

REGULATING REIMBURSEMENTS FOR SURROGATE MOTHERS

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In Canada, the Assisted Human Reproduction Act (AHRA) criminalizes commercial surrogacy while allowing surrogates to be reimbursed for their out-of-pocket expenses and lost work-related income during pregnancy. These reimbursements must take place in accordance with the Reimbursement Related to Assisted Human Reproduction Regulations (Regulations), which were enacted in June 2020. This article explores the history and development of the AHRA and draws on interviews with 26 Canadian fertility lawyers to examine and critique the Regulations. I argue that while the final version of these regulations is more inclusive and flexible than prior drafts, the AHRA may still leave some surrogates in a precarious financial position. In turn, while the Regulations help clarify what is a legal reimbursement, they are unlikely to deter paid surrogacy and may generate new confusion about what is permitted under the AHRA.

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I. INTRODUCTION

In Canada, the federal *Assisted Human Reproduction Act* criminalizes commercial surrogacy.¹ It is illegal to pay, offer to pay, or advertise to pay “consideration” to a

* Assistant Professor, Faculty of Law, University of Ottawa, Common Law Section. This research benefitted from financial support from the Social Sciences and Humanities Research Council of Canada, the Richard H Tomlinson Doctoral Fellowship, McGill University’s Faculty of Law, McGill’s Research Group on Health and Law, and the University of Ottawa’s Faculty of Law. Parts of this article first appeared in my doctoral dissertation entitled *Surrogacy in Canada: Lawyers’ Experiences, Practices and Perspectives* (McGill, May 2020). I am grateful to Angela Campbell, Alana Klein, Stephen Smith, Robert Leckey, Lisa Kelly, Rosalie Jukier, Charlie Feldman, and Katie Hammond for helpful conversations and thoughtful comments on my dissertation. This article also benefitted from superb feedback from Bethany Hastie, Arianne Kent, Rachel Kuchma and three anonymous peer reviewers. I am also thankful to participants at the University of Toronto’s *Regulating Creation* conference and the Ottawa-McGill Health Law Colloquium for their insightful questions and suggestions. Finally, I could not have completed this project without the enthusiastic participation of the lawyers I interviewed. I am tremendously grateful to them for taking the time to speak with me.

¹ SC 2004, c 2 [*AHRA*].

surrogate,² or to an intermediary to “arrange for the services of a surrogate mother.”³ Individuals or organizations who contravene the *AHRA*’s prohibitions on payment face up to a \$500,000 fine and up to ten years in prison.⁴

While surrogates are not permitted to profit from carrying a child, section 12 of the *AHRA* allows them to be reimbursed for their out-of-pocket expenses associated with the surrogacy, or lost work-related income during pregnancy.⁵ These reimbursements must take place in accordance with the *Reimbursement Related to Assisted Human Reproduction Regulations*, which specify the kinds of expenses for which a surrogate may be reimbursed and the procedure that must be followed.⁶ These regulations came into force on 9 June 2020⁷ — sixteen years after the *AHRA* received royal assent.⁸

Over the past two decades, there has been considerable criticism of the Canadian government’s failure to introduce these regulations in a timely way.⁹ While section 12 of the *AHRA* was enacted in 2004, it was not in force due to the absence of regulations. As a result, there was disagreement and confusion about whether it was legal to reimburse surrogates for any expenses in these circumstances.¹⁰ As Health Canada began to develop regulations, some scholars expressed concern about their implications for surrogates and intended parents¹¹ and

² *Ibid*, s 6(1).

³ *Ibid*, s 6(3). It is also illegal for an intermediary to “accept consideration for arranging for the services of a surrogate mother” or to offer or advertise to provide these services (*ibid*, s 6(2)). Those intermediaries who arrange for the services of a surrogate are typically referred to as “surrogacy agencies” or “surrogacy consultants.”

⁴ *Ibid*, s 60. Note that surrogates who accept payment are not subject to these penalties, rather the *AHRA* targets intended parents or agencies who pay surrogates.

⁵ *Ibid*, s 12. Receipts must be provided for all expenditures to obtain reimbursement. In order to be reimbursed for lost income, a physician must certify in writing that continuing to work would pose a risk to the surrogate or to the embryo or fetus.

⁶ SOR/2019-193 [*Reimbursement Regulations*].

⁷ See *ibid*, s 13; Health Canada, *Compliance Approach for the Reimbursement Related to Assisted Human Reproduction Regulations*, Catalogue No H14-346/2020E-PDF (Ottawa: Health Canada, June 2020), online: <www.canada.ca/content/dam/hc-sc/documents/services/drugs-health-products/compliance-enforcement/information-health-product/compliance-approach-for-the-reimbursement-related-to-assisted-human-reproduction-regulations-/compliance-en.pdf>.

⁸ *AHRA*, *supra* note 1 (the *AHRA* received Royal Assent on 29 March 2004).

⁹ See especially Françoise Baylis & Jocelyn Downie, “The Tale of Assisted Human Reproduction Canada: A Tragedy in Five Acts” (2013) 25:2 *CJWL* 183 [Baylis & Downie, “The Tale of Assisted Human Reproduction Canada”]; Alana Cattapan, “Rhetoric and Reality: ‘Protecting’ Women in Canadian Public Policy on Assisted Human Reproduction” (2013) 25:2 *CJWL* 202; Françoise Baylis, Jocelyn Downie & Dave Snow, “Fake It Till You Make It: Policymaking and Assisted Human Reproduction in Canada” (2014) 36:6 *J Obstetrics & Gynaecology Can* 510 [Baylis, Downie & Snow, “Fake It”]; Dave Snow, Françoise Baylis & Jocelyn Downie, “Why the Government of Canada Won’t Regulate Assisted Human Reproduction: A Modern Mystery” (2015) 9:1 *McGill JL & Health* 1 [Snow, Baylis & Downie, “Why the Government?”].

¹⁰ Some scholars pointed out that it was illegal for surrogate mothers to be reimbursed for any expenditures or for loss of work-related income while section 12 was not in force. See e.g. Baylis, Downie & Snow, “Fake It,” *ibid* at 511; Snow, Baylis & Downie, “Why the Government,” *ibid* at 4–6. However, Health Canada — which was tasked with drafting the *Reimbursement Regulations* — took the position that reimbursements were permissible and legal, even in the absence of regulations. “Prohibitions Related to Surrogacy,” online: *Government of Canada* <www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/surrogacy-substitution-eng.php>.

¹¹ See Angel Petropanagos, Vanessa Gruben & Angela Cameron, “Should Canada Implement a Flat-Rate Reimbursement Model for Surrogacy Arrangements? Legal and Ethical Recommendations for a Revised Approach to Reimbursement” in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 155.

about the process through which the government might seek their promulgation.¹² Others called on the government to decriminalize paid surrogacy rather than introducing regulations pertaining to expenses.¹³

This article builds on this scholarship by presenting and discussing results from qualitative interviews I conducted with 26 Canadian lawyers who advise and represent surrogate mothers and intended parents.¹⁴ The week I began these interviews in fall 2016, the Canadian government announced its intention to develop regulations pertaining to the *AHRA*.¹⁵ This timing was fortuitous, as I had the opportunity to ask participants what they thought about this announcement and about the draft regulations that were released at that time.

Most lawyers supported the introduction of regulations to better ensure that they, and their clients, are complying with the *AHRA*'s criminal prohibitions. They explained that it has been difficult to advise their clients about what is a reimbursable expense and noted that some surrogates have been paid through inflated expenses, in violation of the *AHRA*. Some lawyers, however, expressed concern that proposed regulations might run counter to lawmakers' intentions by causing surrogates to incur financial losses as a result of their surrogacy arrangement. Lawyers discussed the kinds of reimbursements surrogates have received in the absence of regulations and worried that surrogates would no longer be permitted to be reimbursed for all of their out-of-pocket expenses or lost work-related income.

Part II of this article offers context for this study. It discusses the history of the *Assisted Human Reproduction Act* and the development of the *Reimbursement Regulations*. Part III then describes my research methods and the results of my interviews. It presents lawyers' arguments in favour and against introducing regulations, as well as their perspectives on the draft regulations that were available at the time of my interviews. Part IV then explores to what extent the *Reimbursement Regulations* address the concerns and issues that lawyers raised during these interviews.¹⁶ I argue that while the final version of these regulations is more inclusive and flexible than prior drafts, the *AHRA* may still leave some surrogates in a precarious financial position. In turn, while the *Reimbursement Regulations* further clarify what is a legal reimbursement, they are unlikely to deter paid surrogacy and may generate new confusion about what is permitted under the *AHRA*.

¹² Notably, Mark McLeod raised concerns about the possibility that the government might use incorporation by reference to promulgate regulations. See Mark C McLeod, "Reimbursement of Expenditures and Possible Sub-delegation of the Assisted Human Reproduction Regulations" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 113.

¹³ See especially Maneesha Deckha, "Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding" (2015) 61:1 McGill LJ 31; Erin Nelson, "Surrogacy in Canada: Toward Permissive Regulation" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 185.

¹⁴ See Stefanie Carsley, *Surrogacy in Canada: Lawyers' Experiences, Practices and Perspectives* (Doctor of Civil Law Dissertation: McGill University, 2020) [unpublished] [Carsley, *Lawyers' Experiences*].

¹⁵ Notice (Department of Health), (2016) C Gaz I, 2818 (*Assisted Human Reproduction Act*), online: <www.gazette.gc.ca/rp-pr/p1/2016/2016-10-01/html/notice-avis-eng.html#ne1> [*AHRA Notice*].

¹⁶ For a related analysis of whether the *Reimbursement Regulations* respond to egg donors' concerns, see Kathleen Hammond, "Not Worth the Wait: Why the Long-Awaited Regulations under the *AHRA* Don't Address Egg Donor Concerns" 37:1 CJLS [forthcoming 2022] (on file with author).

