REGULATING REPRODUCTION - EVALUATING THE CANADIAN LAW ON SURROGACY AND SURROGATE MOTHERHOOD

by

Nisha Menon

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Faculty of Law
University of Toronto

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ABSTRACT

Certain provisions of the Assisted Human Reproduction Act 2004 appear to have been enacted as a legislative response to the objections to surrogacy noted by the Royal Commission on New Reproductive Technologies in 1993. However, the legislation may not be successful in tackling concerns generated by recent developments in assisted reproductive technologies. This thesis identifies the shortcomings of the AHRA provisions that impact its ability to effectively regulate the surrogate act in Canada. The discussion suggests shifting the existing regulatory framework away from the imposition of legislative prohibitions on commercial surrogacy and towards a model that is more effective in dealing with the current reality of the surrogate arrangement. Upon consideration of regulatory regimes in Israel and the United Kingdom, a framework for surrogacy is suggested that balances the reproductive rights of the individuals who participate in such an arrangement, while minimizing the potentially exploitative aspects of the surrogate act.
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DEDICATION

This thesis is offered to Lord Guruvayoorappan

And dedicated to my daughter

Arya Shree Nair

who was born during the writing of this thesis

in the hopes that it inspires a lifelong pursuit of learning.
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CHAPTER 1: ENACTING THE ASSISTED HUMAN REPRODUCTION ACT 2004

1. INTRODUCTION

No specific (federal) legislation had been passed in Canada to regulate the surrogate act until the enactment of the Assisted Human Reproduction Act (hereinafter the “AHRA” or “the Act”)\(^1\) in 2004. The passing of the Act appears to be a legislative response to objections to surrogacy that have been articulated. In this thesis, I will examine the rationale for such objections and evaluate their legitimacy before assessing the success of the AHRA in alleviating the expressed concerns. Consequently, I will identify shortcomings of the Act that may impact its ability to effectively regulate surrogacy in Canada. Finally, I would suggest, upon consideration of regulatory regimes in other jurisdictions, ways in which the regulation of surrogacy can be improved so as to ensure that the rights and interests of the individuals who participate in such an arrangement would be protected.

2. REGULATION OF SURROGACY IN CANADA

The surrogate act - whereby one woman carries a child for another (“the commissioning mother”) with the intention that the child should be handed over to the commissioning mother and her partner (“the commissioning father”) after birth\(^2\) - is not a modern phenomenon. For example, traditional surrogacy, where the surrogate mother\(^3\) is

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\(^1\) Assisted Human Reproduction Act S.C. 2004 c 2 [AHRA]

\(^2\) Dame Mary Warnock (Chairman), Report of the Committee of Inquiry into Human Fertilisation and Embryology Cm 9314 (London: Department of Health and Social Security, 1984) at 42 (para 8.1).

\(^3\) A ‘surrogate mother’ is defined as in section 3 of the Assisted Human Reproduction Act as a female person who — with the intention of surrendering the child at birth to a donor or another person — carries an embryo or foetus that was conceived by means of an assisted reproduction procedure and derived from the genes of a donor or donors. I use the term as so defined in this dissertation and interchangeably with surrogate. However, ‘surrogate mother’, when taken to mean substitute mother, has been suggested to be a misnomer. In some situations she has been argued not to be a substitute mother, ‘but a genuine and authentic mother to
inseminated - or inseminates herself - with the commissioning father’s or donor sperm, has been observed to have been practiced historically in many cultures,\(^4\) and is even said to be ‘as old as childbirth itself.’\(^5\)

It was the development of Assisted Reproductive Technologies (“ARTs”) especially new techniques in In-Vitro Fertilization (“IVF”) however, which provided an impetus for the promulgation of the practice. ARTs not only facilitated new ways of artificial insemination in traditional surrogacy, but also allowed for the development of a new type of surrogate arrangement – gestational surrogacy. Here, the fertilized egg of another woman is transferred to the surrogate - also known as gestational - mother’s uterus and carried by her to term.\(^6\) What this means is that using IVF treatment technology, an embryo can be created in-vitro using the egg and sperm of a commissioning couple, so that the commissioning couple can have an offspring who is wholly recipient of their genetic matter, even where the commissioning woman is sterile.\(^7\)

Even so, as the demand for surrogacy as ‘a solution for involuntary childless couples’\(^8\) was established,\(^9\) so to were concerns that the surrogate act had ‘[the] potential for economic

\(^1\) [Bernard Dickens, *Legal Aspects of Surrogate Motherhood: Practices and Proposals*, *UK National Committee of Comparative Law Colloquium* (Cambridge: Legal Regulation of Reproductive Medicine, 1987) at 1.]. It is also notable that this definition of surrogacy suggests that the Act is not applicable to arrangements where insemination occurs through natural conception.


\(^7\) Gestational surrogacy is also an appealing reproductive option to a commissioning mother who is not sterile but is given to abnormality or loss of the uterus.


exploitation, moral confusion and psychological harm to the surrogate mother [sic], the prospective adoptive parents and the children’.\textsuperscript{10}

\textbf{2.1. Objections to surrogacy}

\textbf{2.1.1. Moral Objections}

One source of unease is a moral objection to the surrogate arrangement. This is partly due to the requirement of surrogacy to have the ‘active co-operation of an otherwise uninvolved woman in the process of pregnancy and birth’.\textsuperscript{11} The surrogate is seen as ‘a third party to the reproductive process’\textsuperscript{12} who, in carrying the unborn child to term, is seen to be supplanting the commissioning mother’s role in this ‘essential feature of motherhood’.\textsuperscript{13}

\textbf{2.1.1.1. Faith based objections}

This opinion is mirrored in religious circles. The Catholic Church has denounced the surrogate arrangement as ‘...contrary to the unity of marriage ...’ and representing ‘an objective failure to meet the obligations of ... motherhood’.\textsuperscript{14} In a not dissimilar vein, surrogate motherhood is prohibited under Islamic (Shari`ah) law, partly because of the potential for confusion of lineage, which is important in Islamic law.\textsuperscript{15} Even if there is an agreement between the parties as to resolution of such concerns, surrogacy is still not sanctioned in Islam since the procedure involves the introduction of the sperm of a male

\textsuperscript{11} J K Mason & G T Laurie, \textit{Mason and McCall Smith's Law and Medical Ethics} 7\textsuperscript{th} ed. (Oxford: Oxford University Press, 2005), at 105.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
into the uterus of a woman to whom the male is not married. This ‘would clearly be termed adultery under Islamic law and is undoubtedly illegal’.  

2.1.1.2. Objections to maternal standing and distribution of responsibility

Nor is the surrogate mother herself spared a tacit moral responsibility to the begotten child. A surrogate is seen to distort the maternal-foetal relationship regardless of her reasons for entering into a surrogate arrangement even if her intention in doing so is to give the commissioning mother ‘the gift of life’. In allowing herself to get pregnant with the deliberate intention of surrendering the child on birth, she has been accused of having demonstrated ‘the wrong way to approach pregnancy’.

A surrogate who is a gestational mother also tests the established legal precept of mater simper certa est - that the mother of the child is always known. This nebulous state of maternal standing in a surrogate arrangement suggests that the surrogate could stake a claim as another adult besides the commissioning couple, who has a potential right to parenthood of the delivered child. In such a situation, surrogacy arrangements can include up to four potential parents - the gestational mother (and her partner) and the commissioning couple. Should the arrangement also involve an egg and/or a sperm donor, the birthed child may theoretically have up to six potential parents.

It is debatable however, whether such ambiguity on maternal standing and responsibility should trigger the regulation let alone, banning of surrogacy. Even if such concerns about the morality of surrogacy are prevalent in society, it has been argued that the function of

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18 Warnock, supra note 2 at 8.11.
the law may not be to ‘intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour’. The Wolfenden committee – which was set up in 1954 to investigate the law relating to homosexuality and prostitution – highlighted the importance of individual freedom of choice and action, and so suggested that ‘there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business’.

**2.1.2. Economic and social objections**

Despite this expressed reluctance to legislate morality, the Wolfenden committee hastened to confirm that the purpose of law should include the provision of ‘safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of physical, official or economic dependence’.

Critics of the surrogate arrangement often raise this role of the law - that requires it to prevent the exploitation of the vulnerable - as an argument for a ban on surrogacy. This objection gained momentum with the advent of compensated surrogacy as a commercial exercise. The introduction of commercial surrogacy - where gestation would be contracted for financial reward - raised concerns that surrogacy may commodify reproduction. The commodification of the reproductive process, it is believed, violates the Kantian exhortation to treat individuals as ‘ends in themselves not [only] as a means to someone else’s end’.

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21 Ibid, at 61.
In the case of surrogacy, ethical indignation has been expressed at the perceived commodification of both the surrogate mother as well as the birthed child.

2.1.2.1. Commodification of women

Both proponents and opponents of surrogacy are in general agreement about the market inalienability of individuals – in this case, of both surrogate mother and child. The tension between the two perspectives usually arises due to what is perceived to be commodified and given a market value in a commercial surrogate arrangement.

Anti-commodification arguments specific to the surrogate mother have revolved around the monetarization of her body and reproductive capacity. Personal dignity, it is asserted, requires that a woman’s body not be ‘a mere instrument for use by others in their own interest, that procreation not become the object of a commercial transaction’. Other anti-commodificationists suggest that surrogacy is analogous to prostitution where there is a ‘sale of sexual services’ and further see a surrogate woman as a ‘paid breeder’ operating in a way ‘incompatible with a society in which individuals are valued for themselves’.

However, proponents of the surrogate act place the surrogate’s decision to carry the child for the commissioning mother within the framework of autonomy and individual freedom.

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24 Inalienability is defined by Radin as ‘something that is not to be sold ... or traded in the market’ [Radin, infra note 26 at 1850.]
25 Council of Europe, Human Artificial Procreation (Strasbourg, Council of Europe, 1989) at 29.
28 Ibid.
They argue that the surrogate should be free to make choices about her bodily autonomy and ‘enhance [her] female reproductive freedom’.29 Thus they suggest that legislation that prevents the expression of her choice to be a surrogate mother is an act of ‘downright paternalism which denies a woman a chance to use her body as she pleases’. 30

Anti-commodificationists are unfazed by such accusations of paternalism, pointing to various instances in society where limits have been set on individual freedom when necessary to protect the rights of the vulnerable. In this case, a ban on (paid) surrogacy has been argued to be necessary so as to prevent the ‘further oppression of poor and ignorant women’. 31 This is because it is believed that a woman who engages in the surrogate act out of economic necessity is at risk of exploitation by economically superior individuals who ‘purchase women’s procreative labour and custodial rights’.32 In other words, it is suggested that the surrogate’s expression of reproductive choice is ‘the product of economic coercion’33 and that her real choice is between ‘being poor and being exploited’.34

**Exploitation of women**

Exploitation is said to occur when poverty driven women agree to be surrogates without completely understanding the consequences of their decisions. In *Re Baby M*35 for example, a dispute arose when a surrogate mother changed her mind about surrendering

30 Mason, supra note 11 at 115.
31 Radin, supra note 26 at 1930.
34 Ibid at 65.
35 Re Baby M, [537 A 2d 1227 (NJ Sup Ct, 1988)].
the delivered baby despite her pre-existing contractual agreement with the commissioning parents to carry the foetus to term and then to hand the child to them upon delivery. The trial judge terminated the surrogate’s rights and issued an adoption order in favour of the commissioning mother. Critics of surrogacy claimed that the case demonstrated the risk of market transactions in threatening the personhood of a woman when elements of such personhood are the commodities in these contested exchanges.

Even so, the validity of such arguments about risk assessment can be challenged on the grounds that risks are by nature unforeseeable and are undertaken by all individuals. That is, risk taking is arguably a usual exercise in the life of any individual, pregnant or otherwise and not unique to the realm of commercial surrogacy. One can also argue that refusal to enforce a surrogate arrangement invalidates a surrogate’s capability to act ‘as a rational and moral agent able to think through and make decisions for [her]sel[f]’.  

Anti commodificationists however argue that it is just not possible for a surrogate to make a ‘free and fully informed’ choice within the structure of a commodified traditional surrogate arrangement. They suggest this is because firstly, it would be impossible to foresee all potential risks involved with a pregnancy and secondly regardless of the monetary incentive, no woman could predict at the time of implantation how she would feel about the birthed child of whom she has to renounce custody.

This reluctance to recognise a surrogate’s expression of choice as anything but exploitation appears to be shared even by some feminists who champion women’s autonomy in other reproductive contexts. These feminists see surrogates who find fulfilment of their

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37 Brazier, supra note 9 at i (4).
38 Ibid at 35 (4.25).
womanhood in their surrogate act as being subject to ‘an ironic self-deception’\textsuperscript{39} that reinforces ‘oppressive gender roles’.\textsuperscript{40} They perceive the male commissioning parent in the traditional surrogate arrangement, as oppressors of the surrogate and of their own female partners: the infertile female’s fate was likened to that of the surrogate – caught in the ‘same kind of false consciousness and relative powerlessness as surrogates who feel called upon to produce children for others’.\textsuperscript{41} This occurs despite empirical studies that suggest that most surrogates view the act as a service of great social value to the benefit of others\textsuperscript{42} and that few express regret at having served in the role.\textsuperscript{43}

Fundamentally then, it may be argued that the argument against commodification of her reproductive services seems to stem primarily from an anti-commodificationist’s lack of acceptance of the idea that not only will a surrogate willingly commodify her reproductive services but that she would also knowingly impregnate herself with the deliberate intention of surrendering the child she delivers at birth.

Reframing the surrogate arrangement as commodification-and-the-subsequent-(perceived)-exploitation of the woman’s body and reproductive services allows the anti-commodificationist to explain the surrogate’s repudiation of her birthed offspring. At the same time, it showcases the degrading effects of the market exchange in surrogacy in undermining both the surrogate woman as well as established family structures.

\textbf{2.1.2.2. Commodity of children}

\textsuperscript{39} Radin, supra note 26 at 1930.
\textsuperscript{40} Ibid.
\textsuperscript{41} Ibid at 1931.
\textsuperscript{43} Lorraine Ali, supra note 17.
The argument thus restructured also highlights the second form of commodification perceived to occur in traditional surrogacy – that of the baby. The child birthed by the surrogate is believed to be the commodity that is “sold” by the surrogate to the commissioning couple who ‘paid for it’. This charge is often refuted by proponents of surrogacy who once again, argue their appreciation of the market inalienability of the baby - they reassert that the commodity being transacted is not the baby but is, as previously argued, the woman’s reproductive services - i.e. to conceive, carry and give birth to the baby.

Anti-commodificationists however, remain unconvinced and assert that commissioning parents ‘want something more tangible’ than just those reproductive services. They imply that commissioning parents should also be considered to have purchased from the surrogate her claim for ‘the legal custody and parenthood of the child in addition to her physical surrendering of [the child]’. This then, they argue, suggests that parental rights over children are akin to ‘freely alienable property rights, to be allocated at the will of the parents’ in line with market norms and which are not made in the children’s best interests. The child is ‘treated as an object’ over whom custodial rights are transacted and who is thus commodified.

This argument has been challenged as being fallacious by those who do not see parental rights as property rights primarily because a baby is ‘not property and cannot be treated

45 Blyth, supra note 23 at 234.
48 Ibid at 21.
in all respects like property’. By this logic, parents are therefore not entitled to treat a child as they would any other property. For example, unlike a commodified entity, the child cannot be “resold” or exchanged in an open market. The parents assume ‘full term responsibility’ for the child with whom ‘it is intuitively apparent’ they develop a relationship which is ‘fiduciary in nature’; the parents have an ‘obligation to care for, protect and rear their children’. The child is therefore not a commodity which can be bought and sold at the whims of the commissioning parents.

However, this does not appear to be an easy concept for anti-commodificationists to accept. Even if they do recognise that the commodity being traded in traditional surrogacy is the surrogate’s gestational services, it is because, they suggest, the baby is already someone else’s property – that of the commissioning father’s. This not only causes them to see surrogacy as an act that commodifies a child, but also as an arrangement that commodifies women as ‘fungible baby-makers’ for the commissioning male who purchases a surrogate woman’s gestational services.

2.2. Genesis of the Assisted Human Reproduction Act 2004

2.2.1. Background to surrogacy legislation

The case for the regulation of the surrogate arrangement appears to have risen partly in response to these concerns and objections to surrogacy. In Canada surrogacy is regulated

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50 McLachlan, supra note 46 at 4.
52 M(K) v M(H) [1992] 3 SCR 3 at 61
53 Ibid
54 Ibid
55 Shalev, supra note 36 at 157.
56 Radin, supra note 26 at 1929.
57 Ibid at 1930.
58 Ibid at 1936.
by the AHRA which controls and regulates acts that use ARTs. The Act is largely set within a deterrent framework to prevent social harms including the potential consequences of commodification.

The passing of the Act in 2004 however, was not without controversy and three previous iterations, indicating the lack of consensus amongst Canadians as to how activities that use ARTs should be legislated upon.

Prior attempts to legislate on this issue began after the Royal Commission on New Reproductive Technologies (“the Commission”) issued its report – *Proceed with Care: the Final Report of the Royal Commission on New Reproductive Technologies* ⁵⁹ (“Final Report”) - in 1993. The Commission was led by five government-appointed Commissioners and was set up to examine the ‘current and potential medical and scientific developments related to new reproductive technologies’⁶⁰ so as to consider the ‘social, ethical, health, research, legal and economic implications’⁶¹ of the new technologies. It was recommended that both altruistic and commercial surrogacy be banned out of consideration for the above-mentioned dominant surrogacy concerns of the time – namely the commodification of the surrogate and the child, the objective treatment of women as reproductive vessels and the potential for exploitation of the surrogate either by their own families or by the commissioning parents.⁶²

In response to this, the Minster of Health announced an interim voluntary moratorium on several activities that required the aid of ARTs including commercial surrogacy. The intense

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⁶⁰ Ibid at 2.
⁶¹ Ibid.
⁶² Ibid at 689.
debate that transpired led to the first legislative attempt – Bill C-47⁶³ – which would have prohibited specified activities but had no clear regulatory scheme to legalize other activities that used ARTs that were less controversial and could be carried out under legislated supervision. Bill C-47 died on the Order Paper when the 1997 federal election was called.

In 2001, the Standing Committee on Health was invited to obtain submissions and hold hearings on the Government of Canada’s Proposals for Legislation Governing Assisted Reproduction (“Draft Legislation”). This committee tabled a report with multiple recommendations and requested that legislation ‘be introduced on a priority basis’.⁶⁴ To that end, Bill C-13,⁶⁵ An Act Respecting Assisted Human Reproduction was introduced in the second session of the 37th Parliament but died on the Order Paper at the end of the session. However, it was reintroduced in the third session of the 37th Parliament as Bill C-6, An Act Respecting Assisted Human Reproduction and related research which was passed by the House of Commons on 11 February 2004 and received Royal Assent on 29 March 2004.

2.2.2. Shifts in legislative policy

The process behind the development of Bill C-6, which was to become the AHRA, differed greatly from the genesis of Bill C-47 and this was subsequently reflected in the content of the Act.

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Aware of the criticism levelled against Bill C-47 – namely that the prohibitions were set out too hastily without adequate consideration of the benefits of ARTs\textsuperscript{66} - the policy makers of Bill C-6, circulated the Draft Legislation and then held consultations with a variety of individuals that included academics, clergymen, government officials, bioethics researchers, feminists, surrogates and other individuals who had a genuine stake in the research into and development and application of ARTs in Canada.

This signalled a markedly different take on ARTs in the AHRA from that which was initially tabled in Bill C-47. As Harvison Young reflected, the changes effected in Bill C-6 seemed to result from an appreciation of the complexity of legislating on the application on ARTs and as a result, did not to have the ‘the paternalistic, at times sanctimonious, tone that characterized Bill C-47’.\textsuperscript{67}

2.2.2.1. Introduction of “controlled” activities

Arguably this may be why Bill C-6, unlike Bill C-47 included a regulatory framework for some “controlled” activities that involved the use of ARTs. Thus while the preamble to Bill C-47 declared that the Parliament of Canada was ‘gravely concerned’\textsuperscript{68} about ‘the threat to human dignity, the risks to human health and safety ... and other serious social and ethical issues posed by ... reproductive and genetic technologies’,\textsuperscript{69} the preamble to the Act clearly indicates that the policymakers now perceived ARTs as being beneficial to individuals, families and general society.\textsuperscript{70}

\textsuperscript{66} Alison Harvison Young, ‘Let’s Try Again... This Time with Feeling: Bill C-6 and New Reproductive Technologies’ (2005) 38 U.B.C. L. Rev. 123 – 145 [Harvison Young, “Let’s Try Again”] at para 9.
\textsuperscript{67} Ibid at para 3.
\textsuperscript{68} Bill C-47, supra note 63.
\textsuperscript{69} Ibid.
\textsuperscript{70} AHRA, supra note 1, s. 2 (b).
2.2.2.2. Setting up of regulatory agency

Additionally, the establishment of the Assisted Human Reproduction Agency of Canada ("Agency") under Section 21 of the Act to ‘foster the application of ethical principles’ appears to be further acknowledgement by the policymakers of ‘the rapid pace of technological development, the intensity of public controversy in the area, and views that may change quickly’ and therefore the need for flexibility in regulating a field that is constantly evolving.

Appreciation of the pace of technological innovation and the corresponding evolution in viewpoints however, did not lead to a change in the legislators’ decision in Bill C-47 to issue statutory prohibitions on the development and application of certain ARTs, specifically – in the context of this thesis – on commercial surrogacy.

2.3. The Assisted Human Reproduction Act 2004

Thus, under the AHRA, commercial surrogacy is prohibited and agencies or people that assist couples in the search for a surrogate may be fined or imprisoned. Pursuant to Sections 6 and 60 of the AHRA, parties involved in a commercial surrogacy arrangement are subject to criminal penalties of up to $500,000 in fines and/or 10 years in prison. Because the surrogate herself is not subject to criminal sanction, it appears that the main objective of the penalties is to target those who profit the most from organising the surrogacy arrangement.

71 Initially named the Assisted Human Reproduction Agency of Canada, it is now called Assisted Human Reproduction Canada.
72 AHRA, supra note 1, s. 22 (b).
73 Harvison Young, “Let’s Try Again”, supra note 66 at para 3.
74 AHRA supra, note 1 at 6 (1).
75 Ibid at 60 (a).
Perhaps out of consideration for women who have a genuine wish to serve as surrogates, it has also been legislated that engagement in surrogacy may proceed as an altruistic act as long as it operates away from market forces. To ensure that the surrogate act remains non-commodified, restrictions are also imposed on altruistic surrogacy – there is to be no financial gain for the surrogates. To that end, reasonable expenses associated with the pregnancy are to be paid to the surrogate only in accordance with the regulations and by obtaining a licence, and only upon production of a receipt. Similarly, lost employment income can only be compensated where a medical practitioner certifies that continuing to work would pose a risk to the surrogate or embryo/foetus, and in accordance with the regulations and a license.

3. Importance of Research

Given that institution of any legislative guidelines on surrogacy is long overdue in Canada, the passing of the AHRA is therefore welcome. However, in this thesis, it will be suggested that such regulation does not adequately protect the interests of all the participants to the arrangement.

There is an especial urgency to rectify this situation in light of recent developments in ARTs that have altered the current reality of surrogate arrangements in Canada; although the Act was drafted to address the established objections to surrogacy noted above in Section 2 of this Chapter, I will explain how the conditions under which surrogate arrangements are pursued in Canada have since changed. As such, current legislation may be successful neither in tackling the traditional objections to surrogacy set out above, nor in addressing

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76 Ibid at 12 (1) (c).
77 Ibid at 12 (2).
78 Ibid at 12 (3).
the newer concerns generated by more recent developments in ARTs that have modified the type of surrogate arrangements Canadians now enter into.

This thesis will also consider the implications for surrogacy regulation in Canada should the regulatory provisions of the AHRA be declared *ultra vires* by the Supreme Court of Canada. The Supreme Court is currently considering a constitutional challenge brought by the Government of Quebec (hereinafter the “Quebec Challenge”) which asserts that the regulatory provisions of the AHRA – including those that govern surrogacy - encroach on provincial jurisdiction.

Ultimately, if surrogacy – whether gestational or traditional - becomes a more common reproductive choice for infertile couples in Canada it is incumbent on the law, whether federal or provincial, to put in place a more detailed framework of surrogacy legislation to regulate this reproductive practice. Constructing this framework however, first requires a more detailed analysis of the current state of surrogacy and surrogacy regulation in Canada so as to identify inadequacies in the legislation.

To that end, in Chapter 2, I will discuss the shortcomings of the AHRA in regulating altruistic surrogacy and prohibiting commercial surrogacy. Further, I will determine if the legislative prohibitions implemented on surrogacy takes into account the contribution and impact of gestational surrogacy on the demand for the surrogate arrangements.

I will then suggest how these shortcomings of current surrogacy legislation potentially moves the discussion on regulating surrogacy away from the imposition of legislative prohibitions on commercial surrogacy and towards the development of a regulatory framework on surrogacy which may be more effective in dealing with the current reality of the surrogate arrangement.
CHAPTER 2: CANADIAN REGULATORY MODEL ON SURROGACY

As previously noted, the Royal Commission on New Reproductive Technologies gave much consideration to the objections to surrogacy outlined in Chapter 1. To that end, the Final Report recommended the federal government implement legislative prohibitions on surrogacy.79

Till the passing of the AHRA in Canada, only Quebec had enacted legislation regarding surrogacy. Section 541 of Quebec’s Civil Code dealt specifically – and only - with preconception arrangements and held that all agreements for procreation or gestation-for-payment are null and void.80

However, unlike Section 541 which was provincial legislation, the AHRA is federal legislation that controls and regulates all acts that use ARTs (including surrogacy) across Canada.

1. POTENTIAL SHORTCOMINGS OF THE AHRA

The institution of such broad based legislative guidelines on surrogacy in Canada was a challenging and prolonged process that went through many iterations for over ten years before the Act finally came into force in 2004. Even so, the sections relevant to surrogacy in the Act have been suggested to have the following shortcomings that could potentially render them ineffective in addressing the concerns raised in Chapter 1.

79 Proceed with Care, supra note 59 at 690.
80 Civil Code of Québec, S.Q. 1991, c. 64, a. 541. [Civil Code of Québec]
1.1. No definition of surrogacy

While a surrogate mother has been defined by the AHRA,\textsuperscript{81} it is unclear how surrogacy as an act itself is defined under the Act. This makes it difficult to determine which forms of surrogacy the AHRA is applicable to. To that end, while it may be reasonably concluded that gestational surrogacy falls under the privy of the AHRA, it is unclear if the regulations apply to traditional surrogacy. If the AHRA is assumed to apply to traditional surrogacy, one might question the appropriateness and basis of using an act that legislates on the use of ARTs to regulate traditional surrogacy especially if the surrogate arrangement in question does not avail of an ART procedure. Even if it were to be assumed that only gestational surrogacy is to be regulated by the AHRA, the ease with which traditional surrogate arrangements may be undertaken at home or in less than medically sound conditions, could undermine whatever legislative control over surrogacy had been anticipated by the passing of the AHRA, while placing all resulting traditional surrogacy acts within a regulatory vacuum.

1.2. No guidelines to regulate altruistic surrogacy

Additionally, while the AHRA does not prohibit altruistic surrogacy, it gives no further guidance as to how the surrogate arrangement is then to be developed or how parenthood is to be defined in such an arrangement.

Arguably the issuance of such guidelines may fall under the purview of the Agency or of the provincial government per Section 92\textsuperscript{82} of the Constitution Act 1867 [“Constitution Act”]\textsuperscript{83}.

\textsuperscript{81} Supra note 3.
\textsuperscript{82} Given that surrogacy is generally a private arrangement, its management may fall to the provinces under section 92 (16) of the Constitution Act which sets out that: ‘In each Province the Legislature may exclusively make Laws in relation to ... Generally all Matters of a merely local or private Nature in the Province’.
\textsuperscript{83} The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.
However, neither the provinces nor the Agency have released any further clarification on the regulation of parental standing and the status of the surrogate with respect to the birth child. Additionally, it has not even been conclusively determined to whom - the provinces or the Agency - the responsibility of issuing and implementing such guidelines should fall. Until these decisions are made and such guidelines drawn up, resolution of any custodial dispute that may arise would be completely dependent on the judicial discretion of the courts which would be arbitrating in a legislative void to determine the legal standing of the surrogate with respect to the commissioning parents.

The dearth of information on how an altruistic surrogate arrangement is to proceed also highlights its potential to undermine the AHRA’s prohibition of commercial surrogacy. For example, there has been a lack of information on how the courts are to differentiate between valid receipted arrangements and consideration for the provision of surrogate services that are prohibited under the AHRA. Anecdotal evidence suggests that, as a result, commissioning parents have been found to be ‘dishing out more than expenses’\(^{84}\) to surrogates, creating a surrogate arrangement akin to surrogacy for profit because there is no guidance in the AHRA on how or what qualifies as receipted expenses.

1.3. Failure to consider impact of gestational surrogacy

Thus, the potential for the AHRA to successfully prohibit commercial surrogacy has also been thrown into doubt. It has additionally been observed that the demand for surrogates continues to grow despite its prohibition in Canada and there is tacit recognition that surrogacy is increasingly practiced on a commercial basis.\(^{85}\) As some commentators have predicted, the prohibition of paid arrangements merely ‘force[s] the process onto the


\(^{85}\) Ibid.
backstreets\textsuperscript{86} and consequently, surrogates and commissioning couples enter into agreements without professional advice and guidance.\textsuperscript{87}

It has been argued that this is partly because while the AHRA appears structured to deal with the concerns raised by traditional surrogacy, the Act fails to adequately consider the rise and impact of gestational surrogacy as a preconception arrangement. Demand for surrogacy seems to have increased with the advent and societal acceptance of gestational surrogacy which appears to be a preconception arrangement under which many of the previous surrogacy concerns and issues are arguably no longer, or not as, significant.

The rise in demand has resulted in traditional surrogacy no longer being the typical surrogate arrangement utilized by infertile couples. Ninety-five percent of all surrogacy arrangements currently carried out in the United States are gestational surrogate arrangements,\textsuperscript{88} which are ‘less readily framed as commodification’\textsuperscript{89} as compared to traditional surrogate arrangements for the following reasons.

