

Canada's vague surrogacy laws may be doing more harm than good

Parenthood through surrogacy is legally fraught in Canada with strict controls on payment, including severe penalties. But the vagaries of the law leave agencies and surrogates operating in a grey area.



Leia Swanberg is the only woman to ever be charged under the federal law governing surrogacy. She's photographed with her six-month old daughter Victoria at home in Qualicum Beach. (CHAD HIPOLITO / TORONTO STAR) |

By [Robert Cribb](#) Foreign
Emma Jarratt Special to the Star
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It was an uneventful start to Leia Swanberg's day on Feb. 22, 2012.

After arriving at the Brighton, Ont., offices of her Canadian Fertility Consulting firm, she began tackling the day's slew of emails and calls from surrogates, intended parents and egg donors.

Until, that is, eight RCMP officers arrived.

For the first and only time in Canada, police with a warrant in hand seized computers, files and expense receipts while investigating an alleged breach of Canada's Assisted Human Reproduction Act (AHRA).

Altruistic surrogacy is a fiercely protected ideology in Canada, with criminal penalties for paid surrogacy on par with those for trafficking and importing drugs, having sex with a minor, or illegally possessing weapons. Paying directly and arranging for the services of a surrogate in Canada for a fee is punishable under the AHRA by a fine of up to \$500,000 or 10 years in prison.

That day, Swanberg — a two-time surrogate and multiple egg donor herself — began a three-year legal battle. She is the only person ever to be charged under the act.

In the end, the original 27 criminal charges, including allegations of paying surrogates and egg donors, were reduced. She pleaded guilty to two regulatory offences. She and her agency paid a \$60,000 fine and avoided a criminal record.

The offences “essentially boiled down to reimbursing surrogates and donors without the appropriate receipts and paperwork that Health Canada suggests everyone have,” she says.

“I didn't think the police were going to raid my office, and I didn't think charges were going to be laid. It took me by surprise.”

Four years later, the practice of surrogacy is exploding in Canada. With programs in traditional surrogacy powerhouses such as India, Mexico and Thailand closing down, Canada has become a magnet for international baby seekers.

And questions are emerging about women here secretly turning surrogacy into an employment opportunity. The biological misfortune faced by prospective parents represents a potential economic boon for fertile women and an increasingly pressing matter of public policy.

While surrogates who agree to carry the children of strangers operate under a legal framework of nonpayment, some say there is a vast grey area that allows plenty of money to change hands, with little enforcement from the government.

“Some do (receive money), as (intended parents) are paying some under the table,” says Sally Rhoads-Heinrich, a former surrogate who now runs one of Canada's largest surrogacy agencies, Surrogacy Canada Online. “It's really bad now because the demand has outstripped the supply.”

After closing her service to new applications for several months, Rhoads-Heinrich is about to reopen and already has 40 to 50 new profiles of prospective parents ready to go live. Those couples will be competing for about seven “available” surrogates.

The competition is breathtaking. Some intended parents may feel that demonstrating generosity beyond what's strictly covered by surrogacy laws could give them an edge.

Remuneration often takes the form of difficult-to-trace gifts and surreptitious payments, she says.

“I’ve had surrogates say they received cash to take their family to Disneyland and things like this, but I don’t think it happens often,” she says. “I hear odds and ends, like a surrogate said a couple offered to cover her rent. Or they get gift cards, cash, jewelry. (Intended parents) don’t tell me anything, because the penalty is severe.”

A surrogate’s motive for accepting gifts can stem from the struggles she experiences during the often difficult process of delivering a child for someone else.

“Most are angry after they have completed this,” Rhoads-Heinrich says. “Left with little money, no job, broken relationships, physical complications — and (they) feel used.”

Industry experts say they have never heard of intended parents or surrogates being audited.

And the only charges to date have been those laid against Swanberg.

That case was closely watched by lawyers and industry insiders, who thought the outcome could set a legal precedent and bring clarity to legislation that has been criticized for its imprecision.