II. HISTORY OF THE AHRA AND REIMBURSEMENT REGULATIONS

A. LEGISLATIVE HISTORY

The AHRA was enacted in 2004 after decades of debate and several failed attempts to legislate in response to assisted reproductive technologies.¹⁷ In 1989, the federal government established the Royal Commission on New Reproductive Technologies to explore and report on the legal, social, economic, and health implications of reproductive technologies for women, children, and Canadian families.¹⁸ In its 1993 report, *Proceed with Care*,¹⁹ the Commission expressed concern that surrogacy — and in particular, paid surrogacy — would commodify, instrumentalize, and objectify women and children²⁰ and would lead to an “undesirable social understanding of the value and dignity of women, their reproductive capacity, and their bodily integrity.”²¹ The Commissioners also worried that women of low socio-economic means would be enticed to act as surrogates in order to make money and that these women would be mistreated or exploited by intended parents or intermediaries who arrange for surrogacy services.²² In response, they recommended that the federal government criminalize payment for surrogates and intermediaries.²³

In 1996, lawmakers introduced Bill C-47 which proposed to prohibit paid surrogacy.²⁴ This bill was debated extensively but died on the Order Paper in April 1997 when the federal

¹⁷ Historically, the terms “assisted reproductive technologies” or “new reproductive technologies” were used to denote a wide variety of practices that could help infertile couples build their families. This included procedures like in vitro fertilization or gamete cryopreservation, which relied upon medical and technological innovations. However, this terminology was also used to refer to practices like sperm donation and surrogacy which might involve medical interventions but which can be achieved without any medical assistance through intercourse or at-home insemination. See e.g. Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*, Catalogue No Z1-1989/3E (Ottawa: Minister of Government Services Canada, 1993). Today, it is more common to refer to surrogacy and sperm, egg, and embryo donation as “third party reproduction” or methods of “assisted reproduction” rather than as “reproductive technologies.”

¹⁸ Royal Commission on New Reproductive Technologies, *ibid* at 2. Note that the Royal Commission is also commonly referred to as the “Baird Commission” as it was chaired by Patricia Baird. See also Alison Harvison Young & Angela Wasunna, “Wrestling with the Limits of Law: Regulating New Reproductive Technologies” (1998) 6 Health LJ 239 at 239; Annette Burfoot, “In-Appropriation – A Critique of *Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies*” (1995) 18:4 Women’s Studies Intl Forum 499 at 500 [Burfoot, “In-Appropriation”]; Diana Backhouse & Maneesha Deckha, “Shifting Rationales: The Waning Influence of Feminism on Canada’s Embryo Research Restrictions” (2009) 21:2 CJWL 229 at 235–36.

¹⁹ The report is comprised of two volumes but is also accompanied by 15 volumes of research conducted for the Commission. See Royal Commission on New Reproductive Technologies, *supra* note 17; Young & Wasunna, *ibid* at 241. For commentary on the Royal Commission’s recommendations see e.g. Patrick Healy, “Statutory Prohibitions and the Regulation of New Reproductive Technologies under Federal Law in Canada” (1995) 40:4 McGill LJ 905; Diana Majury, “Is Care Enough? *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*” (1994) 17:1 Dal LJ 279; Lorna Weir & Jasmin Habib, “A Critical Feminist Analysis of the Final Report of the Royal Commission on New Reproductive Technologies” (1997) 52:1 Studies in Political Economy 137; Burfoot, “In-Appropriation,” *ibid*; Brenda M Baker, “A Case for Permitting Altruistic Surrogacy” (1996) 11:2 Hypatia 34.

²⁰ Royal Commission on New Reproductive Technologies, *supra* note 17 at 683–84.

²¹ *Ibid* at 684.

²² *Ibid*.

²³ *Ibid* at 689–92. However, they proposed that surrogates not be penalized for accepting payment on the understanding that to do so would “simply compound their vulnerability” (*ibid* at 689).

²⁴ *An Act respecting human reproductive technologies and commercial transactions relating to human reproduction*, 2nd Sess, 35th Parl, 1996. See also Alana Cattapan, “Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation” (2014) 29:3 CJLS 361 at 369.

election was called.²⁵ In 2000, Health Canada initiated a consultation process with provincial and territorial stakeholders, legislators, and government representatives to inquire about how to move forward.²⁶ Then on 3 May 2001, Canada's Health Minister presented draft legislation to the House of Commons Standing Committee on Health.²⁷ Like Bill C-47, the draft legislation proposed to prohibit paid surrogacy. However, it also recommended allowing surrogate mothers to be reimbursed for their expenses and permitting payment for legal, medical, and psychological services associated with surrogate motherhood.²⁸

The Standing Committee on Health held a series of hearings and in 2001 issued a report entitled *Assisted Human Reproduction: Building Families* (Brown Report).²⁹ While the Brown Report recommended against allowing for the reimbursement of surrogates' expenses,³⁰ lawmakers instead sought to prohibit reimbursements beyond those for which receipts could be provided.³¹ They introduced Bill C-56, *The Assisted Human Reproduction Act*,³² which died on the Order Paper when Parliament was prorogued in September 2002.³³ The following month, Bill C-56 was reintroduced to the House of Commons as Bill C-13³⁴ and was referred again to the Standing Committee on Health. At the debate stage, the bill was amended to allow surrogates to be reimbursed for loss of work-related income during pregnancy provided a doctor certifies in writing that continuing to work would pose a risk to the surrogate's health or that of the embryo or fetus. Reimbursement for work-related income and expenditures would have to be made in accordance with regulations and a licence.³⁵

Legislative debates surrounding Bill C-56 and Bill C-13 show that lawmakers sought to balance concerns about commercialization and exploitation against concerns for surrogates' health, well-being, and economic security. For instance, MP Jeannot Castongay explained:

[T]he bill was drafted in such [a] way as to not prevent altruism. As such, a woman who wants to help her sister, a friend, or even a perfect stranger, need not bear all the costs of her altruism.... Clearly, a surrogate mother who acts out of the goodness of her heart has expenses to cover, like any other pregnant woman. For example, there may be expenses for psychological counselling or other consultations relating to the birth, there are costs related to drugs and vitamins that are taken during pregnancy.³⁶

²⁵ Erin Nelson, "Comparative Perspectives on the Regulation of Assisted Reproductive Technologies in the United Kingdom and Canada" (2006) 43:4 *Alta L Rev* 1023 at 1027 [Nelson, "Comparative Perspectives"]; Alison Harvison Young, "Let's Try Again ... This Time with Feeling: Bill C-6 and New Reproductive Technologies" (2005) 38:1 *UBC L Rev* 123 at 124.

²⁶ Nelson, "Comparative Perspectives," *ibid* at 1027.

²⁷ Young, *supra* note 25 at 124.

²⁸ *Ibid* at 137; Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December 2001) (Chair: Bonnie Brown) at 13.

²⁹ This report was referred to as the "Brown Report" as the committee was chaired by MP Bonnie Brown. Standing Committee on Health, *ibid*; Nelson, "Comparative Perspectives," *supra* note 25 at 1027.

³⁰ Standing Committee on Health, *ibid* at 13.

³¹ Young, *supra* note 25 at 138.

³² Bill C-56, *An Act respecting assisted human reproduction*, 1st Sess, 37th Parl, 2002 (first reading 9 May 2002).

³³ Young, *supra* note 25 at 139.

³⁴ *An Act respecting assisted human reproduction*, 2nd Sess, 37th Parl, 2002 (first reading 9 October 2002).

³⁵ Young, *supra* note 25 at 139. For further discussion of this licensing requirement (which was eliminated in 2012) see Snow, Baylis & Downie, "Why the Government," *supra* note 9 at 5.

³⁶ *House of Commons Debates*, 37-2, Vol 138, No 072 (18 March 2003) at 4343 (Jeannot Castonguay).

MP Hedy Fry added:

If a surrogate faces any sort of complication due to pregnancy, such as toxemia, abruptio placenta or any one of those threatening problems that can occur during a pregnancy, and needs to take time off work, she should be compensated and reimbursed. At the moment the bill only allows for reimbursement of actual expenses such as taxis, going to the dentist, getting food, et cetera. We need to look realistically at some of the risks that could occur and ensure that the surrogate, the mother and the child are protected so that a healthy child will be born and so that women do not take undue risks.³⁷

Bill C-13 passed second and third readings and was reintroduced as Bill C-6 in February 2004, following the prorogation of Parliament for the second time in 2003.³⁸ Finally, on 29 March 2004, Bill C-6 *An Act Respecting Assisted Human Reproduction and Related Research (Assisted Human Reproduction Act)* received Royal Assent.³⁹

B. AHRA REFERENCE

In the years leading up to and following the *AHRA*'s enactment, there was debate as to whether the federal government was acting within its jurisdiction by legislating in response to assisted reproduction. The *AHRA*'s provisions were grounded in the Parliament of Canada's jurisdiction over criminal law matters;⁴⁰ however, much of the *AHRA* sought to regulate practices relating to assisted reproduction and was ostensibly impinging on provincial jurisdiction over property, civil rights, and matters of a merely local nature.⁴¹

On 4 December 2004, less than a year after the *AHRA* was passed, the Quebec government initiated a reference before the Quebec Court of Appeal, asking whether parts of the *AHRA* exceeded federal jurisdiction.⁴² Quebec did not question section 6 of the *AHRA* (which criminalizes payment for surrogates and intermediaries). However, it argued that section 12 (which allows for the reimbursement of a surrogate's expenses and lost income) and section 60 (which sets out the penalties for breaching section 6) were ultra vires the federal criminal

³⁷ *Ibid* at 4349 (Hedy Fry).