1.3.1. Gestational surrogacy as a service agreement

In a gestational surrogacy, it is easier to make the argument that the surrogate arrangement is indeed a service arrangement – that is, that the commodity marketed is surrogate’s gestational services provided to the child’s genetic parents. This is because the commissioning parents are clearly established as the genetic parents of the child unlike the traditional arrangement where the surrogate was both the genetic and gestational parent.

\textsuperscript{86} Mason, supra note 11 at 118.
\textsuperscript{87} Michael Freeman, ‘Does Surrogacy Have a Future After Brazier?’ (1999) 7 Medical Law Review 1 at 15.
Because the gestational surrogate is not biologically related to the child she gestates in her womb, ‘her identity as the child’s mother is less powerful’. ⁹₀

Even so, concern has been expressed that this concept of genetic belonging resurrects the perception of ‘a property-like interest in ... [the baby] ... based on biology’ ⁹¹ that restores the concern of commodification and objectification of the baby in a surrogate transaction. This is perhaps in response to the perceived ‘diminishing [of] the maternal credentials of the surrogate’ ⁹² when gestational motherhood is desegregated from genetic motherhood - surrogates who are gestational carriers, are ‘not expected to form a maternal bond’ ⁹³ with children who genetically ‘belong to others’. ⁹⁴

On the other hand, some commentators have suggested the clarity provided by the genetic certainty of parental status in a gestational surrogate arrangement is likely to assuage the concern regarding any perceived commodification of the child. This observation seems to be in line with the judicial approach taken by courts, which as independent arbitrators, attempt to rule in the best interests of the child. Thus in Johnson v Calvert ⁹⁵ – where a surrogate who was paid to carry the embryo of a commissioning couple changed her mind six months into the pregnancy as to handing over the child – the courts held that in gestational surrogacy, there are no parental rights attached to the surrogate and so custody of the child should lie solely with the commissioning couple. Consequently, the Court determined that any agreement to payment as set out in the surrogate contract was effectively for services rendered by the surrogate in carrying out the intentions of parties at the time the contract was drawn up and was not to be seen as compensation for the

⁹₀ Ibid at 40.
⁹¹ Ibid at 42.
⁹² Ibid at 41.
⁹³ Ibid at 42.
⁹⁴ Ibid.
transfer of parental rights. Presumably this would resolve any concerns that a gestational surrogate arrangement commodifies the child.96

1.3.2. Benign account of surrogacy

However, even if genetic certainty does not presuppose parenthood – and if therefore it is still doubted whether it is the surrogate’s services instead of the child which is being transacted - commodification concerns are less of a concern in a gestational surrogate arrangement.

This is due in part to the argument that the harms associated with commodification are too ‘abstract and not subject to empirical validation’.97 This contention has been confirmed by empirical research on gestational surrogacy which does indicate a more ‘benign account of surrogacy’98 than the one of abject economic exploitation of women that anti-commodificationists suggest. While admittedly surrogates do not always enter into the surrogate arrangement in the absence of financial profit, and they are not typically as wealthy as the intended parents, few fall into the lowest economic bracket in society.99 They are usually women who are made aware of the nature of the service being provided and are willing to commodify the use of their body for the provision of reproductive/gestational services. For example, a growing number of military wives in the United States volunteer as commercial surrogates after completing their own families, for reasons as varied as ‘gaining a sense of purpose’100 and to enhance their own family’s

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96 It is significant to note that critics have disputed the ratio of the court’s decision. See Chapter 4, section 1.5.1 of this paper for explanation.
97 Scott, supra note 89 at 38.
98 Ibid.
99 Lorraine Ali, supra note 17.
100 Ibid.
welfare by earning money while staying home with their children.\textsuperscript{101} Similarly, commercial gestational surrogacy in India has provided otherwise unemployed women with a source of income and empowers them to be breadwinners for their families.\textsuperscript{102} When a woman can thus reasonably regard surrogacy as ‘improving her overall welfare given society has unjustly limited her options’,\textsuperscript{103} it would arguably add ‘insult to injury’\textsuperscript{104} to deny her the opportunity to engage in the surrogate act should she wish to.

1.3.3. Probability of fewer custodial battles

Furthermore, because the nature of the commodity being transacted is clearly established in gestational surrogacy, it has been suggested that surrogates are less likely to feel emotionally exploited by the arrangement.\textsuperscript{105} Additionally, perhaps by virtue of the lack of genetic connection to the foetus, gestational surrogates appear to have greater psychological detachment from the birthed baby. They have been known to perceive themselves as ‘caring babysitters’\textsuperscript{106} rather than mothers of the children they gestated. This usually means that they are less reluctant to relinquish the child after birth leading to far fewer incidences of custodial battles over the child.

1.3.4. Lack of moral panic

Finally, it is important to note that concerns about the commodification of the surrogate woman and the child were first raised in the era of traditional surrogacy and perhaps in

\begin{itemize}
\item \textsuperscript{101} Ibid.
\item \textsuperscript{102} Deborah Spar, The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception (Boston: Harvard Business School Press, 2006) at 86.
\item \textsuperscript{103} A Wertheimer Exploitation (Princeton: Princeton University Press, 1996) at 111.
\item \textsuperscript{104} Ibid.
\item \textsuperscript{105} Lorraine Ali, supra note 17.
\item \textsuperscript{106} Ibid.
\end{itemize}
response to the moral panic ignited by the *Baby M* trial when there was a lack of awareness and knowledge about surrogate arrangements. Surrogacy, at that time, challenged conventional understandings of the family structure and the nature of motherhood and sparked unease about technologies that ‘allowed genetic, gestational and social parenting to be disaggregated’.107 With the development and establishment of new assisted reproductive technologies in the last fifteen years, IVF and surrogacy - in the form of gestational surrogacy - have achieved a ‘familiarity’108 with the public that assuages fears that these alternatives and innovations to infertility ‘undermine conventional understandings of marriage, family formation and human identity’.109

What the above-mentioned reasons imply is that the fears posed by commodification, while instructive of the potential flaws of the commercialization of surrogacy, are arguably overstated especially where it concerns gestational surrogacy.

This does not belittle the concerns raised by anti-commodificationists, even though it has become clear that economic concerns posed by *Baby M* and feared in its immediate aftermath were exceptional rather than typical. What this does mean though is that commercial surrogacy – especially commercial gestational surrogacy - is likely to continue to be an alternative to fertility treatment that the infertile couple may resort to regardless of the State’s intolerance of it.

1.4. Failures of legislative prohibitions

The potential for AHRA’s prohibition on commercial surrogacy to be undermined highlights the difficulties of legislating in the wake of a pre-existing demand for surrogacy. In light of

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107 Scott, supra note 89 at 21.
108 Ibid at 37.
109 Ibid.
this demand for surrogates and the current more benign perspective on the surrogate act, some commentators question both the efficacy and the necessity of legislative prohibitions on commercial surrogacy.

Advantages of prohibition

It has been suggested that reliance on a framework of legislative prohibitions is warranted where there is a potential for societal harm. Societal harm is harm that threatens the fundamental principles that underpin society and which has the potential to affect individual health and safety, as well as overall ‘human flourishing’. It is thereby suggested that combating such harms requires the ‘powerful and meaningful legislative response’ provided by prohibitions so that ‘those most vulnerable to any abuses that might result’ are protected.

To this end, the Royal Commission recommended that the federal government ‘put boundaries around the use of new reproductive technologies’ in Canada by prohibiting ‘under threat of criminal sanction’ certain activities that ‘conflict so sharply with the values espoused by Canadians and by ... [the] ... Commission, and are so potentially harmful to the interests of individuals and of society’.

It is significant that the Royal Commission supported the use of a model of legislative prohibitions for surrogacy instead of a regulatory model. The Commissioners were ‘sceptical ... that any regulatory scheme could ensure that all parties [to the surrogate arrangement]
were able to make free and informed choices’.\textsuperscript{117} This stemmed from their belief that practices like surrogacy ‘potentially threaten’\textsuperscript{118} common normative values such as human dignity and that no regulatory system could remedy ‘the basic affront to human dignity occasioned by the commodification of children and the commercialization of reproduction’.\textsuperscript{119}

A regulatory framework is also perceived to not have the transparency and democratic accountability that prohibitions are presumed to have. Proponents of legislative prohibitions claim that an administrative body that manages regulations is seen to be ‘a less visible entity’\textsuperscript{120} than Parliament and thus would be ‘free to make unchecked decisions without public and media oversight’.\textsuperscript{121} Prohibitions on the other hand, are ostensibly subject to a greater degree of both Parliamentary scrutiny and oversight by elected officials. Parliamentary scrutiny is believed to be necessary to preserve the principle of human dignity in surrogacy.\textsuperscript{122} Democratic oversight has been suggested to force parliamentary involvement which is crucial for launching public debates amongst for scientists, jurists, academics and the public if there is a need to make any changes to the law.\textsuperscript{123}

Finally, it has been argued that unlike regulations, criminal prohibition is a very visible and permanent way of condemning the activities that use ARTs which are unsafe and socially unacceptable. Regulations, it is believed, ‘lack the power of denunciation that flows from criminal prohibition’\textsuperscript{124} perpetuating instead the premise that such activities are permissible in society and just need to be controlled and monitored.\textsuperscript{125} Prohibition, on the other hand, is thought to convey an appropriate and powerful social message with regard

\textsuperscript{117} Proceed with Care, supra note 59 at 688.
\textsuperscript{118} Campbell, “Policy Rationale”, supra note 111 at para 10.
\textsuperscript{119} Proceed with Care, supra note 59 at 689.
\textsuperscript{120} Campbell, “Policy Rationale”, supra note 111 at para 27.
\textsuperscript{121} Ibid.
\textsuperscript{122} Ibid.
\textsuperscript{125} Campbell, “Policy Rationale”, supra note 111 at para 26.
to the way in which society rejects or decides not to tolerate certain activities within this area of science and research that contravene fundamental societal values.

**Disadvantages of prohibition**

1.4.1. **Impracticality of statutory prohibitions**

However the implementation of statutory prohibitions on commercial surrogate arrangements is impractical for both practical and theoretical reasons. Firstly, it is logistically difficult to ensure the enforcement of such prohibitions. For example, because altruistic surrogate arrangements tend to be private agreements between commissioning parents and an altruistic surrogate, it is arguably improbable that investigators would either be aware of all surrogate arrangements that are being carried out in Canada or be able to gather evidence that such arrangements have not been skewed through gifts and other incentives into commercial transactions.

Secondly, the diversity of viewpoints on surrogacy makes it difficult to identify the fundamental Canadian values that are so contravened as to harm society. Thus even if such values were capable of being identified, it is difficult to apply them to the regulation of scientific technologies because ‘so many variables – considerations of safety, state of science and public opinion – are in a state of flux’.\(^\text{126}\) In effect, it has been noted that as the technology develops and improves, the concerns surrounding their use and application may be resolved. If then ‘a practice that is controversial one year may not be the next’,\(^\text{127}\) it may call into question the need for statutory prohibitions to begin with.

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\(^{127}\) Harvison Young, “Let’s Try Again”, supra note 66 at para 40.
1.4.2. Inflexibility of statutory prohibitions

This then, highlights another concern raised by opponents to prohibitions in the Act - that criminal law is not flexible enough and is ‘too blunt and rigid a tool for dealing effectively with such [assisted reproductive] technologies’.128 The process of amending a legislative prohibition may lag behind far more rapid developments in scientific research which consequently suggests that corresponding evolutions in society’s perspectives on such issues may not be addressed in a timely fashion.

Proponents of prohibitions however, maintain that the importance of the issues raised by ARTs including ‘the extent to which we are able to ... commodify human life’129 warrants ‘a legislative amendment process premised on ensuring caution and alertness over quick reflexive changes’.130 Additionally, they argue that the AHRA requirement that the administration of the Act be reviewed within three years after the Agency comes into force131 is adequate ‘to ensure that the legislation is still in tune with the changing times and technologies’.132

However, till the Quebec Challenge in 2008, no legislative review of either the Agency or the administration of AHRA has been conducted some five years after the establishment of the Agency. Nor has any guidance been given as to how such a review would be conducted and how its observations are to effect legislative change. This seems to give credence to the belief that Parliamentary action ‘rarely moves so quickly’.133 For example, given that it has taken Parliament a decade to enact ART legislation, ‘there is little reason to believe that Parliament will be inclined to move more quickly in the future’.134 Thus, while it has been

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130 Ibid.
131 AHRA supra, note 1 at 70 (1).
132 Standing Committee on Health, supra note 64 at 31.
133 Caulfield, “Bill C-13”, supra note 126 at 20.
134 Ibid.
argued that ‘with political will’\textsuperscript{135} laws can theoretically be enacted or amended ‘in as little as 24 days’,\textsuperscript{136} it has been counter argued that realistically, once such laws have been enacted, ‘they may be difficult to alter in response to new scientific developments or new social concerns’.\textsuperscript{137}

1.4.3. Driving activities underground

As discussed in section 1.3.2, new scientific developments in IVF technology and significant social concerns about the rising levels of infertility have contributed to a more benign account of (gestational) surrogacy and surrogate arrangements. Arguably this is why such arrangements have garnered interest from involuntarily childless couples for whom surrogacy may be a last resort in their attempts to have a genetically related child.

However, prohibitions on commercial surrogacy force these couples who may not be able to find a willing altruistic surrogate, to take these arrangements underground or to travel to other countries in search of a surrogate.

However, both federal and provincial law as they stand would offer no form of protection to the parties to such surrogate arrangements. This is detrimental not just for the commissioning couple who may be never guaranteed the successful execution of the arrangement, but also for the birthed child and the surrogate.

\textsuperscript{136} Ibid.
\textsuperscript{137} Caulfield, “Bill C-13”, supra note 126 at 20.
1.4.3.1. Ambiguity as to legal parenthood of the child

It has been observed that where there is a prohibition on commercial gestational surrogacy – or even a failure to legislate on its validity – courts have been reluctant to recognise the legal parenthood of the commissioning parents under provincial law.

For example, in March 2009, it was ruled that a Quebec woman has no legal right to the child she paid a surrogate to carry for her. The court made that decision even though the surrogate had willingly given up legal claim on the child and the couple had filed to adopt the child. The couple, who had tried for years to be pregnant, had paid a surrogate $20,000 to carry a child for them and disclosed this information to the judge when they filed for adoption. The court’s decision effectively left the child with no legal mother and left the commissioning mother no locus standi to challenge court decisions on the child’s custody – a decision which has been commented on as not being in the best interests of the child.138

The legal parenthood of the child was also the issue in question in the 2008 case of a baby born in India after eggs from an Indian donor were fertilised using the Japanese commissioning father’s sperm and implanted in the womb of the surrogate Indian mother. When the commissioning parents divorced before the birth of the child, the determination of the birthed child’s domicile and legal parenthood could not be easily arbitrated on as neither Japan nor India had any surrogacy laws in place.139 The Indian courts also faced difficulty in ascertaining the legal motherhood of the child as the biological mother who donated her eggs chose to remain anonymous, the commissioning mother severed ties with both the commissioning father and the surrogate arrangement and the surrogate mother’s responsibility ended at childbirth. The commissioning father attempted to legally adopt the child but was thwarted by Indian adoption laws that do not allow single men to adopt. The situation remains unresolved at this time.

138 Canadian Broadcasting Corporation, “Born to surrogate, child has no legal mother, Quebec judge rules” (March 11, 2009).
139 Sandra Schulz, “In India, Surrogacy Has Become a Global Business” Der Spiegel, (September 25 2008).
1.4.3.2. Inadequate pre and post-partum care for the surrogate

The gestational surrogate is also adversely affected by a prohibition of and lack of regulation on, commercial surrogacy. Commercial agencies and the commissioning couple may make attempts to provide the surrogate with adequate health care during and after the pregnancy until the child is delivered to the commissioning couple. However, it is disconcerting to note that even in countries like India, where commercial surrogacy is not prohibited, there is currently no legislation in place to compel either the agencies or the commissioning couple to make legal or medical protection available to the surrogate prior to and after the duration of the surrogate act.

A surrogate could possibly negotiate the terms of financial compensation and medical aid to be included in a surrogacy agreement by herself. However, she may not be able to compel performance if such surrogacy agreements are held to be legally unenforceable as they are in Quebec. In such cases, it is likely that the surrogate would receive little or inadequate counselling, help and care in case of complications that may arise after the delivery or after the process of surrogacy is over.

However, despite the possibility of such detrimental outcomes resulting from the prohibition of commercial surrogacy, proponents of prohibitive legislation feel that such fears of driving the act underground, should not deprive Canada, as a sovereign nation, of ‘the right and responsibility to define for itself what is acceptable’. Martha Jackman, a feminist constitutional law scholar declared more forcefully that Parliament should, through prohibitions, ‘mak[e] it clear that it is not condoning these kinds of [surrogate] arrangements’ and that such arrangements ‘are bad for women, kids, and society’.

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140 Civil Code of Québec, supra note 80.
142 Standing Committee on Health, supra note 64: Submission by Diane Allen of The Infertility Network (November 20 2001) at 1155.
143 Standing Committee on Health, supra note 64: Submission by Martha Jackman (November 22 2001) at 1200.
Admittedly though, the veracity of this statement may be called into question since it was conceded that this scholar had never spoken to families who had benefitted from surrogacy or to surrogates themselves.144

1.4.4. Lack of social consensus on prohibition of surrogacy

Interestingly, similar claims were made by the Royal Commission when it recommended that the federal government impose a prohibition on surrogate activities in Canada. This recommendation appears to be based on a presumption that there is social consensus in Canada on the decision to do so. Thus federal policymakers used the suggestion that there was ‘widespread agreement among Canadians about prohibiting … aspects of new reproductive technologies that are most problematic’145 as a justification for the prohibition on commercial surrogacy.

That there was such consensus on the harm of surrogacy to society was not only contended by the Royal Commission but also by the Standing Committee on Health which held that these activities ‘are of such concern to Canadians’146 that their status as a prohibited activity should only be altered with the approval of Parliament.

In reality however, there is little evidence to support the assertion that surrogacy is of such national concern as to warrant the need for prohibitive action. Other than the moral panic induced by high profile cases such as the Baby M case, surveys conducted for the Royal Commission revealed that the Canadian opinion on surrogacies ‘varies considerably’147 with both ‘the circumstances that lead people to seek a preconception arrangement’148 and the type of surrogate arrangement chosen. There was however no consensus on whether and

144 Ibid.
146 Standing Committee on Health, supra note 64 at 9.
147 Proceed with Care, supra note 59 at 681.
148 Ibid.
which types of surrogate arrangements should be permitted. It was even shown in certain surveys that many Canadians did not want surrogate arrangements to be banned because it was felt that ‘a person who is infertile should be able to consider the use of preconception agreements’. 149 Significantly, these surveys also revealed that the majority of respondents did not believe that preconception arrangements were likely to have a significant impact on society ‘largely because they will not be used very often’. 150

The basis of federal policymakers’ justification for prohibitive legislation on commercial surrogacy is thus weakened by the lack of social consensus on the threat that surrogacy poses to the values held by Canadian society. In the absence of a clear consensus, it suggests that the criminalization of surrogacy in the AHRA ‘lacks legitimacy, utility, or both’. 151 Furthermore, it calls into question the real rationale of policymakers in imposing prohibitions on commercial surrogacy.

1.4.5. Constitutional challenges to federal regulation on surrogacy

It has been suggested that the real ‘unspoken justification’ 152 for the enactment of criminal prohibitions is to secure federal jurisdiction to enact laws in the area of health. 153 This would be in line with the Royal Commission’s recommendation that ARTs be federally regulated so as to implement ‘a national response’. 154 The Royal Commission believed that legislation at a provincial level was ‘not … effective with respect to such arrangements’ 155 as there was evidence that preconception arrangements could take place across provincial

149 Ibid.
150 Ibid at 682.
151 Healey, supra note 124, at 924.
153 Ibid.
154 Proceed with Care, supra note 59 at 19.
155 Ibid at 690.
A uniform federal legislation, on the other hand, was thought to ‘discourage people from travelling to parts of the country where [an otherwise prohibited activity] is permitted’. However, the legitimacy of the federal government’s authority to enact legislation regulating surrogacy has also been called into question. Fundamentally, this is because Section 92 (7) of the Constitution Act has been interpreted to accord certain aspects of health regulation to the provinces not the federal government. For example, Section 92(7) grants provincial legislatures exclusive jurisdiction over the ‘establishment, maintenance, and management of hospitals’. The provinces have also been held to have jurisdiction over the medical profession and the practice of medicine by virtue of subsections 92 (13) and 92 (16). Section 92 (16) also gives the provincial legislature general jurisdiction over health matters within the provinces.

1.4.5.1. Peace, order and good government ("POGG") power

The Royal Commission in its recommendations however, emphasized that it is ‘constitutionally justified’ to deploy federal legislative action under the “national concern” branch of the peace, order and good government ("POGG") power. This is a residual power given to Parliament under Section 91 of the Constitution Act which authorizes Parliament to enact laws in any area that has not been allocated to the provinces.

156 Ibid.
157 Ibid.
158 The Constitution Act, supra note 83 at 92 (7).
159 R v Morgentaler [1993] 3 S.C.R. 463 at 505, per Sopinka LJ.
160 These sections, together with section 93 of the Constitution Act which grants the provinces exclusive legislative authority over education, supports provincial oversight over health and medical education and training. [Martha Jackman, infra note 185 at 112.]
161 The Constitution Act, supra note 83 at 92 (7).
162 Proceed with Care, supra note 59 at 19.
provincial governments. It has been held that there can be federal legislation on health issues when ‘the dimension of the problem is national rather than local in nature’ and when such national concern is ‘directed at the protection of national welfare’.

The criteria for intervention under the national concern doctrine, as set out by the Supreme Court in *R v Crown Zellerbach Canada Ltd.* (“Crown Zellerbach”), requires that the matter Parliament seeks to regulate have ‘a degree of singleness, distinctiveness and indivisibility that distinguishes it from matters of provincial concern’. Thus, the Commission justified the possible application of POGG power to the regulation of activities that utilized ARTs by asserting that such activities possessed ‘a conceptual and practical integrity and distinctiveness’, were ‘easily distinguishable from other matters of human health’ and concerned Canada as a whole.

However, it has been suggested that there are two potential weaknesses to a federal claim of jurisdiction for the regulation of ARTs on the basis of national concern. Firstly, it has been observed that there is no evidence in Canada that activities using ARTs – including surrogacy – are being carried out in such significant numbers either provincially or nationally, to have ‘emerged as a national concern in the strict sense required by the courts’. Secondly, it has been held by the court in *Crown Zellerbach* that the national concern branch of the POGG power is to be used when the provinces have either failed or are unable to regulate a matter efficiently or when the matter is regulated in a manner that created spill-over effects to other provinces. To date, little evidence has been put forth

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163 *The Constitution Act*, supra note 83 at 91; the preamble of section 91 provides that: ‘It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces’.


165 Ibid, at 114 per Estey LJ.

166 Ibid, at 155 per Laskin LJ.


168 Ibid at 432 per Le Dain LJ.

169 Proceed with Care, supra note 59 at 19.

170 Ibid.

171 Healy, supra note 124 at 918.

172 *Crown Zellerbach*, supra note 167 at 432.
to suggest that the provinces have failed to act in relation to the governance of ARTs or that they are unable to do so or that spill-over effects have resulted.

This lack of evidence weakens any constitutional justification for the Commission’s recommendation that the POGG power be utilized to extend federal authority over the governance of ART related activities. The desire for uniform legislative treatment of this issue has been suggested to be ‘not a sufficient basis upon which to ground federal authority over the matter’. 173

To that end, in 2007, the Attorney General of Quebec referred a question regarding the constitutional validity of Sections 8 to 19, 40 to 53, 60, 61, and 68 of the AHRA to the Court of Appeal. As discussed above, these sections of the Act regulate aspects of medical practice that include health professionals, health institutions, the doctor-patient relationship and civil aspects of medically assisted human reproduction – areas of health regulation that, as set out in subsections 92 and 93 of the Constitution Act, are under the jurisdiction of the provinces, not the federal government. 174

In 2008, the Court of Appeal, ruling in favour of Quebec, declared that the highlighted provisions of the Act exceed the authority of the Parliament of Canada under the Constitution Act. 175 The issue is under consideration by the Supreme Court of Canada. Should the Supreme Court choose to uphold the Court of Appeal’s verdict, it will arguably call into question the validity of federal regulation on not only surrogacy but also other forms of assisted reproductive technologies, within the AHRA.

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173 Ibid.
174 Attorney General of Québec v. Attorney General of Canada 2008 QCCA 1167. [“AG Quebec v AG Canada”]
175 Ibid.
1.4.5.2. Criminal law power

Theoretically, it may be argued that this question of constitutional legitimacy only applies to the challenged provisions which includes the regulation of altruistic surrogacy but does not extend to the prohibition of commercial surrogacy in the Act. Thus, even if the decision of the Court of Appeal is upheld, it may be argued that the verdict would not affect the validity of the prohibition on commercial surrogacy since the prohibition clauses have not been directly disputed by the Quebec challenge.

However, it is significant that in among the arguments submitted by the Attorney General of Canada on the validity of the contested provisions and the AHRA, he countered that the purpose of the Act is to protect health, safety and public morals and that this gave the Act a valid criminal law purpose. Thus, unlike the Commission which generally relied on POGG power to support its recommendations for federal intervention in health matters, the federal government grounded its justification for the federal regulation on health on the criminal law power it has been granted under Section 91 (27) of the Constitution.

The use of criminal law power allows the federal government to ensure jurisdiction. However, the application of this power may be contested in this context because the legislation prohibits a type of conduct - engagement in a commercial surrogate arrangement. The prohibition of conduct is arguably ‘not [a] traditional criminal law concern’.

Additionally, it is still unclear if the dominant aspect of the AHRA – an Act which has in place both legislative prohibitions and complex and elaborate regulations - is more regulatory

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176 Ibid.
177 Ibid.
178 The Constitution Act, supra note 83 at 91 (27). This grants Parliament the power to legislate in relation to ‘the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters’.
than criminal in nature; some commentators have suggested that the more regulatory an act of Parliament, the less likely it will be upheld under federal criminal law power. ¹⁸⁰

However, the courts have generally interpreted the scope of this power to create federal prohibitions so broadly that it has allowed the federal government to extend its reach to regulatory schemes enacted in the area of health. This is because legislation constructed under such criminal law power need only ‘contain a prohibition accompanied by a penal sanction and ... be directed at a legitimate public health evil’. ¹⁸¹

This conclusion was upheld by the courts in R v Hydro Quebec (“Hydro Quebec”)¹⁸² when the court assessed the validity - under criminal law power - of sections of federal environmental protection legislation. The Canadian Environmental Protection Act has a relatively complex regulatory regime that has been suggested to be similar to the AHRA in its construction.¹⁸³ The majority opinion of the courts in Hydro Quebec was that where there is a clear legitimate public purpose, Parliament could legislate with regard to the criminal law in its widest sense’ including, it appears, in the development of complex regulatory schemes for prohibiting conduct.¹⁸⁴

Thus, even if the dominant aspect of the AHRA is found to be more regulatory than prohibitive in nature, it has been commented that ‘in allowing for a regulatory approach to public health issues under Section 91 (27), the courts have ‘significantly expand[ed] the potential for federal reliance on the criminal law power in the area of health’.¹⁸⁵

Even so, it is important to note that in Hydro-Quebec the courts were able to identify a ‘public purpose of superordinate importance’¹⁸⁶ that required federal legislation - the goal of protecting the environmental and human health.¹⁸⁷ It is questionable if federal

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¹⁸¹ RIR - MacDonald, supra note 179 at 246, per La Forest LJ.
¹⁸⁴ Ibid at para 63.
¹⁸⁵ Ibid at 102.
¹⁸⁶ Hydro-Quebec, supra note 182 at 231, per La Forest LJ.
¹⁸⁷ Ibid.
legislation on surrogacy - or ART regulation in general – is a matter of superordinate importance that fulfils a legitimate public purpose.

In *Reference Re s. 5(a) of the Dairy Industry Act (Margarine Reference)* Justice Rand set out a non-exhaustive list of legitimate public purposes that include public peace, order, security, health [and] morality. It may be argued that the criminal law prohibition of some activities that utilize ARTs may be justified on the basis of morality. However, as previously noted, there is a lack of social consensus in Canada on the (im)morality of surrogacy. This makes it difficult to characterize surrogacy – or even just commercial surrogacy - as a public health issue let alone one that perpetuates a public health evil.

Given the absence of a clear and consistent public mandate for the prohibition of surrogate arrangements, it may be argued that federal legislative action, either through the use of POGG power or criminal law power, is unnecessary for the regulation of ARTs. Thus, it may be possible for constitutional challenges to be mounted not only on the federal regulation on ARTs and surrogacy, but also on the legislative prohibitions on commercial surrogacy.

**1.4.6. Susceptibility of prohibitions to Charter challenges**

The AHRA may also be susceptible to a successful challenge for breach of Section 7 of the *Canadian Charter of Rights and Freedoms* ("the Charter") if it can be shown that in prohibiting commercial surrogacy, the Act fails to address the rights of infertile individuals and would-be surrogate mothers. An analysis of the susceptibility of the AHRA to such challenges follows.

