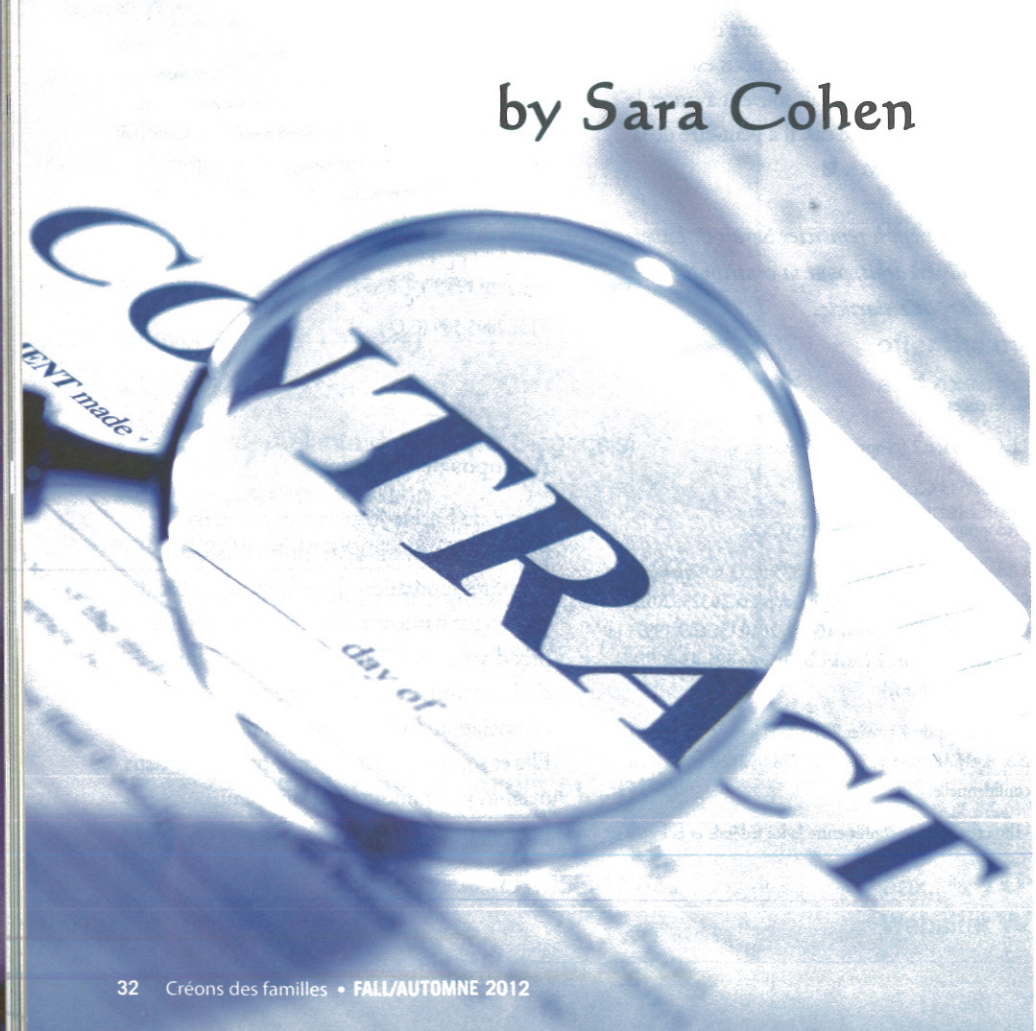
The Prohibition on "Paying or Accepting Consideration for Arranging for the Services of a Surrogate Mother" – What It Means, and Why it Does More Harm Than Good

by Sara Cohen



When the *Assisted Human Reproduction Act* (the "AHRA") was passed, the Senate Standing Committee on Social Affairs, Science and Technology (the "Committee") which recommended its passage did so cautiously, explicitly recognizing that the legislation as drafted had significant limitations. However, the Committee chose that some legislation, albeit imperfect, was better than no legislation at all, advising that the AHRA be revisited within three years of the creation of Assisted Human Reproduction Canada (the "AHRC") and every three years thereafter, because,

"The diversity of views, disparity between public opinion polls, and the rapid pace of change in the fields of reproductive medicine and related research led the Committee to make the observation that careful review of this legislation is essential at the earliest reasonable time…

"The views of Canadians may change even in the near future. The prohibitions on… compensation for gamete donation and surrogacy …should all be carefully reviewed within three years following the creation of the Agency.

