Health Law in Canada

Editor-in-Chief: Gilbert S. Sharpe, B.A., LL.B., LL.M.

February 2003 VOLUME 23, NUMBER 3 Pages 33-52

• WOMBS FOR RENT: AN EXAMINATION OF PROHIBITORY AND REGULATORY APPROACHES TO GOVERNING PRECONCEPTION ARRANGEMENTS •

Melody Chen*
Cassels Brock & Blackwell LLP, Toronto

ABSTRACT

On October 9, 2002, Bill C-13 had its first reading in the Canadian House of Commons. Bill C-13 was in the same form as Bill C-56 of the First Session of the Thirty-seventh Parliament, which had its first reading on May 9, 2002. Bill C-13, an Act respecting assisted human reproduction, prohibits the practice of commercial surrogacy or preconception agreements in Canada, under threat of criminal sanction. In the first half of the article, the author discusses the deficiencies of the Bill's prohibitory approach to governing surrogacy agreements. These problems include the difficulty of implementing a criminal regime, the weak constitutional basis on which the federal government claims jurisdiction to enact a criminal prohibition of commercial surrogacy and the legislation's inability to prevent exploitation and coercion of vulnerable parties in surrogacy arrangements. In the second half of the article, the author examines an alternative regulatory scheme proposed by the Ontario Law Reform Commission and compares it to the prohibitory approach. The author concludes that the regulatory approach is much more effective than the prohibitory approach in governing the practice of commercial and non-commercial surrogacy arrangements. Regulation minimises the potentially exploitative aspects of surrogacy and provides legal protection to both parties in the agreement. The regulatory scheme proposed by the Ontario Law Reform Commission is also more effective in protecting the best interests of the child born as a result of a preconception agreement.

• IN THIS ISSUE •

Wombs For Rent: An Examination Of Prohibitory And Regulatory Approaches To Governing Preconception Arrangement

— *Melody Chen* 33

Editorial — Governments and Health: A Time For Leadership

— *Gilbert S. Sharpe* 50

HEALTH LAW IN CANADA

Health Law in Canada is published four times a year by LexisNexis Butterworths, 75 Clegg Road, Markham, Ontario L6G 1A1

ISBN 0-433-43326-4 **ISSN 0226-88411**

Subscription rates: $230 plus GST per year
Please address all editorial inquiries to:

Verna Milner, Journals Editor
LexisNexis Butterworths
Tel. (905) 479-2665; Fax (905) 479-2826
E-mail: hlic@lexisnexis.ca.

INTRODUCTION

CANADIAN LEGAL RESPONSES TO SURROGACY

A surrogate motherhood arrangement, also referred to as a preconception arrangement, is generally employed to enable an infertile couple to have a child that is genetically related to the commissioning man or to both members of the couple. The practice of surrogacy is highly controversial and is the subject of on-going debate. The views of proponents and opponents of preconception arrangements are based on fundamentally different values and convictions.[1] Preconception agreements provide infertile couples with an alternative to adoption and to other types of assisted reproduction, such as artificial insemination and *in vitro* fertilization. Especially in cases where a woman is unable to carry a child to term, a surrogacy arrangement assists the infertile couple in procreating a genetically related child.

To date, Quebec is the only Canadian jurisdiction to have enacted specific legislation regarding preconception arrangements. Section 541 of Quebec's *Civil Code* provides that all agreements for procreation or gestation for payment are null and void. In the absence of specific legislation, family law and contract law may apply to preconception arrangements.[2]

In 1993, the Royal Commission on New Reproductive Technologies issued a report entitled *Proceed with Care*. In it, the Commission made seven recommendations regarding preconception arrangements. The federal government introduced Bill C-47 in 1996 as a legislative response to the Commission's recommendations. The Bill died in 1997, but in 2001, Health Canada developed proposals for legislation governing assisted human reproduction. Subsequently, the proposed legislation became Bill C-56 (*An Act respecting assisted human reproduction*), which had its first reading at the House of Commons in May 2002, and was re-introduced in the same form on October 9, 2002 as Bill C-13. With respect to the provisions regarding surrogate motherhood, Bill C-13 is largely the same as the proposed legislation of 2001. The significant differences between them will be addressed later in this paper.

The two most contested issues in surrogacy are its commercial element, namely payment of a fee to the surrogate, and the assignment of parental rights to the child born of the arrangement.[3] In response to the first issue, the Royal Commission recommended that the federal government enact legislation to prohibit, under threat of criminal sanction, commercial surro-

gacy or preconception arrangements. In that vein, Bill C-13 and the proposed legislation that preceded it prohibit the payment of a fee to the surrogate, where the fee provides the surrogate with a profit over and above expenses incurred by her as a result of the pregnancy. As for the issue of assignment of parental rights, if both parties comply with the terms of the preconception arrangement, and a baby is born alive, the surrogate mother surrenders custody of the child to the commissioning parents. However, if the surrogate mother changes her mind and decides she wishes to keep the child, a dispute over parental rights of the child would arise and a custody battle would ensue. The Royal Commission recommended in its report that all provinces and territories respond by specifying in family law legislation that all preconception agreements are unenforceable against the gestational woman.

This paper will focus on and compare legislative approaches to governing preconception agreements in Canada. The first part of this paper will analyse the approach taken by the Royal Commission in its recommendations and by the federal government in Bill C-13 to control the practice of preconception arrangements. Specifically, this paper will discuss the problems of a scheme of prohibition with criminal sanctions, including the difficulty of implementing a criminal regime, and the weak constitutional basis on which the federal government claims the authority to regulate the practice of surrogacy. The paper will also discuss the ineffectiveness of a scheme that targets the commercial aspects of surrogacy in preventing exploitation of women and commodification of women's reproductive capacities. The second part of this paper will discuss an alternative regulatory scheme proposed by the Ontario Law Reform Commission and will examine the operation of that scheme in dealing with the issues of surrender of a child born as a result of a surrogacy agreement and payment to the surrogate mother.

As a prelude to the analysis, a brief description of the elements and types of preconception agreements, the conclusions of the Royal Commission on New Reproductive Technologies and the aspects of the 2001 proposed legislation and Bill C-13 pertaining to preconception agreements is given below.

WHAT ARE PRECONCEPTION AGREEMENTS?

Surrogate motherhood refers to an arrangement whereby a woman agrees to gestate and give birth to a child for the purpose of transferring custody and parental rights of that child upon birth to another person or persons.[4] The arrangement is also called a preconception arrangement, since the agreement to transfer custody and parental rights is reached before the child is conceived.[5] The agreement consists of three basic promises on the part of the surrogate, also called the gestational or carrying woman. First, the surrogate agrees to be artificially inseminated with sperm from the sponsoring husband or to be implanted with the zygote resulting from *in vitro* fertilization of the sperm and ova of the sponsoring couple. Second, if a pregnancy occurs, she agrees to carry the child to term. Last, the surrogate agrees to relinquish the child upon birth and surrender all parental rights to the sponsoring couple. In return, the sponsoring couple promises to assume responsibility for the child after birth, pay medical and legal expenses and, in the case of paid surrogacy, to pay a fee to the surrogate for her services.[6]

TYPES OF AGREEMENTS

Advances in reproductive technology have made more types of preconception arrangements possible. Preconception agreements can be characterised by the origin of the ovum, by whether the carrying woman receives payment, and by whether there are any intermediaries.

Origin of ovum

The ovum that becomes fertilized and gestated can originate from the woman who carries and delivers the child, from the commissioning woman or from a third woman. The last type of arrangement is less common. In the majority of cases, the gestating woman provides the ovum. This is called a genetic-gestational arrangement, and the preconception agreement usually involves the artificial insemination of the gestating woman with the commissioning man's sperm. Sexual intercourse is also a possible method of conception. The resulting child is the genetic child of the gestational woman and the commissioning man. The commissioning woman becomes the child's social mother. The genetic-gestational arrangement is the most common.[7]

In the "exclusively gestational" arrangement, the gestational woman is not the source of the ovum. Rather, the commissioning woman is usually the source of the ova, which are fertilized *in vitro* using her partner's sperm. If the sperm fertilizes the egg and the egg develops into an embryo, it is then im-

planted in the uterus of a genetically unrelated woman. Gestational surrogacy requires drug therapy for both women in order to synchronise their hormonal cycles.[8]

Presence of consideration

Preconception agreements can also be characterised according to whether the woman who carries the child receives payment. In paid agreements, the gestating woman is given a fee for her services. The sum of $10,000 US has been cited as a typical fee. In both paid and unpaid arrangements, the gestational woman's expenses for health care, maternity clothes and lost income will often be covered.

