Legal Aspects of Surrogacy Journey



# Relevant Legislation

## Section 6 of Assisted Human Reproduction Act (AHRA)

6. (1) **No person shall pay consideration** to a female person to be a surrogate mother, **offer to pay such consideration** or **advertise that it will be paid.**

(2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.

(3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.

(4) No person shall counsel or induce a female person to become a surrogate mother, **or perform any medical procedure** to assist a female person to become a surrogate mother, **knowing or having reason to believe that the female person is under 21 years of age.**

# Section 60

- ▶ **60.** A person who contravenes any of sections 5 to 7 and 9 is guilty of an offence and
- ▶ (a) is liable, on conviction on indictment, to a fine not exceeding \$500,000 or to imprisonment for a term not exceeding ten years, or to both; or
- ▶ (b) is liable, on summary conviction, to a fine not exceeding \$250,000 or to imprisonment for a term not exceeding four years, or to both.

# Section 12 - Reimbursements

## Reimbursement of expenditures

12. (1) No person shall, except in accordance with the regulations,

...

(c) reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

(2) No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.

(3) No person shall reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy, unless

- ▶ (a) a qualified medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus; and
- ▶ (b) the reimbursement is made in accordance with the regulations and a licence.

# Reimbursements (cont'd)

- ▶ What is acceptable where no regulations or caselaw?
  - ▶ Maternity clothing?
  - ▶ Travel?
  - ▶ Childcare?
  - ▶ Rent?
  - ▶ Heating?
- ▶ Differs lawyer to lawyer

## **My rule: but-for test**

If the expense would have been incurred otherwise, cannot be said to be incurred as a result of the surrogacy

## Section 12 Regulations

## Reimbursement Related to Assisted Human Reproduction Regulations

- ▶ Surrogacy
  - ▶ Travel
  - ▶ Counselling; legal
  - ▶ Dependant care
  - ▶ Products or services recommended in writing by health care provider
  - ▶ Maternity clothes
  - ▶ Insurance
    - ▶ Missing: net lost wages in the postpartum phase
  - ▶ Guidance Document



# Who Are Surrogate Mothers?

Prof. Karen Busby, Empirical  
Research on Surrogacy and its  
Implications for Legal Reform

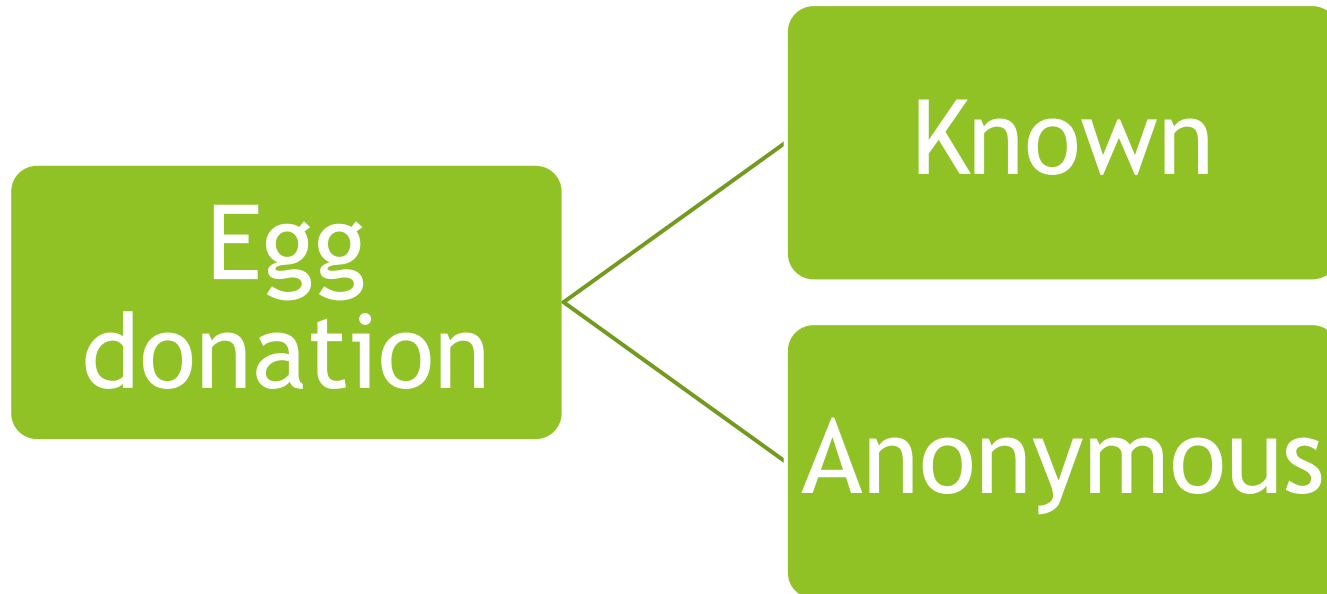
- ▶ Most are Caucasian, Christian and in their late 20s - early 30s. Most have finished high school and some are university educated.
- ▶ They have modest (not low) family incomes and relatively stable financial situations. None are on social assistance.
- ▶ Women of colour are greatly under-represented as surrogate mothers.