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Footnotes:

189 Ibid at 50.
190 Harvison Young and Wasunna, supra note 183 at para 73.
1.4.6.1. Infertile individuals

It is possible for the Section 6 prohibition of commercial surrogacy to be in violation of Section 7 of the Charter. It was set out in *R v Beare* \(^{191}\) that a Section 7 infringement occurs when there has been a violation of the right to life, liberty or security of the person, and when this violation is not in accordance with the principles of fundamental justice. \(^{192}\) The right to liberty as held in *R v Morgentaler*, [*"Morgentaler"*] \(^{193}\) guarantees ‘every individual a degree of personal autonomy over important decisions intimately affecting their private lives’. \(^{194}\) Justice Wilson further specified such decisions are those that have ‘profound, psychological, economic and social consequences’ \(^{195}\) for the party making the decision. \(^{196}\)

It has been argued that such parties and such decisions may include the infertile couple and their decision to seek reproductive assistance for infertility, respectively. \(^{197}\) The impact and importance of infertility has been noted by the Royal Commission. It indicated that the inability to have children ‘cannot be dismissed as inconsequential’ \(^{198}\) and is ‘not … easy to deal with’ \(^{199}\) as it triggers ‘complex and powerful emotions’ \(^{200}\) including grief, anger, guilt and depression. In *Cameron v Nova Scotia*, \(^{201}\) infertility was noted to have ‘a serious impact on the mental and social well-being of the [infertile] couple’ \(^{202}\) and was found to even lead to ‘detrimental social consequences such as divorce or ostracism’. \(^{203}\)

Surrogacy may alleviate these consequences by allowing the infertile couple to become parents. However, the State limits the infertile couple’s access to a surrogate through

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192 Ibid.
194 Ibid at 171.
195 Ibid.
196 Ibid.
197 Hnatiuk, supra note 51 at para 22.
198 *Proceed with Care*, supra note 59 at 171
199 Ibid.
200 *Proceed with Care*, supra note 59 at 172.
202 Ibid at 658.
203 Ibid.
criminal prohibitions while providing very few alternatives to surrogacy. Additionally, existing alternatives are often expensive and provide no guarantee of success. Although the State through the Act, does not prohibit surrogacy outright – since altruistic surrogacy is allowed under Section 12 of the Act - the severity of the State’s intrusion can arguably be shown by its prohibition on paying or advertising for or paying an intermediary to find a surrogate.

When the Act so limits the availability of such procedures, it arguably restricts the freedom of the infertile couple to access assisted reproductive techniques, thus violating their right to liberty.

**Fundamental justice**

However, even if this restriction qualifies as a possible Section 7 violation of the infertile couple’s right to liberty of the person, it may not be seen as a breach of the Charter if it were made in accordance with the principles of fundamental justice. In *R v Malmo-Levine*, the court clarified that the principle of fundamental justice renders unconstitutional those laws ‘that are grossly disproportionate to the state interest to which they are directed’. Thus, a violation of the right to liberty may only be concluded if the courts find that Section 60 of the Act - which imposes criminal sanctions of up to ten years imprisonment and/or a fine of $500,000 on those who pay for surrogate arrangements - is severe and therefore sufficiently disproportionate to the objectives of the Act, which is to prevent commodification and exploitation of surrogates and children.

It has been argued that criminal sanctions for commercial surrogacy may be onerous and unnecessary in light of other legislative options that can be utilized to prevent exploitation. For example, a regulatory framework to manage surrogacy has been suggested to be a plausible alternative that may also address exploitation concerns. Thus it is possible that prohibition of an act like commercial surrogacy, without any consideration

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205 Ibid at 143.
206 Hnatiuk, supra note 51 at para 35.
207 Harvison Young, “Let’s Try Again”, supra note 66 at para 34.
of more moderate alternatives to an outright ban, may be considered a disproportionate response that was not made in accordance with the principles of fundamental justice. Consequently the prohibition of commercial surrogacy may be found to be in violation of Section 7 of the Charter.

1.4.6.2. Rights of the surrogate mother

In a similar vein, it is also possible for Section 6 prohibition of commercial surrogacy to be found to violate Section 7 of the Charter on account of the fact that it limits a woman’s right to bodily autonomy by only allowing her to be a surrogate in an altruistic capacity. This would be an infringement of the right to liberty which includes a right to make ‘fundamental life choices’ free from State interference. In Morgentaler, Wilson J held that such fundamental choices included ‘a woman’s right to reproduce or not reproduce’. Therefore, a potential surrogate’s right to liberty is violated when the decision as to whether her body can be used to nurture new life is taken away from her and made instead by actors appointed by the State.

However, it is important to note that Wilson J made these statements in the context of a State’s right to restrict access to abortion, and so it is uncertain if such fundamental life choices include the right to choose to conceive for the purposes of acting as a surrogate mother. Some commentators suggest that it does because the principles of reproductive autonomy, at their most fundamental level, relate to the freedom of a woman to make choices about her body and should include any significant reproductive choice a woman may exercise including the decision to conceive, to abort or to use contraceptives.

209 Ibid.
210 Morgantaler [1988], supra note 193 at 172.
211 Lori Andrews “Surrogate Motherhood – The Challenge for Feminists” in Larry Gostin (ed), Surrogate Motherhood: politics and privacy (Bloomington: Indiana University Press, 1990) 167 at 168. [“Andrews – Surrogate Motherhood”]
that end, when the State denies a woman a right to consent to act as a surrogate mother, it undermines her dignity by suggesting that she is not capable of making rational, informed decisions about her reproductive capacity.  

Nevertheless, it is difficult to decisively conclude that courts would be willing to see such State interference as a Section 7 Charter violation of the AHRA. This is because even though it prohibits commercial surrogacy, the AHRA does permit women to act as surrogates, albeit within an altruistic context.

However, it has been argued that the AHRA intrudes on a woman’s right to become a surrogate by prohibiting commercial surrogacy and strictly regulating the conditions under which she can engage in an altruistic surrogate arrangement. By so truncating a woman’s right to choose to make a fundamental reproductive choice, the State - through the AHRA – severely restricts a potential surrogate’s freedom to exert her bodily autonomy protected under the Section 7 right to liberty.

Even then, it is notable that thus far the courts have been reluctant to encompass economic liberty within the right to liberty. For example, in Irwin Toy Ltd v Quebec (“Irwin Toy”), Section 7 of the Charter was ‘defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings’ and thus it was held that economic rights do not infringe the Charter.

On the other hand, it may be significant that the Supreme Court in Irwin Toy dealt with the applicability of the Section 7 infringements to corporations not individuals – in fact, judgment was specifically withheld on whether the economic rights of individuals were to be treated ‘as though they are of the same ilk as corporate-commercial economic rights’ and on whether such rights should be included under the right to liberty provision of Section 7.

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212 Shalev, supra note 36 at 11.
214 Ibid.
215 Ibid at 1003-1004.
To this end, it has been suggested that there are theoretical reasons to protect the freedom of a woman to engage in a surrogate arrangement, even if the arrangement compensates her for her participation. From a feminist perspective, an argument can be made that preventing a surrogate from exercising her right to economic liberty reinforces the notion that a woman’s reproductive capacity has no inherent monetary value. Thus the State’s reluctance to tolerate a surrogate’s right to seek economic recompense for her uncoerced, informed choice to take part in a surrogate arrangement has been seen as evidence that it treats reproductive activity as it does domestic labour – ‘as unpaid, non economic acts of love and nurturing rather than as work and real economic contributions to family life’. This perception is reinforced by the lack of value ascribed by the State to other economic opportunities a surrogate may have to give up in favour of surrogacy. For example, under the AHRA, an unemployed woman who decides to be an altruistic surrogate will receive no reimbursement (because she did not draw an income before becoming a surrogate) nor compensation for income-earning opportunities she would have lost or given up as a result of her becoming a surrogate.

Even if an employed woman decides to become a surrogate in an altruistic arrangement, a claim for the reimbursement of receipted work-related income can only be made in relation to the loss of income incurred if a licensed medical practitioner attests that it is unsafe for her or the baby to continue to work. Beyond such compensation, no economic value is attached to the process of surrogacy or arguably to the surrogate who sacrifices her time, energy and bodily integrity to gestate and deliver a child.

Thus, it has been asserted that respect for a woman’s dignity and reproductive autonomy requires that she be entitled to the freedom to dictate the terms under which her services

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216 Shaley, supra note 36 at 157-160.
217 It is thought that this may be a reason why the process of adoption is less susceptible than surrogacy to commodification and exploitation concerns – in an adoption, although money changes hands between the commissioning parents and the intermediaries the mother is not compensated for given up her birthed child. Mary Lyndon Shanley, Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-sex and Unwed Parents (Beacon Press, 2002) at 109. [Shanley, “Making Babies”]
218 AHRA, supra note 1 at 12.
will be provided.\textsuperscript{220} An argument can thus be made that Section 6 of the AHRA, in prohibiting commercial surrogacy, severely limits a woman’s right to make a fundamental and intimate choice with respect to her reproductive freedom and thus may ‘run the risk of violating Section 7 of the Charter’.\textsuperscript{221}

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Before confirming the violation however, the court is likely to consider if the suggested Charter infringement had taken place in a manner that is in accordance with the principles of fundamental justice. To that end, in *Chaoulli v Quebec (Attorney General)* (“Chaoulli”),\textsuperscript{222} the courts clarified that it is a principle of fundamental justice that laws not be arbitrary and there is a ‘real connection on the facts’\textsuperscript{223} between the (contested) law and the State objective underlying it.\textsuperscript{224}

The main State objective behind Section 6 of the AHRA is to prevent the commodification and exploitation of women\textsuperscript{225} and the State is likely to argue that there is a real connection between this objective and the prohibition of commercial surrogacy.

It may however, be difficult to either substantiate such a claim or to show that the law is not arbitrary for three possible reasons.

First, the potential for exploitation has been shown to arise in surrogate arrangements regardless of whether the surrogate is compensated for participation in the act. For example, exploitation of the surrogate has been suggested to also occur within an altruistic surrogate arrangement.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{220} Hnatiuk, supra note 51 at para 45.
\item \textsuperscript{221} Ibid at 42.
\item \textsuperscript{222} *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791.
\item \textsuperscript{223} Ibid at 131.
\item \textsuperscript{224} Ibid.
\item \textsuperscript{225} Health Canada, Proposals for Legislation Governing Assisted Human Reproduction: An Overview (Ottawa: Health Canada, 2001) at 7 [Proposals for Legislation].
\item \textsuperscript{226} Harvison Young, “Let’s Try Again”, supra note 66 at para 33.
\end{itemize}
Ironically, altruistic surrogacy is allowed under the AHRA ostensibly because the lack of economic benefit to the surrogate it is believed, will prevent the exploitation of economically vulnerable women who may otherwise engage in the act.

However, some commentators believe even though money is not exchanged, altruistic surrogates may still be as economically or psychologically vulnerable as commercial surrogates to intrusive procedures.227 In highly coercive family situations, she may be economically dependent on the commissioning parents or on their next of kin or be in otherwise psychologically vulnerable circumstances that put her at risk of being compelled to be a surrogate. It has been noted that the lack of monetary consideration could also ‘be a symptom of the family’s power in taking her reproductive services for granted’,228 as much as it is an indication that she is acting out of uncoerced altruism.229

Second, there is a possibility that the criminalization of the commercial surrogate arrangement does not prevent the activity from being carried out, but, as previously discussed, ‘simply drive[s] the practice underground, where the potential for pressure, exploitation, and inequity is the greatest’.230 The likelihood of such an occurrence is high given (anecdotal) evidence of the pre-existing market for surrogacy.231

In this event, the impact of market forces may skew the legislated prohibition of commercial surrogacy which was directed at preventing the exploitation of surrogates into having ‘just the opposite effect’.232 For example, an economically vulnerable woman, when provided with the opportunity to better her financial condition, may be reluctant to seek help or counselling with respect to her decision to engage in a compensated surrogate arrangement. Prohibition of the act would discourage her from voicing her concerns or

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227 Ibid.
229 Ibid.
230 Standing Committee on Health, supra note 64: Submission by Professor Bernard Dickens, Professor in Health, Law and Policy, Chair in Biomedical Ethics, Faculty of Law, Faculty of Medicine and the Joint Centre for Bioethics, University of Toronto (October 24 2001) at 1625.
231 Gazze, supra note 84.
232 Harvison Young and Wasunna, supra note 183 at para 87.
providing evidence regarding her mistreatment by intermediaries or the commissioning parents. Even if she were willing to do so, the illegality of the act may prevent her from either seeking or being offered independent legal advice. Criminalizing commercial surrogacy can thus take the surrogate practice ‘to the backstreets’ thereby, ‘mask[ing] its existence and ... creat[ing] a greater likelihood of exploitation of [surrogate] women’.

With these two reasons, it is thus possible for the courts to reason that instead of eradicating the exploitation of women, the Section 6 prohibition of commercial surrogacy not only leaves the most vulnerable women to the whims of commercial market, but also does not protect many women who, as altruistic surrogates, are also at risk of exploitation. To that end, it will arguably be difficult to show a real connection between the prohibition and the professed legislative goal.

A third reason for why the Charter infringement may not have taken place in accordance with the principles of fundamental justice stems from the ambiguity surrounding the distinction made between altruistic behaviour and commercially motivated behaviour in the AHRA. Allowing altruistic surrogacy – which is thought to be untainted by the notion of consideration - under the Act may have been justified as a way of acknowledging that a woman may not be motivated by money to be a surrogate.

Arguably though, this recognition of the non-monetary, altruistic motives of a surrogate raises an interesting paradox: why is a woman not to be paid to be a surrogate if it can be established that earning money is not her prime motive? As some commentators have pointed out, there are many professions thought of to be altruistic but for which people are paid, such a priesthood, social work and nursing.

An absolute prohibition of commercial surrogacy inevitably pre-determines that a woman's decision to engage in a commercial surrogate arrangement is necessarily involuntary or uninformed and is therefore exploitative when she may merely be motivated by a desire to

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233 Ibid at para 45.
234 Harvison Young, “Let’s Try Again”, supra note 66 at para 29.
235 Ibid at para 28.
help the infertile. The prohibition thus prompts the surrogate to ask - “Why am I [seen to be] exploited if I am paid, but not [exploited] if I am not paid?”

It is therefore uncertain if there is a real connection between the prohibition of commercial surrogacy and the State’s goal of preventing the exploitation of women. While it is generally accepted that would-be surrogates need to be protected from exploitation, it can be shown that the prohibition of commercial surrogacy is unlikely to protect many women who are at risk of exploitation. At the same time, the prohibition greatly limits the autonomy of others who may not be at risk and encroaches on their reproductive and economic freedoms by preventing them from being able to exercise their autonomous choice to enter into such arrangements outright.

The impact of such prohibitions on an individual’s reproductive autonomy would then suggest that in addition to the legislation being not well connected to the objective motivating it, the Section 6 prohibition of commercial surrogacy is an arbitrary criminal law. In this instance, it is possible for the courts to find that a Section 7 Charter infringement of the right to liberty of a surrogate had taken place in a manner that is not in accordance with the principles of fundamental justice.

1.4.6.3. Justification under Section 1 of the Charter

It is important to note however, that the State may have the opportunity to justify the violation of the rights of either the infertile couple or of the surrogate mother under Section 1 of the Charter. To that end, the Supreme Court in R v Oakes, in setting out the steps

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involved in this justification process, included an evaluation of whether the government has impaired the rights in question no more than necessary to accomplish its objective.238

However, it has been argued that the State may fail to convince the courts that both the prohibitions on surrogacy set out in the Act and the ‘significant’ criminal sanctions levied as punishment for a breach of this section of the Act only minimally impair the rights violated.239

This is because there may be other plausible alternatives to prohibition which not only impair the rights of the involved parties to the arrangement more minimally than prohibition, but are also believed to meet the objectives of the Section 6 prohibition arguably more effectively and less onerously than by enforcing exorbitant penalties and prison sentences of up to ten years. Chief amongst these suggestions is the adoption of a regulatory scheme to manage incidents of commercial surrogacy rather than subjecting such arrangements to an outright criminal ban.240

**Regulatory scheme as a form of minimal impairment**

Regulations have been thought to have the potential to achieve the State’s objectives of preventing the exploitation of women without reliance on onerous criminal sanctions for breach. Additionally, given the deleterious effects of the Section 6 prohibition on the rights of surrogates, set out above, it has been suggested that the courts may find regulations more successful than prohibitions in minimally impairing the rights of both the surrogate and the infertile couple, to liberty and reproductive autonomy while still protecting a surrogate from exploitation.241

It is likely that the State may be unable to justify the Section 7 violation on the right to liberty of both the infertile couple as well as the surrogate mother under the Section 1 justification. In that event, Section 6 of the Act would be found to be a Charter infringement

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238 Ibid at para 70.
239 Hnatiuk, supra note 51 at para 51.
240 Harvison Young, “Let’s Try Again”, supra note 66 at para 34.
241 Hnatiuk, supra note 51 at para 51.
and the State would need to reconsider the use of prohibitions in the context of surrogate arrangements.

2. Necessity of Surrogacy Legislation

Given the above shortcomings of the AHRA stated above, one might question if the regulation of surrogacy is superfluous or even necessary. It may be argued however that a lack of surrogacy regulation would leave the surrogate act and its participants unprotected within the commercial market.

At the same time a legislative prohibition on both altruistic and commercial surrogacy fails to address the reality of the existing demand for surrogate arrangements and would arguably be both ‘an over-reaction that represents an undue intrusion into women’s reproductive autonomy’ and a mechanism that, in effect, abandons the parties to the surrogate arrangement to the whims of the underground market and ‘leav[es] affected women without meaningful support’. Additionally, prohibition ‘based on a non-existent public consensus’ may merely serve to ‘impose norms on society without much regard for the social realities and cultural diversities that may exist therein’.

To that end, regulating on surrogacy appears to require an alternative stratagem to deal with the issue of exploitation and commodification which maintaining its participants’ rights to liberty and reproductive autonomy.

242 Harvison Young, “Let’s Try Again”, supra note 66 at para 34.
243 Ibid.
245 Harvison Young and Wasunna, supra note 183 at para 4.
2.1. Arguments for a regulatory framework on surrogacy

To that end, as suggested in section 1.4.6, what may be needed is a more detailed and nuanced regulatory framework that provides adequate guidance to the participants in a surrogate arrangement.

It is important to note that the regulatory approach already exists within the AHRA with respect to the regulation of altruistic surrogacy. What has been consistently proposed however is that the criminalization of commercial surrogacy be revisited and replaced with a regulated form of commercial surrogacy. A malleable and simplified regulatory structure may have the ‘flexibility and responsiveness’\textsuperscript{246} that is needed to respond swiftly to scientific and social changes while protecting the surrogate, the child and the infertile couple against the harms of commodification and exploitation.\textsuperscript{247}

2.1.1. Advantages of a regulatory regime

Regulations may be a more appropriate mechanism to regulate surrogacy and other activities that utilize ARTs in general. They are seen to be far more responsive and accommodative of rapid scientific developments and the consequent changes and evolutions of public opinion on ARTs. This is because developing an administrative or regulatory response is said to be technically faster than amending existing legislative prohibitions to reflect the same.\textsuperscript{248} Legislative amendments require a lot of ‘time and political energy’\textsuperscript{249} and can only be changed through an act of Parliament. This would not allow policymakers to keep pace with advances in ARTs as easily as they could with

\textsuperscript{246} Caulfield, “Bill C-13”, supra note 126 at 21.
\textsuperscript{247} Elly Teman, “‘Knowing’ the Surrogate Body in Israel” in R Cook et al (eds), Surrogate Motherhood: International Perspectives (Oxford- Portland Oregon, Hart Publishing, 2003) 261 at 277.
\textsuperscript{248} Caulfield, “Clones”, supra note 152 at 337.
\textsuperscript{249} Ibid.
regulations. For example in the context of surrogacy, as suggested in section 1.3, legislation that was passed in 2004 was based on recommendations set out by the Royal Commission a decade earlier and thus do not acknowledge or account for the developments in IVF after 1994 that have given rise to a more benign form of gestational surrogacy.

A regulatory approach, on the other hand, will be able to adapt more quickly to the dynamic developments that characterize the field of ARTs because its decision-making process is less cumbersome than the process of legislative amendment and can thus satiate ‘the need for rapid governmental action’\(^\text{250}\) when necessary. Thus regulations are capable of evolving together with developments in reproductive technology.

This flexibility of a regulatory mechanism in reacting to changing situations and perceptions also extends to its ability to uphold the surrogate’s right to reproductive autonomy while protecting her and other participants in the surrogate arrangement from commodification. This is because, unlike prohibition, regulation would allow for the provision of legal advice and counselling to the surrogate so as to manage the terms under which the arrangement may or may not proceed.

Proper regulation, it has been suggested will also be able to mitigate concerns about exploitation without the use of outright criminal bans\(^\text{251}\) by ensuring that both women who wish to be surrogates and potential commissioning parents undergo screening checks and counselling. It will be able to provide surrogates and the commissioning parents with access to legal and medical advice so that they are made aware of what their consent to the arrangement would entail. In this way, the regulations would ensure that the arrangement is monitored and supervised, the participants are well informed, properly cared for, and are thus more likely to have their rights protected and less at risk of having to provide their services on exploitive terms.

Undeniably, it would be a challenge to create a mechanism that not only responds to the fears of commodification and exploitation in the context of surrogacy but also prevents the


\(^{251}\) Caulfield, “Bill C-13”, supra note 126 at 21.
rights of the affected parties from being eroded. However, arguably the attraction of such a regulatory approach is that it has the potential to better target the harms to which the AHRA is directed and to be more flexible in reacting to changing situations, without invoking severe criminal sanctions which, it has been recommended, should only be used as instrument of last resort.\textsuperscript{252}

\textbf{2.1.2. Disadvantages of a regulatory regime}

The use of regulations in place of prohibitions is not without its detractors. Proponents of legislative prohibitions argue that the issues raised by the development and use of ARTs ‘are so fundamental that their regulation should not be left in the hands of an administrative [regulatory] body that is unaccountable to the public’.\textsuperscript{253} It has been asserted that because the members of these regulatory bodies are appointed and not elected, they do not ‘democratically represent Canadian society’.\textsuperscript{254} It is significant however that these bodies are appointed by and answer to democratically elected officials that are answerable to the public.

Regulation has also been perceived to encourage less public deliberation than legislation ‘because regulations aren’t debated in the House and therefore don’t come to media attention and public scrutiny’.\textsuperscript{255} Legislative entities, on the other hand, are thought to encourage public debates and is thus seen to be a more transparent and accountable regime than a regulatory administration.\textsuperscript{256}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{253} Angela Campbell, “A Place for Criminal Law”, supra note 123 at para 38.
\item \textsuperscript{254} Bayliss and Downie, supra note 135.
\item \textsuperscript{255} Ibid.
\item \textsuperscript{256} Angela Campbell, “A Place for Criminal Law”, supra note 123 at para 81.
\end{itemize}
\end{footnotesize}
However, it is notable that under section 55 of the AHRA, regulations under the Act are required to be reviewed and vetted by the House before being passed.\(^{257}\) This arguably confirms the accountability of ART regulations to a democratically elected entity.

Even so, while they admit that the process of legislative change generally may take longer to be effected,\(^{258}\) proponents of prohibitions highlight the creation and passing of Bill C-36\(^{259}\) – anti terrorism legislation that received royal assent just 9 weeks after its first reading – as an ‘illustr[ation] [of] the pace with which Parliament can act when legislative action is deemed critical and necessary’.\(^{260}\) To end, they maintain that when necessary, Parliament will and does move fast *enough* to effect legislative change.

However, as discussed in section 1.4.2, this is arguably the exception that proves the rule - Parliament rarely moves at the speed with which the terrorism laws under Bill C-36 were amended.

Furthermore, even in the absence of legislative oversight, it has been argued that it is possible to structure a regulatory scheme to be capable of being accountable to the public and Parliament. For example, the Canadian Bar Association sees democratic accountability to be ‘a process issue that, if properly handled, will not in any way weaken the rigour of the regulatory framework’.\(^{261}\)

\(^{257}\) AHRA, supra note 1, s. 66 (1).

\(^{258}\) Angela Campbell, “A Place for Criminal Law”, supra note 123 at para 36.

\(^{259}\) Bill C-36, An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, 1st Sess., 37th Parl., 2002.

\(^{260}\) Angela Campbell, “A Place for Criminal Law”, supra note 123 at para 37.

\(^{261}\) Standing Committee on Health, supra note 64: Submission by Brent F. Windwick, Chair, National Health Law Section, Canadian Bar Association (November 26 2001) at 1010.
2.2. Characteristics of a regulatory regime

To that end, it has been suggested that ‘a properly constituted multidisciplinary oversight body’\(^{262}\) comprised of public and Parliamentary figures who will ‘interpret, educate, and debate’ \(^{263}\) any regulatory amendments be set up. In ensuring a transparent decision making process, it should avail of a public consultation process and will be accountable to Parliament through a ‘negative resolution process’ \(^{264}\) where regulations proposed by the regulatory oversight body would come into effect unless they are explicitly rejected by a negative resolution of the House of Commons and the Senate.\(^{265}\)

Thus, the implementation of regulatory mechanism to administer surrogacy in Canada has been suggested to be one way of acknowledging and addressing the tension between advances in reproductive technologies and the policy concerns that they raise.

Arguably, the success of a regulatory framework lies in its ability to ‘respond to ... rapidly changing science, is respectful of ... diverse moral positions, encourages and facilitates ongoing public debates and is sufficiently accountable [to the public and the legislature]’.\(^{266}\) Significantly, even if such a regulatory system is more responsive, more effective, and no less democratic than prohibitive legislation, it needs to ensure that exploitation and commodification concerns are sufficiently addressed.

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\(^{262}\) Ibid.
\(^{263}\) Ibid.
\(^{264}\) Ibid.
\(^{265}\) Ibid.

Caulfield, “Bill C-13”, supra note 126 at 23.
3. **LOOKING AHEAD**

To that end, in Chapter 3, I will undertake a comparative study of other regulatory and prohibitive models both within and out of Canada to observe the effects of both models on the rights of the surrogate, the child and the commissioning parents. Specifically, I will examine the ways in which these schemes deal with exploitation and commodification concerns by evaluating their methodology regarding the surrender of the child and the question of payment to the surrogate mother.

In order to analyse the effects of legislative prohibitions, I will examine the UK’s *Surrogacy Arrangements Act 1985, the Human Fertilisation and Embryology Act 1990* and *Human Fertilisation and Embryology Act 2008*. The regulations hold void all surrogate agreements and do not compel the surrogate to give up the birthed child to the commissioning parents after birth. However, they also do not explicitly prohibit compensatory payment to the surrogate.

*The Surrogate Motherhood Agreements (Approval of Agreements and Status of Newborn) Law, 1996* of Israel will also be studied as another example of a regulatory system set outside Canada. This regulatory model is unusual in its approach - it allows payments to be made to compensate a surrogate for her time and suffering but once ‘all the requirements [regarding her suitability] have been met, ... gives the birth mother little opportunity to change her mind’.

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CHAPTER 3: REGULATORY MODEL ON SURROGACY IN THE UNITED KINGDOM AND ISRAEL

Canadian surrogacy legislation, in prohibiting commercial surrogacy while permitting altruistic surrogacy, attempts to meet two distinct goals: protecting the rights of the surrogate mother and the child and discouraging commercial involvement in surrogacy. Having identified the shortcomings of existing regulation that prevent it from reaching these goals in Chapter 2, the options for reforming the law will be discussed in the remaining sections of this dissertation.

To that end, in this Chapter the surrogacy legislation in the United Kingdom (“the UK”) and the regulatory regime on surrogacy in Israel will be evaluated. Regulation in both these jurisdictions appears to be based on the belief that surrogacy arrangements are inevitable, but unsound if not subject to legislative guidance. However, both jurisdictions take varying approaches to alleviating the traditional concerns of commercialization of the act and to protecting the rights of the individuals involved. Assessing the successes and failures of both regulatory structures would arguably highlight elements of each regime which could be adapted by policymakers in the reconstruction of Canadian surrogacy law.

1. United Kingdom

It has been noted that key aspects of the AHRA’s legislative framework on surrogacy are similar to those in place in common law jurisdictions such as the UK. Specifically, just as in Canada, the act of surrogacy itself is not illegal in the UK. However various aspects of the surrogate arrangement have been prohibited to ensure its (current) usage as ‘an acceptable option of last resort in cases where it is impossible or highly undesirable for medical reasons for the intended mother to carry the child herself’.

This almost conciliatory approach to surrogacy is in sharp contrast to the initial reluctance expressed by both the medical community\textsuperscript{270} as well as the English courts to even accept it as a procreative option. In \textit{A v C}\textsuperscript{271} - the first documented judicial case of surrogacy where the commissioning couple arranged for a prostitute’s friend to be inseminated by the commissioning man for £3000 on the condition that the child was handed over to the couple after birth – the surrogate arrangement was described as ‘bizarre and unnatural’\textsuperscript{272} and the agreement between the parties was declared to be a ‘sordid commercial bargain’.\textsuperscript{273}

1.1. Surrogacy Legislation

The main motivation for legislating on surrogacy however, arose primarily in response to ‘the national outrage’\textsuperscript{274} generated by \textit{Re C (A Minor) (Wardship: Surrogacy)}\textsuperscript{275}. Here, a surrogate agreed to be inseminated with the commissioning fathers' sperm and, upon the birth of the child resulting from this procedure, was content to relinquish custody. However, the local authority, concerned about the baby’s welfare, invoked the wardship jurisdiction of the High Court and the child was temporarily made a ward of court. Upon satisfying itself of the commissioning couple’s suitability as the child’s custodians, the court ultimately ruled that ‘the care and control of the baby is [to be] committed to [the commissioning couple]’,\textsuperscript{276} and that the couple were therefore permitted to take the child out of the UK. The story attracted considerable media attention and was subsequently drawn into Parliamentary debates, which began to question the moral acceptability of surrogacy.


\textsuperscript{271} \textit{A v C} [1985] F.L.R. 445.

\textsuperscript{272} Ibid per Ormrod LJ at 445.

\textsuperscript{273} Ibid per Ormrod LJ at 457.

\textsuperscript{274} Guichon, supra note 268 at 598.

\textsuperscript{275} \textit{Re C (A Minor) (Wardship: Surrogacy)} [1985] F.L.R. 846 (U.K. Fam Div) [“Re C”]

\textsuperscript{276} Ibid, per Latey J.
Prior to this, no regulations or guidelines had been issued on surrogacy in the UK although the *Report of the Committee of Enquiry into Human Fertilisation and Embryology* (“the Warnock Report”) had held that ‘surrogacy was wrong’.\(^{277}\) Surrogacy had presented the committee that produced the Warnock Report (“Warnock Committee”) with ‘some of the most difficult problems ... [they] ... encountered’.\(^{278}\) In light of the opinions expressed by the Warnock Committee and the events that unfolded in *Re C*, it was determined that ‘new legal safeguards [were] needed ... to prevent the commercial exploitation of surrogate motherhood’.\(^{279}\)

**1.1.1. The Surrogacy Arrangements Act 1985**

The *Surrogacy Arrangements Act 1985* (the “1985 Act”)\(^{280}\) was thus tabled and rapidly received Royal Assent primarily to outlaw the commercialization of preconception arrangements in the UK. It defines a surrogate mother more broadly than Canada’s AHRA, extending the definition to include ‘a woman who carries a child in pursuance of an agreement made before she began to carry the child, and with a view to relinquishing her maternal rights to it’.\(^{281}\) This clearly expands the applicability of the Surrogate Arrangements Act to include traditional surrogate arrangements.