But, with the guilty plea, the opposite happened.

“I really hoped things would change with my case,” says Swanberg. “I believed it was going to open things up so there could be clarity on the law, and it did nothing.”

After the case was over, Swanberg and her family decided to start fresh and moved to Qualicum Beach, B.C., on Vancouver Island, where they recently welcomed a new member — her daughter, Victoria, now 6 months old.



Sara Cohen is a fertility lawyer in Toronto. (Rene Johnston)

Questioning the Law

The law forbidding paid surrogacy was designed to be a forceful expression of how seriously Canada seeks to protect women and children from exploitation.

But many of those women — and the agencies that represent them — are questioning whether the law achieves that. They say that rather than protecting Canadian women, the law actually hurts them.

“Society has exploded on this issue in the past two years,” says Sara Cohen, a fertility lawyer in Toronto. “I think (criminal laws) probably only hurt the people they are trying to protect, because they aren’t clear about what’s legal and what’s not.”

One of the biggest criticisms levelled at Canada’s surrogacy laws is that the language is vague.

Cohen points to the ban on paying “consideration to another person to arrange for the services of a surrogate mother” from the act as a key example.

“It’s very unclear what it means to pay someone to arrange for the services of a surrogate mother,” says Cohen. “I just don’t know what that means, and if I don’t know what that means and this is all I do for a living, I don’t really understand how your typical person can understand what that means.”

The surrogacy agency owners interviewed by the Star advocate changes to the law that would allow intended parents to pay surrogates.

“I wish they could be paid. They’re putting their lives on hold for someone else,” says Robyn Price, managing partner of Canadian Surrogacy Options. “I believe they are entitled to something.”

Rhoads-Heinrich says the current legislation forces surrogacy agencies, surrogates and intended parents to operate in a grey zone.

The lack of regulation surrounding surrogacy agencies is highlighted in their various ways of operating: no two follow the same practices, charge the same fees or offer the same services.

The price of employing an agency’s services is set by the organization and, though they charge thousands of dollars, no guarantees are made.

There is no regulatory body to hear complaints about these agencies, nor is there oversight to manage the concerns of would-be parents.

Often the only recourse is to leave a review on a Facebook page or, in rare cases, take an agency owner to court.

“I feel very strongly that the law is wrong and causes problems,” Rhoads-Heinrich says. “People are not following the law with payment, so it’s super flawed, and failing Canadians.”

Citizenship and health-care costs

Canada is generous to the growing numbers of foreign parents who choose Canadian surrogates to bear their children.

Here much of the surrogate’s health care is covered by Canadian taxpayers. And the newborn will be granted automatic Canadian citizenship.

Those meaningful benefits, which have fuelled Canada’s surrogacy boom, are beginning to come under the microscope.

The Star’s ongoing reports on Canada’s growing role has triggered public debate.

At the moment, Price’s agency is involved with about 70 pregnant surrogates. More than half of the intended parents are from outside Canada.

“When other countries closed down (surrogacy), a lot came to Canada. We’ve definitely seen the number of inquiries going up. It’s probably grown by 100 per cent,” Price says.

She believes the federal government should introduce rules that would recoup health-care costs.

“The majority, if not all, of our foreign couples want to pay,” she says. “They ask if there’s insurance they can buy for the surrogate and the baby. If there was something for foreign parents to pay into, they absolutely would. But there’s nothing.”

At Rhoads-Heinrich's firm, 88 per cent of the 34 surrogates questioned say they either have carried for or have been approached by international intended parents.

"Under the Citizenship Act, children born in Canada to parents who are Canadian are automatically Canadian citizens," wrote a spokesperson for Immigration, Refugees and Citizenship Canada.

Granting of citizenship to children who may spend only a month or two in Canada divides the surrogate sisterhood. Some say they don't care; others call it a deal breaker and won't carry a baby for foreign parents.

