

AHR needs to be on the government's policy agenda

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Thirty years ago, Baby M captured public attention. A newborn was taken from her mother and given to an American couple that had contracted with the woman to carry the child. Concern for surrogate mothers deeply influenced North American approaches to assisted human reproduction, including development of the Canadian Assisted Human Reproduction Act.

The regulatory regime associated with the AHRA was declared *ultra vires* by the Supreme Court of Canada in 2011. Yet, as the former federal government refused open discussion on AHR, current federal laws are based on conflicting policy objectives, fraught with uncertainty and are unenforced. AHR needs to be on the new Trudeau government's policy agenda.

Criminalizing commercial surrogacy and gamete donation within Canada through the act is unfair to the many Canadians who want to participate in AHR. Ten per cent of heterosexual couples and all queer couples and single people need some third-party assistance to conceive children.

Solid figures on the number of children born to surrogate mothers have not been compiled, but the available data suggests such arrangements are pervasive.

Case law on parentage issues exists in almost every province and one Toronto lawyer has drafted more than 2,000 surrogacy agreements. The Canadian Fertility and Andrology Society reports almost 500 attempts to impregnate surrogate mothers through in vitro fertilization in 2014.

While an access to information request for “the number of applications made for Canadian citizenship on behalf of children born internationally via surrogacy since 2004” was met with the response that “the information does not exist,” the Canadian government hosts web sites providing information on how to participate in surrogacy in various other countries.

The current law is based on the premise that women are exploited and children are commodified through these practices. But Canadian law also facilitates commercial AHR practices when they occur offshore.

For example, citizenship policy directives expedite passport issuance to children who are born to surrogate mothers in another country and intended for Canadian parents. Federal income tax case law allows certain deductions for expenses related to obtaining gametes outside Canada.

Both of these laws encourage Canadians to engage in practices abroad that are criminal at home.

Research from Britain, the United States, and Canada overwhelmingly supports the conclusion that women in these countries are not exploited through surrogacy. I am unaware of any reported judicial decisions or media-reported cases in Canada in which a surrogate mother has refused to relinquish a child, yet the spectre of Baby M still haunts political imagination.

Almost without exception, surrogacy litigation relates to issues such as citizenship, tax deductibility, or the process courts should use for the consensual transfer of parentage from the birth mother to the intended parents.

But research conducted in popular surrogacy destinations, such as India, Thailand, and Mexico, indicates that surrogacy is a negative experience for many women in these countries. One serious complaint is the poor quality of health-care services provided to women after delivery. Canadian law protects women who do not need protection while ignoring how Canadian law contributes to the exploitation of women outside the country.

The act also makes AHR much more uncertain for surrogate mothers and would-be parents. Various sources report a strong grey market for commercial surrogacy in Canada, with surrogates receiving \$2,000 to \$3,000 per month for expenses.

These payments are of questionable legality. The act provides that expenses can be paid in accordance with the regulations, but no regulations have been passed — which suggests that no payments can be made.

Yet while surrogates, intended parents, and their health-care providers operate under a cloud of illegality, only one person has ever been charged with an offence under the act. As with other laws purporting to protect women, such as obscenity and prostitution laws, law enforcement officials do not prioritize these offences.

Those who want to avoid this cloud or who have trouble finding a surrogate in Canada may seek a surrogate offshore. This process can be very expensive once travel, living, and medical expenses are factored in. After the child is born in the surrogate mother’s home country, weeks can pass while parentage and citizenship applications are processed.

In one case, an Indian surrogate gave birth to twins intended for a Toronto couple, but DNA tests submitted with the citizenship application established that one twin was genetically

unrelated to either of the intended parents. The couple lived with the twins in India for almost six years before the non-genetic child was finally allowed to come to Canada with his intended parents.

Expenses can be catastrophic if the newborn has health issues because Canadian health-care benefits do not apply offshore.

In yet another curious twist, some children are born to Canadian surrogates for intended parents in other countries, in spite of Canada's criminal prohibitions. There are significant advantages to a Canadian birth.

Pre- and post-natal health care is free and of the highest quality, while health insurance for a surrogate birth in the United States can exceed \$60,000, especially for multiple births. Canadian surrogates tend to be healthy and well-informed and Canadian-born children are automatically entitled to Canadian citizenship.

Canadian law also prohibits discrimination against single people or same-sex couples, whereas countries such as India only permit married heterosexual couples to participate in surrogacy.

Most provinces, with the notable exception of Québec, have established judicial or legislative regimes that facilitate the quick transfer of parentage from the surrogate mother to the intended parents. In British Columbia, parentage can be transferred immediately on birth in most cases, without the need for a court appearance.

Canadian law over-protects Canadian surrogates while under-protecting those who live abroad. It drives some Canadians to find surrogates abroad, while encouraging non-Canadians to engage surrogates in Canada. Uncomfortable as it will be to open up these intimate issues for public debate, the federal government should be encouraged to face the 21st-century facts of life and find a better balance.