# Key things to think about prior to entering into a surrogacy relationship

- ▶ Whose body is it?
  - ▶ Abortion, selective reduction
  - ▶ Invasive testing
  - ▶ Lifestyle
  - ▶ Living will
- ▶ What happens if Intended Parents divorce or separate? Pass away?
- ▶ Confidentiality
  - ▶ Facebook, twitter, etc.
  - ▶ Forums
- ▶ Relationship
  - ▶ Saying goodbye
  - ▶ Future contact

Key =  
respect!

# Part II: Legal Aspects of Egg Donation



# Relevant Legislation (AHRA)

7. (1) No person shall purchase, offer to

purchase or advertise for the purchase of sperm

or ova from a donor or a person acting on behalf

of a donor.

... → NB: no prohibition on selling; no prohibition on paying someone to arrange for the services of

(4) In this section, “purchase” or “sell” includes

to acquire or dispose of in exchange for

property or services.

# Section 12 Regulations

- ▶ Reimbursement Related to Assisted Human Reproduction Regulations
  - ▶ Donors
    - ▶ Travel
    - ▶ Dependant care
    - ▶ Insurance
    - ▶ Counselling; legal
      - ▶ Notably missing any net lost wages in any circumstance
  - ▶ Guidance Document

# AHRA cont'd

9. No person shall obtain any sperm or ovum from a donor under 18 years of age, or use any sperm or ovum so obtained, except for the purpose of preserving the sperm or ovum or for the purpose of creating a human being that

the person reasonably believes will be raised by the donor.

# Why Agreements?

- ▶ Known AND anonymous
- ▶ Exchange of health information in the future
  - ▶ How, what info, etc.
- ▶ Clarity who is a parent and who is only a donor
- ▶ Multi-parent family jurisdictions
- ▶ Depending on the jurisdiction, donor may have parental rights
- ▶ Judges ask to see them when doing parentage declaration

# Part III: Parentage and Birth Registration

Post-Birth process only

At time child born, surrogate/GC is legal parent

→ varies province by province

→ declaration of parentage and/or birth registration

Ontario and BC

Parentage can be done without declaration of parentage, but possible to obtain if required;

No genetic connection necessary

Multiple parents (3+) permitted

Alberta

Parentage as long as one parent has a genetic connection to child

Maximum of two parents



# Provinces to Avoid (moving target)

## All Parents:

- ▶ Quebec
- ▶ PEI

## Where one parent does not have a genetic connection:

- ▶ Manitoba

## Where neither parent has a genetic connection:

- Alberta
- Some unknown (for example, NB)

# A Closer Look at Ontario

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# Prior to *All Families are Equal Act*

## What worked

- ▶ Courts recognize intention-based legal parentage (re surrogacy);
- ▶ Requires no genetic connection between parent(s) and child (gives effect to intention); and
- ▶ Allows multi-parent families.
  
- ▶ Require court oversight to obtain declaration of parentage re surrogacy (prevents child trafficking, gives effect to intention, kept legitimate, etc., but expensive and time consuming)

## Prior to *All Families are Equal Act* (cont'd)

### What didn't work

- ▶ Donor may in fact be a parent;
  - ▶ Even more so, because jurisdiction allow multi-parent families;
  - ▶ Even more so, because AHRA pushes toward known gamete donors (many good reasons);
- ▶ Heteronormative parental presumptions (former s. 8 of the CLRA for example - “male”, “father”);
- ▶ Heteronormative terms used in legislation (i.e. mother and father); and
- ▶ Issues with birth registration (especially but not only for 2 mom families).

# Why the Change?

- Recognition that many children being born through ART
- Recognition of non-heteronormative family building
- Litigation
  - 2 mom families in particular re birth registration (*Grand Charter* challenge)
  - Threat of litigation and actual
    - Problem with litigation as the impetus for change

## Same-sex parents still struggle for legal recognition

A decade after courts ruled legal hoops were unconstitutional, forms still list "mother" and "father."



By **ALYSHAH HASHAM** Staff Reporter  
Tues., May 24, 2016



As Raquel Grand's wife was hemorrhaging dangerously after giving birth to their daughter,

# Grand et Grand et al., Decision of Chiappetta, J. June 22, 2016

## Grand et al., Decision of Chiappetta, J. June 22, 2016

THIS COURT ORDERS, ON CONSENT, THAT:

1. The Court declares that the *Children's Law Reform Act*, RSO 1990, c C.12, as amended, violates section 15 of the *Canadian Charter of Rights and Freedoms* in a manner that cannot be justified in a free and democratic society under section 1 of the *Charter* to the extent that the legislation does not provide equal recognition and the equal benefit and protection of the law to all children, without regard to their parents' sexual orientation, gender identity, use of

FLR 25 (September 1, 2005)

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n 25: Order (general) (page 2)

Court File Number FS-16-20779

assisted reproduction or family composition; and to the extent that the legislation does not provide equal recognition and the equal benefit and protection of the law to all families. The *Children's Law Reform Act* is declared be of no force and effect under section 52 of the *Constitution Act*, 1982 to the extent of the inconsistency. The declaration of invalidity is suspended for 9 months from the date of this order.