"In addition…medicine and science will continue to evolve, as will the views of society, following the initial review of this Act. For this reason we are of the opinion that subsequent three year reviews of the Act should also be required."[1]

The AHRA is perhaps most (in)famous for prohibiting compensation of a surrogate mother[2] and payment for donor gametes,[3] both of which may result in imprisonment for a term of up to ten years and/or a $500,000 fine.[4] The Committee expressed significant concerns about these aspects of the AHRA, in particular the use of the law's bluntest tool – criminal law and imprisonment – to deal with assisted human reproduction in Canada. Nonetheless, the AHRA was cautiously passed. Despite the Committee's recommendation, and despite section 70 of

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the AHRA requiring parliamentary review of the Act within three years of the creation of the AHRC, the AHRA has yet to be reviewed and the severe criminal sanctions for the breach thereof remain.

The prohibition on providing or accepting consideration to "arranging the services of a surrogate mother"

While the Committee spent significant time considering the merits of permitting payment for third-party donor gametes and surrogacy services, there was little meaningful dialogue about the merits of permitting payment for arranging the services of a surrogate mother. Within the AHRA itself, the prohibition on paying or accepting consideration for arranging a surrogacy is sandwiched between the prohibition on paying consideration to a woman to be a surrogate mother,[5] and the prohibition on counselling a woman under twenty-one years of age to be a surrogate mother.[6]

What does the legislation actually say?

Almost hidden between subsections 6(1) and 6(4) of the AHRA are subsections 6(2) and 6(3), which deal with the prohibition on paying or accepting consideration for "arranging for the services of a surrogate mother." Specifically, the AHRA provides as follows:

6(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.

6(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.

What does "arranging for the services of a surrogate mother" mean?

In my experience, there is much confusion about what paying or accepting consideration for arranging the services of a surrogate mother means, and no easy answers are available. The word "arrange," or the phrase "arranging the services of a surrogate mother" are not defined in the AHRA or any regulation thereto and there is no case law to provide clarification. It is unclear what "arranging the services of a surrogate mother" means. Unclear legislation is always troubling, but it is exceptionally so where the breach thereof may result in a sentence of up to ten years in jail and/or a fine of up to $500,000.

Recently, the AHRC provided what it calls a "fact sheet" entitled "Prohibitions Related to Surrogacy." Within this fact sheet, the AHRC states that the AHRA prohibits, among other things,

"Payment of any compensation to an intermediary, and acceptance of any compensation by an intermediary for arranging the services of a surrogate mother, ***including helping parents identify or obtain the services of a surrogate mother*** *(for example, by providing a matching service);*
"The exchange of goods or services or other disguised forms of compensation having financial or other gain as payment to an intermediary for arranging the services of a surrogate mother" [emphasis added]

While it is beyond the scope of this article to delve too deeply into a statutory interpretation regarding the phrase "arranging the services of a surrogate mother," it is helpful to touch briefly on this topic. In applying the modern or purposive approach, which requires that the words of the Act be interpreted "…in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament,"[7] it seems unlikely that for the purposes of the AHRA, "arranging for the services of a surrogate mother" includes "helping parents identify a surrogate mother." To my mind, facilitating a forum for intended parents and surrogate mothers to meet is not the same as arranging the services of a surrogate mother, nor is it providing a "matching service." Moreover, Canadian