However, the 1985 Act does not legislate on altruistic surrogacy focusing instead on commercial arrangements. To that end, the 1985 Act only prohibits the initiation and negotiation of surrogacy arrangements - or any offers to negotiate surrogate arrangements - ‘on a commercial basis’.\(^{282}\) A person does an act on a “commercial basis” when he receives or expects to receive payment for making, negotiating or facilitating a surrogate

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277 Warnock, supra note 2 at xii.
278 Warnock, supra note 2 at 46.
280 Surrogacy Arrangements Act 1985 c 49 [“1985 Act”].
281 Ibid at s. 1(2).
282 Ibid at s. 2(1).
Additionally, under the 1985 Act, it is illegal for anyone – including brokers, commissioning parents and surrogates themselves – to advertise surrogacy services.284

These limits were placed on the surrogate arrangement to allay fears of economic exploitation of the surrogate by ‘remov[ing] the financially motivated entrepreneur from the scene’285 while ‘ensur[ing] that ... surrogacy will be kept within the family’.286


The application of ARTs in gestational surrogate arrangements ensures that they are also monitored by the provisions of the Human Fertilisation and Embryology Act 1990287 (“HFEA 1990”) as amended by the Human Fertilisation and Embryology Act 2008288 (“HFEA 2008”) and its Code of Practice (collectively “the HFEA legislation”). Traditional surrogacy, involving artificial insemination as opposed to natural conception or self-insemination, will also be governed by the HFEA legislation.

Any clinic providing treatment involving the donation of eggs or sperm,289 or the creation or use of embryos in vitro,290 must be licensed291 by the regulatory body set up by HFEA 1990 - the Human Fertilisation and Embryology Authority (“the Authority”).292 Gestational surrogacy that involves the creation of embryos in vitro must therefore only be performed

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283 Ibid at s. 2(3).
284 Ibid at s.3.
285 Mason, supra note 11 at 108.
287 Human Fertilisation and Embryology Act 1990 c 37. [HFEA 1990]
288 Human Fertilisation and Embryology Act 2008 c 22. [HFEA 2008]
289 HFEA 1990, supra note 287 at s. 4 (1) (b)
290 Ibid at s. 3(1)
291 Ibid at s. 3(1) and s. 4 (1)
292 Ibid at s. 5 (1)
in a licensed clinic.\textsuperscript{293} Additionally, when under certain forms of traditional surrogacy the surrogate is artificially inseminated with the commissioning father’s or donor sperm by a health professional, the procedure must also be performed in premises that are licensed by the Authority.\textsuperscript{294}

HFEA legislation also rather ‘incidentally’\textsuperscript{295} attempts to prevent the occurrence of economically compensated surrogacy by requiring that the licence for treatment only be granted by the Authority when it is certain that ‘no money or other benefit ... [is] given or received in respect of any of gametes or embryos unless ... authorised’.\textsuperscript{296} Furthermore, in order to prevent the exploitation of participants to the surrogate act, HFEA 1990 requires that treatment services are not to be provided until written consent\textsuperscript{297} is obtained by the owner(s) of the gametes\textsuperscript{298} and embryo\textsuperscript{299} being used in the treatment. Before such consent is given, the donors of the gametes or embryo, whether such donors are the surrogate or the commissioning couple or other donors, ‘must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps in the surrogate process.\textsuperscript{300} In addition to counselling, HFEA legislation also requires the donors ‘be provided with such relevant information as is proper’\textsuperscript{301} in order to make an informed decision.

The interests of the child are also protected under HFEA 1990 and so the medical procedures may not proceed ‘unless account has been taken of the welfare of any child who may be born as a result of the treatment’.\textsuperscript{302}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{293}Ibid at s. 12 (a) and s. 16 (2) (d) and Schedule 2, s. 1 (1) (a)
\item \textsuperscript{294}Ibid at Schedule 2 s. 1 (1) (e)
\item \textsuperscript{296}HFEA 1990, supra note 287 at s. 12 (e).
\item \textsuperscript{297}Ibid at Schedule 3 (1).
\item \textsuperscript{298}Ibid at Schedule 3 (6) (a).
\item \textsuperscript{299}Ibid at Schedule 3 (6) (c).
\item \textsuperscript{300}Ibid at Schedule 3 3(1) (a).
\item \textsuperscript{301}Ibid at Schedule 3 3(1) (b).
\item \textsuperscript{302}Ibid at s. 13 (5).
\end{enumerate}
\end{footnotesize}
1.2. **Enforcement of the law**

A person guilty of an offence under the 1985 Act can be liable for a maximum fine of up to £5000 or a maximum imprisonment of three months or both.\(^{303}\) While there are differing penalties for various offences under HFEA legislation, it is specifically noted that ‘where a person to whom a licence applies ... gives or receives any money or other benefit, not authorised by directions, in respect of any supply of gametes or embryos’,\(^{304}\) the individual is guilty of an offence and is liable to be imprisoned for a maximum of six months or a maximum fine of £5000 or both.\(^{305}\) Even so, concern has been expressed that these penalties may not be an adequate means of preventing the commercialization\(^{306}\) - and the possible exploitation that may result – in surrogate arrangements in the UK.

1.3. **Alleviating the commercialization and exploitation of surrogacy**

One reason for the expressed concern is that despite the enactment of dedicated legislation in the form of the 1985 Act, the regulation of surrogacy is incomplete. For example, because the 1985 Act focuses on prohibiting commercial surrogate arrangements, it does not regulate surrogate arrangements in which infertile individuals and surrogates access one another through private transactions and non-commercial agencies. Such agencies and private transactions ‘can and do operate without regulation’\(^{307}\) and it is feared that without guidelines to govern the surrogate arrangement, surrogates are at risk of being exploited by the intermediaries within these agencies and the commissioning couples.

In a similar vein, HFEA legislation is not applicable to traditional surrogate arrangements that involve natural conception or self-insemination by the surrogate – processes that do

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\(^{303}\) 1985 Act, supra note 280 at s. 4.

\(^{304}\) HFEA 1990, supra note 287 at s. 41 (8).

\(^{305}\) Ibid at s. 41 (9).

\(^{306}\) Guichon, supra note 268 at 600.

\(^{307}\) Mason, supra note 11 at 108.
not exploit ARTs. Additionally, on account of the nature of the insemination, these forms of surrogacy are likely to be both social and private arrangements that do not need medical intervention and so need not be carried out at HFEA licensed clinics. As such, there are neither rules that govern access to treatment nor screening procedures in place to vet the surrogate mothers and commissioning couples who participate in such arrangements. For example, there are no statutory requirements that compel surrogates who choose to engage in such traditional surrogate arrangements to undergo psychological counselling.

It may also be argued that even where it concerns surrogate arrangements to which it is applicable, the existing surrogacy legislation provides insufficient guidance on its application and administration. For example, while the 1985 Act generally bans the giving or receiving of payments in surrogate arrangements, it allows payments to be made ‘for the benefit of a surrogate mother or prospective surrogate mother’. However, because the term ‘benefit’ has not been defined by the 1985 Act, it is unclear how the term is to be interpreted; the commissioning couple is given little guidance as to whether they are to merely reimburse the surrogate for expenses incurred or to also compensate her for her gestational services.

With no information provided as to what would be suitable payment to the surrogate and no minimum or maximum payment suggested, it is unclear if the law condones or condemns the provision of financial compensation to a surrogate. This is of particular concern to those who suggest that the provision of financial benefit 'should not influence a woman's decision to become a surrogate mother'; it has been feared that allowing compensation for surrogacy would encourage women to become professional surrogates

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309 1985 Act, supra note 280 at s. 2 (3).  
310 Brazier, supra note 9 at para 5.14.
and ‘facilitate[e] a situation whereby some relatively poor and less educated women...[have]...babies for their wealthier and better educated counterparts’.\textsuperscript{311}

Additionally, although HFEA legislation requires the donors of reproductive material as well as the surrogate to undergo counselling and to provide informed consent, no statutory administrative body in the UK has undertaken to standardize or oversee the screening of the surrogates or to ensure that the parties have access to counselling before engaging in the surrogate act. Just as the AHRA set up a regulatory body, the AHRC, to oversee the governance of ART-related activities, the Authority was initiated under the auspices of the HFEA. Neither however, has issued guidelines on the management of surrogacy and its potential participants.

The ban on the commercialization of surrogacy under the 1985 Act also means that access to professional expertise is extremely limited. For example, while it is possible for both the commissioning couple and the surrogate to obtain legal advice on how the law applies to their situation at any stage, they cannot obtain any legal assistance in drafting or negotiating a surrogacy agreement.

The lack of access to such assistance forces the parties to a surrogate act to rely heavily on the information and advice meted out by voluntary not-for-profit organizations such as Childlessness Overcome Through Surrogacy (‘COTS’) and the Surrogacy Parenting Centre (‘SPC’). These agencies introduce infertile couples and surrogates to one another and provide advice and support to the participants to the arrangement.\textsuperscript{312} However, they run what has been argued to be ‘essentially amateur operations’,\textsuperscript{313} the introductions conducted are relatively informal procedures, there are no standard procedures in place to

\textsuperscript{311}Brazier, supra note 9 at para 5.17. It is noteworthy however that independent studies conducted by COTS indicate that even with the provision of compensation, there is no evidence that women view surrogacy as a form of employment even in instances where compensation is provided. [Childlessness Overcome Through Surrogacy (COTS) Surrogacy: A workable solution - In Response to the Review Team’s Report (1999). Available online at www.surrogacy.org.uk]

\textsuperscript{312}To extend legitimacy to these organizations, they were recently given legal endorsement by HFEA 2008 and can now accept ‘a reasonable payment’ in respect of the doing of an act by a non-profit making body. [HFEA 2008, supra, note 288 s. 59].

screen for parental fitness of the commissioning parents\textsuperscript{314} and the ‘criteria for [determining the] suitability [of commissioning couples and surrogates] [a]re relatively vague’.\textsuperscript{315} Additionally, while the parties are offered access to counsellors, these counsellors are not always experienced in dealing with surrogacy arrangements.\textsuperscript{316}

Unsurprisingly, in a survey of agencies and clinics involved with surrogacy in the UK, it was noted that potential commissioning couples and surrogates had a poor knowledge of surrogacy.\textsuperscript{317} It was further remarked that they were unlikely to be completely informed as to what the surrogacy procedure entails and its implications before participating in it.\textsuperscript{318} However, because surrogate arrangements and contracts are not enforceable in law,\textsuperscript{319} neither party has any legal recourse to any remedy in the event of a failure by the other party to meet obligations under a surrogate agreement.

Instead the parties are typically encouraged to ‘have faith’\textsuperscript{320} in one another; the surrogate is asked to believe that the commissioning parents will pay for the surrogate’s expenditures and the commissioning parents are asked to trust in the surrogate’s behaviour during the pregnancy and in her intent to transfer the baby to the parents post partum.

Arguably, a system of regulation based on faith is unlikely to successfully administer surrogacy arrangements. Given that currently both parties’ knowledge of surrogacy has been shown to be less than adequate and that there is likely to be an inevitable increase in the practice of surrogacy in line with a predicted increase in infertility in the UK,\textsuperscript{321} it may be necessary to ‘err on the side of caution by using some form of consistent selection

\textsuperscript{314} Van Den Akker, O.B.A. ‘Organizational Selection and Assessment of Women entering a Surrogacy Agreement in the UK’ (1999) 14 Human Reproduction Motherhood 262 at 263.
\textsuperscript{315} Ibid.
\textsuperscript{316} Ibid at 264.
\textsuperscript{317} Ibid.
\textsuperscript{318} Ibid at 264.
\textsuperscript{320} In fact, 75% of organisations surveyed perceived both commissioning couples and surrogates to have a poor knowledge of surrogacy. [Van Den Akker, supra note 314 at 263].
\textsuperscript{319} Van Den Akker, supra note 314 at 263.
\textsuperscript{321} Ibid at 264.
In other words, the current lack of regulation on surrogacy is suggested to be untenable and can only be corrected by the introduction of legislation that regulates the assessment and selection of participants to the arrangement ‘for their immediate and long term benefit’. 322

However, it has been suggested that one reason for the UK legislature’s reluctance to develop more comprehensive regulation on surrogacy stems from a fear that to do so, would be an endorsement of the surrogate act. It is feared that this would ‘encourage the growth of surrogacy’324 and invite more infertile individuals to consider surrogate as a mainstream alternative to infertility treatment. Paradoxically, as noted above, this disinclination to pass more detailed legislation on the act has resulted in ‘a complete absence of official control over inappropriate involvement in surrogacy’.325 The lack of regulation has also been suggested to encourage ‘procreative tourism’326 whereby potential commissioning couples from countries where surrogacy is more tightly controlled, are attracted to Britain, as they are to Canada,327 as a place to seek out potential surrogates.328

1.4. Best Interests of the Child

Another policy reason for sparse surrogacy legislation is arguably so as not to subject the commissioning parents or the surrogate – the family of the child born as a result of a surrogate arrangement - ‘to the taint of criminality’.329 Arguably this policy objective was codified out of consideration for the best interests of the child. Thus, unlike the penalties imposed under the AHRA in Canada, in the UK no criminal liability is attached to either the surrogate or the commissioning parents for arrangements that have been negotiated

322 Van Den Akker, supra note 314 at 263.
323 Ibid.
324 Warnock, supra note 2 at para 8.18.
325 Jackson, supra note 4 at 282.
327 Gazze, supra note 84.
328 Brazier, supra note 9 at para 3.43.
329 Warnock, supra note 2 at para 8.19.
privately or through not-for-profit brokerage agencies. In further meeting this policy objective, the 1985 Act also decrees that if money does change hands, where the ‘payment [is made] to or for the benefit of a surrogate mother or a prospective surrogate mother’\textsuperscript{330} such payment is not considered to be made on a commercial basis and is therefore allowed.\textsuperscript{331}

Arguably though, it is because commissioning parents are not penalized for any financial inducements they may extend to surrogates to participate in these arrangements, that payments ‘in excess of any reasonable level of actual expenses incurred as a result of the pregnancy’\textsuperscript{332} have been observed as being made to surrogates.

The ability of the commissioning couple to offer payment to the surrogate is also potentially challenging for the courts in the context of adoption of the child. This is because the Adoption and Children Act 2002 (‘the Adoption Act’\textsuperscript{333}) prohibits payments to be made to or to be received by or given to any person\textsuperscript{334} for or in consideration of the adoption by that person of a child.\textsuperscript{335}

This was the situation the courts faced in Re Adoption Application (Payment for Adoption) (‘Re Adoption’)\textsuperscript{336} – a case which was very similar on its facts to the 2009 Quebec case discussed in section 1.4.3.1 of Chapter 2. In Re Adoption, a surrogate was promised a fee of 10,000 pounds by the commissioning parents as compensation for ‘loss of earnings, expenses in connection with the pregnancy, and emotional and physical factors’.\textsuperscript{337} She entered into a traditional surrogate arrangement with the commissioning father – an arrangement described by the courts as ‘a physical congress with the sole purpose of

\textsuperscript{330}\textsuperscript{1985 Act, supra note 280 at s. 2(3).}
\textsuperscript{331}\textsuperscript{Ibid.}
\textsuperscript{332}\textsuperscript{Brazier, supra note 9 at para 3.20.}
\textsuperscript{333}\textsuperscript{Adoption and Children Act 2002 c 38 which replaced the Adoption Act 1976 c 36. [“Adoption Act"]}
\textsuperscript{334}\textsuperscript{Ibid at s. 95 (3).}
\textsuperscript{335}\textsuperscript{Ibid. at s. 95 (1).}
\textsuperscript{336}\textsuperscript{Re Adoption Application (Payment for Adoption) [1987] 2 All ER 826.}
\textsuperscript{337}\textsuperscript{Ibid.}

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procreating a child. In approving the application for the adoption order, the judges found that a surrogacy arrangement would not contravene the Adoption Act if the payments did not constitute an element of profit or financial reward.

However, what was more significant was that unlike the court in the Quebec case, the court in Re Adoption indicated that it was willing to exercise its discretion and authorize payments retrospectively even though payments are prohibited under the Adoption Act. In other words, in the determination of custody, even if payments or rewards are made to adopt the child, courts can subsequently authorize such payments upon consideration of the best interests of the child.

This was demonstrated in Re MW (Adoption: Surrogacy) where a payment of 7500 pounds had been made to the surrogate in order to ensure her consent to the arrangement and the adoption process. When she withdrew her consent, the courts had to decide if ‘the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views or interests of an objecting parent’. To that end, they considered the detrimental effects on the child ‘of tearing him away from his present home and location’ in light of the ‘glowing reports’ of his welfare while living with the commissioning parents for two and a half years. They determined that ‘to introduce uncertainty, to disturb the present position,’ in order to remedy the circumstances under which the child was adopted ‘is contrary to the welfare and interests of this small boy’.

The court’s decision was thus governed by the need to safeguard and promote the welfare of the child. To that end, the court dispensed with the surrogate’s consent, the payments were retroactively authorised and an adoption order was made.

338 Ibid per Latey J.
339 Ibid.
341 Ibid per Callman LJ.
342 Ibid.
343 Ibid.
344 Ibid.
345 Ibid.
1.5. Acquisition of legal parenthood

1.5.1. Adoption

While the best interests of the child is also paramount in any discussion surrounding the acquisition of legal parenthood, the process of applying for adoption has been asserted to be ‘extremely onerous and time consuming’.346

In a surrogate arrangement, the process is further complicated by the statutory requirements governing maternal and paternal standing as set out in HEFA 1990.347

1.5.1.1. Maternal standing

A mother of a child is legally defined in English law as ‘the woman who is carrying or has carried a child ... and no other woman’.348 Thus in both traditional as well as gestational forms of surrogacy, the surrogate is the mother of the child regardless of whether she is just the gestational carrier or the genetic mother as well. As the legal mother, the surrogate has the absolute right to decide whether to keep the child or to relinquish the child to the commissioning parents.

It is however significant that in this unambiguous identification of legal motherhood, ‘the presumed interests of the surrogate mother even take priority over the interests of the child’.349 It may also impose obligations of parenthood on a surrogate that may not be in the child’s best interests.

1.5.1.2. Paternal or other parent standing

346 Jackson, supra note 4 at 276.
347 The criteria for the determination of parental standing were expanded in HFEA 2008.
348 HFEA 1990, supra note 287 at s. 27 (1).
349 Jackson, supra note 4 at 266.
If the commissioning man is the sperm donor, arguably, he has a biological right to share custody of the child with the commissioning woman in a gestational surrogacy, and to share custody of the child with a surrogate in a traditional surrogacy. However, the law on paternal or other second parent standing is less straightforward.

There is a common law presumption of paternity within marriage, endorsed by the HFEA 1990 and updated by HFEA 2008, that holds that if the surrogate is married 350 - or in a civil partnership 351 - it is her husband or civil partner who will be the legal father or second legal parent of any child born, not the commissioning man. 352 If the surrogate has a partner, with whom she is not married to or in a civil partnership, the partner must have consented to being the father or second parent of any child born as a result of treatment in order to be legally recognised as such. 353

However if it is shown that the surrogate’s partner does not consent to the treatment, or if the surrogate is single, HFEA 2008 - as of April 2009 - allows for any man who consents, including the commissioning man, to become the legal father 354 - but only where ‘the creation of the embryo carried by ... [the surrogate] ... was not brought about with the man’s sperm’. 355 Thus, rather bizarrely, if the commissioning father has provided sperm for the treatment of the surrogate, he will need to register as a donor and cannot be the father upon birth of the child. 356

The intent of these HFEA clauses is to vest legal paternity in individuals whose partners undergo artificial insemination using donor sperm and to free the sperm donor from the responsibilities of parenthood. Ironically however, its application to surrogate arrangements grants legal parenthood together with all its rights to the individual who neither intended to be a legal parent nor contributed biologically to become one.

350 HFEA 2008, supra note 288 at s. 35 (1).
351 Ibid at s.42 (1).
352 Ibid at s. 35 (1) and s. 42 (1).
353 Ibid at s. 37(1).
354 Ibid at s.36 (a).
355 Ibid at s. 36 (d).
356 Ibid at s.41 (1).
Such complications and counter-intuitive contradictions revealed by the HFEA 2008 paternity rules arguably also give the participants in a surrogate arrangement an incentive to engage in the act covertly without proper guidance or regulation. This is because if conception takes place after sexual intercourse between the commissioning man and the surrogate or if the surrogate self inseminates with the commissioning man’s sperm, the commissioning man can still be considered the father if both parties jointly request paternal registration by personal attendance or providing a statutory declaration of paternity. Thus the effectiveness of current surrogacy regulation that ironically also offers ‘compelling incentives to avoid its protection’ has been questioned.

Ultimately, in a surrogacy arrangement, the child only exists because the commissioning couple intended its birth. To ignore the centrality of their intention and instead ascribe *prima facie* parenthood to a couple that never intended to keep the child may not promote the child’s welfare.

This was argued in the case of *Re W (Minors) (Surrogacy)* where a couple who had gone through a gestational surrogacy arrangement resulting in the birth of twins, had then been informed that they would have to apply to adopt their biological children. The couple also challenged the legal precept that the commissioning mother, even if she were the genetic mother of the child, will never automatically acquire legal standing as a parent of a child born through surrogacy without any legislative change to the law.

**1.5.2. Parental Order**

The court in *Re W (Minors) (Surrogacy)* held that the best interests of the child were the paramount consideration to be considered in a surrogacy arrangement. To that end, if it

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357 *Births and Deaths Registration Act* 1953 c 20 at s.10.
358 Jackson, supra note 4 at 272.
were in the best interests of the child to be with their genetic parents, the courts held that it was necessary ‘to facilitate any steps that cement their relationship’.  

As a pre-condition of the court’s judgement (and following a complaint lodged by the commissioning couple in Re W (Minors) (Surrogacy) with their Member of Parliament) Section 30 of HFEA 1990 was inserted at the Report stage of the HFEA 1990 bill. This clause, which came into force in November 1994, provided limited circumstances in which commissioning couple can seek a parental order to be considered as the parents of the child at law and to terminate the rights of the surrogate. It provides an alternative to adoption which was previously the only route available to the commissioning couple to obtain legal parenthood.

Significantly, Section 30 of HFEA 1990 appears to apply not only to participants in a gestational surrogate arrangement but also to commissioning couples who engage in traditional surrogate arrangements including arrangements where the artificial insemination does not take place in licensed clinics.

It was however noted that confining parental orders to married couples ‘seem[ed] overly restrictive’ given that 40 per cent of all children born in the UK are the progeny of unmarried couples. In response, Section 30 of HFEA 1990 has since been repealed and replaced with Sections 54 and 55 of HFEA 2008 that extend the availability of parental orders to commissioning civil partners of both genders and to some couples who are unmarried or not civil partners but who are ‘two persons who are living as partners in an

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360 Ibid per Scott Baker J.
361 Section 30 (1) of HFEA 2008 holds that “The court may make an order providing for a child to be treated in law as the child of the parties to a marriage ... if ... the child has been carried by a woman other than the wife as the result of ... her artificial insemination.
362 HFEA1990, supra note 287 at s. 1.
363 Jackson, supra note 4 at 272.
364 Ibid.
enduring family relationship and are not within prohibited degrees of relationship in relation to each other'.

Although this extension of availability of parental orders will come into effect only in April 2010, Section 54(11) provides for an application to be made ‘within the period of six months beginning with the day on which this section comes into force’ by two persons who were not eligible to apply for a parental order throughout the period applicable under Section 30 of HFEA 1990. This would then make the applicability of Section 54 consistent with the Adoption and Children Act 2002 under which unmarried couples were also given the right to adopt.

The concept of acting in the best interests of the child directs the legislature to ‘have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child’. To that end, Section 54 provides for parental rights and obligations in respect of surrogacy arrangements to be transferred from the surrogate to those who commissioned the surrogacy arrangement, only if certain conditions, introduced in the best interests of the child, are met.

Access to a parental order is limited to situations where ‘the gametes of at least one of the applicants were used to bring about the creation of the embryo’, conception must not have been by natural intercourse but ‘as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination’ and the application is made within 6 months of the birth of the child. However, the agreement of the surrogate to the application is invalid if made less than six weeks after the child’s birth. At the time of the parental order application and when the parental order is being made, ‘the child’s home

365 HFEA 2008, supra note 288 at s. 54 (2) (c).
366 HFEA 2008, supra note 288 at s. 54 (11).
367 Adoption Act, supra note 333.
369 HFEA 2008, supra note 288 at s 54 (1) (b).
370 HFEA 2008, supra note 288 at s 54 1 (a).
371 HFEA 2008, supra note 288 at s 54 (3).
372 HFEA 2008, supra note 288 at s 54 (7).
must be with the applicants’,\textsuperscript{373} the surrogate and the child’s second parent (as long as the second parent is not the commissioning father)\textsuperscript{374} must ‘have freely and with full understanding of what is involved’\textsuperscript{375} given unconditional consent to the making of the order and the court must be satisfied that, other than for reasonably incurred expenses, ‘no money or other benefit ... ha[d] been given or received by either applicant’\textsuperscript{376} in connection with the surrogate arrangement unless subsequently authorized by the court.\textsuperscript{377}

Parental orders give commissioning parents a simple, ‘fast track’\textsuperscript{378} to achieving legal parenthood when the surrogate does not object to the transfer, and if the commissioning couple meet the requirements of Section 54. However, the Section 54 regulation is not without its shortcomings which occur largely because of the practical problems encountered in its application.

*Shortcomings of the regulation of parental orders*

First, it has been observed that in attempting to meet the policy objective of acting in the best interest of the child, the State may have introduced a ‘rather puzzling’\textsuperscript{379} requirement - that the eligibility for a parental order is conditional upon the child already living with the commissioning couple.\textsuperscript{380} The commissioning couple will usually have no legal relationship with the child prior to the making of the order because as discussed above in sections 1.5.1.1 and 1.5.1.2, it is the surrogate and her husband who will be considered the child’s legal parents. Thus if arrangements are made to house the child at the commissioning parents’ residence, it would be because Section 54 – ostensibly drafted to promote the welfare of the child - paradoxically requires a child to live for a period of time with people who have no legally recognised responsibility for him or her.

\textsuperscript{373} HFEA 2008, supra note 288 at s 54 (4) (a).
\textsuperscript{374} HFEA 2008, supra note 288 at s 54 (6) (a) and (b).
\textsuperscript{375} HFEA 2008, supra note 288 at s 54 (6).
\textsuperscript{376} HFEA 2008, supra note 288 at s 54(8).
\textsuperscript{377} HFEA 2008, supra note 288 at s 54 (8)(d).
\textsuperscript{378} Jackson, supra note 4 at 273.
\textsuperscript{379} Ibid at 275.
\textsuperscript{380} HFEA 2008, supra note 288 at s.54 (4) (a).
Second, opponents of the surrogate arrangement note that there is little guidance given by HFEA legislation or the Authority on how the courts are to assess ‘expenses reasonably incurred’ to ensure that no consideration has been given by the commissioning parents to the surrogate or other involved parties.

In attempting to strike a balance between public policy denouncement of commercial surrogacy agreements and the welfare of the child concerned, Hedley J suggests in Re X and another (Foreign Surrogacy) 381 (“Re X”) that the court pose itself three questions: ‘(i) was the sum paid disproportionate to reasonable expenses? (ii) were the applicants acting in good faith and without 'moral taint' in their dealings with the surrogate mother? (iii) were the applicants party to any attempt to defraud the authorities?’ 382

However, even where there is a contravention of the 'no money or other benefit' rule set out in Section 54 (8) of HFEA 2008, if it is in the child’s best interests to make a parental order, the court is unlikely to refuse the application for the order on the grounds that a large sum of money had changed hands. In Re X for example, the commissioning couple paid a Ukrainian surrogate £25,000 for her notarized consent to the surrogate agreement and to ‘cover her expenses, compensate her for loss of earnings and … to put down a deposit for the purchase of a flat in the place where she and her husband worked’. 383 The court agreed that the sums paid ‘significantly exceeded expenses reasonably incurred’. 384 However, finding that the ‘welfare of these children require that they be regarded as lifelong members of the applicants' family’, 385 the court approved retrospectively the payment made to the surrogate and was satisfied that the statutory requirements had been complied with.

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381 Re X and another (Foreign Surrogacy) [2008] EWHC 3030 (Fam).
382 Ibid per Hedley J at 21.
383 Ibid per Hedley J at 4.
384 Ibid per Hedley J at 18.
385 Ibid per Hedley J at 23.
1.6. Reforming surrogacy regulation

Such decisions of the English courts which carve out exceptions to the criminalization of commercial surrogacy appear to undermine the original intent of the policymakers when they constructed the 1985 Act. Yet, the current validity of the original intent - which was based on a disapproval of surrogacy - has itself been questioned; while the 1985 Act showed its disapproval of surrogacy by prohibiting commercial surrogacy, acceptance of surrogacy as a method of assisted reproduction is so widespread that the HFEA legislations encourage those who commission surrogates to apply for parental orders to gain custody of the child. However, the lack of detailed regulations to guide the practical application of the law suggests that ‘neither pieces of legislation was rationally constructed or properly thought through’.386

To that end, a parliamentary report – the Brazier Report (the “Report”) - was commissioned in 1997 to determine if existing legislation on surrogacy law continued to meet public concerns. The Brazier Report not only reviewed existing legislation but also made recommendations on shortcomings it perceived in the existing policy on surrogacy in the UK.

1.6.1. Relevance of the UK regulatory regime to Canada

The AHRA, like the 1985 Act, puts into place provisions that banned commercial surrogacy but allowed altruistic surrogacy. To that end, the Brazier Report’s assessment of the practical impact of the 1985 Act is arguably instrumental to determining, all other things being equal, the effect of passing similar legislation in Canada.