Non-commercial arrangements usually occur between family members or close friends.[9]

Third-party intermediaries

In the United States, brokers operate publicly to bring the commissioning couples and surrogates together and facilitate the agreement between the two parties. Brokers may charge a substantial fee for their services, which include soliciting commissioners, advertising for surrogates, arranging for insemination and delivery of a child and arranging for the transfer of the child's custody. Where a broker participates in a preconception arrangement for profit, the arrangement is called a "commercial arrangement", regardless of whether the woman carrying the child is paid, because the broker is carrying on a business.[10]

Another group of third-party intermediaries are *in vitro* fertilization practitioners, who become involved in the practice of exclusively gestational arrangements. These arrangements may increase the market for the services of IVF practitioners.[11]

CONCLUSIONS OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES

The Commission reviewed a range of positions in the debate on preconception arrangements and concluded that commercial preconception arrangements were offensive on several grounds:[12]

> First, they offend human dignity by commodifying women's reproductive capacities and commodifying children; they contradict the principle that human reproduction should not be commercialized in any way. Second, we see actual and potential harms for families, for individual women and children, and for specific groups within society.

According to the Commission's assessment, the premise of commercial preconception contracts is that a child is a product that can be bought and sold on the market. Furthermore, preconception arrangements commodify women's reproductive functions and reduce the capacity to become pregnant and bear a child to a marketable service.[13] The Commission was particularly concerned with the potential for exploitation in commercial preconception agreements. These concerns stemmed from the social and economic disparities and the inequalities of bargaining power they perceived to exist between gestational women and commissioning couples and the economic vulnerability of gestational women.[14]

The Commission reached similar conclusions with respect to non-commercial preconception arrangements between family members or close friends. The Commission noted that even if no money is involved, the arrangement still results in the commodification of a child and the reproductive process. Making a gift of another human being is offensive to the human dignity of the child. The arrangement still results in a woman being placed at medical risk for the benefit of someone else. The Commission observed that there is the potential for coercion in non-commercial arrangements, in the form of family pressure to participate.[15]

RECOMMENDATIONS OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES

The Commission made seven recommendations to prohibit commercial preconception arrangements and to deter non-commercial arrangements. This paper will address only Recommendations 199 and 200. The Commission's recommendations were structured so as not to impose sanctions on gestational women, whom it regarded as the most vulnerable parties in preconception agreements. Since it found commercial arrangements to be repugnant, the Commission believed that commissioning couples should be prohibited from making payment for preconception arrangements, and other parties, such as brokers and physicians should be prohibited from assisting in such arrangements.[16] Thus, the Commission recommended that:[17]

> 199. The federal government legislate to prohibit advertising for or acting as an intermediary to bring about a preconception arrangement; and to prohibit receiving payment or any financial or commercial benefit for acting as an intermediary,

> under threat of criminal sanction. It should also legislate to prohibit making payment for a preconception arrangement, under threat of criminal sanction.
>
> 200 Provinces/territories amend their family law legislation to specify that all preconception agreements, whether or not they involve payment, are unenforceable against the gestational woman.

The Commission's first goal was to ensure that the prohibition on commercial preconception agreements be comprehensive and uniform across the country. It did not believe prohibition at the provincial level would be effective as a deterrent to commercial preconception arrangements. Recommendation 200 was also made in an effort to deter the practice of commercial preconception arrangements. The Commission reasoned that statutory provisions rendering preconception contracts unenforceable would generate uncertainty for commissioning couples as to whether they would be able to gain custody of the child born as a result of the agreement.[18]

Rather than recommend a prohibition with criminal sanctions, the Commission believed that the most effective way to deter non-commercial arrangements was to penalize third parties who facilitate preconception arrangements. Recommendations 201 and 202 target *in vitro* fertilization and assisted insemination practitioners, as well as lawyers who may become involved as brokers.[19]

HEALTH CANADA'S PROPOSED LEGISLATION GOVERNING ASSISTED HUMAN REPRODUCTION (2001) AND BILL C-13 (FIRST READING, OCTOBER 9, 2002)

The provisions pertaining to surrogacy arrangements are found in ss. 4 and 10(*d*) of the proposed legislation,[20] and in ss. 6 and 12(*c*) of Bill C-13. The legislation covers two types of activities: prohibitions and controlled activities. Section 4 of the proposed legislation and s. 6 of Bill C-13 provide that payment for surrogacy, acting as an intermediary in a surrogacy agreement and payment to intermediaries are prohibited activities. In other words, the legislation does not ban surrogacy altogether, but does ban the commercial aspects of surrogacy. It appears to envisage that altruistic surrogacy, where a surrogate does not receive payment for her services, will occur. Since advertising for the services of a surrogate mother is prohibited, surrogacy arrangements will most likely be made between family members or friends.

The significant difference between Bill C-13 and its predecessor is the lack of exceptions to the prohibition. In the 2001 proposal, s. 4(4) makes an exception for the payment of consideration for the provision of legal services, medical services or psychological counselling services. The purpose of s. 4(4) is to allow women who wish to become surrogate mothers under an unpaid arrangement to obtain legal advice and medical or psychological counselling services and to allow those service providers to receive payment. On the other hand, Bill C-13 does not contain this exception, so it appears to prohibit lawyers and medical practitioners from accepting consideration for their services when provided in connection with a preconception arrangement.

A controlled activity is defined in Bill C-13 as one that may not be undertaken except in accordance with the regulations and a licence. In other words, the activity is permitted, but under the authority of regulations and a licence. The reimbursement of a surrogate mother for any expenses incurred by her in relation to her pregnancy is a controlled activity under s. 10(*d*) of the proposed legislation and s. 12(*c*) of Bill C-13. Furthermore, s. 12(2) of Bill C-13 requires that a party must provide a receipt for the expenditure before the expenditure can be reimbursed.

Bill C-13 creates the Assisted Human Reproduction Agency of Canada, which can designate inspectors and analysts for the enforcement of the Act. Sections 60 and 61 provide that a person who contravenes any provision or regulation pertaining to prohibited and controlled activities is liable to a fine or imprisonment, that is, criminal sanctions.

PROBLEMS WITH CRIMINAL PROHIBITION

A criminal prohibition is the most severe form of regulation, conveys high levels of societal disapprobation and entails a social stigma.[21] A prohibition with criminal sanctions raises the concern of whether such an approach is necessary or justifiable.

A CRIMINAL PROHIBITION MAY NOT BE CONSTITUTIONALLY VALID

The first issue raised by the Commission's recommendations and Bill C-13 is whether the federal government has the constitutional authority to enact legislation governing surrogacy and other forms of assisted reproduction. Both the federal and provin-

cial governments have jurisdiction in the area of health under the division of powers set out in ss. 91 and 92 of the *Constitution Act, 1867*. The provinces have jurisdiction over hospitals, health plans, and the regulation of health professionals, and thus the regulation of assisted reproduction may fall under provincial jurisdiction.

Peace, order, and good government power

In the first chapter of its report, *Proceed with Care*, the Commission characterises new reproductive technologies as issues of national importance. In its opinion, new reproductive technologies "raise issues of a magnitude and importance that not only warrant but *require* a national response".[22] The Commission writes:[23]

> Considering the overarching nature, profound importance, and fundamental inter-relatedness of the issues involved, we consider that federal regulation of new reproductive technologies — under the national concern branch of the peace, order and good government power, as well as under the criminal law, trade and commerce, spending, and other relevant federal constitutional powers — is clearly warranted.... Parliament has the authority, under the national concern branch of the federal peace, order, and good government power, to regulate matters going beyond local or provincial interest that are of inherent concern to Canada as a whole.