³⁸ *House of Commons Debates*, 37-3, Vol 139 No 008 (11 February 2004) at 1510.

³⁹ Canada, Library of Parliament, *Legislative Summary: Bill C-6: Assisted Human Reproduction Act*, by Monique Hébert, Nancy Miller Chenier & Sonya Norris, LS 466E, online: <loppar.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/37-3/c6-e.pdf>. Since 2004, there has been considerable critique of the *AHRA*'s surrogacy provisions. See e.g. Rakhi Ruparelia, "Giving Away the 'Gift of Life': Surrogacy and the Canadian *Assisted Human Reproduction Act*" (2007) 23:1 Can J Fam L 11; Karen Busby & Delaney Vun, "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers" (2010) 26:1 Can J Fam L 13 at 81; Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (New York: Routledge, 2016); Erin Nelson, *Law, Policy and Reproductive Autonomy* (Portland: Hart, 2013); Deckha, *supra* note 13; Nelson, *supra* note 13.

⁴⁰ When the Royal Commission on New Reproductive Technologies reported, it had called for a national, uniform legislative response to reproductive technologies grounded in the federal government's jurisdiction over matters related to peace, order, and good government (POGG) and its criminal law power. However, as Alison Harvison Young has pointed out, in the years following the release of *Proceed with Care*, it seemed less likely that POGG would be found by Canadian courts to be valid basis for this legislation and thus lawmakers relied on criminal law power as justification for federal legal responses (Young, *supra* note 25 at 134).

⁴¹ For a description of the provisions of the *AHRA* aside from those applicable to surrogacy arrangements, see *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

⁴² *Dans l'affaire du renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, LRO, c R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, LC 2004, c 2*, 2008 QCCA 1167.

law power.⁴³ The Quebec Court of Appeal answered the reference questions in Quebec's favour⁴⁴ and the Attorney General of Canada appealed to the Supreme Court of Canada.

On 22 December 2010, the Supreme Court struck down much of the *AHRA* but found that parts of the *Act* (including section 12 and section 60) fell within federal jurisdiction.⁴⁵ With a 4-4-1 split, Justice Cromwell's reasons were decisive. He explained that section 6 of the *AHRA* is valid federal criminal law because it prohibits commercial surrogacy and thus targets "commercializing the reproductive functions of women and men."⁴⁶ Justice Cromwell explained that section 12 is an extension of section 6 — it defines the scope of its prohibition on payment by providing exceptions to its restrictions.⁴⁷ He thus held that this provision serves, in purpose and effect, to "prohibit negative practices associated with assisted reproduction" and falls within criminal law power.⁴⁸ He also held that those provisions that "set up the mechanisms to implement"⁴⁹ section 12 were properly enacted by Parliament, and that section 60 is constitutionally valid.⁵⁰

C. *R. v. PICARD*

While the Supreme Court confirmed that the federal government has jurisdiction to prohibit paid surrogacy, in practice Health Canada has done little to monitor or enforce compliance with these provisions⁵¹ — with one notable exception. In 2013, a fertility agent,

⁴³ *Ibid.*

⁴⁴ *Ibid.* In other words, the court held that section 12 and section 60 were ultra vires federal jurisdiction.

⁴⁵ For commentary on the *AHRA Reference* and its implications, see Ubaka Ogbogu, "The Assisted Human Reproduction Act Reference and the Thin Line Between Health and Crime" (2013) 22:1 Const Forum Const 93; Vanessa Gruben & Angela Cameron, "Quebec's Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women's Reproductive Autonomy?" in Stephanie Paterson, Francesca Scala & Marlene K Sokolon, eds, *Fertile Ground: Exploring Reproduction in Canada* (Montreal: McGill-Queen's University Press, 2014) 125; Barbara von Tigerstrom, "Federal Health Legislation and the Assisted Human Reproduction Act Reference" (2011) 74:1 Sask L Rev 33; Ian B Lee, "The Assisted Human Reproduction Act Reference and the Federal Criminal Law Power" (2011) 90:2 Can Bar Rev 469; Ian B Lee, "Licensing and the *AHRA Reference*" in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 34; Graeme G Mitchell, "Not A General Regulatory Power: A Comment on Reference re Assisted Human Reproduction Act" (2011) 54 SCLR (2d) 633; Hoi L Kong, "The Federalism Implications of the Assisted Human Reproduction Act Reference" in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 44; Ubaka Ogbogu, "Reference re Assisted Human Reproduction Act and the Future of Technology-Assisted Reproduction and Embryo Research in Canada" (2011) 19 Health LJ 153; Dave Snow, "Blunting the Edge: Federalism, Criminal Law, and the Importance of Legislative History after the Reference Re Assisted Human Reproduction Act" (2015) 48:2 UBC L Rev 541; John D Whyte, "Federalism and Moral Regulation: A Comment on Reference Re Assisted Human Reproduction Act" (2011) 74:1 Sask L Rev 45; Juliet Guichon, Ian Mitchell & Christopher Doig, "Assisted Human Reproduction in Common Law Canada after the Supreme Court of Canada Reference: Moving beyond Regulation by Colleges of Physicians and Surgeons" (2013) 25:2 CJWL 315; Dave Snow, *Assisted Reproduction Policy in Canada: Framing, Federalism, and Failure* (Toronto: University of Toronto Press, 2018).

⁴⁶ *Reference re Assisted Human Reproduction Act*, *supra* note 41 at para 290.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* at para 291.

⁴⁹ *Ibid* at para 292.

⁵⁰ *Ibid* at para 293.

⁵¹ Note that prior to 1 October 2012, Assisted Human Reproduction Canada (AHRC) was responsible for administering and enforcing the *AHRA* and its regulations. However, in response to the *AHRA Reference*, the Government of Canada announced that it would wind down AHRC and that Health Canada would take over enforcement. See Baylis & Downie, "The Tale of Assisted Human Reproduction Canada," *supra* note 9.

Leia Picard, was found to have violated section 6 of the *AHRA*.⁵² Picard's business, Canadian Fertility Consulting Ltd. (CFC), matches intended parents with surrogates and refers clients to clinics and fertility lawyers. The Agreed Statement of Facts from the case indicates that intended parents would pay CFC a flat consulting fee, which differed depending on whether they were Canadian or international clients. The fee would be paid into a trust account, which CFC would use to reimburse surrogate mothers for their expenses.⁵³ After receiving complaints that Picard and CFC were contravening the *AHRA*, Health Canada referred the case to the RCMP to investigate. The RCMP found that Picard and CFC were paying surrogate mothers in contravention of section 6(1) of the *AHRA* and that Picard had accepted consideration for arranging surrogacy services, in violation of section 6(2).⁵⁴

With respect to the charge under section 6(1), CFC's clients signed contracts stipulating that intended parents would be liable to pay surrogates' expenses up to a capped amount (\$18,000–\$24,000) if receipts were provided.⁵⁵ In practice, surrogates were being paid monthly installments "whether or not the surrogate provided receipts and regardless of the nature or amount of their actual expenses" and always to the maximum amount stipulated in the contract.⁵⁶ As was explained in the Agreed Statement of Facts:

Several surrogates submitted receipts for expenses that were not related to surrogacy. These included rent, family expenses, household purchases, entertainment-related purchases, car insurance, internet, utility and phone bills. Some of these expenses would have been incurred irrespective of the pregnancies. The tallied receipt totals often differed from the monthly payments given to surrogates. In many instances, the envelopes containing receipts for reimbursement had not been opened by CFC and were filed away in banker's boxes.⁵⁷

Three surrogates testified that they were paid \$1,950–2,200 per month, and received additional payments, in accordance with their surrogacy contracts, for their embryo transfer (\$500), for a maternity clothing allowance (\$500–750), for giving birth to twins (\$2,000), for having a "positive pregnancy"⁵⁸ (\$2000), or for having a C-section (\$2,000–7,400). These payments did not cover medical expenses, which were paid directly by the intended parents.⁵⁹

Picard's charge under section 6(2) of the *AHRA* related to money that Picard had received from a Maryland fertility lawyer, Hilary Neiman, for referring Canadian clients to her. In

⁵² This case is unreported. But see Public Prosecution Service of Canada, *Annual Report 2013-2014*, Catalogue No J75-2013 (Ottawa: Office of the Director of Public Prosecutions, 2014) at 13, online: *Public Prosecution Service of Canada* <www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2013_2014/ar14-ra14.pdf>; "R v Picard and Canadian Fertility Consulting Ltd: Agreed Statement of Facts," online: *Novel Tech Ethics* <www.dal.ca/content/dam/dalhousie/pdf/sites/noveltecheithics/AHRA_Facts.pdf> ["Agreed Statement of Facts"]. See also Snow, Baylis & Downie, "Why the Government," *supra* note 9 at 4; Alison Motluk, "First Prosecution under Assisted Human Reproduction Act Ends in Conviction" (2014) 186:2 CMAJ E75 [Motluk, "First Prosecution"]. Note that Picard was also found to have contravened section 7 of the *AHRA*, which prohibits purchasing, or offering or advertising to purchase, sperm or ova. Picard was convicted of paying egg donors a flat fee of \$5,000 for donating their ova.

⁵³ Initially, domestic clients paid CFC \$4,520 and international clients paid \$8,400 for surrogacy. The domestic fee was later increased to \$6,400. See "Agreed Statement of Facts," *ibid* at para 2.

⁵⁴ See Snow, Baylis & Downie, "Why the Government," *supra* note 9; Motluk, "First Prosecution," *supra* note 52.

⁵⁵ These agreements also stipulated though that receipts only needed to be provided "if receipts are available given the nature of the particular expense." "Agreed Statement of Facts," *supra* note 52 at para 12.

⁵⁶ "Agreed Statement of Facts," *ibid* at para 13.

⁵⁷ *Ibid*.