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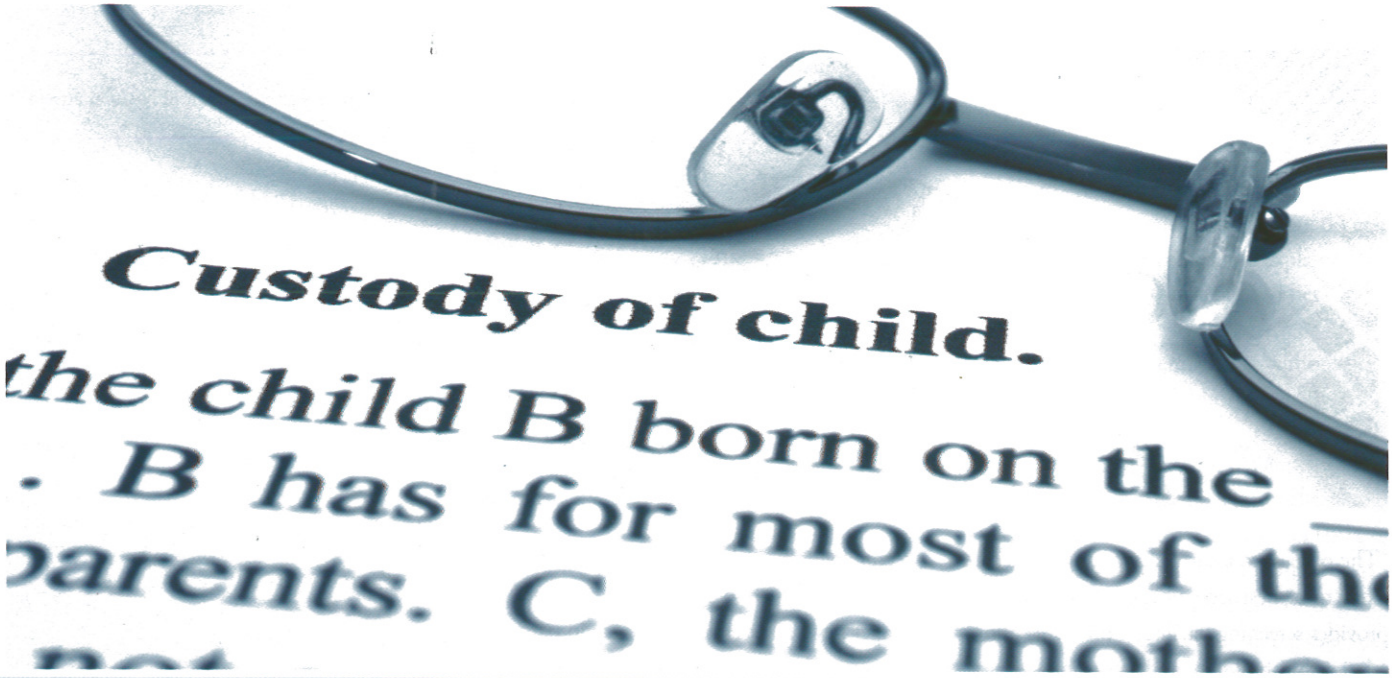
jurisprudence has long required that in interpreting legislation, the court will not infer an intention that would effect an injustice unless such an intention is clearly expressed.[8] Had the federal government intended to prohibit the payment or acceptance of consideration for helping intended parents identify a surrogate mother, it would have expressly stated so.

Some of the negative effects of the prohibition regarding arranging for the services of a surrogate mother

As one could well imagine, finding a woman willing to act as a gestational carrier on behalf of intended parents is no easy task. Add to this the threat of severe criminal sanctions for accepting or paying consideration for arranging a surrogacy (whatever the meaning), and we are left with a confusing and daunting situation where intended parents and potential surrogate mothers have very little guidance or access to resources about how to go about finding each other without potentially breaching the AHRA and suffering its draconian consequences. In my experience, fertility clinics, lawyers and counsellors feel that their hands are tied and cannot introduce the potential surrogate mothers or intended parents who are within their acquaintance, in order to steer clear of any allegation that they indirectly profited from such an introduction. If we are truly concerned about the health and well-being of the women who choose to act as surrogate mothers, we ought to be providing them with resources, information, support and expertise, instead of leaving them to find intended parents on *Craigslist, Kijiji* and the like, and to choose with which intended parents to work without any professional guidance.

Altruistic surrogacy and the prohibition on compensation for arranging the services of a surrogate mother need not go hand in hand

Because surrogacy in Canada is altruistic and non-commercialized, it is assumed by many



Surrogate mothers in Canada are generally white, educated women from modest income families; surrogate mothers in Canada are not forced into surrogacy because of low incomes, and they tend to have positive and fulfilling experiences.

that so, too, must be arranging the services of a surrogate mother. However, these two need not go hand in hand. Similar to surrogacy, adoption, for example, is only legal if it is altruistic; it is illegal to pay a birth mother for her child. All provinces and territories have laws that prohibit, in effect, buying children through adoption.[9] However, it is legal for adoptive parents to pay an adoption agency for the costs incurred in arranging the adoption. The fact that it is illegal to pay to adopt a baby doesn't make it illegal to pay an agency or a licensee to arrange the adoption.[10]

We do not expect birth parents and adoptive parents to have the tools, expertise, resources or objectivity to be able to find each other or choose the best "match" on their own. Similarly, we ought not to have these unreasonable expectations for intended parents and surrogate mothers.