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386 Freeman, supra note 87 at 20.
1.6.2. The Brazier Report findings

The Brazier Report found that surrogacy was an ‘acceptable alternative’\(^{387}\) to other fertility treatments. However, it also expressed concern about the level of payments made to surrogates by the commissioning parents. The Report noted that although *guardians ad litem* – who supervise parental orders - reported payments that ‘ranged from nothing to £12,000, averaging £3,800 where payments were made’,\(^{388}\) COTS had revealed that payments of ‘£15,000 or more’\(^{389}\) are being made by commissioning couples to surrogates.

Arguably the tendency to pay more than just to cover expenses is the practical outcome of regulation such as the AHRA and the 1985 Act which allow for reasonable expenses but leaves the ambit of “reasonableness” open. Additionally, as discussed in section 1.4, even when the reasonableness of the expenses has been challenged, courts in the UK are reluctant to enforce penalties on the potential family of the child \(^{390}\) and so, find themselves in effect “forced" to authorise expenses which are simply covert.\(^ {391}\) This then propagates a system that condemns the act of paying more than expenses for the surrogate act, but are not able to enforce penalties for any transgressions of the law because ‘criminalising the child’s parents (including the surrogate) … may not promote … [the child’s] welfare’.\(^ {392}\)

The Brazier Report conceded that payment for services does not make people into a mere means and that, ‘on the contrary lack of payment … may be much more exploitative’.\(^ {393}\) However, it went on to suggest that ‘payment increases the risk of exploitation … [and]  

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\(^{387}\) Brazier, supra note 9 at para 4.7.
\(^{388}\) Ibid at para 1.31.
\(^{389}\) Ibid at para 3.4.
\(^{390}\) This however, has been suggested to be an attitude derived ‘from the fait accompli nature of the proceedings [more] than any basic empathy with the practice’. [Mason, supra note 11 at 114]
\(^{391}\) Brazier, supra note 9 at para 4.40
\(^{392}\) Ibid at para 4.50.
\(^{393}\) Ibid at para 4.23.
constitutes an inducement to participate in an activity whose degree of risk the surrogate cannot, in the nature of things, fully understand or predict’.394

To that end, the Brazier Report recommended firstly that that all payments other than strictly defined expenses –a list of permissible expenses was provided 395 - should be prohibited noting that ‘any financial arrangement that involves remuneration rather than simply expenses has to be regarded as a form of child purchase’.396

Even so, the Brazier Report concluded that ‘there is not strong enough evidence [of exploitation of the surrogate] to warrant attempts to ban surrogacy [but] because of its effect on surrogate mothers, there is sufficient cause for concern to make regulation essential’.397 The risks of not having a regulatory framework for surrogacy it suggested, ‘are greater than any entailed by not introducing one’.398

In response to the lack of consistency and detail in UK’s surrogacy regulation, the Brazier Report proposed a new framework which would place the surrogate act ‘within the context of a fully informed and free act of giving ... [where] ... neither the child nor the surrogate ... [is] ... regarded as the subjects of a commercial transaction’.399 To that end, the Report suggested that existing legislation be replaced with a new surrogacy act (“Surrogacy Act”) that ‘set[s] out guidance aimed to prevent intentional or unintentional exploitation of each other by the parties to the arrangements’.400

Thus it recommended the consolidation of most of the provisions of the 1985 Act including the ban on commercial surrogacy and the non-enforcement of surrogate agreements. It was further suggested that limiting payments to the surrogate ‘to the actual and provable

394 Ibid at para 4.25.
395 Ibid at para 5.25.
396 Ibid at para 4.35.
398 Ibid at para 6.6.
399 Ibid at para 4.39.
400 Ibid at para 4.45.
expenses’401 be codified under this Surrogacy Act, which should also require surrogacy agencies to be registered by ‘the UK Health Departments and ... operate in accordance with a statutory Code of Practice’.402

Even so, the Brazier Report acknowledged that ‘surrogacy will never be risk free’403 and that surrogacy arrangements can be made outside their regulatory framework.404 The regulations however would be ‘the best possible protection for those who do wish the benefit of a properly regulated service’.405 However, so as to ensure that ‘the child’s welfare ... be the highest priority’,406 the Brazier Report suggested that parental orders should only be granted in the High Court and only when the terms of the Act had been complied with to ‘ensure that the effective "approval" of a surrogacy arrangement is given by judges of the highest experience’.407

It is notable however that despite a review of HFEA and a general review of fertility law in 2008, the recommendations of the Brazier report have yet to be adopted by the UK legislature. If the British government does not act on the recommendations, then the current ‘policy vacuum’408 that has contributed to the development of surrogacy in a ‘haphazard fashion’409 is expected to continue into the near future.

Conversely, a more structured system of regulation has been introduced and implemented by Israel and this regime shall be examined next.

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401 Ibid at para 7.11.
402 Ibid at para 6.23.
403 Ibid at para 4.49.
404 Engagement in unregulated surrogacy however, would make it difficult to secure a Parental Order.
405 Brazier, supra note 9 at para 6.6.
406 Ibid at para 4.50.
407 Ibid at para 7.24
408 Ibid at i.
409 Ibid.
One of the reasons for the development of the Israeli model of surrogacy was to combat a falling birth rate. Thus, unlike in the UK, where ‘government preoccupations of healthcare are far removed from surrogate arrangements’,\textsuperscript{410} Israeli legislation actively encourages infertile Israeli women to utilize ARTs for reproduction.\textsuperscript{411} Effort was put in to develop a regulatory regime that would harness the use of surrogacy as viable alternative to infertility treatment.

The legal treatment of surrogacy in Israel shifted from a ban on commercial surrogacy in the aftermath of the \textit{Baby M} case in 1988, to the legalization and regulation of surrogacy under a complex and arguably comprehensive regulatory scheme in 1996. The turnaround in policy was effected by three events. First, there was a pragmatic need to reproduce and ‘populate the nation’,\textsuperscript{412} which was born ‘out of the emotional needs of a people in a permanent war’,\textsuperscript{413} reinforced by the governmental encouragement and social pressure to bear children and manifested in the population ‘as the Jewish Israeli woman’s national mission’.\textsuperscript{414}

Second, in \textit{Nachmani v Nachmani}\textsuperscript{415} – where the court awarded an estranged couple's frozen pre-embryos to the childless wife so that she could attempt to implant the pre-embryos in a surrogate -- the existence of the right to be a parent was recognised by the Israeli Supreme Court to be ‘stronger than a man's right not to be a father’.\textsuperscript{416} Infertile couples in Israel had already begun to exercise this right by travelling to the United States where surrogacy centres operated to participate in surrogate arrangements. However this

\footnotesize{\textsuperscript{410} Blyth, supra note 23 at 239.

\textsuperscript{411} Elly Teman ‘The Medicalization of ‘Nature’ in the Artificial Body: Surrogate Motherhood in Israel’ 17 (1) \textit{Medical Anthropology Quarterly} 78 [“Teman: Medicalization”] at 80.

\textsuperscript{412} Ibid at 81.

\textsuperscript{413} Yuval Davis, Nira “National Reproduction and ‘the Demographic Race’ in Israel” in Nira Yuval Davis and Floya Anthias (eds), \textit{Woman-Nation-State} (London: The Macmillan Press,1989) at 92.

\textsuperscript{414} Teman: Medicalization, supra note 411 at 80.

\textsuperscript{415} \textit{Nachmani v Nachmani} 50(4) P.D. 661 (Isr.)

\textsuperscript{416} Ibid.}
was less advantageous to the infertile: not only was there the expense of travel and the cost of a commercial surrogate arrangement, but where the surrogate was not Jewish, the child was not able to inherit his or her Jewish identity. 417

A third impetus for the change in the policy occurred when the Ministry of Health was sued by the Nachmani couple before their estrangement, when they sought to overturn the ban on surrogacy. The couple asserted that the legal regulations on surrogacy set out by the Ministry were promulgated without proper authority and that the rules lacked a reasonable basis. 418 The Ministry not only settled the case but also set up a committee – the Aloni Commission (“the Commission”) - to investigate the practice of surrogacy. What was notable with respect to the Commission was that it was ‘the first committee in the history of Israel to study issues that were related to women that actually composed of half women members’. 419

2.1. The Aloni Commission Report

The Commission proposed a liberal regulatory framework that reflected its belief that the principles of autonomy and privacy require minimum state interference in human reproduction. 420 However, it also gave credence to the feminist perspectives advocated by its members and this was reflected in its recommendations. Thus while it suggested that surrogacy be allowed in Israel, it also recommended firstly that a government committee be set up to provide psychological counselling for all the parties, 421 secondly that the surrogate

418 Ibid at 74.
419 Per Lela Amis, Member of the Aloni Commission. [Ibid at 99]
should be paid only for expenditure\textsuperscript{422} and thirdly that the surrogate agreements not be enforceable so as to allow the surrogate to change her mind.\textsuperscript{423}

The Commission’s recommendations were also indicative of the pragmatic approach Israel took to the promulgation of surrogate arrangements in the country. The moral objections to surrogacy that contribute to the reluctance of the Canadian and UK legislature to accept surrogacy as a viable alternative to infertility treatment, are overshadowed in Israel by the more prevalent cultural and religious imperative to reproduce. Jewish doctrine (Halakha) sets out a Jewish duty to procreate as instructed by the Jewish commandment to ‘be fruitful and multiply’ and emphasizes domestic and family integrity which speak to the importance of child-rearing by practicing Jews.\textsuperscript{424} Halakha also suggests an obligation to help a childless couple fulfill this duty under the Jewish commandment of loving kindness\textsuperscript{425} that arguably provides an incentive for potential surrogates to volunteer to help an infertile couple.

However, Halakha also requires several restrictions to be placed on surrogacy before it is deemed an acceptable alternative to fertility treatment. As in English law, the imposition of these conditions on surrogacy regulation was suggested to be in the best interests of the child – in the Israeli cultural context, this would be so as not to prejudice the status of the child under Jewish law. First, there is a requirement that the intended mother and the surrogate are of the same religion so as to avoid disputes as to whether the child is Jewish.\textsuperscript{426} Second, the arrangement cannot be a traditional surrogate act where the egg comes from the surrogate herself.\textsuperscript{427} Third, the sperm must come from the intended father, and not of a donor so as to ensure that the identity of the father is known.\textsuperscript{428} Fourth,

\textsuperscript{422} Ibid.
\textsuperscript{423} The Aloni Commission Report, supra note 420 at para 7.4.
\textsuperscript{425} Ibid.
\textsuperscript{427} Ibid.
\textsuperscript{428} Ibid.
Halakha requires that the surrogate be unrelated to the commissioning parents and that she should not be married to prevent the risk of incest and illegitimacy.\(^{429}\)

### 2.2. Surrogacy Legislation

Because the social morality of surrogacy in Israel is tied to the guidance given by Halakhic precepts, regulating surrogacy in Israel involved a compromise between the liberal views of the secular Israelis and these restrictions imposed on surrogacy by the Jewish orthodox establishment. Thus, the *Surrogate Motherhood Agreements (Approval of the Agreement and Status of Newborn) Law 5756-1996* (“Surrogacy Law”)\(^{430}\) that was eventually passed was far more conservative than the regulatory framework suggested by the Commission.

It is significant that the restrictions set out by Halakha when incorporated into the Surrogacy Law resulted in surrogacy in Israel being only plausible when *not* conducted on an altruistic basis. The Commission however, had envisioned surrogacy in Israel to be a typically altruistic arrangement.\(^{431}\) This was because the Commission felt, as do the policy makers in the UK and Canada, that such arrangements would not be as exploitative of vulnerable women in difficult financial circumstances as commercial arrangements. ‘[I]n light of the typical socioeconomic disparity of the contracting parties’,\(^{432}\) the Commission believed that surrogates in a compensated arrangement may not have been in a position to give informed consent, to ensure their welfare and to protect their rights.

The Israeli Parliament, the Knesset, appeared to be aware of this concern when they set out a comprehensive regulatory regime in the Surrogacy Law. The regime was built on a need for state intervention in surrogacy so as to protect not just the surrogate but the other

\(^{429}\) Ibid.

\(^{430}\) *Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756-1996*, 1996, S.H. 1577, 176 [“Surrogacy Law”].


\(^{432}\) Shalev, supra note 36 at 145.
parties who may also be affected by the arrangement – the commissioning parents and the birthed child.

2.2.1. Committee for Approving Surrogate Motherhood Agreements

To that end, surrogate arrangements in Israel must be authorized by the state appointed committee for Approving Surrogate Motherhood Agreements (“the Approving Committee” or “the Committee”).433 The Approving Committee’s role in the regulation of surrogacy in Israel is paramount. It vets every surrogate application and awards couples and surrogates the right to enter legally binding surrogate arrangements by determining if the parties meet the strict criteria of suitability set out in Surrogacy Law.434 Most importantly, it aims to give ‘the optimal measure of protection to each [party] while achieving the right balance between the interests and rights of each [party]’. 435

To ensure that the Approving Committee has the necessary experience, the committee members are drawn from a variety of disciplines, nominated by the Health Minister and includes seven members, at least three of whom are male and three, female. It would be made up of two physicians qualified in obstetrics and gynaecology, a physician qualified in internal medicine, a clinical psychologist, a social worker, a lawyer as public representative and a clergyman, according to the religion of the parties involved. The decisions of the Committee must be accepted by the majority of its members, and must be made in the presence of at least five of the members including the chairman.

2.3. Alleviating the commercialization and exploitation of surrogacy

One of the main objectives of both the Aloni Commission and the Surrogacy Law is the prevention of the exploitation of the parties to the arrangement. However, the Surrogacy

433 Surrogacy Law, supra note 430 at s 3(a)(6).
434 Ibid.
435 Schuz, supra note 426 at 35.
Law diverged from the Commission’s recommendations with respect to the type of surrogate arrangement that was to be legalized. It legalized surrogacy for which expenses and compensation\textsuperscript{436} may be paid to a surrogate while banning surrogacy that involves a relative.\textsuperscript{437} This is in sharp contrast to other jurisdictions like the UK and Canada that have legalized altruistic surrogacy (which would have likely been carried out by a relative) while banning any form of compensated surrogacy.

As explained in section 2.1, a cultural reason for this provision is to protect the status of the child in Jewish law and prevent the risk that the child will be treated as a product of incest between close relatives.\textsuperscript{438} Arguably, preventing an altruistic arrangement also avoids any pressure that may potentially be exerted on a mother, daughter, granddaughter, sister, aunt or cousin of the commissioning couple to become a surrogate for them.

The Surrogacy Law not only permits the surrogate be reimbursed for expenditures related to the surrogacy but also allows for payments that compensate her for her time and suffering.\textsuperscript{439} However, it is significant that the Aloni Commission recommended that the surrogate be reimbursed \textit{only} for expenditure claims, out of concern for the potential for exploitation that may exist within an arrangement where money changes hands. The Commission’s fear may arguably be compounded by the fact that the Committee does not issue guidelines as to the aggregate amount payable to the surrogate\textsuperscript{440} nor does the Committee mandate the amount of compensation that is allowed for various reasons such as inactivity, suffering or lost income.\textsuperscript{441}

However, in order to protect the surrogate against any financial vulnerability, the Approving Committee supervises the surrogacy agreement between the commissioning couple and

\textsuperscript{436} Surrogacy Law, supra note 430 at s 6.
\textsuperscript{437} Ibid at s 2(3)(b).
\textsuperscript{438} Such a child is referred to as a \textit{mamzer} under Halakhic precepts.
\textsuperscript{439} Surrogacy Law, supra note 430 at s 6.
\textsuperscript{440} It has been independently noted that these expenses usually range between $20,000 to $25,000 [Schuz, supra note 426 at 42.
\textsuperscript{441} Surrogacy Law, supra note 430 at s. 6
the surrogate ("the Agreement") so as to ensure that the surrogate received monthly payments to cover actual expenses.442

Any deviation in payments from the approved compensation is an offence, punishable with a one-year imprisonment.443 Additionally, the sum equal to the total estimated costs is to be held in trust before the Approvals Committee even considers the surrogacy proposal.444 In this way, the Committee ensures that even if an economically disadvantaged individual becomes a surrogate, she will be guaranteed adequate compensation.

However, because the Surrogacy Law does not prohibit commercial surrogacy, commercial agencies have arisen to assist in the application for a surrogate arrangement. These agencies, whose business practices are not regulated by the Surrogacy Law, could potentially broker surrogacy arrangements between commissioning couples and economically disadvantaged or otherwise vulnerable women. Services offered by such intermediaries are prohibited in both the UK and Canada for fear that they may exploit vulnerable women and entice them to enter such arrangements without proper guidance or physical and psychological screenings to ascertain their suitability.

However it is significant that most of these agencies in Israel have been forced to close due to a lack of clientele. One reason for this is that the state-run medical centres charge far less than these agencies445 and have social workers who assist both the commissioning couples and the potential surrogates they bring in for screening through every step of the approvals process.446

442 Ibid.
443 Surrogacy Law, supra note 430 at s. 19(b)
444 Surrogacy Law, supra note 430 at s. 6
445 Commercial centres charge an average of 8000 dollars while the cheaper government-run public centres that charge only 500 dollars. [Schuz, supra note 426 at 37].
446 The state-run medical centre, - the public IVF Centre at Rambam Hospital in Haifa, Israel - does not find surrogates for the commissioning couples but will screen the potential surrogate and assist in the application to be submitted to the Approving Committee. Surrogates and commissioning parents usually make contact through advertisements or word of mouth. [Shalev – Halakha, infra note 494 at 66]
The other reason for the closure of these agencies dovetails with the observation that after an initial increase, there has been a substantial drop in the number of applications received by the Approving Committee from potential commissioning couples with every passing year.\textsuperscript{447} This has been suggested to be because infertile couples in Israel have ‘either successfully entered into surrogacy agreements or discovered that it is not [medically] suitable for them’.\textsuperscript{448} It appears then that after the initial interest in the process, the population of couples who require the services of such brokers was not large enough to sustain commercial brokerages.

Arguably then, the Israeli experience seems to indicate that even if commercialization is not overtly prohibited, the commercialization of the surrogate process through intermediaries is less likely to occur if there is little demand for their services and if cheaper, and better regulated alternative centres are offered by government agencies.

In addition, Israel has attempted to alleviate exploitation concerns by requiring that every application for participation in a surrogate arrangement be subject to review by the Approving Committee before being allowed to proceed. In this review the Approving Committee requires medical and psychological opinions confirming the surrogate’s suitability to engage in the surrogate arrangement.\textsuperscript{449} Both the physician who examines the surrogate and the surrogate herself have to confirm in writing that the latter understands the consequences and risks of surrogacy.\textsuperscript{450} She will also have to undergo a medical examination to ensure her fitness to engage in the implantation procedure and to carry a baby. In order to ensure her physical health, a limit is also placed on the number of embryos she is prepared to carry, the number of attempts at implantation she is prepared to undergo and the maximum duration for such attempts to be made.\textsuperscript{451}

\textsuperscript{447} Schuz, supra note 426 at 37.
\textsuperscript{448} Ibid.
\textsuperscript{449} Surrogacy Law, supra note 430 at s. 4 (a).
\textsuperscript{450} Ibid at s. 5 (a) (1).
\textsuperscript{451} Schuz, supra note 426 at 40.
The surrogate will also have to attest that she had received independent legal advice from a lawyer who specializes in surrogate motherhood agreements about her concerns in relation to surrogacy. This will be separately confirmed by the Approving Committee who will interview the prospective surrogate to ensure that she understands the ambit of her commitments under a surrogate arrangement and that her consent has been engaged in such procedures is voluntary and informed.452

Furthermore, it has been the Approving Committee’s practice to allow a woman to become a surrogate only if she has previously given birth even though there is no legal requirement for her to have had a child prior to engaging in the surrogate act. The rationale for the Committee’s informal criterion has been suggested to be that ‘a woman who has not previously given birth cannot truly understand the consequences of her commitments and thus cannot give true consent’.453 Ensuring that the surrogate is aware of what a pregnancy entails will in turn help preserve her mental health.

To further protect her mental health, the Approving Committee requires the surrogate and her children to receive psychological counselling throughout the process until six months after the surrogate gives birth.454 The importance of such mental health counselling has been reinforced by studies that revealed the emotional vacuum and the feelings of exploitation that some surrogates felt after the birth when the commissioning parents, who made the surrogates feel important during the pregnancy, did not keep in touch with the surrogate post delivery.455

It is significant that unlike the 1985 Act and the AHRA which prohibits the surrogates from courting professional advice from lawyers and doctors, the Surrogacy Law allows doctors, lawyers and psychologists to assist and advise the surrogate. While the prohibitions on commercial involvement were put in place by the UK and Canada legislatures, ostensibly to prevent exploitation of the surrogate, the Israeli regulatory regime arguably indicates that

452 Surrogacy Law, supra note 430 at s. 5.
453 Schuz, supra note 426 at 40.
454 Ibid.
allowing access to such services may actually be to the benefit of the surrogate and would protect her physical and mental health and her rights to privacy and a fair wage. In other words, allowing for certain commercial services in surrogacy, albeit subject to close statutory regulation, may actually prevent the legal, medical and psychological exploitation of the surrogate rather than exacerbate it.

2.3.1. Legal rights of the surrogate

The Surrogacy Law is also structured to ensure that no provision contradicts the right of the surrogate mother to excess her free will in accessing medical treatments or undertaking a medical procedure including the interruption of her pregnancy.\(^ {456}\) The Approving Committee requires a clause to be inserted into the surrogacy agreement into the Agreement to ensure that both parties are aware that neither the commissioning couple nor any other party has the right to control the surrogate’s behaviour during pregnancy,\(^ {457}\) including her choices with respect to nutrition, her drinking habits, sexual behaviour, or use of drugs. It will also be stipulated in the agreement that the commissioning couple cannot be present at or intervene in any of the surrogate’s prenatal examinations or at the birth of the child without the consent of the surrogate.\(^ {458}\) They also cannot interfere in the prenatal care received by the surrogate, nor can they force her to undergo invasive and non-invasive prenatal procedures, such as amniocentesis, against her will.\(^ {459}\)

Even though these clauses are given legal effect under the Surrogacy Law, they are included in the Agreement to ensure that ‘both the birth mother [“surrogate”] and the intended parents are aware of these rights’.\(^ {460}\)

\(^{456}\) Surrogacy Law, supra note 430 at s. 5 (a).

\(^{457}\) Surrogacy Law, supra note 430 at s. 5 (a) (3).

\(^{458}\) Schuz, supra note 426 at 41.

\(^{459}\) Surrogacy Law, supra note 430 at s.18.

\(^{460}\) Schuz, supra note 426 at 40.
2.3.2. Legal rights of the commissioning couple

The agreement also sets out the legal rights of the commissioning couple.

Thus unlike the UK, the Surrogacy Law does not assume that the commissioning couple do not need legal protection because of a perceived bargaining advantage. Even in instances where they are socio economically stronger than the surrogate, it has been suggested that they could be ‘more vulnerable emotionally’.\(^\text{461}\) To that end, the Surrogacy Law requires the commissioning couple to be examined by a mental health care giver to confirm their suitability to participate in the arrangement and to become parents.

Additionally, the surrogate arrangement can only proceed if the Approving Committee approves the Agreement. The commissioning couple is also made aware of the fact that because the Agreement is enforceable, they need not respond to demands for additional payments which would be illegal under the Agreement. This gives some measure of financial protection to the commissioning couple who may otherwise be subject to ‘outrageous demands’\(^\text{462}\) for payment from surrogates who think the compensation is inadequate. The Surrogacy Law denies the surrogate the right to renego on the Agreement unless it is established that there has been a change in circumstances and that the welfare of the child will not be damaged thereby.

2.4. Acquisition of legal parenthood

The Surrogacy Law has attempted to simplify the determination of maternal and paternal standing in a surrogate arrangement. To that end, the legal guardian of the child, from birth until the legal procedure of adoption is complete, is a social worker nominated by the

\(^{461}\) Schuz, supra note 426 at 43.

\(^{462}\) Ibid.
Ministry of Welfare. 463 The commissioning couple will only become the legal parents and guardians of the child when the court approves their adoption application464 even though the child will be in their custody as soon as the surrogate delivers him or her. The court will only approve the request after the social worker confirms that the approval is consistent with the welfare of the child.465

This system is unlike that in English law, where the legal mother is defined as the woman who gives birth even if she is not the genetic parent and where the laws surrounding paternal standing allow for up to three different men to be the child’s father.

The linear transfer of custodial power under the Surrogacy Law not only simplifies the acquisition of legal parenthood but it also clarifies maternal and paternal standing by only recognizing one legal father and mother of the child. The finality of parental status provided by the process not only protects the interests of the commissioning parents but, unless the court determines otherwise, is arguably also in the best interests of the child.

2.5. **Best interests of the child**

It has been noted that there is a responsibility on the State to ensure the welfare of the child because ‘the risks to a child’s welfare are greater than in relation to ‘natural’ birth, and that surrogacy involves the active assistance of the state both in the provision of medical services and determining the status of the child’.466

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463 Surrogacy Law, supra note 430 at s.10 (b).
464 Surrogacy Law, supra note 430 at s.12 (a).
465 Surrogacy Law, supra note 430 at s.11 (a).
466 Schuz, supra note 426 at 44.
To that end, the Surrogacy Law, as noted above, requires the commissioning couple and the surrogate to undergo medical screenings to ensure and maintain the child’s physical health at conception and during gestation. 467

Additionally, the Surrogacy Law honours the intent of the parties and houses the child with the commissioning parents from the time of birth. 468 This way the law attempts to ensure that the child will be exposed to only one parental unit so as to inflict minimal disruption to the child’s familial relations.

To prevent the child from being rejected at birth, the Approving Committee requires a written commitment from the commissioning parents that they will accept the child even if the child were born with disabilities or if the marriage of the commissioning parents breaks down. 469 If however, the court determines that it would be against the child’s best interests to be housed with the commissioning parents, or if the commissioning couple withdraws from the agreement, the court will not approve of the adoption request and will make an order giving the surrogate maternal status. 470 The surrogate would then become the legal guardian of the newborn unless she refuses to raise the child. If the latter event occurs, the child will then be transferred to the welfare authorities of the state who will remain the child’s legal guardian. 471 The establishment of this chain of custody thus ensures that the welfare of the child is always provided for even when the Agreement is not honoured.

The Surrogacy Law also prohibits partial surrogacy. Ostensibly this is because it may be not be in the best interests of the child to know that the purpose of his or her conception by a

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467 Arguably, the foetus’s health could also be at risk if treatment for the foetus conflicts with the surrogate’s right to refuse treatment. In common law, a pregnant woman has a right to refuse treatment or to engage or disengage in any behaviour during her pregnancy. [Paton v British Pregnancy Advisory Service [1979] QB 270 at 276]. This has been upheld by the European Court of Human Rights. (“ECHR”) that ruled that the unborn life of a foetus does not have a higher value than the life of the pregnant woman. [Paton v United Kingdom [1981] 3 EHRR 408]. However, it is untested in Israel if the surrogate or the commissioning parents (depending on the individual whose actions were determined to be unreasonable and caused damage to the child) would be liable for damages for refusing treatment to ensure the child’s physical health.

468 Surrogacy Law, supra note 430 at s.10 (a).

469 Schuz, supra note 426 at 46.

470 Surrogacy Law, supra note 430 at s. 11 (b).

471 Surrogacy Law, supra note 430 at s.10 (b).
surrogate was to be transferred to ‘a total stranger’.472 The majority of the Aloni Commission however, did not consider the method of conception significant.473 Thus it has been suggested, that despite attempts by the Surrogacy Law to justify the ban on partial surrogacy on this reasoning, it is more likely that traditional surrogacy was not allowed because of the vehement opposition it would attract from the Jewish orthodox community over the status of the child under Jewish law.474

As explained above in section 2.1, the Surrogacy Law encompasses clauses which were designed to protect the child’s future welfare by preventing doubt from arising about his or her status in Jewish law. These include ensuring that the surrogate and the commissioning mother are both of the same religion (unless neither of them are Jewish) so as to avoid disputes as to whether the child is Jewish. Other provisions were enacted to ensure that the sperm used for artificial insemination comes from the father and not a donor so that the identity of the father is always known. The Surrogacy Law also requires that the surrogate be neither a relative of the commissioning parents and that she is not married so as to prevent the risk that the child will be treated as an illegitimate child.475 What this means is that the only women who can be surrogates are generally unmarried – single widowed or divorced - women who have previously have had previously given birth.

The Surrogacy Law does however allow a married surrogate where it is satisfied that is not possible to find a single, widowed or divorced woman.476

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473 Ibid at para 7.16.
474 Schuz, supra note 426 at 46.
476 Surrogacy Law, supra note 430 at s. 2 (3) (a).

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2.6. Enforcement of the law

The Surrogacy Law also ensures compliance with the regulations by enforcing penalties for transgressions. For example, the establishment of a surrogacy agreement without the authorization of the Approving Committee is a criminal act that carries a punishment of one year in prison for the party that offers, gives or asks money or benefits for participation in such an agreement.\footnote{Ibid. at s. 19.} Even where the Approving Committee authorizes agreement, any deviation from the payments approved by the Approvals Committee is an offence also punishable with one-year imprisonment.\footnote{Ibid. at s. 19 (b).}

The Surrogacy Law attempts to ensure the welfare of the child by penalizing the transfer and acceptance of a child when not in the presence of the social worker (or without a court order) with a punishment of one year in prison.\footnote{Ibid. at s. 19.} In order to protect the privacy of the child as well as the other parties to the arrangement, the publication of details from the Committee’s discussions that include information that could identify the surrogate, the commissioning parents or the child of the parties involved is forbidden and carries a punishment of one year in prison.\footnote{Ibid at s.19 (c).}

It is significant that these penalties are generally not any more onerous than the ones set out by the AHRA or by the 1985 Act, and yet little transgression of these clauses has been reported by the parties to the arrangement since the Surrogacy Law came into force. The regime has ensured that all the individuals who have partaken in surrogacy contracts in Israel to date have been, per the Surrogacy Law, permanent residents and citizens of Israel, between the ages of 22 and 52. Moreover, all of the surrogates have been single mothers raising between one and five children of their own, and all of the couples have been heterosexually paired, mostly married couples, with long histories of female infertility, or in
which the female partner was either born without a womb or lost her womb to hysterectomy. Additionally, 78 children have been born under this regulatory regime, with no instance of a surrogate attempting to breach the Agreement. This success is arguably due in large part to the strict directives of the Surrogacy Law and the close supervision by the Approving Committee, which the law has put in place.