⁵⁸ Presumably, this means a positive pregnancy test.

⁵⁹ "Agreed Statement of Facts," *supra* note 52 at paras 15–22.

2011, Neiman — who had created a “baby-selling ring”⁶⁰ — was convicted of defrauding the United States government.⁶¹ The FBI notified the RCMP that Picard had received \$31,000 from Neiman, and the RCMP found that Picard had accepted this money for referring three Canadian clients to Neiman.⁶² Picard and her company CFC pleaded guilty to all charges and were fined \$20,000 per charge for a total of \$60,000.⁶³

Picard’s case ultimately provided some, albeit limited, clarity as to what behaviour may result in criminal charges under the *AHRA* and what penalty can be expected for contravening section 6 of the *AHRA*. However, this case also raised new questions about the scope of the *AHRA*’s provisions and Health Canada’s willingness to enforce this legislation. It has been suggested that Health Canada only decided to take action in Picard’s case because of the connection to Neiman in the United States.⁶⁴ It has also been argued that the \$60,000 penalty CFC received will be viewed as the “cost of doing business.”⁶⁵ Media reports indicate that following her conviction, Picard’s business quadrupled.⁶⁶ As will be discussed in Part III below, my empirical work also confirmed that agencies have continued to encourage surrogates to claim “expenses” that contravene the *AHRA*’s prohibitions.

⁶⁰ Neiman, along with a lawyer from California and a surrogacy agent from Nevada, had sent surrogates from Canada and the United States to other countries to undergo fertility treatment — without first being matched with intended parents — and arranged for them to give birth in California. The surrogates underwent IVF using donated embryos, and once they became pregnant, Neiman and her colleagues matched them with intended parents. Neiman lied and told these intended parents that the women had agreed to act as surrogates for other couples who had reneged on their agreements. She then offered to arrange for these intended parents, including several Canadians, to be legally recognized as parents of these children in return for fees of up to \$149,000 per child. To circumvent the adoption process, Neiman and her associates filed falsified pre-birth orders in California for the intended parents to be registered as the child’s legal parents. See e.g. Tom Blackwell, “Canadian Fertility Consultant Received \$31k for Unwittingly Referring Parents to U.S. ‘Baby-Selling’ Ring,” *National Post* (15 December 2013), online: <news.nationalpost.com/2013/12/15/canadian-fertility-consultant-received-about-30000-for-unwittingly-referring-parents-to-u-s-baby-selling-ring/>.

⁶¹ US Attorney’s Office, Press Release, “Prominent Surrogacy Attorney Sentenced to Prison for Her Role in Baby-Selling Case” (24 February 2012), online: <www.fbi.gov/sandiego/press-releases/2012/prominent-surrogacy-attorney-sentenced-to-prison-for-her-role-in-baby-selling-case/>; Bonnie Rochman, “Baby-Selling Scam Focuses Attention on Surrogacy” *Time* (19 August 2011), online: <healthland.time.com/2011/08/19/baby-selling-scam-focuses-attention-on-surrogacy/2/>; “Agreed Statement of Facts,” *supra* note 52 at para 23.

⁶² “Agreed Statement of Facts,” *ibid* at paras 23–25.

⁶³ Motluk, “First Prosecution,” *supra* note 52. Interestingly, Picard was not charged under section 6(2) for accepting consideration from intended parents for arranging surrogacy services. Surrogacy agencies in Canada, like CFC, charge intended parents for their consulting services, but assert that they comply with the *AHRA*’s provisions by matching surrogates and intended parents for free or by allowing clients the opportunity to match themselves through the agency’s resources. These agencies explain that their fees — which can exceed \$10,000 — cover other services such as referrals, arranging appointments, mediating disputes and in some instances, managing surrogates’ financial expenses. See e.g. “Canadian Surrogacy Options,” online: <www.canadiansurrogacyoptions.com/>; “Canadian Fertility Consulting,” online: <fertilityconsultants.ca/future-parents-surrogates/>.

⁶⁴ Motluk, “First Prosecution,” *ibid*.

⁶⁵ Françoise Baylis & Jocelyn Downie, “Wishing Doesn’t Make It So” (17 December 2013), online: <impactethics.ca/2013/12/17/wishing-doesnt-make-it-so/>.

⁶⁶ Alison Motluk, “After Pleading Guilty for Paying Surrogates, Business is Booming for this Fertility Matchmaker,” *The Globe and Mail* (28 February 2016), online: <www.theglobeandmail.com/life/health-and-fitness/health/business-is-booming-for-fertility-matchmaker-leia-swanberg/article-28930242/>.

D. DEVELOPING REGULATIONS

In 2015, Health Canada began to take steps to draft the *Reimbursement Regulations*. It first asked the Canadian Standards Association (CSA) to develop standards containing a list of reimbursable expenses.⁶⁷ The CSA standards were posted online in June 2015 for a three month public consultation. Then, on 30 September 2016, the Canadian government released a notice of intent to develop regulations pertaining to the *AHRA* and asked for comments on this proposal.⁶⁸ On 21 October 2016, Health Canada released a slightly modified draft of the CSA standards for public commentary.⁶⁹

With respect to surrogacy, the draft standards stated that expenditures eligible for reimbursement must be “reasonable and related to” the surrogacy.⁷⁰ They also stipulated that the person issuing the reimbursement must be given “a receipt or verifiable claim for each expenditure” as well as a declaration, signed by the person claiming the reimbursement, that “the expenditures . . . have not been and will not be otherwise reimbursed.”⁷¹ These standards provided a list of items and services that would be eligible for reimbursement, notably: costs relating to vitamins, medication and medical supplies, health care services, legal advice and counselling, supplemental insurance, maternity clothing, gym memberships, travel and accommodation, phone and internet charges, medical records, dependent care when attending appointments or during recovery from the birth, and meals on days in which the surrogate attends appointments.⁷² They also stipulated that a surrogate could be reimbursed for additional costs related to dependent care, household maintenance, home care, compromises to academic progress (lost tuition or tutors), or other expenditures if a health care professional certifies that these costs are needed to protect the surrogate’s health, that of her children, or the embryo or fetus.⁷³ Finally, the CSA draft indicated that a surrogate could be reimbursed for lost work-related income prior to or after the birth for up to 17 weeks if a “qualified medical practitioner certifies in writing that continuing to work might pose a risk to her health and safety or that of the embryo or fetus.”⁷⁴

⁶⁷ They proposed that these standards be annexed to existing standards on tissues for assisted reproduction. See CSA Guidelines (2015), A.2.1 (on file with author). See also Alison Motluk, “Reimbursement Discussions Exclude Surrogates, Donors” (2016) 188:1 CMAJ E7, online: <www.cmaj.ca/content/early/2015/11/23/cmaj.109-5176>.

⁶⁸ *AHRA Notice*, *supra* note 15.

⁶⁹ The 2016 version added that a surrogate could be reimbursed for increased exercise-related expenses and for the cost of obtaining a medical certificate. It also clarified that communication expenses could include internet and phone usage if this is directly related to the surrogacy. The 2016 version did not remove any provisions from the earlier version. For academic commentary on these proposed regulations, see McLeod, *supra* note 12; Petropanagos, Gruben & Cameron, *supra* note 11.

⁷⁰ CSA Guidelines (2016), A.2.1.1 (on file with author).

⁷¹ *Ibid.*, A.2.2.1, A.2.2.3

⁷² *Ibid.*, A.3.5.1.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, A.3.5.2.

On 12 July 2017, Health Canada published a consultation document with its key policy proposals and solicited further feedback from stakeholders for 60 days.⁷⁵ Then, in January 2018, Health Canada published a report summarizing the results of this public consultation.⁷⁶ In May 2018, while these regulations were being developed, Liberal MP Anthony Housefather tabled a private member's bill that proposed to decriminalize paid surrogacy instead of regulating expenses.⁷⁷ This bill received considerable media attention and generated substantial public debate.⁷⁸ However, in October 2018, Health Canada reaffirmed the government's commitment to maintaining the *AHRA*'s criminal prohibitions.

On 27 October 2018, Health Canada began another public consultation; it pre-published draft regulations and requested feedback from the public until 10 January 2019.⁷⁹ Then, on 26 June 2019, Health Canada published the *Reimbursement Related to Assisted Human Reproduction Regulations* in the *Canada Gazette*.⁸⁰ The content of the *Reimbursement Regulations* will be discussed in detail in Part IV of this article. The following Part presents and discusses the results of the interviews I undertook while these regulations were being developed.

⁷⁵ Health Canada, *Toward a Strengthened Assisted Human Reproduction Act: A Consultation with Canadians on Key Policy Proposals*, online: *Health Canada* <www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction/document.html>.

⁷⁶ Health Canada, *What We Heard Report: A Summary of Feedback from the Consultation: Toward a Strengthened Assisted Human Reproduction Act*, Catalogue No H164-229/2018E-PDF (Ottawa: Health Canada, 2018), online: *Health Canada* <www.canada.ca/content/dam/hc-sc/documents/services/publications/drugs-health-products/feedback-toward-strengthening-assisted-human-reproduction-act/ah-what-we-heard-report-2018-eng.pdf>. Note that while this report provides some insight into what lawyers thought about the proposed regulations, its findings with respect to the section 12 reimbursements are reported on little more than a page and do not distinguish between lawyers' views and those of other identified stakeholders: professional associations, academics and surrogacy advocates. The report indicates that the majority of stakeholders expressed that the process for reimbursement should not be unduly onerous and should ensure the timely reimbursement of surrogates. The report also notes that stakeholders disagreed about whether the government should be allowing for reasonable compensation for surrogates rather than merely reimbursements for their expenses. See *ibid* at 4–5.