The Report further asserts that federal intervention under the peace, order and good government (POGG) power to create uniform legislative treatment is constitutionally justified because new reproductive technologies possess a "conceptual and practical integrity and distinctiveness", and are "clearly identifiable and distinct from other areas of medical science, technology, research, and health service".[24]

Basically, the Report asserts that federal jurisdiction is justified by the distinctiveness of the subject matter, the harm that arises from the absence of uniform law on these matters and the need for urgent action.[25] It is difficult to see the urgency of controlling the practice of surrogate motherhood or how the issues raised by the practice have become a national concern. There is no evidence in Canada that commercial surrogacy arrangements are being made in numbers significant to warrant immediate enactment of federal legislation. Furthermore, the national concern branch of the POGG power can only be deployed when the provinces are unable to deal with the matter adequately and where there are spillover effects to other provinces when one province is unable to deal with the matter.[26] On this point, Patrick Healy observes:[27]

> There is no apparent evidence that the provinces have failed to act in relation to the matter or that they are unable to do so. Nor is there evidence to support a conclusion that material harm will result if the provinces fail to take uniform measures with respect to matters within their authority.

Therefore, the POGG power is a weak basis upon which to justify federal authority to govern matters of assisted reproduction.

Criminal law power

The federal government may have a stronger justification for legislative authority over surrogacy arrangements and assisted reproductive technologies in the federal criminal law power, enumerated in s. 91(27) in the *Constitution Act, 1867*. The test for a valid use of the criminal law power is articulated in the Supreme Court of Canada's decision in the *Margarine Reference* case.[28] First, the law must have a criminal form consisting of prohibition and penalty. The law must be criminal in purpose and substance. The purpose would be to prevent some injurious or undesirable effect on the public and would generally be related to public peace, order, security or morality. The last requirement is that the federal law must not be a colourable intrusion or attempt to regulate on the jurisdiction of the provinces.

The Commission recommends that commercial surrogacy must be prohibited under the threat of criminal sanction because the practice is potentially harmful to the interests of individuals and society. The most common rationale for the use of the criminal law is the protection of society from harm.[29] Criminal law is often used to identify and vindicate fundamental social values, and such moral values are protected by criminalizing conduct that actually threatens those values. Patrick Healy emphasises that the values must be actually threatened, and the conduct that the criminal law seeks to deter must actually occur.[30] The Law Reform Commission of Canada, in its report entitled *Our Criminal Law*, recommended that the following four principles should guide the criminalization of conduct whether:

- it seriously harms other people;

- it so seriously contravenes social values as to be harmful to society;
- the necessary enforcement measures will not themselves contravene social values; and
- the criminal law can make a contribution to dealing with the problem.[31]

Furthermore, assuming that there is a genuine harm to people and society, the important principle of restraint states that the criminal law power should be used only where other means of social control are inadequate to achieve the same result.[32]

This raises the question of whether the practice of surrogacy and commercial surrogacy, in particular, actually threatens values held by Canadians. Surveys conducted for the Commission revealed that there is no consensus in Canada on whether and what types of preconception arrangements should be permitted.[33] The surveys showed that many Canadians do not wish for preconception arrangements to be banned altogether and believe that an infertile person should be able to consider the use of a preconception agreement. The surveys also showed that a majority of respondents do not believe that preconception arrangements will have a significant impact on society because they will not be used very often.[34] Given the lack of consensus and lack of evidence that the practice actually harms Canadians and threatens values held by Canadian society, the federal government does not have a valid justification for using the criminal law power. The criminal law should not be used to suppress problems that pose no material threat of harm to society at the moment. As Patrick Healy observes:[35]

> In the absence of a clear consensus that the conduct prohibited is generally offensive to some identifiable norm of acceptable behavior, and in the absence of the means by which to implement a criminal prohibition by investigation and prosecution, the enactment of criminal offences lacks legitimacy, utility, or both.

DIFFICULTIES WITH ENFORCEMENT

Assuming that preconception arrangements do pose harm to Canadian society, the prohibitions must be capable of investigation and prosecution in order for them to be effective.[36] Criminal offences relating to surrogacy arrangements and other forms of assisted reproduction present the practical difficulty of being almost impossible to enforce, because of their private nature.[37] In ordinary criminal offences, investigation would lie chiefly with the police. Bill C-13 provides that inspectors may be designated by the Assisted Human Reproduction Agency of Canada to investigate offences and enforce the statute. Subsection 47(1) provides that an inspector may enter any place in which the inspector believes on reasonable grounds that a controlled activity is undertaken. If the place is a dwelling house, an inspector may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant (s. 48(1)). In order to have reasonable grounds, the inspector would first have to receive information that an activity was being carried out, contrary to the statute. If a commissioning couple were to pay consideration or offer to pay consideration to a surrogate mother, it is unlikely that this would ever come to the attention of inspectors or any other third-party. If inspectors did acquire knowledge that a commercial surrogacy arrangement was being carried out, they must look for whether there is evidence that an offence was committed.[38] It seems highly unlikely that an inspector would be able to find evidence that a surrogate mother was receiving payment for the purpose of commercial gain or that an IVF practitioner assisted in a surrogacy arrangement with knowledge that the surrogate mother would be paid for her services. It is hard to envisage a prosecution of an offence ever getting off the ground.

Bill C-13 provides that no person shall, except in accordance with the regulations and a licence, reimburse a surrogate mother for any expenses incurred by her in relation to her pregnancy (s. 12(*c*)). A person who contravenes this provision is liable to a fine or imprisonment (s. 61). The purpose of this provision is to allow for reimbursement of the surrogate mother's expenses in a non-commercial arrangement, where the surrogate mother is not receiving payment for her services. Since commercial surrogacy and advertising for the services of a surrogate mother are prohibited, the commissioning couple will likely turn to friends or family members to enter a non-commercial arrangement. It seems far-fetched to expect that a commissioning couple will go through the trouble of obtaining a licence in order to reimburse a friend or family member. In fact, the Royal Commission recognised that it is impossible to enforce requirements pertaining to a private, non-commercial arrangement.[39] It would be impossible to investigate and prove that unlicensed reimbursements have been made, in contravention of the statute. The licensing requirement in Bill C-13 appears to be futile.

These practical obstacles indicate that the scheme of criminal prohibition of commercial aspects of surrogacy arrangements contemplated by the federal government will not be effective in achieving its purposes. This observation, coupled with the principle of restraint, militate very strongly in favour of adopting another, less draconian, form of legal regulation.

INDIVIDUALS WILL NOT BE ABLE TO KNOW CLEARLY WHAT CONDUCT CONSTITUTES A CRIME

Another consideration in determining the suitability of criminal prohibitions to the perceived problem is whether the criminal prohibition is sufficiently clear and certain that individuals know if they are engaging in criminal conduct.[40] The commercial aspects of preconception arrangements are prohibited, but the 2001 proposed legislation appears to allow physicians and lawyers to charge reasonable fees for their services when the arrangement between the commissioning couple and the surrogate mother does not result in commercial gain for the surrogate mother. The difficulty is, a physician or a lawyer would never *know* that the parties are in a paid arrangement unless that is disclosed. The intermediaries cannot be sure that in providing services to facilitate the parties in carrying out their agreement, they are or are not committing an offence. The proposed legislation does not clearly express whether professionals have an affirmative duty to ask their clients if they are involved in a commercial surrogacy agreement or whether breach of such a duty would constitute a crime.

On the other hand, Bill C-13 appears to prohibit physicians or lawyers from charging fees at all when providing services in connection with a preconception arrangement, whether the surrogate mother is paid or not. While this avoids the problem of uncertainty respecting criminal conduct, the prohibition on doctors and lawyers accepting consideration for their services creates other obstacles. These problems will merit further discussion below.