In stark contrast, despite the magnitude of the penalties for breach of their respective surrogacy laws, there is anecdotal evidence of surrogacy laws being ignored or breached in the UK and concern that there is the potential for the same to happen in Canada.

2.7. Relevance of the Israeli regulatory regime to Canada

The apparent success of the regulatory regime in Israel is arguably also indicative of how such regulations are in agreement with both the public perception and perceived morality of the surrogate act. It has been observed, for example, that surrogacy law in Israel operates strictly for the purposes of aiding procreation within the ambit afforded by the religious dogmas of its mainly Jewish population. This explains why despite the ambivalent attitude of the law to the commercialization of surrogacy, traditional surrogacy, which is strictly prohibited under Halakhic doctrine is banned.

However, the morality of surrogacy is not as easily defined in a less religiously homogenous society such as that in the UK or Canada, where there are also differing opinions on the impact that morality should have on the law. Such dissimilar perspectives on morality and the legality of the surrogate act may explain why the legislative regime is often debated in the UK and subject to continuous amendments.

482 Weisberg, supra note 417 at 202.
Even so, the regulatory framework in Israel is instructive for Canada, as it demonstrates how state intervention can be effective in structuring and enforcing the rights of the parties to the arrangement and protecting their welfare. It must be noted however, that the level of state intervention required by such a regime may not only be ‘alien’ to Anglo-American jurisdictions but also undesirable. This is because the restrictions imposed on surrogacy have the potential to impinge on the rights of the various parties to the arrangement.

For example, the Surrogacy Law determines that ‘the sperm used for extra-corporeal fertilization shall be of the intended father’. To that end, it does not allow sperm from a donor, when it is the commissioning man, rather than the commissioning woman who is infertile. Given that the probability of infertility occurring in a male has been estimated to be the same as it occurring in a female, the Surrogacy Law effectively prevents surrogacy from being utilized by half the infertile population. Similarly, the Surrogacy Law does not allow for partial surrogacy or for donor eggs in IVF insemination. Thus surrogacy is not an option that can be exercised in instances where the commissioning woman is unable to produce enough eggs for IVF implantation in a surrogate. Taken together, these restrictions imposed by the Surrogacy Law arguably curtail the rights of the commissioning couple to be a parent.

The extent of state intervention in the rights of the surrogate may also be challenged. For example, it has been suggested that the surrogate’s rights to both privacy and to liberty are compromised by demands placed on her prenatal and post partum sexual relations; there is a contractual requirement in the Agreement that requires the surrogate to undertake not

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484 Ibid at 136.
485 Surrogacy Law, supra note 430 at s. 2 (4).
486 The right to be a parent was acknowledged in Nachmani v Nachmani [supra 406].
to have sexual relations for two weeks before and three weeks after the implantation and not have unprotected intercourse throughout the whole period of the contract.\(^{487}\)

It may however be argued that these restrictions are put in place primarily to effect successful implantation of the fertilized egg and hence are necessary for the surrogate arrangement to proceed. Even so, the fear expressed is that more behavioural demands may be placed on the surrogate ostensibly in the best interests of the child, but which may end up trampling on her right to privacy and ‘medicaliz[ing] her body’. \(^{488}\)

The surrogate’s privacy may also be perceived to have been compromised when her rights are trumped by the interests of the child. Thus, although the Surrogacy Law attempts to ensure the surrogate’s privacy by prohibiting the publication of any details of the parties to surrogacy arrangements, \(^{489}\) her name, religion, nationality and identity number is logged in a register that can potentially be viewed by various government officials and by the child upon becoming an adult. \(^{490}\) Even though the Commission viewed this action as a serious invasion of the surrogate’s privacy, the legislature defended the register and the potential dissemination of its information as ‘giving effect to a child’s right to know his or her origins’. \(^{491}\) It may however also be argued that such information was made available out of deference to Halakhaic precepts that require evidence that the child was not the product of an illegitimate relationship so as not to mar the status of the child under Jewish law.

The enforcement of her contractual obligations under the Agreement arguably also curbs a surrogate’s reproductive rights. A surrogate mother is not allowed to unilaterally withdraw the consent she gave in the surrogacy agreement to hand over the baby after birth. Even if she develops an emotional bond to the child during the pregnancy, she would

\(^{487}\) In reality though, it has been observed that where there a respectful relationship between the commissioning woman and the surrogate, the surrogate is often willing to make behavioural changes like reducing the consumption of alcohol or smoking out of respect for the commissioning mother’s concern for the unborn child. [Schuz, supra note 426 at 461]

\(^{488}\) Teman: Medicalization, supra note 411 at 83.

\(^{489}\) Ibid at s.19 (c).

\(^{490}\) Surrogacy Law, supra note 430 at s. 3.

\(^{491}\) Schuz, supra note 426 at 47.
be contractually bound to give the child to the commissioning couple upon delivery. She would additionally, have no parental standing with respect to the child despite any physiological connection created during gestation between the child and her.\footnote{Rabbi Dr Mordechai Halperin in Kaplan Sommer, supra note 455.}

The stringent approach to enforcement of the surrogate’s obligations under the agreement may be justified on the basis that every attempt would have been made by the carefully supervised approvals process to ensure first, that the surrogate is aware of her status within the arrangement before she embarks on the pregnancy; and second, that she had given her informed and voluntary consent to it.

However, it is significant that there are some circumstances in which the court \textit{may} approve a surrogate withdrawing her consent and rescinding the agreement. However, the court needs to be satisfied ‘that there has been a change in circumstances that justifies the withdrawal of consent of the carrying mother (surrogate), and that it will not harm the best interests of the child’\footnote{Surrogacy Law, supra note 430 at s. 13.} and it must have not already issued an adoption order in favour of the commissioning parents. In such cases, it would nominate the surrogate mother as the legal mother and only guardian of the child, but may also hold the surrogate mother liable to the commissioning couple for both expenses and damages.

The most criticized aspects of the regulatory scheme however seems to be those related to the restrictions placed by the Surrogacy Law on the eligibility of a surrogate. As indicted in section 2.3, unlike surrogate legislation in the UK and Canada, the relatives of commissioning couple and married women are prohibited from becoming surrogates. Additionally, the surrogate has to be of the same religion as the commissioning woman.

It has been noted that the policy consideration underlying these restrictions was to ‘lay down rules that conform with [sic] the requirements of Jewish religious law’, \footnote{Carmel Shalev, ‘Halakha and Patriarchal Motherhood: An Anatomy of the New. Israeli Surrogacy Law,’ (1998) 32 \textit{Israel Law} Rev. 51 at. 64. [“Shalev – Halakha”]} which is the binding law in Israel over matters of marriage and divorce and the status of the child in

\footnotesize{492} Rabbi Dr Mordechai Halperin in Kaplan Sommer, supra note 455.

\footnotesize{493} Surrogacy Law, supra note 430 at s. 13.

Jewish society. According to Jewish law, a child born to a married woman from a man who is not her marital partner or a child who is born as a result of sexual relations between persons who are related to a degree that prohibits their marriage, is a *mamzer* or illegitimate child. A *mamzer*, under the Halakha, cannot marry non-*mamzer* Jews. Thus the exclusion of married women and relatives of the commissioning couple from the pool of potential surrogates was to secure the status of the child under the Halakha and to remove any impediments to the child’s marital opportunities.

Some commentators have asserted that the imposition of this value system ‘structurally violates the human dignity of the carrying mother’ because it creates ‘a caste of unmarried women having children for married women within a system of rules that leaves them little reproductive choice’. The Aloni Commission itself was reluctant to incorporate these restrictions into Israeli law suggesting that ‘such considerations should not be the basis for *a priori* restriction’. Instead, the Commission’s suggestions were based on a policy of minimal state interference as they felt that the rights of the surrogate and the commissioning woman were protected by a fundamental right to privacy.

In a similar vein, even the Approving Committee’s authorization of surrogates only if they have previously given birth has also come under criticism especially since the majority of the Commission had suggested that no such restriction should be made. As explained in section 2.3, the Approving Committee’s reasoning however is that a woman who has not experienced pregnancy may never truly understand the nature of her commitments under the arrangement. Thus her participation in the arrangement may affect her emotional and mental health – a risk of harm that would, in any event under the Surrogacy Law, prevent the Committee from approving the relevant surrogacy application.

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495 Ibid.
496 Ibid at 65.
497 Ibid.
498 Ibid at 78.
499 Ibid.
501 Schuz, supra note 426 at 47.
502 Surrogacy Law, supra note 430 at s.5(a) (2).
However, not only does this discretionary restriction arguably limit the pool of surrogates unnecessarily, but it also, like the other restrictions on the surrogate’s eligibility, prevents (married) women from exercising their reproductive freedom to engage in the surrogate act.

Conversely, it may be argued that some limitations on rights are required when balancing the conflicting interests of the different parties. Thus, it has been noted that it is ‘simply not realistic in the Israeli context’⁵₀³ to instate absolute reproductive freedom for women while providing a solution for infertile individuals without sacrificing the interests of the child to be born. The principle that the interests of the birthed child should not only be considered but also be paramount under the Surrogacy Law appears to stem from the belief that it is ‘irresponsible for society to actively sanction and facilitate the birth of child whose status in Jewish law may be problematic’.⁵₀⁴

Arguably a decision based on Halakha enabled Israel to pass legislation on surrogacy that appealed to the prevailing morality of its society. Even though weaving Halakhic morality into the legal fabric that governs surrogacy suggests the imposition of the sensibilities of the majority on the religious minorities in Israel, – the Christians and the Muslims – since these religious minorities disapprove of surrogacy, it has been suggested that they are, in any case, unlikely to approve of engagement in a surrogate arrangement.⁵₀⁵

However, the creation of such a regulatory regime in Canada may not be as straightforward.

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⁵₀³ Schuz, supra note 426 at 47.
⁵₀⁴ Ibid at 52.
⁵₀⁵ However, the Surrogacy Law has given some deference to non-Jewish Israelis who do decide to engage in a surrogate arrangement. While the Halakhic provision that the surrogate should be of the same religion of the commissioning couple still stands, the Approving Committee may allow for an interreligious agreement following consultation with the clergyman from the relevant non-Israeli community [Surrogacy Law, supra note 430 at s. 3(a)(6)].
3. IMPEDIMENTS TO THE RECONSTRUCTION OF CANADIAN SURROGACY LAW

Firstly, Canada, like the UK is given to a culturally diverse population which holds often contradictory religious and moral beliefs on surrogacy. Not only does this make it difficult to develop a suitable moral framework within which to regulate surrogacy but it also questions the introduction of moral offence as a basis to restrict and restructure the reproductive rights of the parties to the arrangement.

Secondly, surrogacy agreements between the surrogate and the commissioning couple are not given legal effect in both Canada and the UK because, it has been suggested, decisions within in a surrogate arrangement are ‘so deeply personal’\(^{506}\) that individuals should not be bound by them.\(^{507}\) Essentially, it is believed that the non-enforcement of such contracts protects the surrogate from ‘be[ing] forced to give up a child to whom she had given birth’.\(^{508}\) This is dissimilar to the approach taken by Israel. There, part of the surrogacy legislation is subsumed under contract law so as to securitize the arrangement and ensure that the regulations governing participation in the surrogate act, as set out by both the Surrogacy Law and the Approving Committee, will be met by all parties to the agreement.

Thirdly, and perhaps most crucially, the implementation of a comprehensive scheme of federal regulation such as that established in Israel or separate legislative acts on surrogacy similar to the 1985 Act and the HFEA legislation may not be plausible in a federalist state like Canada. As discussed in section 1.4.5.1 of Chapter 2, the enactment of federal regulation on surrogacy under the AHRA has been challenged by Quebec as \emph{ultra vires}. It has been argued that the provincial not the federal government has jurisdiction over health per the \emph{Constitution Act 1867}.\(^{509}\) Should the Supreme Court uphold the Quebec Court of

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\(^{506}\) M Field “Surrogate Motherhood” in J Eekelaar and P Sarcevic (eds) \emph{Parenthood in Modern Society: legal and social issues for the twenty first century} (London: Nijhoff, 1993) 223 at 225. [“Field – Surrogate Motherhood”]

\(^{507}\) Ibid.

\(^{508}\) Jackson, supra note 4 at 308.

\(^{509}\) AG Quebec v AG Canada, supra note 174 at 26.
Appeal decision - that the federal government lacked the constitutional authority to enact the regulatory provisions of the AHRA - then the relevant sections of the Act including those that regulate surrogacy will be found to be invalid. This may result in surrogacy neither being regulated federally by the existing - if incomplete - patchwork of legislative provisions nor provincially because most provinces do not have dedicated surrogacy legislation in place and there is ‘nothing to compel a province or territory to introduce legislation to regulate assisted human reproduction’.\textsuperscript{510}

4. **CONCLUSION**

To that end, in Chapter 4, I will first examine in detail the possible repercussions of the Supreme Court decision on the constitutional validity of the clauses within the AHRA that are currently being contested by Quebec. Specifically, I will examine the implications of a potential Supreme Court decision to uphold the determination of the Quebec Court of Appeal, on how surrogacy would, and also could be regulated in Canada.

Consequently, this discussion will include a study of the recommendations for provincial surrogacy legislation in Ontario as set out by the Uniform Law Conference of Canada and by the Ontario Law Reform Commission. Particular attention would be paid to how both these committees suggest legal parenthood of the child and custody is to be determined.

The *Ontario Law Reform Commission Report on Human Artificial Reproduction and Related Matters* (“Report”) is particularly apt as it also sets out a provincial framework that rejects legislative prohibitions on the belief that it would drive surrogacy underground and exacerbate the dangers of exploitation. This Report suggests that regulation would also, among other benefits, make it possible to determine reasonable compensation for the surrogate in order to assuage concerns about exploitation and coercion and to act in the best interests of the child.

\textsuperscript{510} Francoise Baylis, “Baby making technologies: fertile field for federal or provincial oversight?” *The Globe and Mail* (4 May 2009).
I will also investigate why some commentators believe that contract law offers ‘a productive framework for some aspects of the facilitative regulation of surrogacy’. The arguments for the non-enforcement of surrogacy contracts between the surrogate and the commissioning couple will be compared to the benefits reaped by the imposition of contractual obligations so as to determine whether a surrogacy agreement in Canada should be enforced.

Consideration of these issues would contribute to the proposed reconstruction of the Canadian regulatory framework on surrogacy within which the rights of the (potential) surrogate and the commissioning parents are just as protected as the interests of the birthed child.

Thus, the aim of this final Chapter is to recommend a regulatory regime for both traditional and gestational surrogacy that protects the dignity of the vulnerable parties involved in surrogate arrangements while allowing access to new and safe technologies and maintaining the participants’ rights to liberty and reproductive autonomy.

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511 Ibid at 309.
CHAPTER 4: RECONSTRUCTING THE CANADIAN FRAMEWORK ON SURROGACY

Legal responses to surrogacy arrangements have long grappled with the tension between the private contractual nature of the act and the public policy implications of enacting regulations to supervise the arrangement. Alleviating the tension requires acknowledgement of the need to allow the participants’ procreative intent to be expressed even as their interests are protected. The U.K. has updated the HFEA regulations in order to take some of these rights and interests into account. However, similar law reform has yet to occur in Canada where the legal system has not begun to rethink their presumptions with respect to the complex relationships that underpin a surrogate arrangement.

1. IMPLICATIONS OF THE IMPENDING ATTORNEY GENERAL OF QUEBEC v ATTORNEY GENERAL OF CANADA RULING

As argued in this dissertation, giving effect to the particular dynamic of a surrogate arrangement requires the relevant provisions of the AHRA to be revised. Realistically however, the way in which the Canadian regulatory framework on surrogacy would be reconstructed depends largely on the resolution of the (expected) Supreme Court ruling on the constitutional validity of the regulatory provisions of the AHRA in Attorney General of Quebec v Attorney General of Canada. 512

1.1. AG Quebec’s challenge

As briefly discussed in Chapter 2 section 1.4.5.2, the Attorney General of Quebec, challenged the ‘pith and substance’513 of the Act and the provisions under sections 8 to 19, 40 to 43, 60, 61 and 68 of the AHRA. The activities encompassed under these clauses - which include the reimbursement of costs incurred by persons involved in an ART assisted

512 AG Quebec v AG Canada, supra note 174.
513 Ibid at 26.
surrogacy - were argued to be health matters under provincial jurisdiction.\textsuperscript{514} It was also asserted that the AHRA indefensibly infringes more than fourteen Quebec laws and regulations relating to health, including article 541 of the \textit{Civil Code of Québec} which declares the absolute nullity of any surrogacy contract.\textsuperscript{515}

1.2. AG Canada’s rebuttal

The Attorney General of Canada in refuting the Attorney General of Quebec’s contentions defended the constitutional validity of the impugned provisions using the double aspect doctrine, according to which both levels of government may legislate on different aspects of the same matter, such as health.\textsuperscript{516} It was emphasized that the power of one level of government to legislate in relation to one aspect of a matter takes nothing away from the power of the other level to legislate another aspect within its own jurisdiction.

The Attorney General of Canada also highlighted the validity of the legislative technique employed, namely the creation of prohibitions with certain strictly defined exemptions. Citing the jurisprudence of \textit{Hydro Quebec} – where the Canadian Environmental Protection Act, a law for the purpose of protecting the environment was constituted as criminal law and upheld as valid federal legislation – it was argued that health, like environment, is a broad and complex area that does not fall within one exclusive constitutional jurisdiction. A regulatory scheme may thus be established in this area of health in support of a valid criminal law.\textsuperscript{517}

Consequently, the Attorney General of Canada asserted that the pith and substance of the AHRA and its provisions are to safeguard public health, safety and morality and that this was a legitimate and recognised criminal law purpose falling within exclusive federal

\textsuperscript{514} Ibid at 27.
\textsuperscript{515} Ibid at 30.
\textsuperscript{516} Ibid at 35
\textsuperscript{517} Ibid at 42.
It was argued that the utilization of federal criminal law power was required to prevent unsafe or ethically reprehensible access to ARTs. Such access was argued to constitute an “evil” that requires the legislative intervention of Parliament.\(^{519}\)

1.3. Court of Appeal’s verdict

The Quebec Court of Appeal in determining the constitutional validity of the impugned clauses confirmed that there was no constitutional monopoly on health in Canada.\(^{520}\) As a constitutional matter, it held that health may be the subject of federal or provincial legislation, depending on the nature and scope of the issue addressed.

However, it acknowledged provincial power in health legislation highlighting the acknowledgment of the courts in Chaoulli v. Quebec (Attorney General) that the provision of health care is an integral part of the provincial legislative corpus.\(^{521}\) To that end, it reasserted that, as held in RJR - MacDonald Inc. v. Canada (Attorney General) (“RJR-MacDonald”), the federal government could only use criminal prohibition as a legal mechanism to create provisions governing practice and research in the area of assisted reproduction when the legislation is ‘accompanied by a penal sanction and [is] directed at a legitimate public health evil’.\(^{522}\)

The Quebec Court of Appeal noted the acknowledgement of the courts in RJR-MacDonald that legislation enacted by Parliament under its criminal law jurisdiction may, ‘validly contain exemptions for certain conduct without losing its status as criminal law’.\(^{523}\) These exceptions may be further defined and delineated by detailed regulations. The introduction of such a scheme of exceptions (with explanatory regulations) within an Act that is constructed within the field of criminal law was held to not encroach on provincial

\(^{518}\) The Constitution Act, supra note 83 at 91(27).

\(^{519}\) AG Quebec v AG Canada, supra note 174 at 38.

\(^{520}\) Ibid at 76.

\(^{521}\) Ibid at 89.

\(^{522}\) RJR - MacDonald, supra note 179 at 246, per La Forest LJ.

\(^{523}\) RJR - MacDonald, supra note 179 at 263, per La Forest LJ.
jurisdiction if the exceptions in some way remain incidental to the prohibition, and do no more than define or reduce its scope. The basic intention of the act in question must still be to suppress an “evil” or an ‘injurious or undesirable effect’.525

In analysing the applicability of this exemption to the present case, the Court of Appeal firstly held that with respect to the impugned clauses there was no “evil” that needed to be repressed. It was determined that the clauses dealt with health matters that do not pose any threat to public health or raise issues of public morality that needed to be subject to criminal law sanctions under federal criminal law power.526

Secondly, while there clearly were prohibitions within the Act, it was held that the accompanying regulations did not create exceptions to the prohibitions but rather defined the framework within which the medical practice of assisted reproduction may evolve.527 It was suggested that in light of the Royal Commission’s recommendation to standardize rules governing ARTs, Parliament’s objective in passing the AHRA was to ensure uniform legislation on the development and application of ARTs across Canada. Thus unlike the Attorney General of Canada, the Court of Appeal perceived that the objective of Parliament’s exercise of criminal law power was not to repress unlawful ART related activities but to place the power to make regulations governing ARTs in the hands of the federal government.

The latter however, was held not to be a valid criminal law purpose and the regulations in place were seen as a pretext for encroaching on a sphere of activity that does not fall within Parliament’s jurisdiction.528 As a result the Court of Appeal deemed the impugned

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524 Hydro-Quebec, supra note 182 at 52.
525 Ibid.
526 RJR - MacDonald, supra note 179 at 28 per La Forest LJ.
527 Margarine Reference, supra note 188 at 50 per Rand J.
528 AG Quebec v AG Canada, supra note 174 at 104.
provisions of the federal Act to be unconstitutional and held that those provisions fell under provincial legislative authority.

1.4. Implications of imminent Supreme Court decision

The Government of Canada has asked the Supreme Court of Canada to reverse the Quebec decision. Accordingly, the Supreme Court decision to uphold or reverse this judgment will – when issued - have a considerable impact on the regulation of surrogacy in Canada.

The significance of a Supreme Court decision upholding the Court of Appeal ruling is twofold.

First, a declaration that the contested provisions of the AHRA are *ultra vires* would no longer subject ART-assisted surrogacy to the Section 12 provision that specified the conditions under which the reimbursement of expenditure to a surrogate could occur. The administration of surrogacy will no longer be federally regulated and the arrangement would be subject to provincial legislations should such legislation be in place. However, as previously noted in Chapter 2, no province other than Quebec has issued any legislation or guidelines on the development or administration of surrogacy. Even with respect to Quebec, surrogacy is only directly regulated by Article 541 of the Civil Code which establishes the absolute nullity of surrogacy contracts.

Second, even though the Attorney General of Quebec did not challenge the prohibitions set out in sections 5 to 7 of the AHRA, it is unclear if any surrogate act in Canada would continue to be subject to AHRA’s section 6 prohibition of commercial surrogate arrangements including the ban on payment of consideration to a surrogate or an intermediary.

These prohibitions were held to be a matter of criminal law and therefore fell within the exclusive jurisdiction of the federal Parliament. However, it may be argued that federal
legislative action through the use of criminal law power to prohibit compensated surrogacy is unnecessary and even unconstitutional. It is unnecessary because, as the experience of Israel indicates, rather than prohibiting commercial surrogacy, the commodification and exploitation fears that accompany compensated surrogacy can arguably be alleviated by implementing a comprehensive regulatory regime that protects the interests and rights of its participants. It is also potentially unconstitutional because, as discussed in Chapter 2, section 1.4.5.2., there is a lack of consensus on whether compensated surrogacy is a public health evil. Additionally, as set out in section 1.4.6 of Chapter 2, the legislative prohibition on commercial surrogacy is also vulnerable to a section 7 Charter challenge. To that end, it is likely that the prohibition of compensated surrogacy itself can be challenged.

Thus if the Supreme Court does not reverse the Quebec decision, and the prohibition on commercial surrogacy is found to be unconstitutional or a Charter violation, it is likely that surrogacy in Canada will not be administered by any form of provincial or federal regulation.

As the regulatory regime in Israel and the legislative system in the UK have shown, regulation is necessary to protect the rights and interests of the participants to the arrangement particularly where it concerns custodial issues including the acquisition of legal parenthood of the child.

1.5. Acquisition of legal parenthood

The urgency in ensuring regulation in this field has been noted by feminist commentators who highlight that ‘both fatherhood and motherhood have become increasingly fragmented concepts’ due in large part to ART assisted activities like surrogacy. As briefly discussed in Chapter 3 section 1.5.1.2, reproductive technology creates the

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529 Harvison Young and Wasunna, supra note 183 at para 73.
531 Ibid.
opportunity for a child to have more than just biological parents. Motherhood, it has been noted can become ‘a collaborative enterprise involving genetic, uterine and social functions ... discharged by different women’. Thus the legal parenthood of the child who is the product of a surrogate arrangement can be assigned to various permutations of genetic, gestational or commissioning individuals depending on the criteria considered in the determination of parental status.

However, provincial law in Canada has not directly addressed the issue of parental standing in either traditional or gestational surrogacy. This is unlike the UK, where the law on maternal status holds that the surrogate is the legal mother and where the criteria for paternal or other parent status have been codified. Typical provincial legislation regarding the acquisition of parental status merely states that ‘any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child’. Such statues have been recognised as being based ‘on a historical reality that pre-dates most AHR techniques, so they [would] provide little guidance to a court when challenged’.

1.5.1. Determination of parentage

In light of the way in which the application of ARTs to surrogate arrangements has eroded the certainty of parenthood, clarifying the legal parentage of the child has been suggested to require first, the determination of parentage at the moment of birth and second, establishing whether the identified individuals are those who should be entitled to register as parents.

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533 HFEA1990, supra note 287 at s. 27 (1).
534 Children’s Law Reform Act R.S.O. 1990, c C.12, s. 4 (1).
536 Ibid at 12.
Currently the mother of the child at birth appears to be rather awkwardly inferred to be the woman who gives birth to the child and there is a rebuttable common law presumption of paternity within a marriage which would accord paternity to the surrogate’s husband or common law partner.

Arguably however, the determination of legal parentage of a child born as a result of a surrogacy arrangement should take into account the distinctive characteristics that distinguish a surrogate arrangement from a natural birth process. These include the commissioning couple’s role in the creation of the child before his or her birth - the child would never have been conceived and carried through to birth but for the intention of the commissioning parents who initiated the surrogate arrangement.

Thus establishing the criteria for determining legal parentage - and the custodial rights that subsequently flow from them - first requires an evaluation of the consequences of assigning parenthood on the basis of either intent of the parties to the arrangement or the genetic ties that effected the creation of the embryo.

1.5.1.1. Genetic ties

Typically, the main advantage of allocating legal parenthood on the basis of genetic ties is the lack of ambiguity in the determination of parental status. However, this may have unintended consequences when applied to a surrogate arrangement.

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537 Section 1 of the Vital Statistics Act 1990 holds that “birth” means ‘the complete expulsion or extraction from its mother of a fetus that did at any time after being completely expelled or extracted from the mother breathe or show any other sign of life, whether or not the umbilical cord was cut or the placenta attached’. [Ontario Vital Statistics Act, infra, note 539 at s 1]

For example, if in a traditional surrogacy, the legal parents are held to be the genetic parents, then the law would vest custody of the child born in the surrogate and a sperm donor who may not be the commissioning father. A similar situation would arise within a gestational surrogate arrangement if the egg was not from the commissioning mother but from an egg donor. Potentially though, this could lead to the legal parenthood of the child being assigned to the individuals – the surrogate or egg donor or the sperm donor - who have the least interest in raising the child. The legal imposition of the obligations of parenthood on these individuals thus would not be in the best interests of the child.

Conversely, in certain provinces, the assignment of legal parenthood to the commissioning parents, where a gestational surrogate arrangement proceeds with the fertilized gametes of both commissioning parents, could potentially be at odds with the existing legal definition of motherhood. For example, recognising the genetic mother as the legal mother would conflict with the legal status of motherhood accorded, as mentioned above, to the gestational mother under the *Ontario Vital Statistics Act*, where birth is defined as ‘the complete expulsion or extraction from its mother of a foetus...’

Despite the unique genetic and social relationships he or she is born into, any suggestion that child of surrogacy should have two biological mothers has been thought to be ‘conceptually explosive’. Consequently, as it has been noted, legal systems to date have not recognised the coexistence of more than one biological mother. It has even been observed that it is usually the gestational mother who is ‘sacrificed in order to preserve the dyadic or exclusive parenting [two-parent] model’. For example, in *Rypkema v British Columbia*, the commissioning couple - who were also the genetic parents of a child born

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539 *Ontario Vital Statistics Act* R.S.O. 1990, c V.4, s. 1
541 Jackson, supra note 4 at 267.
542 Boyd, supra note 530 at 84.
to a gestational mother - brought an action to name the commissioning woman the mother on the birth certificate. Justice Gray wrote the surrogate out of the birth registry, allowing the genetic parents who intended to care for the child to be declared to be the child’s parents for the purposes of the birth registration process maintained by the provincial government.

This then is one of the main feminist critiques of the surrogate arrangement. It has been asserted that an emphasis on genetic ties ‘adopt[s] a masculine consciousness of birth’ which undermines the gestational surrogate’s role in pregnancy and childbirth. It has been argued that if a gestational surrogate is denied legal parenthood on the basis of her lack of genetic link to the child, this would ‘diminish[] ... pregnancy and childbirth as indicia of biological maternity and parenthood’.

The concern has been suggested to be compounded by the parentage case of Trociuk v. British Columbia (“Trocik”). Here, a biological father successfully challenged a provision in the British Columbia Vital Statistics Act, which gave a birth mother the power not to acknowledge fathers on the birth registry. If not acknowledged, fathers would have no power to veto a mother’s choice of surname. The father applied for a declaration to have the provision struck out as unconstitutional for violating his section 15 Charter right to equality. The Supreme Court, in allowing the appeal, held that affirming biological ties between parent and child was ‘a significant means by which some parents participate in a child’s life’.