⁷⁷ Bill C-404, *An Act to amend the Assisted Human Reproduction Act*, 1st Sess, 42nd Parl, 2018 (first reading 29 May 2018). Note that it also proposed to decriminalize payment for sperm and egg donors.

⁷⁸ See e.g. Anne-Isabelle Cloutier, "Decriminalizing Payment of Gamete Donors and Surrogates in Canada: An Analysis of Factors Influencing the Public Debate in Light of Bill C-404" (2019) 7:3 *Health Reform Observer* 1; Françoise Baylis & Alana Cattapan, "Paying Surrogates, Sperm and Egg Donors Goes Against Canadian Values," *The Conversation* (2 April 2018); Alana Cattapan & Françoise Baylis, "Argument of Paying for Surrogacy, Sperm and Eggs based on Misinformation," *The Star* (1 May 2018); Louise Langevin & Dominique Goubau, "Féminisme, mères porteuses et femmes pauvres: un amalgame douteux", *Le Devoir* (30 March 2018), online: <www.ledevoir.com/opinion/idees/524106/feminisme-meres-porteuses-et-femmes-pauvres-un-amalgame-douteux>; Vida Panitch, "Time to Decriminalize Payment for Sperm, Ova and Surrogacy," *Ottawa Citizen* (10 May 2018), online: <ottawacitizen.com/opinion/columnists/panitch-time-to-decriminalize-payment-for-sperm-ova-and-surrogacy>; Anthony Housefather & Sara R Cohen, "Our Fertility Laws Can Criminalize People Trying to Start a Family. It's Time for an Overhaul," *The National Post* (9 April 2018), online: <nationalpost.com/opinion/our-fertility-laws-can-criminalize-people-trying-to-start-a-family-its-time-for-an-overhaul>; Sarah Sahagian & Alexandra Kimball, "Why Surrogate Moms Deserve to be Paid," *Toronto Star* (20 August 2018).

⁷⁹ Health Canada, *Consultation on Proposed Assisted Human Reproduction Regulations*, online: <www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction-regulations.html>.

⁸⁰ *AHR Reimbursement Regulations*, *supra* note 6; *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193, online: <gazette.gc.ca/rp-pr/p2/2019/2019-06-26/html/sor-dors193-eng.html>.

III. LAWYERS' PRACTICES AND PERSPECTIVES

A. RESEARCH METHODS

The data presented below is derived from a larger qualitative study that I conducted with Canadian fertility lawyers in fall 2016.⁸¹ This project explored lawyers' experiences working with surrogates and intended parents, the services and advice they provide to these clients, and their perspectives on Canadian surrogacy laws and proposed reforms. My study was the first in Canada to focus on fertility lawyers and to interview a large sample of this population from multiple provincial jurisdictions.⁸²

Between 28 September and 13 December 2016, I conducted in-depth, semi-structured interviews with 26 lawyers from British Columbia, Alberta, Ontario, and Quebec. I selected these four provinces for study, in part, because of their distinct legal approaches to surrogacy arrangements.⁸³ These jurisdictions were also chosen as sites for my empirical work because they have the most practicing fertility lawyers⁸⁴ or have a substantial number of surrogacy arrangements that take place within their borders.⁸⁵

In July 2016, I completed the Tri-Council Policy Statement 2 Course on Research Ethics and prepared my application for McGill's Research Ethics Board (REB) along with my interview guide, consent forms, and recruitment documents. I submitted my REB application on 5 August 2016, and it was approved on 6 September 2016. I prepared for these interviews

⁸¹ Carsley, *Lawyers' Experiences*, *supra* note 14. Lawyers who specialize in fertility law are often retained by surrogates and intended parents to provide independent legal advice and to draft and negotiate surrogacy agreements. Lawyers also assist with the required paperwork or with obtaining a judicial order to allow the surrogate to transfer her parental rights to the intended parents.

⁸² Most empirical research on surrogacy in Canada involves interviews with surrogates or intended parents. Only two other scholars have interviewed Canadian fertility lawyers about their experiences working with surrogacy clients. In 2008, Shireen Kashmeri interviewed two surrogates, one intended parent and three lawyers in Ontario as part of her master's thesis on surrogate motherhood. In 2017, Michelle Giroux interviewed three lawyers and five judges in Quebec for a comparative report on surrogacy in Quebec and France. Giroux focused on how judges have responded to surrogacy cases in Quebec; only a few pages of the report discuss her interviews with lawyers, and she presents only two quotes from one of the lawyers. See Shireen Kashmeri, *Unraveling Surrogacy in Ontario, Canada: An Ethnographic Inquiry of the Influence of Canada's Assisted Human Reproduction Act (2004) on Surrogacy Contracts, Parentage Laws, and Gay Fatherhood* (Master of Arts, Concordia University, 2008) [unpublished]; Michelle Giroux, "Les conventions de procréation ou de gestation pour autrui au Québec: entre solution jurisprudentielle et réforme du droit" in Véronique Boillet et al, eds, *La gestation pour autrui: Approches juridiques internationales* (New York: Anthemis, 2018) 125.

⁸³ While the federal AHRA applies across Canada, Canadian provinces have different laws pertaining to surrogacy contracts and the parentage of a child born through surrogacy. For further discussion of different provincial regimes, see especially Dave Snow, "Measuring Parentage Policy in the Canadian Provinces: A Comparative Framework" (2016) 59:1 *Can Public Administration* 5; Stefanie Carsley, "Reconceiving Quebec's Laws on Surrogate Motherhood" (2018) 96:1 *Can Bar Rev* 121; Karen Busby, "Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere" (2013) 25:2 *CJWL* 284. See also Susan G Drummond, "Fruitful Diversity: Revisiting the Enforceability of Gestational Carriage Contracts" in Trudo Lemmens et al, eds, *Regulating Creation: The Law, Ethics, and Policy of Assisted Human Reproduction* (Toronto: University of Toronto Press, 2017) 274; Régine Tremblay, "Surrogates in Quebec: The Good, the Bad, and the Foreigner" (2015) 27:1 *CJWL* 94; Marie-France Bureau & Édith Guilhermont, "Maternité, gestation et liberté: réflexions sur la prohibition de la gestation pour autrui en droit québécois" (2010) 4:2 *McGill JL & Health* 45; Isabel Côté & Jean-Sébastien Sauvé, "Homopaternité, gestation pour autrui: *no man's land?*" (2016) 46:1 *RGD* 27; Robert Leckey, "One Parent, Three Parents: Judges and Ontario's All Families Are Equal Act, 2016" (2019) 33:3 *Intl JL Pol'y & Fam* 298.

⁸⁴ Ontario and British Columbia.

⁸⁵ Alberta and Quebec.

by researching qualitative methods and interview techniques,⁸⁶ and I reached out to colleagues in law and sociology to obtain advice and feedback on my interview guide.

I began recruiting participants in September 2016. To identify potential participants, I first performed a series of online searches to see which lawyers advertise that they can assist with surrogate motherhood, surrogacy contracts, or reproductive agreements.⁸⁷ I found lawyers' names on law firms' websites, clinics' websites, surrogacy agencies' websites, surrogacy blogs, surrogacy message boards, fertility law groups' websites, and in advertisements for conferences or lectures on surrogacy or assisted reproduction. Next, I looked to legal databases to identify lawyers who had acted as legal counsel in all reported surrogacy cases in Canada.⁸⁸ I also used snowball sampling: at the end of each interview, I asked participants for the names of other lawyers who practice fertility law. I excluded from my recruitment sample lawyers who are only listed as counsel in one reported surrogacy case and who were not identified through snowball sampling or internet searches.⁸⁹ I identified a total of 53 lawyers through the above methods and sent emails to 50 lawyers inviting them to participate.⁹⁰

Interviews were on average 76 minutes and were conducted by phone or in-person at lawyers' offices. All interviews were audio-recorded with participants' consent. I had prepared an interview guide with a list of questions to ask participants, and most lawyers did not have any knowledge of the questions I would be asking beyond the information I had provided in the consent form.⁹¹

⁸⁶ For examples of sources that I consulted in preparing for my interviews, see Carol A B Warren & Tracy X Karner, *Discovering Qualitative Methods: Field Research, Interviews, and Analysis*, 2nd ed (New York: Oxford University Press, 2010); Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice*, 4th ed (Thousand Oaks, Cal: Sage Publications, 2015); Darin Weinberg, *Qualitative Research Methods* (Malden, Mass: Blackwell, 2002); Eleanor McLellan, Kathleen M MacQueen & Judith L Neidig, "Beyond the Qualitative Interview: Data Preparation and Transcription" (2003) 15:1 *Field Methods* 63; Johnny Saldaña, *Fundamentals of Qualitative Research* (New York: Oxford University Press, 2011); Norman K Denzin & Yvonna S Lincoln, *The SAGE Handbook of Qualitative Research* (Thousand Oaks, Cal: Sage Publications, 2005); Patricia Leavy, *The Oxford Handbook of Qualitative Research* (New York: Oxford University Press, 2014); Sharlene Nagy Hesse-Biber & Patricia Leavy, *The Practice of Qualitative Research* (Thousand Oaks, Cal: Sage Publications, 2007); Sharlene Nagy Hesse-Biber & Patricia Lina Leavy, *Feminist Research Practice: A Primer* (Thousand Oaks, Cal: Sage Publications, 2007); Margarete Sandelowski, "Focus on Qualitative Methods: The Use of Quotes in Qualitative Research" (1994) 17:6 *Research in Nursing Health* 479; John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, 3rd ed (Thousand Oaks, Cal: Sage Publications, 2013).

⁸⁷ I used Google and applicable keywords such as Canada surrogacy lawyer, Canadian fertility lawyer, surrogacy lawyer British Columbia, mère porteuse avocat Québec, surrogacy contract Canada, assisted reproduction lawyer Canada, and so on.

⁸⁸ Westlaw, CanLII, Quicklaw and Soquij.