How much safer, healthier and less fraught with power imbalance would surrogacy in Canada be if surrogate mothers and intended parents could work with licensed individuals who had acquired specialized training and expertise in dealing with the complicated relationships involved in surrogacy? As stated by Dr. Karen Busby in her influential paper, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers,* "empirical research repeatedly shows that it is the quality of the surrogate mother's relationship with the commissioning parent(s) during the pregnancy and after the birth that largely determines the surrogate mother's satisfaction with her experience."

And later, "Provided that they have access to appropriate support and advice, there is little evidence that surrogate mothers lack the ability to negotiate expectations and maintain appropriate boundaries with commissioning parents, thereby avoiding exploitation and commodification during the pregnancy. **But if they cannot or are hesitant to get this information - and their ability to do so is exacerbated by the state of Canadian law rather than facilitated by it - anecdotal evidence shows how surrogate mothers can be exploited.**" [Emphasis added.] Further,

"The parties [to a surrogacy arrangement] are likely to be best served by an agency that provides screening, facilitates pre-conception relationship-building, and assists in issue identification and decision-making."

Also notable, although the AHRA prohibits payment for donor gametes, it does not prohibit the payment or acceptance of consideration for arranging the services of gamete donors. For all these reasons, then, it is clear that both as a matter of practice and as a matter of law, altruistic third-party reproductive technology is not necessarily bound together with altruistic supporting services.

Why the AHRA's prohibition on providing or accepting consideration to arrange for the services of a surrogate mother does more harm than good (if any good)

It is unclear what good exists in the current prohibition on providing or accepting consideration for arranging the services of a surrogate mother. It is even more unclear as to why such an action warrants a sentence of up to ten years in jail and/or a fine of $500,000. At the time that the AHRA and its predecessor report were originally drafted, some Canadians were fearful of new reproductive technologies (which are now called assisted reproductive technologies; i.e. they are no longer new) and viewed surrogacy in particular as an inherently exploitative process. Any such concerns within the Canadian context have been largely alleviated by the empirical evidence regarding surrogacy in Canada. This empirical evidence demonstrates that surrogate mothers in Canada are generally white, educated women from modest income families; surrogate mothers in Canada are not forced into surrogacy because of low incomes, and they tend to have positive and fulfilling experiences.[11]

On the other hand, the benefit of creating a licensing scheme whereby potential surrogate mothers and potential intended parents could rely upon the knowledge, expertise and training of individuals to find each other, choose each other and work together, much like the services available for birth parents and adoptive parents, has been explained in detail above. For these reasons, the relevant legislation ought to be amended to welcome, instead of potentially criminalize, the support and involvement of people who have specialized training, education, knowledge and expertise in managing the relationships between surrogates and intended parents, including helping these people find each other and choose the best match, that will make the surrogacy experience the healthiest it can be. ■

References

[1] http://www.parl.gc.ca/Content/SEN/Committee/373/soci/rep/rep02mar04-e.htm

[2] Section 6(1) of the Assisted Human Reproduction Act, S.C. 2004, c. 2 (the "AHRA")

[3] Section 7(1) of the AHRA

[4] Section 60 of the AHRA

[5] Supra note 2

[6] Section 6(4) of the AHRA

[7] Driedger, Construction of Statutes (2nd ed. 1983), at p. 87.

[8] R. v. Fong (1939), [1939] 3 W.W.R. 459 (B.C. S.C.); reversed on other grounds (1940), [1940] 2 W.W.R. 160 (B.C. C.A.); Petro-Canada Inc. v. Coquitlam Assessor, Area No. 12 (1989), 64 D.L.R. (4th) 227 (B.C. C.A.).

[9] Busby, Karen, Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers, (2010) 26th Canadian Journal of Family Law, with Delaney Vun.

[10] See, for example, the Ontario Intercountry Adoption Act, SO 1998, c 29

[11] Supra note 9.

About the author

Sara R. Cohen is a fertility lawyer in Toronto, Canada, but with clients throughout the country and beyond. She approaches fertility law with the compassion, empathy and respect it deserves. Sara's passion is to help build families and she considers herself very fortunate to have such a fulfilling career. Sara has been widely quoted in the media about issues relating to fertility law in Canada. She is an advocate for all parties involved in third party reproductive technology and works closely with intended parents, surrogate mothers, gamete donor and recipients, as well as domestic and international businesses in the fertility industry. You can read more about her practice at www.fertilitylawcanada.com, follow her on twitter @fertilitylaw or on Facebook at www.facebook.com/FertilityLawCanada.