BILL C-13 DOES NOT HAVE A CLEAR CRIMINAL PURPOSE

In order for the law to be a valid use of the criminal law power, the law must be criminal in purpose and substance.[41] Bill C-13 does not prohibit surrogacy arrangements altogether. In fact, it allows for non-commercial agreements and for reimbursement of the surrogate mother's expenses. Because it does not enact a total ban, it is not clear whether the dominant purpose of the legislation is to define unlawful conduct or to define the conditions under which lawful conduct may be pursued.[42] In other words, it is difficult to tell whether the federal government is prohibiting or regulating conduct. The purpose of regulatory powers is to outline the terms and conditions under which an activity can lawfully take place, rather than to say that the activity should never happen.[43] If the purpose of Bill C-13 is regulatory with respect to surrogacy arrangements, then it falls under provincial jurisdiction and federal criminal law is not warranted. It would make more sense and be more consistent for the federal government to either ban all forms of surrogacy or allow the practice to occur under regulation. Regulating all types of surrogacy arrangements would be more effective, less confusing and less complicated than subjecting commercial and non-commercial arrangements to different forms of regulation.

Considering that the Royal Commission found surrogacy arrangements to be offensive, and made recommendations to deter both commercial and non-commercial arrangements, the rationale for prohibiting only commercial surrogacy and activities facilitating such arrangements for commercial gain is not clear. The issue of targeting only commercial arrangements will be discussed in more detail below.

THE CRIMINAL PROHIBITION TARGETS ONLY COMMERCIAL ACTIVITIES ASSOCIATED WITH SURROGATE MOTHERHOOD

The report of the Royal Commission on New Reproductive Technologies states that the commissioners strongly believed that preconception arrangements are unacceptable:[44]

> The extent to which Commissioners deplore the practice of preconception arrangements is evident in our determination to recommend strong measures to discourage these arrangements and to penalize those who would seek to benefit financially from them. Our goal is to halt commercial practices entirely and to discourage others from participating in these arrangements.

The Commission made recommendations not only to ban commercial surrogacy and activities undertaken for commercial gain, but also to deter the practice of non-commercial surrogacy between family members or close friends as well:[45]

> We do not believe such arrangements should be undertaken, sanctioned, or encouraged. The motivation might be sincere and generous, but the arrangement still results in the commodification of a child and the reproductive process. Even if no money is involved, no one should have the right to make a "gift" of another human being; this is offensive to the human dignity of the child.

On the basis of these views, one would expect the Commission to recommend legislation prohibiting the practice of preconception arrangements altogether. However, the Commission stopped short of banning non-commercial arrangements because it recognised that surrogacy arrangements between family and friends were probably going to occur,[46] and that it would be virtually impossible to enforce a law prohibiting private, non-commercial preconception arrangements.[47] As discussed earlier in this paper, it is also tremendously difficult to enforce a law prohibiting commercial preconception arrangements. Furthermore, the prohibition of commercial surrogacy means that infertile couples can no longer seek out strangers to serve as surrogate mothers and forces them to turn to family members or friends. Since private, non-commercial arrangements are even more difficult to regulate than commercial arrangements, the Commission and the drafters of Bill C-13 have painted themselves into a corner. The effect of the prohibitions provided in the proposed legislation is to drive the practice of surrogacy into the private, non-commercial realm: a realm over which the government has no control whatsoever. Moreover, as will be discussed below, it is a realm which affords no legal protection to surrogate mothers.

The two main difficulties with the prohibition of commercial preconception arrangements are: it supposes that there is a clear distinction between commercial and non-commercial arrangements; and it does not eliminate the perceived potential harms to individuals and society.

The distinction between commercial and non-commercial surrogacy is not obvious

The key features of a commercial surrogacy agreement are: the surrogate mother is given payment as consideration for her services; the commissioning couple advertises that it will give consideration in exchange for such services; and brokers are involved to bring infertile couples and surrogate mothers together and to facilitate preconception agreements. The brokers are paid for their services as well. The key features of a non-commercial surrogacy agreement are: brokers are not involved; the arrangement takes place between family members and friends, rather than strangers; and the surrogate mother does not receive consideration for her services, although she can be reimbursed for the expenses she incurs as a result of her pregnancy.

If advertising and the involvement of brokers are eliminated, the difference between paid and unpaid surrogacy arrangements is less obvious. Whether the surrogate mother is paid consideration for her involvement or not, the surrogate mother's expenses will be covered by the commissioning couple. Suppose that the total cost of a surrogate mother's expenses is $10,000. What is the difference between giving a woman $10,000 as consideration for her participation as a surrogate mother, out of which she can pay her expenses, and reimbursing an altruistic surrogate mother for her expenses? Would the first case be illegal because the payment to the surrogate mother is consideration, thereby violating s. 6(1) of Bill C-13? In both cases, the surrogate mother is not making a profit.

Bill C-13 appears to prohibit the surrogate mother from providing her services for profit. She must provide her services gratuitously. However, the commissioning couple could give the surrogate mother gifts. The question is whether those gifts constitute consideration, such that the giving of gifts between family members becomes an offence under Bill C-13. This question exposes the absurdity of the prohibition. In any event, such activities would be impossible to monitor, investigate or prosecute.

If the surrogate mother is normally employed and has to take time off from work as a result of the pregnancy, then she will lose income. Since the surrogate mother is not making a profit for her services, it seems fair for the commissioning couple to compensate her for lost income, in the same way that the surrogate mother is reimbursed for expenses that she incurs as a result of the pregnancy. Compensation for lost income can be characterised as reimbursement rather than consideration and would thus be legal under Bill C-13. On the other hand, if an unemployed woman enters an altruistic surrogacy arrangement, she does not lose income. There would be no lost income to reimburse. However, the surrogate mother loses income-earning opportunities as a result of entering into a surrogacy arrangement. Nevertheless, if the commissioning couple pays the

surrogate mother for giving up her time and energy for nine months to gestate and deliver a child, that payment may well be characterised as consideration, as opposed to reimbursement. The surrogate mother appears to be making a profit. The arrangement would constitute a commercial agreement and would be illegal under Bill C-13. There is no difference in substance between the two scenarios, since both women are providing a service and foregoing other opportunities, but the payment to the unemployed woman appears to be commercial, while the payment to the employed woman appears to be non-commercial.[48] This distinction between commercial and non-commercial agreements is artificial. It does not seem fair to prohibit payment to the unemployed woman but to allow payment to the employed woman.

Prohibiting commercial surrogacy does not eliminate perceived harms

Acting as an intermediary, and payment to intermediaries, are prohibited in ss. 6(2) and 6(3) of Bill C-13. A person cannot accept consideration for arranging or offering to arrange the services of a surrogate mother. A person cannot advertise the arranging of such services. A person cannot pay or offer to pay consideration to another person for arranging the services of a surrogate mother, or advertise that they will pay it. Subsections 6(2) and 6(3) prevent third-party intermediaries from brokering surrogacy arrangements between commissioning couples and potential surrogate mothers and from making a profit from the business of brokering. These prohibitions do reduce some of the harms associated with commercial surrogacy, in that they eliminate the potential exploitation by intermediaries of infertile couples and surrogate mothers. However, surrogate mothers remain vulnerable to exploitation in a number of a ways.

Bill C-13 does not provide for an exception to ss. 6(2) and 6(3). However, under the proposed legislation of 2001, s. 4(4) provides that ss. 6(2) and 6(3) do not apply in respect of the provision of legal services, medical services or psychological counselling services. This exception allows potential surrogate mothers to obtain legal advice, medical care and psychological counselling. The absence of this exception in Bill C-13 means that legal and medical practitioners cannot accept payment for services provided in connection with a surrogacy arrangement. The result is that women involved in paid or unpaid surrogacy arrangements will have tremendous difficulty obtaining the assistance of a lawyer, physician or counsellor with respect to the surrogacy arrangement. This increases, rather than prevents, a surrogate mother's vulnerability to exploitation.

Exploitation can occur in non-commercial agreements

Commentators have noted that the social and economic disparities between surrogate mothers and commissioning couples result in inequality of bargaining power and in the disproportionate assumption of risks and obligations by surrogate mothers in a preconception contract. It has been argued that because women willing to become surrogate mothers are usually those who are economically vulnerable, agreements where there is an opportunity for financial gain are exploitative of such women. However, prohibiting commercial agreements does not eliminate the potential for exploitation of surrogate mothers.