⁸⁹ I suspect that the few lawyers who fall into this category might have assisted with an adoption or declaration of parentage in relation to surrogacy because of their family law practice but might not have further experience in this area. I felt it made sense to exclude them given the questions I would ask in my study about the creation and negotiation of surrogacy contracts and about lawyers' interpretation and application of the federal *AHRA*.

⁹⁰ The three potential participants whom I did not recruit were not identified through any of my searches but only through snowball sampling in my final interviews. At that stage, I felt it was unnecessary to reach out to these lawyers as I had attained data saturation (in other words, my final interviews were not yielding much new information).

⁹¹ Two participants asked if I would send them the questions ahead of time. I did not send them my interview guide as I was concerned that having the questions in advance might affect their responses, but I provided them with a few sample questions to help them feel comfortable participating. I also explained that, because the interviews would be semi-structured, I would be asking some questions spontaneously based on their responses. I have kept in mind that these two lawyers received a couple questions in advance in analyzing their responses.

Some of my interview questions focused on lawyers' views of federal and provincial laws, proposed reforms, and policies. I asked participants: "if you could change current surrogacy laws, would you? And if so, what would be the first thing you would change?"⁹² In relation to the *Reimbursement Regulations*, specifically, I asked lawyers what they thought about Health Canada's intention to enact regulations. I also asked their opinion on the draft regulations that were released for public consultation. The first set of CSA standards were released in June 2015 (prior to my interviews) and a modified draft was released on 21 October 2016 (midway through my interviews). As both drafts were substantively similar, there were no major differences between the responses provided by lawyers interviewed before 21 October and those interviewed afterwards.⁹³

I transcribed these interviews verbatim and assigned pseudonyms to participants to protect their identities. Although I had three male participants, I used exclusively female pseudonyms to better protect the identities of participants from certain provinces.⁹⁴ I sent the transcripts to participants to give them the opportunity to clarify any statements they made or add comments. Only one asked that I make very minor redactions and her requests did not affect my interview results. I conducted one brief follow-up interview with an Ontario lawyer on 21 March 2017; this lawyer had worked on several surrogacy files following our first interview and reached out to tell me about these cases. In April and May 2017, I coded my interviews using NVivo software and started to interpret the data using content analysis.⁹⁵ I first coded broadly according to the questions I asked participants and then more narrowly according to the themes and patterns that were emerging from the data. Finally, between May and August 2017, I prepared three memos which summarized the data emerging from the interviews and organized quotes thematically.⁹⁶

The sections below present the data I obtained pertaining to surrogates' reimbursements. I first set out lawyers' arguments in favour of regulating surrogates' expenses. I then describe lawyers' concerns about prospective regulations. In discussing the merits and limitations of proposed regulations, lawyers provided novel insight into what was happening on the ground in the absence of these regulations and how the new regulations could affect the kinds of reimbursements surrogates receive.

⁹² For two participants, I asked "what would you change" rather than about the "first thing" they would change because, prior to asking the question, they had already shifted the conversation towards law reform and had begun discussing possible changes.

⁹³ See *supra* note 69.

⁹⁴ I did not feel that there was a reason to identify male participants as I did not detect differences in their responses vis-à-vis their female colleagues, and I felt the risk of potential identification would be too great.

⁹⁵ I began with deductive analysis: I had asked my participants specific questions in order to test traditional assumptions about what is happening on the ground in surrogacy arrangements. I then proceeded to inductive analysis: I explored what new understandings of surrogacy arrangements might be generated by my data. For a discussion of content analysis generally, see Patton, *supra* note 86 at 541. For a discussion of content analysis and empirical work involving surrogacy, see Kévin Lavoie & Isabel Côté, "Navigating in Murky Waters: Legal Issues Arising from a Lack of Surrogacy Regulation in Quebec" in Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) 81 at 86.

⁹⁶ For in-depth discussion of my research methods, see Carsley, *Lawyers' Experiences*, *supra* note 14 at 75–94.

B. WHY REGULATE

Most lawyers supported introducing regulations that would bring section 12 of the *AHRA* into force. They argued that these regulations were necessary to provide further clarity regarding what is an allowable expense and to deter indirect payment that seeks to circumvent the *AHRA*'s prohibitions.

Many lawyers explained that they have had difficulty advising their clients about what is a permissible expense. Some looked to Health Canada's website for guidance but noted that the information provided was limited and vague. At the time of my interviews, this website indicated that "[a]lthough paying a surrogate mother is a crime, a surrogate mother may be repaid for out-of-pocket costs directly related to her pregnancy" (such as maternity clothes, medications) if receipts are provided to the person providing for this repayment, and the repayment does not involve "financial or other gain" to the surrogate mother.⁹⁷ Health Canada offered few examples of the kinds of expenses that the government would consider to be directly related to the pregnancy and noted that "whether or not a particular cost is directly related to the surrogacy depends on the circumstance(s) of each surrogacy arrangement."⁹⁸

Lawyers, therefore, developed a variety of rules and tests for discerning what kinds of expenses can be legally reimbursed. Some explained that, because section 12 indicates that expenses must be "incurred by [the surrogate] in relation to her pregnancy," they adopted a "but for" test to determine whether an expense is allowed.⁹⁹ For instance, Laura described:

Laura: The but for test, right? Like but for this arrangement, would the cost have been incurred? And if the cost would have been incurred then it's not reimbursable, right? Um, but if the cost wouldn't have been incurred then yes, it should be reimbursable, because there's only one reason they're incurring that expense, right?

Faye pointed out that she would use a "you can't be better off at the end of the day" test to determine whether a surrogate can be reimbursed for an expense. Other lawyers explained that the expenses needed to be "reasonably" related to the surrogacy. Sophia spoke about how she would ask, "would I want or need this if I was pregnant?" in determining whether an expense is reasonable:

Sophia: And that's the question I ask myself with every expense is: "would I want this or need this if I was pregnant?" ... Would I be shoveling the snow? No. Not a chance. Would I cut my grass? Nope... If I was on bed rest would I need a TV if I didn't have one in my room? Oh yes. But is it a 70-inch TV? No. 32 inch is reasonable — or less.

While some lawyers felt confident in their ability to advise clients about what is permitted, many argued that Health Canada should clarify what kinds of expenses are reimbursable because their clients risk that they might breach the *AHRA* and face substantial penalties. For

⁹⁷ "Prohibitions Related to Surrogacy," *supra* note 10.

⁹⁸ *Ibid.*

⁹⁹ *AHRA*, *supra* note 1, s 12.

instance, Courtney explained: “we need more direction, right? Because what’s reimbursement and what isn’t? And if they’re on the wrong side, the penalties are quite significant, right? Criminalization, right? Big fines.” Gabrielle similarly pointed out:

Gabrielle: [T]here needs to be clarity around this expenses issue. Even if nothing else. I think it’s a huge problem. It puts everyone at risk, including the lawyers ... people are going by common sense, convention, um Health Canada has some statements on their website, etc. But I really think that having something where you say “if you don’t follow the rules you’re subject to um, criminal prosecution, but by the way, we’re not giving you the rules” is a ridiculous situation.

Heather also noted that, without regulations, it has been unclear whether certain reimbursements are offside and cross the line into consideration or payment. For instance, she commented in relation to a surrogate’s grocery bills:

Heather: I’ve had clients who have three or four kids and they want to be a surrogate — they love being pregnant. And then intended parents are having one or two shots at having a biologically related child.... And they want that surrogate’s pregnancy to be perfect, just absolutely perfect. They want the right food, the right medical attention, the whole routine, and they’ll say, “I only want you to shop at Whole Foods.” You know organic foods. “I want to not take a chance.” And the question that the surrogate had asked was “well you know, I’ve got four kids, what do you want to do with my kids? I’m not going to go to two grocery stores and make two sets of meals.” And some [intended parents] will say “well I don’t give a damn, feed your whole family Whole Foods!” Well I don’t know if that’s offside or not offside.

Lawyers also noted that in the absence of regulations, surrogacy has become increasingly expensive and intended parents may have difficulty predicting what their surrogacy will cost. Brenda explained that while some lawyers seek to cap the amount of expense reimbursements — in other words, dictate the maximum amount that may be dispersed to the surrogate — contracts are increasingly being negotiated such that intended parents agree to reimburse the surrogate for expenses beyond the cap. Faye worried that soon only wealthy intended parents will be able to afford to work with a surrogate mother to build their families:

Faye: Reimbursement is becoming quite excessive now, you know. You have your maximum but then you have all these other things that you are entitled to on top of that maximum, but at the end of the day when you’re acting for an intended parent, you can’t give them any clarity as to what this is ultimately going to cost ... it could be a range of fifteen or twenty thousand dollars. Well that’s huge for some people. So I think if there was a little bit more guidelines, more um — maybe a list of things that they’re entitled to because right now they’re becoming pretty all-sweeping.... I worry that surrogates are going to start doing it for the money and that’s not the intent obviously, right?

This concern about surrogates doing it for the money was shared by several participants, who felt that women should be motivated to act as surrogates for altruistic reasons.¹⁰⁰

Participants also explained that some surrogates have been paid indirectly through the reimbursement of their expenses. Lawyers confirmed that, despite Leia Picard’s prosecution

¹⁰⁰ In other words, some lawyers felt that surrogates should be motivated exclusively by a desire to help another individual or couple build their family.

under the *AHRA*, agencies have continued to push the boundaries of what can be considered a reimbursable expense. For instance, surrogates continued to receive increased expenses if they were a second-time or experienced surrogate, if they had a multiple pregnancy (twins, triplets, or higher-order multiples), or if they needed to undergo a caesarian section. Katie took issue with these reimbursements pointing out that they are “being used to facilitate actual payment which is against the law.” She explained:

Katie: Having more reimbursements tied [to] when someone is an experienced surrogate, that doesn't really correspond with the law, which is all about reimbursements and out-of-pocket expenses — which may be higher if it's your second time being a surrogate, but it might not be. Um. And also with multiples — certainly someone carrying multiples may end up legitimately having more expenses, but I don't think that it's accurate that it automatically follows.