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545 Boyd, supra note 530 at 84.
547 Ontario Vital Statistics Act, supra note 539 at s 3(1)(b) and 4(1)(a).
548 Trociuk, supra note 546 at 16 per Deschamps J.
The court’s perspective was not shared by feminists who asserted that the Supreme Court’s decision in *Trociuk* ‘affirms the power that a known genetic father holds when he chooses to assert his genetic ties against a mother’s wishes – including circumstances where they are not in a conjugal relationship’.\(^{549}\) In other words, by highlighting the biological connection and diminishing ‘the reality of connection to and care for children’,\(^{550}\) especially where there is no mutual intent to parent, it is feared that the rights and interests of both the surrogate and the children would be sacrificed.\(^{551}\)

However, the apparent fragility of a surrogate’s maternal ties in a gestational arrangement is arguably analogous to the marginalization of the commissioning woman and her (potential) role in childrearing in a traditional surrogate arrangement; here it is the commissioning mother who would be similarly sidelined on the basis of her lack of genetic ties to the birthed offspring.

What this potentially indicates is that even though paternity has been constructed to allow fatherhood to be established in more than one way,\(^{552}\) maternity within a surrogate arrangement continues to be seen as a ‘unitary construction’\(^{553}\) where a woman – be it the surrogate or the commissioning mother - can be ‘deprived of her [maternal] status if both the biological and social roles are not fulfilled’.\(^{554}\) Therefore the determination of legal parenthood purely on the basis of genetic ties has the potential to be inaccurate in its articulation of the reproductive choices of both the surrogate and the commissioning mother.

1.5.1.2. Intent of the parties to the arrangement

\(^{549}\) Boyd, supra note 530 at 85.


\(^{551}\) Ibid.

\(^{552}\) As indicated in Chapter 3 section 1.5.1.2.


\(^{554}\) Ibid.
An alternative model ascribes parenthood to individuals based on the intention of the parties to become parents and to exercise their right to reproductive self-determination. For example, in a traditional surrogate arrangement a woman who commissions a surrogate to carry a child for her, but who has no genetic connection to the child, typically would have still been mentally and practically prepared for parenthood. Giving effect to a commissioning woman’s procreative intent, which arguably is partly responsible for initiating the existence of the child, would be a more accurate reflection of her reproductive choices than the involuntary imposition of obligations on the surrogate on account of her genetic ties to the child.

Recent Canadian cases provide evidence of the emergence of an intent-based regime of parenthood in response to the new reproductive scenarios created by scientific advances in ARTs. In *J.R. v. L.H.*, the parties entered a gestational agreement and the surrogate became the legal mother pursuant to the Vital Statistics Act. This gave her a right to register the child as her own. The commissioning parents applied for a declaration that they were the biological parents of the child and for an order directing the Registrar General to register a statement of birth consistent with that declaration. The Ontario Superior Court of Justice in granting the orders noted that the parents entered the arrangement ‘with the sole objective of bringing children into the world who would be well‐cared for’ and therefore the declarations ‘[we]re in the best interests of the child’.

Even though the court in *J.R. v. L.H.* admitted that there is no compulsion to consider the best interests of the child in cases where declaratory relief is sought, it was evidently aware that existing rules on parenthood in Canada would leave the child in a vulnerable state; if neither intended parent has any status as a parent at birth, they would not have standing to make decisions regarding the welfare of the child, whose birth they commissioned but for whom they were not legally responsible. To that end, in this case,

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557 *J.R. v. L.H.*, supra note 555 at 20.per Kiteley J.
558 Ibid.
559 Ibid.
the court recognised the commissioning couple’s initiation of the surrogate arrangement as indicative of their intent to raise the child. In consequently making a presumption in favour of the intended parents, the court hoped to ‘promote the stability and security of the child’s first months’.

The primacy of the intention to act in the best interests of the child may thus nudge judicial regulation of surrogacy towards a legal framework under which birth registration statutes identify the adults who intend to take responsibility for a child as the parents rather than a framework that merely give effect to genetic parentage.

Arguably such a presumption in favour of the commissioning couple is open to challenge and the determination of parenthood, even on the basis of intent, can be complicated should the surrogate contest the commissioning parents’ application for birth registration and legal custody.

Where the surrogate is only the gestational carrier, the courts appear to uphold the intent of the commissioning couple to assume parental responsibilities upon delivery. For example, in Johnson v Calvert, when the gestational surrogate sought to be declared the birth mother of the child, the Court of Appeal held that the commissioning parents, who also were the genetic parents, were the ‘natural and legal parents of the child’. The surrogate who was not the genetic mother was not entitled to a declaration of her parenthood. Presumably the commissioning parents’ genetic ties to the child when taken together with their articulated intent to parent, significantly impacted the court’s decision.

It is significant, however, that critics of this judgment who dispute the legitimacy of this decision assert that it was the ‘color of Anna Johnson's [the surrogate’s] skin’ which set the terms under which parental status was determined. The gestational surrogate who was an African American was racially dissimilar to the child she gestated who was part

560 Jackson, supra note 4 at 270.
561 Johnson v Calvert, supra note 95.
562 Valerie Hartouni ‘Breached Birth: Reflections on Race, Gender, and Reproductive Discourse in the 1980s’ (1994) 2 Configurations (1) 73 at 87.
Caucasian and part Asian. She was also a single parent on welfare. The commissioning parents, on the other hand, were a middle class couple. Although the court did not emphasize the economic status of the parties and although there was no indication that the surrogate was coerced into serving as a gestational surrogate because of her race or economic status, it has been insinuated that the court’s decision not to recognise the surrogate’s parental rights was guided by its aim to ‘restabilize conventional understandings of parent and family’.\textsuperscript{563}

Regardless, as briefly discussed in section 1.5.1.1 above, the impact of the couple’s prior intention to parent on the way in which legal parenthood will be determined may reduce where it is the surrogate who is the genetic mother instead of the commissioning woman. Alleviating the consequent tension that would arise with respect to birth registration when the intent of one party conflicts directly with the genetic ties of the other to the child would arguably require redefinition of the nexus of relationships within a surrogate arrangement.

1.5.2. Resolving the tension between genetic ties and intent

1.5.2.1. Recognition of two mothers

It has been suggested that one way to effect this redefinition is to ‘destroy[] the centrality of the (hetero)sexed couple and [to] re-center women’\textsuperscript{564} within the surrogate arrangement. To effect this, the courts would need to appreciate the ‘distribution of maternity’\textsuperscript{565} in a surrogate act and determine if both the gestational and the genetic mothers could be recognised in law as mothers of the child.

It is presently possible for two women to be registered as the parents of a child in certain provinces\textsuperscript{566} if one of the women is the common law female partner of the woman undergoing artificial insemination.\textsuperscript{567} This was also confirmed by the court in \textit{M.D.R. v.}...
Ontario. Here, Ontario’s Vital Statistics Act which provided for the recognition of only one mother and one father on a child’s birth registration was challenged by four lesbian couples who had undergone artificial insemination. The Court first interpreted parentage as set out in birth registration legislation to include ‘non-biological parents in situations where they clearly intend to parent the child’. Second, it held that the legislative provision that disallowed the inclusion of both lesbian parents on the birthed child’s Statement of Live Birth was a violation of the equality provisions set out in section 15 of the Charter on the basis of sex. Arguably, this suggests ‘a growing openness’ to identifying two women as a child’s mothers even when that child has been conceived through assisted reproduction.

Additionally, the court in M.D.R. v. Ontario highlighted the plight of one of the lesbian couples who challenged the birth registration legislation. In this case, one woman was the gestational carrier of her partner’s fertilized eggs. The court noted that while ‘a genetic mother who uses a surrogate is not involved in the birthing process … it is an error of logic to … conclude that all mothers must give birth’. In other words, the court recognised that ‘biologically speaking there can be more than one mother: gestational and genetic’.

The court’s determination that there is more than one way of defining motherhood coupled with the expressed relevance of intent to the establishment of legal parenthood of a child born with the assistance of ARTs would suggest that either the surrogate or the commissioning mother can potentially be listed as a legal parent of the birthed child to whom they lack a genetic connection as long as they display an intent to parent.

However, the idea of co-maternity as evidenced by the applicants in M.D.R. v Ontario may not be directly applicable to all surrogate arrangements. This is because firstly, the

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569 Ibid per Rivard J. at 56.
570 Ibid at 273.
571 Ibid at 273.
573 M.D.R. v. Ontario, supra note 568 per Rivard J at 14.
574 Ibid at 59.
575 Ibid.
commissioning mother is usually not in a relationship with the surrogate and they are not common law partners who intend to parent together. Secondly, it has been noted that the government has ‘yet [to] reconcile[ ] the fact that there can be two biological mothers with the fact that they only recognize that there can be two parents on the Statement of Live Birth’.  

Even though the rules of statutory interpretation of the Vital Statistics Act acknowledge that two women (albeit in a common law relationship) can co-parent, the courts have been amenable to the idea only where a ‘third parent – in particular, the sperm donor or potential father – does not figure within the child’s life’.  

The court in *M.D.R. v Ontario* reiterated that ‘birth fathers have rights to be registered that must be protected’. With respect to surrogacy then, even if both the surrogate and the commissioning mother are recognised as mothers of the child, it is unclear if the law would recognise the parental status of a second mother over that of the paternity interests of the commissioning man, especially upon consideration of the potential ramifications such an action would have for his competing rights to legal parentage.

1.5.2.2. More than two parents

The necessity of displacing a parent because of the legal recognition of only two parents has been challenged in *A.A. v. B.B.* Here, an application was made by the common law partner of a child’s genetic mother to be named a co-parent together with the child’s genetic mother and the sperm donor who was the genetic father.

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575 Ibid at 146.
576 Campbell – Conceiving Parents, supra note 571 at 256.
577 *M.D.R. v. Ontario*, supra note 568 per Rivard J at 261.
The lower court had noted that although subsection 4 (1) of the Ontario Children’s Law Reform Act ("CLRA") had permitted a declaration that a person was recognized to be the father of a child or the mother of a child, the use of the definite article "the" in the provision ‘contemplates a single mother and a single father’. The Ontario Court of Appeal however held that the legislature was ‘a product of the social conditions and medical knowledge at the time’ and ‘did not foresee for the possibility of declarations of parentage for two women’. However, the court recognised that advances in reproductive technology and in ‘our appreciation of the value of other types of relationships’ had created ‘gaps’ in the CLRA’s legislative scheme that ‘require re-examination of the most basic questions’.

The Ontario Court of Appeal held that there was ‘no other way to fill this deficiency except through the exercise of ... [its]... parens patriae jurisdiction’ and so overruled the lower court ruling and declared that in the best interests of the child three legal parents could be recognized under subsection 4 (1) of the CLRA.

The implication of this judgement, when applied to surrogate arrangement, would suggest that the framework of parenthood be restructured to allow both the commissioning parents and the surrogate to be legally recognised. Parentage, so reconstructed, could provide a suitable resolution when expression of reproductive intent conflicts with the recognition of genetic ties.

579 Children’s Law Reform Act, supra note 534.
580 Section 4 (1) of the Children’s Law Reform Act states that ‘Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child’. [Children’s Law Reform Act 1990 R.S.O. 1990, c. C.12, s. 4 (1).]
581 A.A. v. B.B. [2003], supra note 578 per Aston J at 35.
583 Ibid
584 Ibid at 35.
585 Ibid
586 Ibid at 33.
587 Ibid at 37.
However, the Ontario Court of Appeal in *A.A. v. B.B.* did not order that the parental provision in question be changed; in fact, the Court declined to address the Charter issues raised by the applicant in the Appeal. As a result, the remedy in this case dealt only with the applicant’s individual claim made after consideration of the effect of such a declaration on the welfare of the child in question. Thus, unless a legislative framework is developed that amends existing CLRA regulations, the registration of three (or more) parents would arguably depend on a case-by-case consideration of each application.

However, even if parentage of surrogate and the commissioning couple is simultaneously legally recognised, doubts have been expressed as to the practical benefit of such provisions. There is arguably a potential for such arrangements ‘to create or exacerbate custody and access litigation’. This is especially likely to occur when the commissioning couple and the surrogate do not intend to parent together.

The courts were faced with such a custodial issue in *H.L.W. and T.H.W. v J.C.T and J.T.* Here an interim application for access and custody pending trial was made by a surrogate and her husband despite an initial agreement between the parties that the child was to be placed with the commissioning parents – the sperm donor and his partner. The surrogate was the genetic mother of the child.

The courts acknowledged that there is a ‘presumption in the Family Relations Act, Section 27 of guardianship with a birth mother’ but noted that ‘the only parents ... [the child] ... ha[d] known [we]re J.C.T. and J.T. (the commissioning parents)’ and it was in ‘[his]...
interest and will be of most benefit to him that there be the least possible disruption in his day-to-day care pending trial’. 593

Thus in a traditional surrogate arrangement, where a custodial conflict emerges between the commissioning parents and the surrogate, the courts appear to be less inclined to rely on the intent of the contracting parties or on genetic ties. Instead H.L.W. and T.H.W. v J.C.T and J.T indicates their preference to framework the resolution around ‘what is in the best interest of the child’. 594

1.5.2.3. Best Interests of the child

A best interests approach to the acquisition of legal parenthood nevertheless requires that the child’s birth begin with litigation. Such litigation to date has relied on the awkward application of existing legislation which, as discussed above, is made at the discretion of judges adjudicating on the issue without a dedicated legislative directive on surrogacy. It is thus plausible that the law on attaining parental status would develop in a haphazard way from individual court decisions.

This development would arguably occur regardless of whether the Supreme Court decides to uphold or dismiss the Quebec Court of Appeal ruling on the unconstitutionality of AHRA provisions; should the Supreme Court decide to dismiss the appeal from the Government of Canada, surrogacy regulation would potentially develop with a lack of consistency among the provinces with respect to the determination of parentage and its application to birth registration. Such inconsistency in parental status regulation is intrinsically unconstitutional since ‘birth registration is a foundation document from which citizenship and the right to participate in society flows’. 595

The resultant concern is that the current lack of regulatory guidance on the administration of surrogacy, particularly in the determination of legal parenthood, is (paradoxically) not in

593 Ibid. at 45
594 Ibid. at 20.
595 Uniform Law Conference of Canada, supra note 535 at 8.
the child’s interests. To that end, even if the Supreme Court upholds the appeal, the onus would be on legislators to develop a dedicated regulatory framework that governs both gestational and traditional surrogacy arrangements including traditional surrogate acts that do not avail of ARTs.

2. **DEVELOPING A REGULATORY FRAMEWORK FOR SURROGACY**

The Ontario Law Reform Commission and the Uniform Law Conference of Canada have both issued recommendations for the development of a suitable regulatory framework on surrogacy to oversee the arrangement in Canada. The observations of both these committees not only anticipate the potential issues that may arise under the AHRA, but arguably, in the event the AHRA provisions are declared *ultra vires* are also instructive for the clarification and development of provincial surrogacy legislation.

2.1. **Recommendations of the Uniform Law Conference of Canada**

The Uniform Law Conference of Canada - which was organized for the purpose of promoting uniformity of legislation among the provinces - assigned a working group (“Working Group”) to develop a regulatory scheme that would harmonise, among other provisions, the presumption and registration of parental status of the participants in a surrogate arrangement.

2.1.1. **Parental status at birth**

In order to accommodate all forms of traditional and gestational surrogacy, the Working Group suggested a legislative approach that equalizes ... natural and assisted conception. 596

To that end, it was proposed that the surrogate continue to be presumed the legal mother at the time of birth regardless of whether the child was conceived naturally or with the egg

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596 Ibid. at 23.
from the surrogate, the commissioning mother or a donor. This is thought to ‘provide stability for the child and treat ... natural and assisted conception the same’. 597

Secondly, it recommended separate status provisions for surrogacy to accommodate the special issues raised by surrogacy arrangements. Thus unlike the presumption of paternal status in other ART-assisted arrangements, in a surrogate arrangement the sperm donor, and not the conjugal spouse of the surrogate, was to be recognised as the legal father of the child at birth.598 This is to avoid inadvertently vesting legal paternity in an individual who neither intends to nor biologically contributes to the birth of the child.

2.1.2. Transfer and registration of parental status

The Working Group appears to have attempted to structure possible procedures for registration of parentage around the best interests of the child. In order to avoid judicial intervention as early as just after the birth of the child, it recommended that intended parents in surrogacy arrangements need not obtain court-ordered declarations of parentage from before they are allowed to register themselves as the child’s parents with a Vital Statistics registry. Instead it was suggested that the actual transfer or recording of parentage occur administratively through a registration process rather than through a court application.599

Determining who can register as a parent could be based on whether or not the child is genetically related to the intended parents. If there is a genetic link between at least one of the intended parents and the child, the Working Group proposed legislation that would allow the genetically linked intended parent and that parent's spouse or conjugal partner to apply for a declaration of parentage’ 600 through an administrative process.

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597 Ibid. at 24.
598 Ibid. at 25.
599 Ibid. at 36 (1).
600 Ibid.
However, the problem with a recommendation based on a genetic link is that where is no genetic tie between any of the intended parents and the child, the former will still have to undergo the tedious process of court proceedings in order to adopt the child.\textsuperscript{601}

To that end, the Working Group also recommended another model to determine parenthood – one based purely on the intention of the parties. Under this option, even where neither intended parent is genetically related to the child, they do not need to apply to adopt the child. Instead, the administrative registration of parentage in this regime is based purely on ‘the intention ... [articulated] ... before conception ... of the intended parents to parent and the intention of the surrogate to relinquish her parentage’.\textsuperscript{602}

Arguably, it was the Working Group’s identification of the tension that would manifest when genetic ties to the child clash with the expression of reproductive intent that gave rise to the two models recommended.

2.1.3. Rights of the participants to the agreement

However, the Working Group also suggested that neither model – whether based on intent or genetic ties expressed prior to conception – should be enforced without the surrogate’s consent to relinquish her parentage which will have to be obtained AFTER the child’s birth.\textsuperscript{603} Allowing the transfer of parentage only upon the surrogate’s consent after birth was thought to preserve the expression of her procreative liberty and ensure that ‘her rights [to reproductive autonomy] are protected and balanced with the rights of the intended parents’.\textsuperscript{604}

\begin{footnotes}
\item[601] Ibid.
\item[602] Ibid. at 36 (2).
\item[603] Ibid. at 40.
\item[604] Ibid. at 40.
\end{footnotes}
However, the presumption of maternity in favour of the surrogate leads to the ‘egregious ... failure ... to acknowledge the role of the infertile wife’ and has the effect of potentially eroding any parental right the commissioning couple may have to their genetic child. This concern is arguably augmented by the lack of guidance given by the Working Group on how the custodial arrangement would be determined if the surrogate does not consent to giving up her parental status. Even if in such an event the surrogate and the genetic father are legally registered as the parents of the child, the guardianship of the child would remain uncertain given that they may not intend to parent together.

What this suggests is that an implicit policy decision to assign greater importance to the rights of the surrogate as compared to the rights of the commissioning parents would have an impact on the status and welfare of the child of a contested surrogacy which may not be in his or her best interests.

2.1.4. The unenforceability of a surrogate agreement

The (potential) failure of the Working Group’s recommendations to balance the rights of the participants to the surrogate arrangement is arguably augmented by its suggestion that surrogacy arrangements not be enforced.

Surrogacy agreements between the commissioning couple and the surrogate may take diverse forms ranging from oral and informal agreements such as those in A v C, to ‘agreements made usually between strangers ... in writing and ... lengthy’. Typically they set out obligations to be met by the participants to the arrangement. For example an agreement accepted by the Israeli Approving Committee generally seeks, among other

606 Uniform Law Conference of Canada, supra note 535 at 33.
607 It was noted that ‘[n]either the judge at first instance, nor the Lord Justices in the Court of Appeal mention a written agreement. It would thus appear that there were no written agreements between the parties’. [Guichon, supra note 268 at 657]
608 Guichon, supra note 268 at 468.
clauses, the surrogate’s obligation to transfer the birthed child to the commissioning parents upon his or her delivery.\(^609\) It also requires the commissioning couple to agree to pay the surrogate a predetermined amount for her gestational services upon the transfer of the child and sets out the surrogacy related expenses the former will need to pay.\(^610\)

Admittedly, the recommendation to invalidate any agreement between the parties to a surrogate arrangement would simplify surrogacy regulation by ensuring that the parties to the arrangement would only be bound by legislative requirements and not by private contractual obligations. However it has been argued that so deeming the surrogate’s consent non-enforceable ‘conflicts with the general legal policy allowing competent individuals to engage in potentially risky behaviour as long as they have given their voluntary, informed consent’.\(^611\)

### 2.1.4.1.

**Arguments against the enforcement of agreements**

Opponents to the enforcement of surrogacy contracts however, contend that a surrogate’s consent to participate in a surrogate arrangement and to transfer her custodial rights is neither voluntary nor informed.

*(Un)informed consent*

One reason for this assertion is due to the belief that a woman cannot give an informed consent unless they have experienced the intervening acts of pregnancy and birth that occur between the times the original consent was given and when the commissioning parents are given custody of the birthed child. Pregnancy is seen to be ‘an emotionally

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\(^{609}\) Surrogacy Law, supra note 430 at s 6.

\(^{610}\) Ibid.

\(^{611}\) Lori Andrews *Policy and procreation: the case of surrogate motherhood policy and procreation* in the Feminism and law workshop series WS 91-92 (6) (1992, Faculty of Law, University of Toronto, Toronto, Ontario) at 11.
volatile condition'\textsuperscript{612} and a process through which ‘some kind of instinctive maternal bonding to the foetus takes place’.\textsuperscript{613} A woman is thought to not know ‘the depth of her desire to rear her child until she has given birth’.\textsuperscript{614} The emotional attachment to the child that may potentially result is thought to cause the surrogate to regret her decision to transfer her parental rights after delivery of the child.

Thus the non-enforcement of such contracts is justified on the basis that it ensures that a surrogate is never forced to give up her birthed child and so protects her right to make an ‘intimate future relationship with her child’.\textsuperscript{615} This right to motherhood has been argued to be ‘so important to her dignity and human happiness that … [it] … should be regarded as inalienable’.\textsuperscript{616}

Even so, it has been counter-argued that this approach ‘is at odds with the legal doctrine of informed consent’\textsuperscript{617} because typically, when informed consent is requested, an individual is not expected to have experienced a certain medical intervention in order to make an informed decision with respect to agreeing to the experience.\textsuperscript{618} As Lori Andrews comments, ‘the legal doctrine of informed consent presupposes that people will predict in advance of the experience whether a particular course will be beneficial to them’.\textsuperscript{619}

\textit{(In)voluntary consent}

The second reason for this assertion stems from the perceived inequality of the bargaining power between the surrogate and the commissioning couple. Some commentators stress that surrogacy contracts are intrinsically exploitative; they believe that any financial inducement paid to an economically needy, would-be surrogate – even if ostensibly

\textsuperscript{612} Elly Teman ‘The social construction of surrogacy research: An anthropological critique of the psychosocial scholarship on surrogate motherhood’ (October 2008), 67 Social Science & Medicine 7, 1104 at 1109.
\textsuperscript{613} Shalev, supra note 36 at 121.
\textsuperscript{614} Guichon, supra note 268 at 498.
\textsuperscript{616} Ibid at 14.
\textsuperscript{617} Andrews - Surrogate Motherhood, supra note 211 at 172.
\textsuperscript{618} Ibid.
\textsuperscript{619} Ibid.
recorded as payment for reasonable expenses – negates the voluntariness of her consent. This is because, they assert, such consent can then be challenged as being more ‘the product of economic coercion than free choice’ 620 This belief dovetails with the contention that enforcing a surrogate agreement endorses the commodification of the child; the benefit bestowed on the commissioning parents by the surrogate’s act of relinquishing her parental rights is thought to be incomparable to any payment the former can offer the surrogate. 621

It may be argued however, that any perceived inequality in bargaining power would ‘alert the court to the possibility that the stronger party may have taken advantage of their dominant position’. 622 Thus, if a contractual term is found to be substantially unfair, then as in the regulation of standard form consumer contracts, the term could be severed or the contract voided. The contract can also be voided where agreements require the surrogate to undergo certain prenatal tests or to have an abortion if the foetus is found to have abnormalities. This is because any medical intervention that interferes with the bodily integrity of the surrogate mother without her consent would be both an assault and battery. In such an event, the offending term would be unlawful and may be severed from the contract, or the whole contract may be voided.

Suitability of contract law in the regulation of surrogacy

Fundamentally however, contract law is perceived to be an inappropriate doctrine for the arbitration of social relationships and familial arrangements such as the surrogate act. Surrogacy has usually been governed by family law, which has been argued to be incongruous with the tenets of contractual obligations. 623 For example, the custody of a child in a contested surrogate arrangement is judicially determined in the UK and Israel by considering the best arrangement for the interest, security and welfare of the child; this is a

620 Rosemarie Tong Feminist Approaches to Bioethics (Boulder:Westview, 1997) at 200.
621 Ibid.
622 Jackson, supra note 4 at 310.
condition that cannot be overlooked on the grounds that a prior contract had declared it irrelevant to the outcome of the arrangement.

Furthermore, it has been asserted that surrogacy contracts are automatically void because they concern conduct which is immoral and against public interest – characteristics that would invalidate a contract. The charge of immorality stems from the belief that the surrogate arrangement involves the sale of babies who, under the principle of market inalienability, should never be subject to a commercial transaction. Surrogacy contracts are thus perceived to be unconscionable because it involves relationships that, it has been argued should not be contractualised at all.624 To that end, it is not suggested that surrogacy cannot be made to look like an ordinary contract, ‘but that it would be wrong to try to make it look so’.625

However, the invalidity of an enforceable contract on these grounds can be challenged - as discussed in section 2.1.2.2 of Chapter 1, an alternative perspective on surrogacy regards any monetary transaction as payment for gestational services rather than for the purchase of a baby. Perceiving the surrogate arrangement as a contractual agreement for the sale of services would accordingly recognize the need to subject the participants in the act to contractual obligations.

Against public policy

Even so, it has been steadfastly maintained that contractual obligations in surrogacy ‘will always be [seen to be] unenforceable on the grounds that ... [they are] ... against public policy’.626 Surrogacy is seen to be analogous to some promises that are ‘so deeply personal’627 that a surrogate should not only not be bound by them, but also have her right to change her mind about any related decision protected.

624 Radin, supra note 26 at 1926.
625 Lane, supra note 483 at 129.
627 Field - Surrogate Motherhood, supra note 506 at 225.
Arguably though, this does not mean that the contract should be unenforceable, only that the surrogate should have the option of changing her mind for a period of time. For example the contract could specify that her right to withdraw from the agreement or to terminate the foetus be maintained for the duration of her pregnancy. However, such a right would be extinguished after the baby is born and handed over to the commissioning parent so as to protect the welfare and best interests of the child by avoiding disruption to his or her life.\textsuperscript{628}

\textit{Remedy for breach of contract}

Those who oppose the enforcement of surrogate agreements also fear the impact of the potential contractual remedy of specific performance. It has been suggested that the resulting implication for the surrogate who decides to keep the birthed baby - and is therefore in breach of her contractual obligations - is that she will be forced to complete the contract and hand over the child to the commissioning parents.\textsuperscript{629}

Advocates for the enforcement of surrogate agreements however maintain that this is an unlikely scenario because if a surrogate agreement is a contract for gestational services, a party’s failure to fulfill obligations under the agreement triggers a remedy of damages, not specific performance.\textsuperscript{630} Damages in the form of economic compensation, it has been argued, will not only compensate the other party for their disappointment but will also ‘not have the same potential to wreak havoc with the basic liberties of the surrogate mother’.\textsuperscript{631}

Even then, it has been argued that the remedy of damages is an inappropriate remedy for the subject matter of a surrogate arrangement. This is primarily because it is not always easy to establish and quantify the loss flowing from the breach of the agreement. Thus while loss can be computed when the commissioning couple fail to make the payments

\textsuperscript{628} This would be in line with the British law on adoption which held that ‘once the child has been placed with the adopters, time begins to run out against the mother, and as time goes on, it gets more ... difficult for her to show that the withdrawal of her consent is reasonable’. [Re H (Infants) (Adoption: Parental Consent) [1977] 1 WLR 471 per Ormrod LJ at 472]
\textsuperscript{629} Jackson, supra note 4 at 312.
\textsuperscript{630} Ibid.
\textsuperscript{631} Ibid.
promised to the surrogate, if the latter fail to hand over the child to the commissioning parents, monetary compensation is unlikely to replace the loss of the child.

However, it is (rather paradoxically) plausible that an enforceable remedy of damages may also discourage economically vulnerable individuals - who will not be able to pay such damages - from engaging in the act if they are in any way unsure of the consequences of such a decision. An enforceable contract may not force the surrogate to give up the child post-partum, but would ensure that she is aware before she enters into the arrangement, of the remedy of damages that she would be liable for if she were to renege on the agreement. From a practical standpoint however, if a surrogate is economically disadvantaged, it may not be possible for the commissioning couple to claim a remedy of damages from her should she be in breach of the agreement.

2.1.4.2. Arguments for the enforcement of agreements

Freedom to contract

Proponents of surrogacy agreements who do not see the surrogate act as non-beneficial or as perpetuating serious harm also favour an individual’s freedom to contract - either to serve as a surrogate or to contract with such a surrogate. To completely prohibit a surrogate from entering into legally binding surrogacy contracts in the belief that she may change her mind has been suggested to be paternalistic\(^632\) and to insinuate that the surrogate cannot maintain rationality because ‘her faculty of reason is suspended by the emotional facets of her biological constituency’.\(^633\) By thus hijacking a woman’s right to reproductive autonomy, the State has been seen to be suggesting that the surrogate’s intent at the moment of agreement is not be taken seriously as it is subject to change after

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\(^{632}\) Shalev, supra note 36 at 121.
\(^{633}\) Ibid.
the pregnancy. This then would ‘reinforce the traditional perception of women as imprisoned in the subjectivity of their wombs’.634

Securitizing the participants’ interests and rights

Moreover, it may be argued that the failure of the law to enforce surrogacy agreements would prevent these contracts from acting to the benefit of the surrogate by providing and protecting her rights. For example if a woman decides to exercise her right to reproductive autonomy by engaging in surrogacy, it would be in her interests to have the protection of an enforceable contract that sets out her requirements with respect to reimbursement for expenditure and the parameters of her involvement in the arrangement.