Gratuitous surrogacy arrangements within family situations or between close friends may be very coercive. Michael Trebilcock comments that "the potential for coercion, exploitation, and domination in allegedly voluntary surrogacy arrangements among relatives seems seriously underestimated by the proponents of [prohibition]".[49] As the Royal Commission stated in its report, there may be family pressure to participate in surrogacy. There is the potential that family relationships may be damaged before or after the child is born, as well as confusion on the part of the child, because of the continuing contact between the surrogate mother and the commissioning couple. Furthermore, the arrangement still results in a woman being placed at medical risk for the benefit of someone else.[50]

The Commission's report referred to anecdotal accounts as to how non-commercial surrogacy arrangements are practised. The accounts suggest that the typical case would involve a relative or close friend of an infertile woman being inseminated with the sperm of the infertile woman's partner, usually without medical involvement. "The gestational mother may have pregnancy care and deliver the child in hospital under the commissioning woman's name and health insurance number, register the birth using the commissioning woman's name...and relinquish the child to the commissioning couple upon leaving the hospital".[51] In this type of arrangement, it is apparent that the surrogate mother is being exploited. Her rights are unprotected and appear to be disregarded. She is not even recognised as the birth

mother of the child and is being used only for her womb. Thus, coercion within the family context may be even greater than coercion by a contract for money.

One further point about altruistic surrogacy is that the notion that such services are legal as long as the woman providing the service does so gratuitously "reinforces traditional views that devalued women's services... by suggesting that they were so fundamental to womanhood that they should be simply given for nothing".[52] Michael Trebilcock has also noted that the failure to compensate a gestational mother is objectionable and reinforces traditional gender stereotypes.[53] Thus, banning payment to surrogate mothers can also be regarded as harmful to women and their place in society.

WHY COMMERCIAL SURROGACY SHOULD NOT BE PROHIBITED

In summary, there are many problems with the criminal prohibition of commercial surrogacy arrangements in Bill C-13. First, it is constitutionally questionable and may be neither a valid use of the federal government's POGG, nor of the federal criminal law power. It would be extremely difficult to enforce the prohibitions, and Bill C-13 does not have a clear criminal purpose. Furthermore, prohibiting only the commercial aspects of surrogacy does not eliminate or protect against the perceived harms of the practice of surrogacy. On the contrary, a prohibition may exacerbate the dangers of exploitation of the most vulnerable parties. Since the regime of criminal prohibition in Bill C-13 is not constitutionally justifiable, is virtually impossible to implement and is ineffective in protecting individuals and society against harm, there is a strong argument in favour of using another form of regulation to govern surrogacy arrangements.

The approaches taken by the Royal Commission on New Reproductive Technologies and by the federal government in Bill C-13 reflect the concerns of opponents of commercial surrogacy, specifically that surrogacy arrangements are harmful to both the individual surrogate and to society. Adopting a form of regulation other than prohibition implies that the practice of commercial surrogate motherhood is acceptable and legitimises it. It is helpful at this juncture to discuss in more detail the responses by proponents of regulation to the concerns of those who favour prohibition.

RESPONSE TO ARGUMENT OF HARM TO SOCIETY

Critics of commercial surrogacy argue that it is harmful to society to sell babies, in other words to exchange a child for money. Lori Andrews counters by arguing it is not appropriate to characterise surrogacy as a sale of babies. The baby is not being transferred for money to a stranger who can then do anything he or she wants with the child.[54] According to Richard Epstein, the point of surrogacy is not to "commodify" children in the sense of treating them as fungible goods to be sold and consumed like other market products.[55] Rather, money is being paid to enable a man to procreate his biological child.[56] Andrews suggests that, at most, the commissioning parents are buying not a child, but the preconception termination of the birth mother's parental rights. Preconception sale of a father's parental rights has been allowed for many years through the practice of artificial insemination by donor.[57]

RESPONSE TO ARGUMENT OF HARM TO WOMEN

Critics oppose surrogacy because of the potential psychological and physical risks to individual surrogates. They are concerned that a surrogate mother will regret relinquishing the child, resulting in psychological harm. Furthermore, critics argue that it is impossible for a woman to grant the necessary informed consent in order tc become a surrogate mother for two reasons.[58] First, consent is never informed because it is impossible for the surrogate mother to predict in advance of pregnancy how she will feel about relinquishing the child after she gives birth. Second, consent to become a surrogate is never fully voluntary because surrogates only enter these agreements out of economic necessity, rather than true choice. In that sense, financial inducement vitiates the voluntariness of her consent.[59] A response to the first reason is that the surrogate has specifically decided to become pregnant with the intention of parting with the child. The child would not exist without the intention of the commissioning parents to have the child carried by a surrogate mother. Because the surrogate mother makes her decision in advance of pregnancy, that makes her consent more, rather than less, voluntary and informed.[60] In response to the second reason, Andrews observes that the vast majority of surrogates have not entered into surrogacy arrangements because they needed to obtain a basic necessity such as food

or health care.[61] Richard Epstein argues that the transfer of money does not negate the voluntary nature of the transaction; "money only converts the transaction from a voluntary donation of parental rights to a sale of parental rights".[62]

RESPONSE TO ARGUMENT THAT PAYMENT IS EXPLOITATIVE

Opponents of commercial surrogacy make the related argument that payment to surrogates leads to exploitation of women from lower economic levels who are coerced by the opportunity to earn a profit. Bill C-13 prohibits payment to a woman in consideration for becoming a surrogate and suggests that the surrogate should provide her services for free. In contrast, proponents of commercial surrogacy argue that the gestational mother has the right to be paid for her services. Pregnancy and childbirth involve a significant danger to life and health. Surrogacy is also time intensive, requires psychological and emotional investment and can be a substantial infringement on the surrogate's personal freedom.[63] To deny a surrogate payment for her labour disregards the valuable service that she has performed as well as the risks she has faced during pregnancy and childbirth.[64] A prohibition on payment means that relatively few women will engage in surrogate arrangements without receiving reasonable compensation for their services. Thus, a prohibition on payment has a chilling effect on the practice of surrogate motherhood.[65] In contrast, allowing payment of fees to surrogates would increase the number of women willing to participate in these arrangements and would allow for selection of the most qualified surrogates.[66]

The concerns about exploitation of surrogate mothers are also countered by the way surrogacy arrangements are carried out. According to Epstein, all the parties in a surrogacy arrangement have a deep concern about the health and well being of the baby who will be born as a result. That concern motivates the commissioning couple to undergo a careful selection process to find a surrogate who will be able to deliver a healthy baby at term. Potential surrogates will also wish to select suitable parents for the baby. It is not in the commissioning parents' interest to find a woman of whom they can exploit or take advantage, because they have a vested interest in the health and welfare of the child to be born.[67]

REGULATION OF SURROGACY ARRANGEMENTS: THE ONTARIO LAW REFORM COMMISSION'S APPROACH

In 1985, the Ontario Law Reform Commission (OLRC) examined legal issues pertaining to surrogate motherhood and other forms of assisted human reproduction. The OLRC's discussion of the issues and recommendations for a legal framework to deal with those issues were presented in its Report on Human Artificial Reproduction and Related Matters. The OLRC rejected prohibition of surrogate motherhood on the belief that it would drive surrogacy underground, which would exacerbate the dangers of exploitation.[68] Among other benefits, regulation would make it possible to determine what is a reasonable amount of compensation for surrogate mothers, in order to deal with concerns about exploitation and coercion.[69] Regulation can also better protect the interests of the parties involved, particularly those of the child.[70]

In choosing a regulatory scheme, the OLRC identified two basic approaches that might be adopted. Under the first approach, the court would become involved in adjudicating a surrogacy arrangement after the child has been born or after the parties have already entered the agreement. A second approach would involve prior judicial screening of the arrangement.[71] The OLRC rejected the first approach for reasons that will be discussed more fully in the following section on surrender of the child. In brief, the OLRC's reasoning was that judicial involvement after the child is born may be too late to protect the parties and that harms to the surrogate mother, commissioning parents or child may have already occurred.