"This is one small reason why I didn't really want to deal with international intended parents," says Kitchener surrogate Tara-Ann Gagnon. "I feel like if I'm having the baby here, I'm being covered under our health plan, then the baby should at least go to Canadian parents."

Most surrogates the Star interviewed felt that Canadian citizenship should not be automatic.

But the concern that intended parents may be seeking an "anchor baby" is completely unfounded, argues fertility lawyer Sara Cohen.

"It would be a scary thing to deny these children citizenship," says Cohen, who notes that in six years of practice she has yet to meet foreign intended parents who chose Canada for the citizenship. "There are many places in the world that deny children born through surrogacy citizenship, and we wouldn't want Canada to be the cause of making children born with no citizenship anywhere in the world."

Agencies and the law

The Star interviewed three major surrogacy agency owners in Canada to learn how they are navigating the legal minefield.

Their varied approaches reflect widespread confusion when it comes to creating a practice working on the right side of the law.



Sally Rhoads-Heinrich runs one of Canada's largest surrogacy agencies, Surrogacy Canada Online.

Company: Canadian Surrogacy Online

Owner: Sally Rhoads-Heinrich

Location: Londesborough, Ont.

Practice: "We charge for consulting, providing information, referral and support," says Rhoads-Heinrich. "Payment is made when (intended parents) join. (It's illegal for them to pay us for the 'match' or after the match has occurred)."

The benefits: CSO's access paywall prevents lost business, says Rhoads-Heinrich, not only from clients who could walk away, but also from competitors who she worries may poach her carefully cultivated surrogate and donor list. Rhoads-Heinrich also points out that she is the only consultant in Canada that doesn't charge for non-anonymous egg donation.

The risks: "If I was to interpret the law, 'no one can arrange the services of a surrogate', to me, that means I'm violating the Act. But the professionals in the industry say that what I do is not in violation, as I just put the parties together and don't actually 'pair' or 'match make.' Is that semantics then?"

Cost: \$5,750-plus, for two years of access to the surrogate database, support team and surrogacy information.



Leia Swanberg runs Canadian Fertility Consulting firm and is a two-time surrogate and multiple egg donor. (CHAD HIPOLITO)

Company: Canadian Fertility Consulting

Owner: Leia Swanberg

Location: Coburg, Ont., and Parksville, B.C.

Practice: “I can’t receive any money until people are working with the surrogate,” says Swanberg, whose agency opens its surrogate catalogue to intended parents for free, in hopes that after a match has been made the couple will agree to pay her thousands of dollars to ‘consult’ — meaning they manage the legalities, expenses and reimbursement side of the pregnancy. “We are the only consultancy in Canada that operates this way.”

The benefits: Swanberg claims to have the most conservative practice in Canada, explaining: “In order for the surrogates to be in a safe space in the surrogacy world and the intended parents to be safe, this is how I operate.”

The risks: Swanberg estimated she loses at least 10 per cent of her business every year when prospective clients elect to work independently with a surrogate they found in her pool rather than use her consulting services after they connect with a CFC surrogate.

Cost: \$7,000-\$10,500-plus for consulting fees for one complete surrogacy.

Company: Canadian Surrogacy Options

Owner: Joanne Wright

Location: Guelph

“After the initial consultation, a deposit is received,” says CSO manager Robyn Price, who says the deposit gives intended parents access to a profile page for potential surrogates to see. “When the match is made between the surrogate and the intended parents, the balance of our agency fee is submitted to CSO by the intended parents along with a deposit for future expenses.”

The benefits: “Our service goes beyond just working with intended parents and their surrogates, but also co-ordinating the professional team of lawyers, counsellors, clinical staff and more,” says Price. “We co-ordinate and manage the entire journey from beginning to end.”

The risks: Clients aren’t obligated to work with CSO and, sometimes, after deposits are paid and a match has happened, intended parents and their surrogates will choose to continue independently. Price estimates CSO has lost about 5 per cent since of its business this way since the organization started.

Cost: \$7,500-\$10,000