The effect of contractual non-enforcement would be to keep intended parents ‘in a state of uncertainty and lack of control prior to the birth’635 as to whether (their) legal parenthood of the child can be secured. As discussed above, an enforceable contact that stipulates economic penalties for breach can also provide some form of economic compensation to the commissioning couple if the surrogate rescinds on the agreement. It will also reduce the vulnerability of the commissioning parents to threats of extortion by the surrogate who, when unhindered by an enforceable agreement, could plausibly keep the advanced financial inducements and ask for more than the agreed-to amount before giving the baby to the commissioning parents.636

634 Ibid.
636 Even so, arguably an enforceable contract with a remedy for monetary damages for default may not be useful should the commissioning parents decide to renege on the agreement to take custody of the birthed child. In that situation, neither damages payable to the surrogate nor specific enforcement of their undertaking to take the child would be in the surrogate’s or the child’s best interests respectively. However, in such a situation, an intention based test of parenthood has been suggested to be ‘a more productive solution ... [that would require] ... the commissioning couple rather than the surrogate ... to go through the process of giving up their child for adoption’.636 [Jackson, supra note 4 at 315]
Fundamentally, an enforceable surrogate agreement might serve as a safety net if and when the ‘illusionary relationship of “trust” and “friendship” between strangers’\(^{637}\) who are involved in the surrogate arrangement is challenged.\(^{638}\)

An unenforceable contract, on the other hand, gives both parties the freedom to withdraw from the agreement without any concern for the implications this may present to the other party to the contract. As noted above, it may induce women to become surrogates even if they are ambivalent on their decision to transfer custodial rights to the commissioning parents.\(^{639}\)

Unenforced contracts are thus perceived to treat parties to a surrogate arrangement ‘as gamblers in a wagering contract, in which the bargaining chips will be moral pressure and financial inducement, the risks, emotional vulnerability, psychologically distress, and familial uncertainty’.\(^{640}\)

Consequently while the Working Group’s guidelines for the transfer of custodial rights is timely, its recommendation to not enforce surrogacy agreements can be criticized as being counterproductive to the aim of protecting the interests of the involved parties. Admittedly, its objective in refusing to enforce the agreement is to protect the surrogate from any assault on her bodily integrity. However, as discussed above, ‘to introduce deliberately the uncertainties of a breakable agreement’\(^{641}\) into a surrogate arrangement may not be in the best interests of the surrogate, the child or the commissioning couple.

### 2.2. Recommendations of the Ontario Law Reform Commission

The Ontario Law Reform Commission (“OLRC”) on the other hand, in acknowledging this conclusion in its Report on Human Artificial Reproduction and Related Matters (“Ontario Report”), identified the necessity of an enforceable contract to better administer surrogacy

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\(^{637}\) Jackson, supra note 4 at 312.

\(^{638}\) Lane, supra note 483 at 134.


\(^{641}\) Mason, supra note 11 at 109.
arrangements. The wide-ranging recommendations for legislative action on surrogacy that were set out in the Ontario Report differed significantly from suggestions made by the Working Group not only with respect to the enforcement of surrogacy arrangements but also in the determination of parental status and the question of payment to the surrogate mother.

**OLRC recommendations as a basis for a new regulatory framework on surrogacy**

The recommendations proposed by the OLRC, with minor variations to account for the lessons learnt from the Israeli and UK regulatory experience, could provide a plausible framework for a regulatory regime – one that is based on the best interests of the child but which also provide for the expression of the surrogate and the commissioning parents’ reproductive rights. Various aspects of such a regime are discussed below.

**2.2.1. Enforcement of surrogacy agreement**

The OLRC favoured the regulation of surrogacy so as to ‘protect the interests of all concerned particularly the child who is to be conceived and transferred’.\(^{642}\) However, it held that the current law\(^ {643}\) was ‘inadequate’\(^ {644}\) in resolving the issues raised by surrogate motherhood.\(^ {645}\)

In suggesting possible ways in which the law could be more comprehensive, the OLRC - like the Israeli regulatory regime - recommended that surrogate agreements be enforced but only when the agreement is in writing\(^ {646}\) and only after it has been vetted. It was opined


\(^{643}\) Ibid at 233.

\(^{644}\) Ibid.

\(^{645}\) Ibid.

\(^{646}\) Ibid. at 281. (Recommendation 36)
that the courts were the institutions ‘best suited to undertake this crucial supervisory responsibility’.\(^\text{647}\)

However, the OLRC noted that the terms of the contract and the suitability of the parties to the arrangement should be approved \textit{before} conception occurred; any involvement of the court that occurs \textit{after} the surrogate act had been arranged was suggested to ‘come[] at a stage when it ... may be too late to protect all concerned’.\(^\text{648}\)

The OLRC also recommended the enactment of a statute that ‘unambiguously’\(^\text{649}\) establishes mandatory minimum standards that surrogacy agreements must meet. Thus in reviewing a prospective surrogacy arrangement, a court should determine whether the agreement complies with the statutory standards prescribed as well as whether it ‘adequately protect the child and the parties and ...[is]... not inequitable or unconscionable’.\(^\text{650}\)

\textbf{2.2.2. Suitability of participants}

Both the commissioning couple and the surrogate would be required to satisfy the court of their suitability to participate in a surrogacy arrangement. As in the Israeli model, the commissioning couple need to provide evidence that their engagement in surrogacy arrangement is because of a ‘medical need that is not amenable to alleviation by other available means’\(^\text{651}\) and there is no other medical option available for them to have a child. The court would have to be convinced that the child will be provided with ‘an adequate upbringing’\(^\text{652}\) by the commissioning parents, be satisfied with the physical and mental health of the prospective surrogate and the consent of her spouse (or partner) and be

\begin{footnotes}
\item[647] Ibid. at 233.
\item[648] Ibid.
\item[649] Ibid.
\item[650] Ibid. at 281. (Recommendation 36)
\item[651] Ibid. at 281. (Recommendation 38)
\item[652] Ibid. at 282. (Recommendation 39)
\end{footnotes}
convinced that steps had been taken to alleviate possible adverse effects of the surrogate’s participation upon any of her children.\textsuperscript{653}

Unlike the Israeli model however, the contractual terms within the Canadian context need not be harmonized with a specific religious doctrine or a common morality that directs the suitability of a surrogate on the basis of religion, marital status and the number of children she had already borne. As the Ontario Report suggested, there is ‘no theoretical or empirical basis’\textsuperscript{654} for such an approach. It further noted that there should be ‘no restriction on the eligibility of women’\textsuperscript{655} to serve as surrogates other than that they should have ‘reached the age of majority at the date of application for court approval of their participation’.\textsuperscript{656}

\textbf{2.2.3. Parental status at birth and at registration}

The OLRC recommended that in an uncontested arrangement, pursuant to the surrogate’s agreement to surrender the child to the commissioning couple, legal parenthood would be undertaken by the commissioning couple. Thus, the commissioning parents would be recognised as the parents of the child ‘for all legal purposes’\textsuperscript{657} and it is recommended that the surrogate mother have ‘no legal relationship to the child’.\textsuperscript{658} Consequently, the commissioning parents would be registered as the child’s legal parents under the provincial \textit{Vital Statistics Act}. The surrogate mother would not be named in the register of births; in the interests of privacy, neither would the fact that the child has been born to a surrogate mother appear in the register.\textsuperscript{659}

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\begin{itemize}
  \item \textsuperscript{653} Ibid. at 282. (Recommendation 43)
  \item \textsuperscript{654} Ibid. at 240.
  \item \textsuperscript{655} Ibid. at 241.
  \item \textsuperscript{656} Ibid. at 284. (Recommendation 41)
  \item \textsuperscript{657} Ibid. at 284. (Recommendation 56)
  \item \textsuperscript{658} Ibid. at 284. (Recommendation 58)
  \item \textsuperscript{659} Ibid.
\end{itemize}
As noted by the OLRC, such directions which give effect to the pre-delivery intent of the parties ensure continuity, certainty and clarity in the determination of the child’s parentage so that he or she will ‘rest securely in ... [his or her] ... new environment’.

2.2.4. OLRC’s proposal for assigning custody of the child

However, as observed under the Working Group’s regime, when a surrogate withdraws her consent to the transfer of the child after its birth, the legal status of the child is less certain. A contested surrogacy would potentially subject the child to ‘years of litigation to determine who will be considered to be his or her legal parents’. Litigation and uncertainty would be detrimental to the welfare of the child.

In this regard, the OLRC’s recommendation that the surrogate agreement be enforceable could help reduce such uncertainty since the surrogate would then be ‘under a legal compulsion to surrender the child [to the commissioning parents] in accordance with her promise to do so under the surrogate agreement’.

In the event that she refuses to do so, the Ontario Report suggested that the court ‘order that the child be delivered to the social parents’. The OLRC further held that if the court is made aware prior to the birth that the surrogate intends to refuse to surrender the child upon birth, ‘it should be empowered, prior to the birth of the child, to make an order for transfer of custody upon birth’.

While the OLRC recognised the ‘risk of disappointment and trauma’ that the surrogate will undergo in being forced to surrender the child under these circumstances, it also

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660 Ibid. at 260.
663 Ibid. at 283. (Recommendation 49)
664 Ibid.
665 Ibid. at 251.
observed that the same trauma would be visited on the ‘social [commissioning] parents ... should the surrogate be given a right to rescind in the agreement unilaterally within a period after birth’. To that end, the OLRC attempted to make a custodial determination purely in the best interests of the child.

In this regard, it was persuaded by the opinion expressed by its Advisory Board that the immediate surrender of the child would ‘prevent bonding with the surrogate ... and facilitate bonding with the [commissioning] ... mother who in the vast majority of cases would be the ultimate recipient of the child and who therefore would be the primary influence in its life.

2.2.4.1. Custodial rights of commissioning couple

The approach taken by the OLRC in the determination of legal parentage and custody is in sharp contrast to that suggested by both the Working Group and the regulatory regime in the UK which automatically assigns parentage at birth to the surrogate. Arguably, as in the Israeli regime, the OLHC criteria are affected by the intended parents’ role in the creation of the child before his or her birth; the child would never have been conceived and carried through to birth but for the efforts of the intended parents who initiated the surrogacy arrangement.

However, as previously alluded to, the automatic assumption of parentage by the commissioning parents has drawbacks. For example, it is possible that despite the judicial vetting of prospective parents prior to their engagement in the surrogate act, the suitability of the commissioning couple to parent the child is subsequently thrown into doubt. When such an event occurs or when the couple undergoes a change in mind or circumstance after the commencement of the arrangement that would foreseeably affect their ability to parent, it would not be in the child’s best interests for parentage to be automatically assigned to the commissioning parents.

666 Ibid. at 251.
667 Ibid.
In order to ensure that the welfare of the child ‘is not sacrificed in the interests of certainty’, the OLRC concedes to the dislocation of the child’s environment by empowering children’s aid societies with the right to apply to the court for a review of the arrangement if they have information that suggested the unsuitability of the commissioning couple to parent the child. This right to apply for a review of the agreement has also been extended to the surrogate by the OLRC ‘where circumstances indicate that the social parents are unsuitable to receive the child’. In that event, the surrogate can seek custody of the child if the court, upon review of the arrangement, proceeds to rescind it.

2.2.4.2. Custodial rights of the surrogate

Unless the court so rescinds the agreement however, the surrogate is contractually bound to surrender the child to the commissioning parents, ‘irrespective of any attitudinal change on her part in the intervening period’. The automatic assignment of parental status to the commissioning parents also reduces the visibility of the surrogate in the life of the child after his or her birth. This would arguably make it difficult for the surrogate to challenge the assignment of parenthood to the commissioning parents; because stability in the form of a lack of disruption to the child’s custody is perceived in his or her best interest, it has been anticipated that ‘whoever has the child until the time of the custody hearing has an advantage because ... stability suggests leaving the child where it is’.

The fear then is that intent based analysis adopted by the OLRC to assign parentage and custody at birth will colour the way in which the concept of best interests is utilized by the courts in the determination of legal custody of the child. The best interests standard, which

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668 Ibid. at 253.
669 Ibid. at 283. (Recommendation 50)
670 Ibid. at 253.
671 Ibid. at 251.
is usually ‘sensitive both to factual nuance and child welfare’, when applied through an intent based approach may always lead to ‘the genetic parents prevailing over the surrogate’.  

2.2.5. Alternate proposal for assigning custody of the child

An alternative approach then would be for the presumption of parental status to neither favour the surrogate as suggested by the Working Group nor the commissioning couple as recommended by the OLRC. Instead, as in the Israeli regulatory regime, the State should undertake to be the guardian of the child at the time of his or her birth and the child should be housed by the State until the process of birth registration is completed.

What this means is that when the surrogate discharges her contractual obligation under the surrogate agreement to surrender the child at birth, it would be the State that would gain initial custody of the child.

Starting from a premise that neither the commissioning couple nor the surrogate have a right to legal custody at birth would alleviate the tension between the expression of preconception intent (of the commissioning couple) and the surrogate’s gestational rights by shifting the focus of the subsequent determination of legal parentage towards a resolution that would genuinely serve the best interests of the child.

As in the UK, legal parentage could then be granted by the court upon the application of a parental order by the commissioning couple. In a pre-approved surrogacy the parental order would be denied only upon evidence of the unsuitability of the commissioning couple as suggested in the regulatory regime in Israel. Such evidence could be presented to the court by the officers of the State, or as recommended by the OLRC, the local children’s aid societies, even after the birth of the child but before legal parentage is determined and the birth registration completed.

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673 Ibid at 81.
674 Ibid.
Should the surrogate contest the application in a pre-approved surrogacy, the agreement and its participants should once again come under the review of the court. The court should then either evaluate any new evidence presented that suggests the unsuitability of the commissioning couple to parent or assess any reason to grant the surrogate joint or sole custody of the child that merits consideration.

It may be argued that the determination of legal parenthood using a framework that relies on the judicial interpretation of the best interests of the child would exacerbate the uncertainty of custodial outcome. It is however believed that the application of an impartial and objective judicial methodology to this issue as opposed to compliance with a general legislative edict has ‘the advantage of slowing down the growth of surrogacy to give society time to think through its position about this … technology’. 675

2.2.6. Payment to the surrogate

The constructive use of judicial discretion can also help to determine the payment to be made to the surrogate by the commissioning couple. As the OLRC recommended, ‘no payment ... [should] ... be made in relation to a surrogate motherhood arrangement without the prior approval of the court’676 especially because there may be many different motivations for payments.

The OLRC noted four categories of payment that the commissioning couple could make to the surrogate – for profit for participation, for expenses incurred by the surrogate in the course of the arrangement, for lost income and lost earning opportunities and for compensation for pain and suffering. However, it was unable to provide more specific guidance largely due to the divergence of viewpoints within the OLRC itself as to the type of

675 Ibid.
payment that should be allowed by law and the degree of discretion the court is to be allowed in adjudicating on the issue. 677

The differences in opinion expressed within the OLRC clearly indicate that each payment scheme has its drawbacks. As previously discussed in Chapter 1, a payment-for-profit plan has been seen as a morally ambiguous sale by the surrogate of her parental rights over the birthed baby that leads to the ‘dehumanization and debasement of both the surrogate mother and the child’.678 Alternatively, despite recognition of the market inalienability of the birthed child, a payment-for-profit scheme may also plausibly entice entrepreneurial surrogates to exploit the commissioning couple’s desire for genetic offspring by demanding exorbitant fees for the provision of their gestational services.

As noted in Chapter 2, section 1.4.6.2, payment to only compensate the surrogate’s expenses – as set out in the AHRA - has been thought to devalue the gestational process by failing to acknowledge the economic value of female reproductive labour.679

Arguably, a collective ban on payment itself – including compensation purely for expenses - would ‘chill the practice of surrogacy’680 by providing no incentive for women to engage in the surrogate act. This would either result in the process being conducted illegally – providing no protection for the surrogate, or the process not being conducted at all which would result in the rights of the commissioning parents to avail of this procreative option not being expressed.681

It is thus likely that any regulatory regime that recognizes only one particular form of payment – or nonpayment - will be criticized for trampling on the rights of the other participants to the arrangement. To that end, the proposed regulatory framework would be best served if it adopts the principle behind OLRC’s recommendation on payments - that any scheme of payment adopted in a surrogate arrangement should be subject to judicial

677 Ibid. at 254.
678 Ibid. at 253.
679 Shalev, supra note 36 at 160.
680 Gostin, supra note 615 at 11.
681 Ibid.
oversight as a precautionary measure so as to ‘reveal any financial exploitation of a surrogate mother by the prospective social parents’. 682

2.2.6.1. Terms of payment

In addition to such supervision, which would be necessary in order to identify payments that are not permissible in the surrogate’s best interests, the potential for exploitation of the participants would arguably be further reduced if both the commissioning parents and the surrogate are made aware of the minimum reasonable level of compensation that should be provided. For example a payment scheme similar to that which is in place in Israel - which specifically sets out the expenses and compensation to be paid – would inform the commissioning couple of the average cost to be incurred if they participate in such an agreement, and would reassure the surrogate of her financial protection and that her medical, psychological and legal concerns would be paid for.

Surrogacy legislation, in protecting the rights of both the surrogate and the commissioning couple, should require the payment terms of the surrogacy agreement to include the reimbursement of expenses incurred by the surrogate including all legal and medical costs related to the surrogate act and any income she may have lost as a result of her involvement in the arrangement.

Limiting the level of payment to mere reimbursement however does not indicate an appreciation of the time, effort and emotional investment that the surrogate gives to the surrogate arrangement by the provision of her gestational services. While it is feared that payment beyond expenses threatens to commodify a woman’s reproductive ability, failure to make such a payment could also be perceived as a refusal to acknowledge the pain and suffering that the surrogate undergoes and the time she sacrifices in engaging in the arrangement.

To that end, in addition to the reimbursement of expenses, an argument can be made for the surrogate to be paid for her (temporary) loss of earning ability during the surrogate arrangement as well as to be recompensed for the pain and suffering she underwent on account of the pregnancy. Entrenching these clauses within the proposed regulatory scheme and subjecting their application to judicial scrutiny would ensure the non commodification of its participants and the birthed child. The regulatory regime would then be able to provide for an equitable act of compensated surrogacy.

2.2.7. Involvement of intermediaries

Israel’s experience with respect to the operation of commercial surrogate agencies is also of relevance to the proposed regulatory framework. Unlike the AHRA, the Israeli surrogacy law allows intermediaries such as these agencies to operate legally so as to facilitate encounters between potential surrogates and commissioning couples. Adapting this experience to the Canadian context would require specific guidelines to guard against ‘offensive commercialism’\(^{683}\) - the fear of which lead policymakers to prohibit the involvement of any such middlemen under the AHRA.\(^{684}\)

To this end, the proposed regulatory framework should, as in Israel, provide for the State supervision of any agencies that arrange surrogate motherhood agreements. Surrogacy legislation should, as recommended by the OLRC, ensure the proper accreditation of the operators of such agencies, monitoring ‘the calibre and number of their staff, advertisement and recruitment practices, services offered and fees charged’.\(^{685}\)

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\(^{683}\) Ibid. at 261.
\(^{684}\) AHRA supra, note 1 at s 6 (1).
2.2.8. Unauthorised agreements

Surrogate arrangements pursued without the authorization of the courts however, are unenforceable and provide no protection to its participants. Thus in order for a regulatory framework to be effective, it should account for, and act to reduce, the proclivity of individuals to engage in an unauthorised act.

However, given the social and private nature of the surrogate act, it is possible for certain arrangements – particularly traditional surrogate arrangements that involve natural conception or self-insemination by the surrogate - to be conducted without the knowledge, let alone approval, of public authorities. In fact, anecdotal evidence has been offered that suggests that such examples of traditional surrogacy ‘have been long practiced in many immigrant and aboriginal communities’686 in Canada with little social disruption.687

Even so engagement in unauthorized agreements conducted without the guidance and protection of a supervisory framework could potentially destabilize the life of the birthed child and increase the vulnerability of a surrogate or commissioning couple to fraud and economic exploitation. Thus while it may not be possible to completely prevent unauthorized surrogate acts from taking place, in light of the protective policy underlying the suggested regulatory regime, agreements to engage in such arrangements should actively be discouraged.

So as to reduce the occurrence of or participation in unauthorized surrogate arrangements, the suggested regulatory framework could impose, as the OLRC recommended, a penalty of a fine on the surrogate, the commissioning couple and any intermediary who may have brokered an arrangement that ‘intended to evade the proposed regulatory scheme’.688 It

686 Standing Committee on Health, supra note 64: Submission by Professor Bernard Dickens, Professor in Health, Law and Policy, Chair in Biomedical Ethics, Faculty of Law, Faculty of Medicine and the Joint Centre for Bioethics, University of Toronto (October 24 2001) at 1710.
687 Ibid.
has been noted that penalties other than fines, such as incarceration of the participants, may be improper; not only is ‘the severity of the penalty is of less importance than the fact of its existence’ ⁶⁸⁹ but incarceration of the prospective parents of the child would be, as noted by the Warnock Commission, not be in the best interests of the birthed child. ⁶⁹⁰

A monetary fine then may be the only penalty that can be imposed on the participants of an unauthorised arrangement. This would mean, as the OLRC noted, that commissioning parents who engaged in an illegal arrangement cannot be denied that opportunity to regularize their relationship with the child – it ‘would have the effect of punishing children for the conduct of their parents’. ⁶⁹¹ Thus when a commissioning couple who had engaged in an unauthorized surrogate arrangement applies for a parental order to legitimise the status of the child, legal parentage should be granted. However, as the OLRC suggests, this should be pursuant to ‘evidence respecting their [the commissioning parent’s] suitability’. ⁶⁹²

The regulation of surrogacy under the proposed framework, when structured around the best interests of the child, requires a higher level of State and judicial intervention than is currently envisioned by the Working Group - one where state-appointed committees and the courts have the authority to scrutinize contracts beforehand and supervise any issue related to the custody of the child, payment to the surrogate and the parties interaction with intermediaries.

This level of State intervention may potentially discourage some commissioning parents and surrogates from engaging in the practice. However, it would ensure the successful enforcement of a legislatively established scheme of regulation that protects the interests of its participants, while providing the child with the stability of an identifiable family and the security of undisputed guardianship.

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⁶⁸⁹ Ibid. at 269.
⁶⁹⁰ Warnock, supra note 2 at para 8.19.
⁶⁹² Ibid. at 272.
3. Conclusion

The difficulty in legislating on surrogacy - whether as a traditional procreative process of natural conception or as an ART-assisted alternative to infertility treatment – is due largely to the ‘divisibility of procreative tasks’\(^{693}\) that reconstructs the previously unchallenged concepts of reproduction, maternity and consequent parenthood.

The surrogate arrangement questions the biological definition of parenthood by suggesting that the reproductive process begins - well before the point of conception - when intent to procreate is articulated and conveyed to a surrogate.

As discussed in Chapter 1, by introducing a third party to the reproductive process, surrogacy is seen to fragment motherhood, subvert the structure of the nuclear family and have the potential to transform the private nature of parenthood into a public contractual arrangement that could commodify hitherto inalienable entities namely the surrogate and the birthed child. In other words, surrogacy, to policymakers and the State appears to ‘threaten accepted views of what a family is, of gender-appropriate parental behaviour and of our ideas of what is natural in the realm of reproductive behaviour’.\(^{694}\)

However, as evaluated in Chapter 2, an outright prohibition of the practice is superfluous: there is evidence that private and unenforceable traditional surrogate arrangements had been carried out well before the first instance of gestational surrogacy was carried out in 1985 in the United States.\(^{695}\) Additionally, anecdotal evidence indicates that a demand for surrogacy continues to exist that would merely drive the practice of surrogacy underground should the process be legally banned.

The reason for this demand is fundamentally because the participants of such arrangements hold a vastly differing perspective on surrogacy from that of the

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693 Morgan – Essay, supra note 640 at 59.
694 Rachel Cook, Shelly Day Sclater and Felicity Kagnas, supra note 267 at 5.
policymakers. Surrogacy, as conceptualized by the commissioning couple, is the use of non-traditional means to fulfill a biologically established need to parent a child who is the (partial) product of their genetic heritage. Similarly, a surrogate’s offer of gestational (and sometimes genetic) services to assist an otherwise childless couple can be seen as her way of affirming the centrality of family life.

There thus emerges a need to reconcile the expression of both the surrogate and the commissioning couple’s reproductive autonomy with societal concerns about the impact of surrogacy on the morality, health and safety of the participants and the public as a whole. It was explained in Chapter 2 why this is best achieved by the implementation of a regulatory framework that aims to allow the expression the reproductive rights of the participants while minimizing the potentially exploitative aspects of the act.

In this regard, a fundamental shortcoming of the existing Canadian framework on surrogacy is the policymaker’s failure to recognise that the impact of surrogacy extends far beyond its availability as an ART assisted treatment procedure. Thus the AHRA, by defining a surrogate as an individual who gestates an embryo conceived ‘by means of an assisted reproduction procedure’,696 is only applicable to gestational surrogacy and some forms of traditional surrogacy. The development of more cohesive legislation requires acknowledgement of the all forms of surrogacy and the ‘multiple existing bodies of law’697 that can accommodate these various surrogate arrangements.

To that end, as discussed in Chapter 3, surrogacy regulation would benefit from being encompassed within dedicated legislation such as the 1985 Act which was applicable to all forms of surrogacy. However, unlike the 1985 Act, such dedicated legislation on surrogacy should not only deal with commercial intermediaries but also provide comprehensive guidelines for the participants of the surrogate act in both commercial and non-commercial arrangements.

696 AHRA supra, note 1 at 3.
697 Jackson, supra note 4 at 263.
The Israeli regulatory regime also proves to be instructive by demonstrating how a willingness by the state and the judiciary to play a greater role in evaluating surrogacy arrangements helps to establish detailed legislation that can protect the rights while balancing the interests of its participants. However, the Israeli regime also reveals that the extent to which surrogacy is accepted as an alternative to infertility treatment may also be dependent how well it reconciles with the dominant value system of the population. Thus in Israel, a common morality based on the Jewish faith dictates values that accepted the expression of surrogacy only in the form of compensated gestational surrogate arrangements.

It is difficult to apply, even deduce, a similar value system to Canada partly because it does not have a culturally homogenous population as that in Israel. However, as ascertained in Chapter 4, the Canadian courts have instead attempted to be guided by the intent to act in the best interests of the child born as a result of a surrogate act; there is judicial recognition that the child is the product of various permutations of genetic interactions, gestated with altruistic intent or after the negotiation of suitable compensation. In line with the judicial assessments and mindful of the multiple partnerships that effect the child's birth, both the Uniform Law Conference of Canada and the OLRC have drawn on elements of contract law, family law and medical law in their attempts to develop sustainable regulation that would ensure the child's welfare.

In the second part of Chapter 4, a plausible regulatory regime for surrogacy was suggested which was based on the recommendations of the OLRC but modified to accommodate for the lessons learnt from the implementation of surrogacy legislation in the UK and Israel.

The proposed regime calls for the reconstruction of Canadian surrogacy legislation to be structured around the best interests of the child while the optimal measure of protection is given to rights and interests of the surrogate and the commissioning couple. To that end, it is suggested that written surrogacy agreements between the surrogate and the commissioning couple set out the obligations and rights of both parties. The agreement should also be enforceable. This would however be subject to prior judicial approval of the
suitability of the participants to enter into such an arrangement as well as judicial scrutiny of the agreement itself so as to ensure that terms are equitable.

The agreement would set out the obligations of the surrogate to surrender the child at birth and the expectation that the commissioning couple would compensate the surrogate for her gestational services. The nature and amount of reasonable compensation would be indicated in the agreement but would be subject to judicial oversight to minimize the risk of exploitation of the surrogate. The terms of payment, in reflecting reasonable compensation, should reimburse the surrogate not just for expenditures related to the surrogacy but also for loss of earning ability as well as for the pain and suffering she undergoes as a result of her participation. The State should gain initial custody of the child who would be housed at the State’s expense till the commissioning couple’s application for a parental order is approved. Should the surrogate contest the transfer of custody from the State to the commissioning couple, then custody will be determined by the courts upon re-evaluation of the agreement and its participants. Failure by any participant to conform to the regulatory regime would result in the penalty of no more than a monetary fine.

While such suggestions have been put forward, it remains to be seen if they would be implemented and given legal effect. It has been noted that neither the federal government nor its sanctioned agency has yet to enact the necessary regulations under the AHRA that would guide the development of surrogacy in Canada. Furthermore, as indicated in Chapter 4, the constitutionality of any such regulations so constructed by the federal government has also been challenged by the Government of Quebec.

However, should the Supreme Court uphold the Quebec Court of Appeal decision that regulatory provisions of the AHRA are unconstitutional, the proposed framework would still serve to inform provincial policymakers – to whom the responsibility of regulating on surrogacy would fall - of the central issues of the surrogacy debate that the provincial government would need to address.
On the other hand, even if the Supreme Court were to dismiss the Quebec Court of Appeal decision and uphold the federal prerogative to regulate on ARTs, arguably it would be in the best interests of any participant in a surrogate arrangement for separate dedicated legislation to be enacted that would govern all forms of traditional or gestational surrogate arrangements and would thus be capable of dealing with the issues that arise therein.

A consensus on the extent of state intervention on an individual’s participation in the surrogate act is unlikely to be reached. As the OLRC notes, ‘in the final analysis the question becomes one of fundamental values, which cannot be resolved conclusively to the satisfaction of everyone’. However the proposed regulation acknowledges multiple belief structures and accommodates, within the ambit of a more expansive definition of reproductive autonomy, the connection between a child and the individuals who contributed to his birth through intent or genetic ties even if such individuals do not coalesce into one family. Consequently, the proposed regulations would ensure that the legal and medical encroachments on the surrogate’s or the commissioning couple’s right to procreative liberty is limited to situations where the risk of harm to another person outweighs that individual’s undeniably compelling interest in determining whether and how to reproduce.

Until such change is effected and such regulation implemented however, discussion of the necessity to reconstruct the Canadian regulatory framework on surrogacy – so as to balance the rights of the surrogate and the commissioning parents to procreative autonomy even as decisions are made in the best interests of the child - remain merely a step in the right direction.

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