THE REGULATORY SCHEME ENVISIONED BY THE OLRC

The OLRC's view was that regulation should involve judicial screening of the surrogacy agreement before any aspect of the agreement is implemented. Most importantly, judicial involvement should take place before artificial conception technology is employed to achieve a pregnancy.[72] The OLRC recommended the enactment of a statute that prescribes mandatory minimum standards that surrogacy agreements must meet. In reviewing a prospective surrogacy arrangement, a court should determine whether it complies with the statutory standards.[73]

The basic regulatory scheme envisaged by the OLRC would operate as follows. A prospective sur-

rogate mother and the couple intending to raise the child must reach a written agreement that conforms to the minimum requirements specified by statute. The parties must submit the agreement to the court and obtain its approval before the necessary artificial conception can be legally undertaken. As part of the approval hearing, the court will assess the suitability of the parties to participate in the arrangement. If the parties are determined to be suitable and the written agreement meets statutory requirements, the court will approve the arrangement. Once the child is born, the surrogate mother will be required to surrender custody of the child to the intended parents, and the legal status of the child will be confirmed by legislation.[74] However, if the agreement and the intended parents have not been pre-approved by the court, the agreement will not be enforced.

In designing an appropriate regulatory scheme, the OLRC considered four of the most contentious issues pertaining to surrogacy arrangements: the surrender of the child, the question of payment to the surrogate mother, the possibility of a handicapped child and the possibility of an abortion by the surrogate mother. This paper will focus on the operation of the OLRC's approach with respect to the first two issues, in the context of traditional genetic-gestational surrogacy arrangements.

SURRENDER OF THE CHILD

The transfer of custody and parental rights is the essential element of surrogacy arrangements, and is a source of great controversy. At issue is the legal effect of an agreement to transfer custody of a child and whether the transfer of custody by the surrogate mother should be enforced by law.

The Royal Commission on New Reproductive Technologies recommended that "Provinces/territories amend their family law legislation to specify that all preconception agreements, whether or not they involve payment, are unenforceable against the gestational woman".[75] Rendering a surrogacy contract unenforceable means that if a surrogate mother decides to keep the child in breach of her promise to transfer custody under the surrogacy agreement, the court cannot order her to surrender the child.

THE COMMON LAW POSITION

Even in the absence of legislation, the OLRC observed that at common law, courts have historically refused to enforce agreements to transfer custody or parental rights and duties. Many courts refused to enforce such agreements, declaring them void on grounds of public policy.[76] The common law position is that parental rights and responsibilities are inalienable and incapable of transfer as a matter of contract.[77]

However, the unenforceability of the agreement as a matter of contract law does not mean that it is impossible to transfer custody of a child that is born as a result of a surrogacy agreement. With the Cupertino and agreement of the surrogate mother, the commissioning parents can take steps to gain custody of the child. The first step in the procedure would be for the commissioning father, who is the biological father as well, to obtain an order of paternity and a custody order under the *Children's Law Reform Act*.[78] The next stage would be for the biological father's spouse to begin step-parent adoption proceedings.[79]

The Cupertino of the surrogate mother in the form of consents to a paternity order, a custody order and to step-parent adoption are crucial if the process is to be successful. A surrogate mother's unwillingness to co-operate in the transfer of the child at any stage during the procedure could lead to a custody dispute between the parties. The results of custody disputes are not easily predictable, and disputes may be disruptive to whichever family obtains custody.[80] The uncertainty in the legal status of the child and disruption to its environment may have a detrimental effect on the well-being of the child born of a surrogacy arrangement. According to the OLRC, the existing law, which provides for judicial involvement only after the child is born, does not provide adequate protection to the parties.

THE ADOPTION MODEL

Various commentators have suggested that the adoption model should be applied to surrogacy and that the surrogate should be allowed to change her mind and to assert a parental claim over the child. Most adoption statutes in the United States prohibit irrevocable pre-birth consent to adoption by the biological mother.[81] In Ontario, under the *Child and Family Services Act*,[82] consent to adoption cannot be given until after the child is seven days old. Any person who has given consent has a right to withdraw it within 21 days after it has been given.[83] Acceptance of the adoption model seems to resonate with the view that the pre-birth decision to terminate

parental rights and to surrender custody of the child cannot be the product of valid consent.

In response to proponents of the adoption model, Andrews observes that there are many differences between surrogacy and adoption, such that adoption would be an inappropriate model for determining parental rights. First, with surrogacy, the child comes into being through the intention of the commissioning parents. The surrogate mother would not be going through pregnancy and childbirth were it not for the intention of the commissioning couple to parent the child. In contrast, the biological mother in the traditional adoption situation is already pregnant as part of a personal relationship of her own. In many instances, she would like to keep the child but cannot because the relationship is not supportive or she cannot afford to raise the child.[84] Second, the consequences of allowing the surrogate mother to change her mind with respect to relinquishing custody of the child are much different than those of allowing a biological mother to change her mind in an adoption situation. In adoption, if the biological mother decides to keep the baby, the child goes home with her, and the strangers who planned to adopt the child have no claim for custody. On the other hand, if a surrogate changes her mind, the child could be subject to years of litigation to determine who his or her parents are, since both the surrogate and the contracting couple have a biological tie to the child.[85]

THE CASE FOR NON-ENFORCEMENT

The motivation behind rendering preconception contracts unenforceable against the surrogate mother is presumably to protect her rights under s. 7 of the *Canadian Charter of Rights and Freedoms*. It can be argued that to compel a surrogate mother to transfer custody of the child against her will is a violation of her liberty rights.[86] The Supreme Court of Canada's decision in *Morgentaler*[87] recognised the principle of women's reproductive autonomy in the context of abortion. The principle of reproductive autonomy gives a woman the right to make decisions regarding her body and her reproductive capacity free from state intervention. According to Justice Wilson, the choice to procreate, which includes the choice to terminate pregnancy, is one of the most basic, personal and important decisions that a person can make.[88] State interference in that decision violates a woman's bodily integrity and subjects her to psychological stress.[89] It can be argued that a woman's right to make reproductive choices free from state interference applies to the surrogacy context as well, meaning that a woman has a right to become a surrogate mother and that her decision should be respected.[90] Furthermore, it can be argued that if a surrogate mother were judicially compelled to surrender the child upon birth, that would be an interference in her bodily and psychological integrity, thus violating her right to liberty and security of the person.[91]

If the surrogate mother's rights were the only ones at stake in a surrogacy arrangement, it would not be difficult to conclude that she has the right to change her mind and decide to keep the child. However, the commissioning father also has rights to claim custody of the child because of his biological connection and because the surrogate mother made a promise under the agreement. The court deciding the issue of custody would be faced with choosing between competing rights of two biological claimants. Andrews argues that there is very little to be gained by the surrogate if surrogacy agreements are unenforceable. It might strengthen the position of a woman who becomes a surrogate mother, but it would be hard for the surrogate to claim "that the child is better off with the surrogate and a man who never intended to raise the child than with the couple who wanted a child and intended to rear him or her".[92]

THE CASE FOR SPECIFIC PERFORMANCE

The OLRC commented in its report that there are only two resolutions to the question of surrender. Either the regulatory scheme should provide that the surrogate mother must honour her promise and surrender the child after birth, or the surrogate mother should be given the right to change her mind, free of the consequences of defaulting on the agreement. The crucial question, according to the OLRC, is which resolution will serve the best interests of the child.[93] If surrogacy contracts are unenforceable against the surrogate mother, it makes the legal status of the child uncertain and subjects the child to years of litigation to determine who will be considered to be his or her legal parents.[94] The OLRC was persuaded that this protracted litigation and uncertainty would be detrimental to the welfare of the child and, thus, recommended that legislation should provide for immediate surrender of the child.[95] The surrogate mother would be under a legal compulsion to surrender the child in accordance with her promise to do so under the surrogacy agreement. This is equivalent to the remedy of specific performance for breach of contract.

In an ordinary breach of contract situation, the usual remedy is an action for damages. If a surrogacy contract is analogised to an ordinary contract, then in the event the surrogate mother defaults on the contract and decides to keep the child, the intended parents should not be able to demand performance (*i.e.*, surrender of the child). Rather, they would sue for monetary compensation. However, the amount of damages would be hard to determine, and the surrogate mother may not have the resources to pay any compensation. Monetary damages do not provide adequate compensation for what the intended parents wished to obtain from the agreement.[96] The general rule in contract law is that the specific performance remedy is available only where monetary compensation is inadequate.[97] Compensation would be inadequate if the contract concerns something that is unique and non-fungible. The one exception is contracts for personal services, which are not specifically enforceable because courts cannot supervise the quality of the service that is to be provided[98] and because enforcing personal services is akin to slavery.