# *All Families are Equal Act*

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## ▶ Legal Parentage in Ontario re Gamete Donation

- ▶ Most significant change for our purposes:
  - ▶ 5. A person who provides reproductive material or an embryo for use in the conception of a child through assisted reproduction **is not, and shall not be recognized in law to be, a parent** of the child unless he or she is a parent of the child under this Part.
- ▶ BUT: remember Ontario allows for multiparent (3+) parent families



# Cont'd



NB: Act has very broad definition of ART - anything other than sexual intercourse (i.e. at home insemination is legally equivalent to clinic insemination, embryo transfer, etc.)



NB: compare to BC law which states that a donor is not **AUTOMATICALLY** a parent → Ontario goes further

# Legal Parentage in Ontario re Surrogacy

## Legal Parentage in Ontario re Surrogacy

“surrogate” means a person who agrees to carry a child conceived through assisted reproduction if, at the time of conception, the person intends to relinquish entitlement to parentage of the child, once born, to one or more persons.

- ▶ **NB:** does not distinguish between **gestational** and **traditional** surrogacy;
- ▶ no requirement for clinic involvement

# Cont'd



Birth Parent is Still Legal Parent at First Instance:



6. (1) The birth parent of a child is, and shall be recognized in law to be, a parent of the child.

Exception, surrogacy



(2) Subsection (1) is subject to the relinquishment of an entitlement to parentage by a surrogate under section 10, or to a declaration by a court to that effect under section 10 or 11.

## Surrogacy cont'd

“intended parent” means a party to a surrogacy agreement, other than the surrogate;

“surrogacy agreement” means a written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate, in which,

- (a) the surrogate agrees to not be a parent of the child, and
- (b) each of the other parties to the agreement agrees to be a parent of the child.

# 4 Conditions to be met where can register surrogacy birth without court order



1. Surrogacy agreement in place prior to conception (ie prior to transfer).



2. The surrogate and the intended parent or parents each received independent legal advice before entering into the agreement.



3. No more than four intended parents (more available with court order).



4. The child is conceived through assisted reproduction (i.e. not sex, but anything else).

## Recognition of Parentage Through Surrogacy

...on the surrogate providing to the intended parent or parents consent in writing relinquishing the surrogate's entitlement to parentage of the child,

- ▶ (a) the child becomes the child of each intended parent and each intended parent becomes, and shall be recognized in law to be, a parent of the child; and
- ▶ (b) the child ceases to be the child of the surrogate and the surrogate ceases to be a parent of the child.
- ▶ **(4) The consent referred to in subsection (3) must not be provided before the child is seven days old.**
- ▶ **NB: no longer requirement for court oversight, DNA testing (including for traditional surrogacy); it is the parties themselves who advise whether they have complied with legal requirements**

# Parental Rights and Responsibilities for 7 Days Following Birth

## Parental Rights and Responsibilities for 7 Days Following Birth

- ▶ (5) Unless the surrogacy agreement provides otherwise, the surrogate and the intended parent or parents share the rights and responsibilities of a parent in respect of the child from the time of the child's birth until the child is seven days old, but any provision of the surrogacy agreement respecting parental rights and responsibilities after that period is of no effect.

# Part IV

## ▶ What Else is New?



# Safety of Sperm and Ova Regulations

- ▶ No longer just applies to sperm, but also ova (NB: not embryos)
- ▶ Takes place of the Semen Regulations
- ▶ Directed Donation vs Regular Process
- ▶ Directed Donation = when known to each other
- ▶ Donor suitability assessment = donor screening, physical examination and testing

# Bill

## An Act to Amend the Assisted Human Reproduction Act

- ▶ **2 Section 6 of the Act is replaced by the following:**

### Surrogate mother – requirements

- ▶ **6** No person shall counsel or induce a female person to become a surrogate mother, or perform any medical procedure to assist a female person to become a surrogate mother, knowing or having reason to believe that she is
  - ▶ **(a)** under 21 years of age;
  - ▶ **(b)** incapable of consenting to becoming a surrogate mother; or
  - ▶ **(c)** being coerced by a third party to become a surrogate mother.

# Cont'd

- ▶ **Subsection 7(1) of the Act is replaced by the following:**

## **Sperm or ovum donation – requirements**

- ▶ **7 (1)** No person shall, except for a purpose permitted under section 9, counsel or induce a person to donate their sperm or ova, or perform any medical procedure to assist a person to donate their sperm or ova, knowing or having reason to believe that the person is
  - ▶ **(a)** under 18 years of age;
  - ▶ **(b)** incapable of consenting to the donation; or
  - ▶ **(c)** being coerced by a third party to donate.

▶ Thank you!

Follow up questions may be sent to Sara at  
[sara@fertilitylawcanada.com](mailto:sara@fertilitylawcanada.com)