Katie suggested that the agencies are creating a culture where surrogates are demanding increased reimbursements:

Katie: I know people looking for surrogates and they're looking independently, but surrogates are saying I want 50,000 dollars of reimbursements um, and because I'm an experienced surrogate. So it's creating a culture.... And some surrogates I've heard say things like they don't feel appreciated by the intended parents because they're not offering enough. So I think in many ways commercialized surrogacy is happening under the guise of reimbursements.

Jackie and Daphne similarly questioned whether these kinds of reimbursements are appropriate but had different degrees of tolerance for them. While Daphne would discourage surrogates from asking for these kinds of reimbursements, Jackie noted that she would draft contracts indicating that the intended parents will pay a bonus for a caesarian section or multiples because “there's a demand for it.”

Laura also pointed out that sometimes surrogates have been reimbursed for expenses that are not adequately connected to the surrogacy, and that would have been incurred irrespective of any surrogacy arrangement:

Laura: I've seen people say like we'll pay your internet fees so that we can Skype with you. But they would have been incurring internet anyway, right? ... most people have internet. So to reimburse for internet as a reimbursable expense, I think that's borderline payment, right? Because you were incurring it anyways. Same with cellphones and things like that [and] if you already had a snow clearing service, you probably shouldn't accept payment for that, right?

Laura noted that while her clients try to “squeak stuff in” she has advised surrogates that this is risky and that they should not accept reimbursements for these kinds of expenses.

Lawyers also spoke about how the lack of regulations has resulted in a disparity between what some surrogates receive as reimbursements. As Alexandra explained:

Alexandra: [S]ome surrogates are getting just about every expense covered for them from rent to gas in their vehicles, to every — you know, food, everything. And you have other surrogates who are getting much less, mostly based on the means of the intended parents. So some surrogates are you know, yeah we'll reimburse

you for your gas to and from doctors' appointments but your regular gas we're not going to reimburse you for, we're not going to pay for your — for your rent because that's not increasing now because you're pregnant. Um. Yeah, we'll pay for your prenatal supplements and we'll pay for you to have some healthy food, but — so I guess it's, my difficulty is where's the line? The legislation doesn't provide any guidance there, so you end up with vastly different situations for different surrogates.

Victoria confirmed that some surrogates have experienced a lifestyle enhancement as a result of the surrogacy arrangement:

Victoria: [Y]ou know, there's no doubt that the reimbursements assist in their lifestyle. So, I mean, they're going to do things for themselves pregnant that they wouldn't otherwise do. They might, um, eat better food, work out more because it's being reimbursed, go to yoga, have massages, be cared for by a doula or a midwife, etc. So, I mean there's definitely a lifestyle enhancement during the course of the agreement which, um, which is nice for the surrogates frankly.

Victoria's comment indicates that she does not view these kinds of reimbursements as breaching the *AHRA*. However, these kinds of expenses might be understood to contravene the *AHRA* precisely because they enhance the surrogate's lifestyle and benefit the surrogate.

C. CONCERNS ABOUT REGULATIONS

While many participants argued that Health Canada should enact regulations, many also expressed concern that these regulations could put surrogates in a difficult financial position. Lawyers worried that regulations would unduly restrict the kinds of reimbursements surrogates receive. They also argued that the *AHRA*'s requirements for reimbursement do not reflect the lived realities and experiences of surrogate mothers and intended parents.

Several participants feared that regulations would prevent surrogates from receiving items or services that they might need during pregnancy. For instance, Sophia explained that she liked the flexibility afforded by the lack of regulations for this reason:

Sophia: I don't want to see a mandatory list of expenses ... I think lawyers fear the open-endedness of the current law and want regulations because they fear being in the position of not being able to advise the client of whether something is acceptable or not. But I think this is what stands us above in the crowd so to speak. You know, you are a lawyer. You are a professional and you must maintain the integrity of the institution by being able to provide skillful advice.... So I don't want it defined. Because if it says no TVs, well, what do you expect her to do on bed rest? How much knitting can she do?

Dana similarly believed that lawyers ought to be able to continue to determine whether an expense is reasonably related to the pregnancy and the government should not further constrain this. Samantha indicated that the status quo has been working fine, up until now. Alyssa argued that it would be a "big mistake" to introduce regulations because this would be "adding teeth to criminal provisions that shouldn't be there" and would make it "so much easier [to] charge someone" for breaking the law.

Several lawyers disagreed with section 12's requirements.¹⁰¹ For instance, some argued that the requirement that a surrogate be reimbursed for her expenses does not reflect the financial circumstances of many surrogates. Allison explained that surrogates may not have the money to cover certain costs. As a result, some intended parents have no choice but to breach the *AHRA* and to pay the surrogate in advance:

Allison: Some of them do it almost as a payment schedule, so once we do the implantation, then you'll get 5,000 dollars to cover any of the expenses that come from that. You still have to provide the receipts but we're going to give you installments of money at each stage of the process so that you're not actually out-of-pocket. Because um some of the surrogates, particularly some that are coming from the rural areas of Alberta and have to come into either Calgary or Edmonton for the process — the implantation process — or for medical appointments um, they may not have necessarily the money to pay for all of that up front and get reimbursed for it after the fact.

Lawyers also pointed out that the rules around reimbursement have led to situations in which intended parents have refused, following the birth or a miscarriage, to reimburse a surrogate for her expenses.¹⁰² Participants explained that while surrogates could have sued the intended parents to recover their out-of-pocket losses, the costs of bringing a lawsuit would have outweighed the claims being brought.

Olivia took issue with section 12's provisions regarding the reimbursement of work-related income.¹⁰³ She argued that it is paternalistic and ridiculous to limit the recovery of work-related income to situations where a "medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or to that of the embryo or fetus."¹⁰⁴ She explained:

Olivia: [Y]ou can't even take a day off work because you're vomiting unless it's in a doctor's opinion that it's a danger to you or the fetus. Like that's ridiculous. It is so paternalistic this legislation, and so out of touch with the realities between surrogates and intended parents.

Other lawyers pointed out that it is impractical to require surrogates to obtain receipts in order to be reimbursed. For instance, Samantha explained that surrogates cannot always obtain receipts for their expenses:

Samantha: Are you going to receipt a lunch? Are you going to receipt somebody who's shovelling your snow? Are you going to receipt someone who's — a housekeeper, a babysitter? You know, these people get paid cash, so what are you going to do?

Mandy noted that if a surrogate goes to the farmers' market to buy organic fruits and vegetables, she is not going to have receipts to provide for her food expenses.

¹⁰¹ *AHRA*, *supra* note 1, s 12.

¹⁰² For further discussion of these cases, see Carsley, *Lawyers' Experiences*, *supra* note 14 at 194–96. If the intended parents were to renege on their promises with respect to reimbursements *during* pregnancy, then the surrogate could refuse to transfer her parental rights to them until they pay the reimbursements owed.

¹⁰³ *AHRA*, *supra* note 1, s 12.

¹⁰⁴ *CSA Guidelines*, *supra* note 70, A.2.1.2.

Lawyers commented on the CSA draft regulations that were available at the time of my interviews.¹⁰⁵ Several participants took issue with a provision that stipulated that a surrogate may only be reimbursed for food costs incurred on the days in which she attends an appointment. They noted that it has become common practice for surrogates to be given a grocery supplement or a food allowance to cover their increased food costs associated with the pregnancy and that the regulations should allow for this. They explained that surrogates may have a larger food bill because they are eating more in the day while pregnant or are being asked by the intended parents to eat well or eat healthier than they would normally. For instance, Natalie and Courtney pointed out that a surrogate's food costs may increase if they are "buying tomatoes ... in January" or "want to make sure that they get a lot of antioxidants, and they're eating fresh berries."

Some surrogates also have increased food costs for health reasons or because of dietary restrictions imposed by the intended parents on account of their religious beliefs or lifestyle choices. For instance, Dana explained:

Dana: [I]f a woman gets gestational diabetes associated with the surrogacy or the pregnancy, my understanding is that regulations may prohibit her from being able to, um, being able to submit receipts for additional food or certain foods. It's not her fault she got gestational diabetes. Um, if intended parents want to impose specific dietary restrictions on their surrogate because of either religious or cultural or just general beliefs, it's not reasonable to expect that she's expected to incur those expenses. So there are lots of IPs — intended parents — who say things like "it is very important to me that my surrogate eats all organic." Well she has just tripled her grocery bill because of that. And that is a reasonable expense that is related to the pregnancy which in my opinion should be reimbursed.

A few lawyers explained that the costs of a surrogate's grocery bill might also increase because she is too tired, or unwell during pregnancy to cook. Rachel explained:

Rachel: Part of the meal thing is that you're too tired to make meals. So either you have a provision that someone comes in and cooks for your family and does stuff, and all that's covered, or you just increase the grocery costs so that you can actually have meals out.

Katie spoke about how her own pregnancy made her aware of the kinds of expenses that might arise for a surrogate relating to food:

Katie: I think going through a pregnancy made me realize where there really could be - it changed my position where there could be real costs for surrogates. I had terrible morning sickness, so for me I was able to sort of see first-hand the loss of income that a surrogate might face, the kind of more indirect costs that can be incurred from — you know, I wasn't doing much grocery shopping or cooking when I was so sick so I was — so my husband and I definitely bought a lot more food from restaurants. I bought copious amounts of protein bars which add up. And it sounds so trivial, but all of it, I could see how some of the costs could be present.