Enforcing surrogacy contracts reinforces the idea that children are not fungible commodities, but unique individuals.[99] Enforcement also does not violate the legal doctrine prohibiting specific performance of personal services contracts because no further physical action on the part of the woman is necessary once the child is born. This means that giving parental rights to the contracting couple is not specific performance of personal services.[100] The OLRC observes that the promise to transfer the child involves a discrete act that would not require judicial supervision, which supports the argument that specific performance would be appropriate.[101] In addition, Epstein argues that denying the specific performance remedy can leave the biological father with parental obligations that require greater supervision than the transfer of the child at birth.

There are a number of advantages to having a legal regime where surrogacy contracts will be firmly enforced. It sends a message to potential surrogate mothers that they will not have the option to wait and see as to whether they will relinquish custody of the child. Women who have doubts about their willingness or commitment to part with the child will be less inclined to participate in surrogacy transactions. Firm enforcement functions as a safeguard against psychological regret on the part of prospective surrogate mothers. It also functions as a device for selecting those women who would be the most appropriate surrogate mothers.[102] An enforceable contract asserts that the surrogate mother's decision is final before conception. To reiterate the greatest benefit, specific performance of the contract concludes the relationship between the surrogate mother and the intended parents, thus avoiding an extended dispute over custody and support, which may be detrimental to the interests and welfare of the child.

PAYMENT TO THE SURROGATE MOTHER

In formulating a regulatory approach to surrogacy arrangements, the OLRC considered the issue of payment to the surrogate mother. Payment is controversial because it raises concerns about the possibility of exploitation of disadvantaged women by the more affluent. The OLRC identified four categories of payments in its report.[103] The first is payment of a fee in the way of profit to the surrogate mother for her participation in the arrangement. The second takes the form of reimbursement for expenses incurred by the surrogate mother during the course of pregnancy and childbirth. The third is payment for lost income or lost earning opportunities during the period of pregnancy and recovery. The fourth can be characterised as compensation for pain and suffering, which might include postpartum grief or even loss of consortium.

The members of the OLRC did not reach a consensus as to which types of payment should be permitted by legislation. However, all members did agree that no payment should be made in relation to a surrogacy arrangement without the approval of the court. The implication is that some form of payment should be allowed.[104]

Bill C-13 prohibits payment of the first type and appears to permit only payment of the second category. Where a surrogate mother is reimbursed only for her expenses, she is essentially providing her services for free. Bill C-13 does not recognise the argument that a surrogate mother has the right to be paid for her services.

On the other hand, the first category of payment identified by the OLRC does allow a surrogate mother the opportunity to make a profit for her participation in the arrangement. The OLRC comments that whether this fee is characterised as payment for a child, or merely as payment for services, it raises the concern of exploitation.[105] One concern is that the commissioning couple could easily state that the payment is for the services of the surrogate, while in

reality the payment is being offered for the delivery of clear title to the child.[106]

However, the OLRC's recommended scheme of regulation has the ability to address this concern. Provided that payment for the services of a surrogate mother is permissible, judicial scrutiny of the payment terms in the arrangement may help to ensure that the payment is for services rather than for the purchase of the child. If the payments were structured as periodic payments rather than a lump sum contingent on the delivery of the baby to the intended parents, that may indicate to the court that the contract is more likely for the provision of services. If the arrangement is such that the surrogate mother would not receive any payment at all if she miscarries, then that appears to be a contract for the purchase of a baby and is exploitative of the surrogate mother. Judicial pre-approval of the payment terms of a contract can help to deal with concerns about exploitation and coercion before a pregnancy is initiated. Furthermore, a court may also be able to determine what is a reasonable amount of compensation to the surrogate mother.

CONCLUSION

Surrogate motherhood is a controversial and divisive subject. The range of opinions on the subject cannot be readily reconciled because often the opinions are based on opposing values and convictions. The Royal Commission on New Reproductive Technologies and the federal government in Bill C-13 take the view that commercial surrogacy should be prohibited, while the Ontario Law Reform Commission takes the position that the practice should be permitted under regulation. The OLRC stated in its report that: "In the final analysis, the question becomes one of fundamental values, which cannot be resolved conclusively to the satisfaction of everyone; the differences merely can be acknowledged".[107] However, whether or not one believes surrogacy is morally acceptable, regulation is necessary.

Based on the examination of the scheme of criminal prohibition created by Bill C-13, and an examination of the scheme of regulation envisaged by the OLRC, there is a strong basis for arguing that regulation is superior to prohibition in dealing with the practice of commercial and non-commercial surrogacy arrangements. Put simply, the prohibition contained in Bill C-13 is not an effective method of governing preconception agreements. Prohibition merely drives the practice of surrogacy underground, rather than attempt to deal with the perceived harms of the practice in the open. Moreover, where surrogacy is driven underground, surrogate mothers are deprived of basic legal protections.[108] These conclusions are evident from even a glance at Bill C-13. Beyond prohibiting commercial surrogacy, the Bill does not establish a comprehensive scheme for regulating non-commercial surrogacy, aside from requiring a licence for reimbursement. The Bill contains no provision for unpaid surrogate mothers to obtain legal, medical or psychological advice without breaking the law. Therefore, this prohibition of commercial surrogacy is incapable of eliminating or reducing the harms and dangers of the practice, which continue to exist. To the contrary, the prohibition may contribute to such harms.

In contrast, "regulation can help minimise the potentially exploitative aspects of surrogacy and protect the individuals who choose it as a reproductive option".[109] The OLRC's approach of prior judicial screening of the preconception agreement and of the suitability of the parties in entering the agreement minimises the risks of conflict and exploitation of the parties. Judicial intervention can assist the parties in determining what is a reasonable amount of payment to the surrogate mother. The position that specific performance of the transfer of custody will be enforced, coupled with the requirement that judicial approval must take place before a pregnancy can be initiated, benefit the prospective surrogate mother, intended parents and child to be born. This approach prevents women who may regret relinquishing the child from entering into surrogacy agreements, provides commissioning parents with a greater certainty that they will be able to obtain custody of the child and avoids protracted litigation over custody and support of the child, thus protecting the best interests of the child.

[*Editor's note*: Melody Chen is an articling student at Cassels Brock & Blackwell LLP in Toronto, and graduated from the Faculty of Law, University of Toronto in 2002.]

---

* The author would like to thank Bernard Dickens of the Faculty of Law, University of Toronto for his assistance and comments on earlier drafts of this paper.

1 Royal Commission on New Reproductive Technologies, *Proceed with Care* (Ottawa: 1993) at 683 [hereinafter "Royal Commission"].

2 *Ibid.*, at 666-67.

3 S.B. Rae, The Ethics of Commercial Surrogate Motherhood (Westport: Praeger, 1994) at 3.

4 Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (Toronto: 1985) at 91 [hereinafter "OLRC"].
5 Royal Commission, *supra*, note 1, at 662.
6 S.L. Tiller, "Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements" (1987) 72 Iowa Law Rev. 415 at 417.
7 Royal Commission, *supra*, note 1, at 662-63.
8 A. Brandel, "Legislating Surrogacy: A Partial Answer to Feminist Criticism" (1995) 54 Maryland Law Rev. 488 at 491-92.
9 J.R. Guichon, "Surrogate Motherhood: Legal and Ethical Analysis" in Royal Commission on New Reproductive Technologies, *Legal and Ethical Issues in New Reproductive Technologies: Pregnancy and Parenthood* (Ottawa: 1993) 457 at 464.
10 *Ibid.*, at 464.
11 *Ibid.*, at 539.
12 Royal Commission, *supra*, note 1, at 683.
13 *Ibid.*, at 684.
14 *Ibid.*, at 670.
15 *Ibid.*, at 689.
16 *Ibid.*
17 *Ibid.*, at 690.
18 *Ibid.*
19 *Ibid.*, at 691.
20 The draft legislation is entitled "Proposals for Legislation Governing Assisted Human Reproduction" and was produced in May 2001 by Health Canada.
21 S.L. Martin, "An Overview of the Legal System in Canada" in Royal Commission on New Reproductive Technologies, *Overview of Legal Issues in New Reproductive Technologies* (Ottawa: 1993) 85 at 116.
22 Royal Commission, *supra*, note 1, at 18.
23 *Ibid.*, at 18-19.
24 *Ibid.*, at 19.
25 P. Healy, " Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada" (1995) 40 McGill L.J. 905 at 917.
26 *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.
27 P. Healy, *supra*, note 25, at 918.
28 *Reference re Validity of Section 5(1) of the Dairy Industry Act (Margarine Reference)*, [1949] S.C.R. 1 [hereinafter *Margarine Reference*].
29 P. Healy, *supra*, note 25, at 922.
30 *Ibid.*, at 923.
31 S.L. Martin, *supra*, note 21, at 116; OLRC, *supra*, note 4, at 33-34.
32 S.L. Martin, *supra*, note 21, at 117.
33 Royal Commission, *supra*, note 1, at 681.
34 *Ibid.*, at 681-82.
35 P. Healy, *supra*, note 25, at 924.
36 *Ibid.*, at 923.
37 S.L. Martin, *supra*, note 21, at 117.
38 P. Healy, *supra*, note 25, at 933.
39 Royal Commission, *supra*, note 1, at 682.
40 S.L. Martin, *supra*, note 21, at 140.
41 *Margarine Reference*, *supra*, note 28.
42 P. Healy, *supra*, note 25, at 928.
43 S.L. Martin, *supra*, note 21, at 121.
44 Royal Commission, *supra*, note 1, at 692.
45 *Ibid.*, at 689.
46 *Ibid.*, at 689.
47 *Ibid.*, at 682.
48 B. Dickens, "Do Not Criminalize New Reproductive Technologies" (1996) 17 Policy Options 11 at 14.
49 M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) at 51.
50 Royal Commission, *supra*, note 1, at 689.
51 *Ibid.*, at 665.
52 A.H. Young, and A. Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies" (1998) 6 Health Law Journal 239 at 269 [hereinafter "Young"].
53 M. Trebilcock, *supra*, note 49, at 50.
54 L.B. Andrews, "Surrogate Motherhood: The Challenge for Feminists" in L. Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990) 167 at 169.
55 R.A. Epstein, "Surrogacy: The Case for Full Contractual Enforcement" (1995) 81 Virginia L.R. 2305 at 2327.
56 L.B. Andrews, *supra*, note 54, at 169.
57 *Ibid.*, at 170.
58 A. Brandel, *supra*, note 8, at 495.
59 *Ibid.*; L.B. Andrews, *supra*, note 54, at 174.
60 L.B. Andrews, *supra*, note 54, at 171; A. Brandel, *supra*, note 8, at 502.
61 L.B. Andrews, *supra*, note 54, at 174.
62 R.A. Epstein, *supra*, note 55, at 2333.
63 S.L. Tiller, *supra*, note 6, at 433; A. Brandel, *supra*, note 8, at 502.
64 A. Brandel, *supra*, note 8, at 521.
65 L. Gostin, "A Civil Liberties Analysis of Surrogacy Arrangements" in L. Gostin, ed., *Surrogate Motherhood: Politics and Privacy* (Bloomington: Indiana University Press, 1990) 3 at 9; S.L. Tiller, *supra*, note 6, at 433.
66 S.L. Tiller, *supra*, note 6, at 439.
67 R.A. Epstein, *supra*, note 55, at 2371.
68 OLRC, *supra*, note 4, at 232.
69 S.L. Tiller, *supra*, note 6, at 439.
70 OLRC, *supra*, note 4, at 232.
71 *Ibid.*, at 233.
72 *Ibid.*
73 *Ibid.*
74 *Ibid.*, at 235.
75 Recommendation 200, in Royal Commission, *supra*, note 1, at 690.
76 OLRC, *supra*, note 4, at 92.
77 *Ibid.*, at 99.
78 *Children's Law Reform Act*, R.S.O. 1990, c. C-12.
79 OLRC, *supra*, note 4, at 100.

80 *Ibid.*, at 101.
81 B. Stark, "Constitutional Analysis of the *Baby M* Decision" (1988) 11 Harvard Women's L. J. 19 at 48.
82 *Child and Family Services Act*, R.S.O. 1990, c. C-11.
83 OLRC, *supra*, note 4, at 251.
84 L.B. Andrews, *supra*, note 54, at 171.
85 L.B. Andrews, "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood" (1995) 81 Virginia L.R. 2343 at 2368.
86 B. Stark, *supra*, note 81, at 48.
87 *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
88 M. Jackman, "The Constitution and the Regulation of New Reproductive Technologies" in Royal Commission on New Reproductive Technologies, *Overview of Legal Issues in New Reproductive Technologies* (Ottawa: 1993) 1 at 20-22; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 171.
89 M. Jackman, *supra*, note 88, at 20.
90 Young, *supra*, note 51, at 638.
91 M. Jackman, *supra*, note 88, at 33.
92 L.B. Andrews, *supra*, note 85, at 2369.
93 OLRC, *supra*, note 4, at 251.
94 L.B. Andrews, *supra*, note 85, at 2358.
95 OLRC, *supra*, note 4, at 252.
96 R.A. Epstein, *supra*, note 55, at 2336-37.
97 OLRC, *supra*, note 4, at 250.
98 *Ibid.*
99 L.B. Andrews, *supra*, note 85, at 2368.
100 *Ibid.*, at 2370.
101 OLRC, *supra*, note 4, at 250.
102 R.A. Epstein, *supra*, note 55, at 2339.
103 OLRC, *supra*, note 4, at 254.
104 *Ibid.*
105 *Ibid.*
106 L. Gostin, *supra*, note 65, at 12.
107 OLRC, *supra*, note 4, at 233.
108 M. Trebilcock, *supra*, note 49, at 53.
109 A. Brandel, *supra*, note 8, at 489.

• EDITORIAL — GOVERNMENTS AND HEALTH: A TIME FOR LEADERSHIP •

Gilbert S. Sharpe
Goodman and Carr LLP, Toronto

Ontario's health budget now exceeds $25 billion. Hospital deficits continue to mount and hopes for a truly integrated health care system appear to dwindle. The challenge lies not in crafting better laws to regulate the silos but rather to re-examine the conceptual frame of reference driving government policy.

Although both levels of government will continue in progressive states to acknowledge and uphold citizens' rights to have health protected, it is increasingly a reality that the delimitation of the standards and conditions for such rights will be subject to a wide variety of constraints, some of which will be regarded as contentious and volatile of individual claims and entitlements. Whereas some commentators are prepared to couch arguments about the right to health as natural and absolute for all citizens, governments are not able to afford these rights in all circumstances.

The task of government is to guarantee as far as possible, access to health as fundamental to living in a democratic, socially responsive environment, while observing, based on principles of a fair-minded pragmatism, that it will be in the realistic setting of limitations that the threshold of health can best be protected for all citizens.

In practical terms, this means that certain curtailments unfamiliar to the normal practices of professionals will become the vehicle through which government can prove its social responsiveness. In return for such guarantees as subsidized education and no bad debts, professionals may, in discrete circumstances, be called upon to service populations whose needs are in jeopardy and whose level of reliance may be great.

Equally, institutions cannot effectively survive if their services are redundant and costly for limited populations. This is the case where these groups are in an unfair advantage because of urban locations of historical accident, or represent special interests within medicine; for example, where a particular disease has or was given priority because of a specific history such as a connection to an institution or projects of research. Government must take on the responsibility of setting the structures for allowing the diverse demands being made upon the public purse through being engaged as a broker of both interests and costs.

In the economic sector, government must quickly learn to experiment with contending models for the delivery of high quality services to the largest possible population at the least cost that can be made available in the marketplace. Whether a version of the HMO American model, or the tendering system of health costing and novel instruments of physician payment emergent in the U.K., various models of regional delivery systems from other provinces, or creative contractual agreements amongst providers,