¹⁰⁵ I also refer to this below as the CSA standards or CSA list.

Some lawyers also disagreed with draft provisions relating to the reimbursement of work-related income. The CSA draft stipulated that surrogates could claim lost work-related income during or following pregnancy for up to a total of 17 weeks. Some participants noted that this period was too short or too restrictive. For instance, Patricia spoke about a friend of hers who broke her pelvis during labour and noted that should a surrogate experience a similar complication she would require more than 17 weeks of reimbursement. Rachel explained that she has seen surrogacy contracts that allow for the reimbursement of a surrogate's lost income up to six months after the birth. Katie took issue with the CSA standards because they did not indicate that a surrogate can be reimbursed for taking time off work before the pregnancy, in order to meet with a lawyer, attend medical appointments, or undertake a psychological assessment.¹⁰⁶

Lawyers also pointed to other expenses that would not be recoverable pursuant to the CSA standards. For instance, Beth argued that the CSA standards' provisions regarding dependent care should be wider. While the standards would have allowed a surrogate to be reimbursed for dependent care if she needed to attend an appointment or was recovering from the birth, Beth explained that a surrogate should be reimbursed for dependent care if she needs additional assistance during pregnancy:

Beth: So, I think the childcare needs to be a bit broader. So yes, of course on the days, so yes of course after recovery from the birth, but I think there should be some leeway for um, during the pregnancy. Energy goes down, you've got three kids running around you and you're pregnant, you might need some extra help. If you have anything difficult in your pregnancy and even if you don't, the third trimester is exhausting.

Amy pointed out that the CSA's list would not allow a surrogate to be reimbursed should she need to pay someone to look after her pets because she has to attend medical appointments:

Amy: I'm going to give you an egg donor example but same idea. We had this egg donor that was in Thunder Bay and had like, I don't remember it was like a Great Dane or something that had to be boarded. And that specific clinic didn't want her using a satellite clinic or satellite office, she had to literally be in Toronto for like 3 weeks or something like that. So we had to board a Great Dane for 3 weeks. Like who is considering boarding a Great Dane for 3 weeks!? ... And like 100 percent she wasn't making money off of this, we had a receipt, she's boarding a Great Dane for 3 weeks. And you're never going to get this perfect list, and like if you have this list then everything that you reimburse that's not on this list is now clearly illegal.

Amy, along with several other participants, felt that the list should contain a catch-all or discretionary clause that allows surrogates to be reimbursed for expenses that can be justified as reasonable and related to the surrogacy. Eleanor explained the list needs to provide some

¹⁰⁶ However, as will be discussed in Part IV, the regulations cannot allow for this without contradicting section 12 of the *AHRA*. Section 12 states that only loss of work-related income "during pregnancy" is reimbursable and that the time off from work must be related to the surrogate experiencing a medical complication (such as a doctor ordering bed rest). While none of the lawyers pointed this out, the CSA draft was problematic for a similar reason. The CSA draft would have allowed a surrogate to be reimbursed for loss of work-related income during pregnancy or "after birth for up to 17 weeks." In order to allow for reimbursement of lost income before pregnancy or after birth — that is, any time aside from "during pregnancy" — the Canadian government would need to amend section 12. *AHRA*, *supra* note 1.

discretion; otherwise, in her view, it would not withstand constitutional scrutiny. She provided the following example:

Eleanor: I had a situation that the agency brought to my attention for this, an orthodox Jewish family, very strictly orthodox, who wanted the surrogate to have a second dishwasher in her house just like they do. And they wanted a set of dishes that she would use, just like they do, because they believe the creation of this fetus is important in terms of their religious beliefs. They wanted a kosher fetus.... Buying a dishwasher for a surrogate seems, on the face of it illegal. But not in that context.

She offered another example of an expense that she felt could be reasonable to reimburse in some contexts but not in others:

Eleanor: You know, one lawyer who lives in Calgary said to me it's very important for her that if the pregnancy is occurring through the winter ... they need snow tires. I think that's very reasonable if you're in Alberta or BC in those mountain territories. I may not think it's reasonable for Toronto.

Other lawyers similarly argued that any list of expenses needs to allow for flexibility and discretion because it is impossible to anticipate all expenses a surrogate might incur or a surrogate's particular needs. Isabelle explained:

Isabelle: I think there needs to be some guidance about what counts and what doesn't, but I don't think it can be really stringent and defined clearly.... I think it's really a hard one because (laughs) too much discretion, you're kind of where we are now, which nobody knows what fits. Um, and too little discretion — too many requirements, means people are going to fall through the cracks. And the surrogates who are already doing so much, may actually not be even able to get back their realistic expenses, or be in trouble for that.

Overall, lawyers' narratives emphasized a need for the *Reimbursement Regulations* to provide clarity and flexibility. Most lawyers wanted further guidance about what is permissible to ensure that they, and their clients, are not breaching the *AHRA*'s criminal prohibitions. However, they also stressed that in order to accord with lawmakers' intentions, the regulations should be sufficiently broad so that surrogates do not incur financial costs as a result of their arrangement. The following Part explores to what extent the *Reimbursement Regulations* adequately address and balance these concerns.

IV. REIMBURSEMENT REGULATIONS

On 9 June 2020, the *Reimbursement Regulations* and section 12 of the *AHRA* came into force.¹⁰⁷ Like the prior *CSA* drafts, the *Reimbursement Regulations* help to clarify what is a permissible expense by setting out a list of eligible reimbursements. However, the final list is more expansive and flexible and includes several items and services that my interviewees had noted were absent from the *CSA* drafts. The *Reimbursement Regulations* allow surrogates to be reimbursed for medications,¹⁰⁸ travel and accommodation, counselling, legal services, telecommunications, maternity clothes, prenatal exercise classes, and insurance.¹⁰⁹

¹⁰⁷ *Reimbursement Regulations*, *supra* note 6; *AHRA*, *supra* note 1.

¹⁰⁸ Specifically, the regulations state that she may be reimbursed for "any drug or device as defined in section 2 of the *Food and Drugs Act*" (*Reimbursement Regulations*, *ibid*, s 2(e)).

¹⁰⁹ *Reimbursement Regulations*, *ibid*, s 4.

Unlike the CSA drafts, they also enable surrogates to be reimbursed for their increased grocery costs — and not merely their food costs related to appointments. They permit reimbursements related to the care of pets and dependents — even if this is not medically necessary. With respect to the reimbursement of lost income, the *Reimbursement Regulations* also removed the proposed 17-week maximum; they simply indicate that a surrogate may be reimbursed for loss of work-related income during her pregnancy.¹¹⁰

The *Reimbursement Regulations* also allow for expenditures related to any products or services that health care providers recommend in writing.¹¹¹ While not a catch-all provision, this will enable surrogates to be reimbursed for most items or services that they have been receiving up to this point but which are not listed in the *Reimbursement Regulations*. Health Canada released a “Guidance Document” alongside the *Reimbursement Regulations* that explains that this provision is “intentionally broad” to account for different circumstances. It says that “this category could permit a surrogate mother to be reimbursed for the cost of household maintenance (e.g., snow removal, cleaning) to support their doctor’s written recommendation of bedrest or avoiding strenuous activity.”¹¹² It also states that “if their doctor recommends alternative or complementary health care services (e.g., chiropractor, massage therapy) to support the surrogate mother’s pregnancy, expenditures for such services may be reimbursed.”¹¹³

Expenses that some lawyers felt were reasonable — like snow tires or a kosher dishwasher — do not fit neatly within the *Reimbursement Regulations*. However, the Guidance Document also indicates that “Health Canada is of the view that reimbursements made in respect of matters not set out in section 12 of the AHR Act are not automatically prohibited” and that other reimbursements “may be reasonably justified” provided persons making such reimbursements “can demonstrate that the reimbursement is not a disguised form of payment.”¹¹⁴ In other words, Health Canada indicates a willingness to accept as legitimate some reimbursements that fall outside the scope of section 12 and the *Reimbursement Regulations*.

While some lawyers had expressed concern about the ability of surrogates to furnish receipts for all their expenses, Health Canada notes in its Guidance Document that it “intends to take a broad view of what constitutes a receipt for the purposes of the Act and the Regulations.”¹¹⁵ It explains that “where a conventional receipt is not generated (e.g., paying a babysitter), a written and signed documentation acknowledging the receiving of goods or money that indicates the date upon which the expenditure occurred would be considered sufficient to satisfy the requirement.”¹¹⁶

¹¹⁰ *Ibid.* Note that the *Reimbursement Regulations* state that in order for a person to reimburse a surrogate for her expenses or lost work-related income, the surrogate must provide receipts and other documentation, including signed and dated declarations. For further information about these requirements see *ibid.*, ss 5–11.

¹¹¹ *Ibid.*, s 4.

¹¹² Health Canada, *Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations*, Catalogue No H164-288/2019E-PDF (Ottawa: Health Canada, 2019) at 10.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.* at 5.

¹¹⁵ *Ibid.* at 15.

¹¹⁶ *Ibid.*

In addition, the Guidance Document restricts several reimbursement practices that some lawyers had identified as problematic. For instance, it notes that telecommunication and grocery costs must be directly related to surrogacy and must not be “disguised forms of payment.”¹¹⁷ It states that “paying a surrogate mother’s entire telecommunications bill, including for cable TV, high speed internet, etc.” or “paying the grocery bill for the surrogate mother’s entire family for the duration of the pregnancy” is not allowed.¹¹⁸

The *Reimbursement Regulations* and Guidance Document thus address many concerns lawyers had expressed during my interviews. They provide greater clarity about what is a permissible expense but also considerable flexibility. When compared with the CSA draft regulations, they enable surrogates to claim reimbursement for more items and services they might need. They also make clear that surrogates and their families are not allowed to profit from these reimbursements.

However, my interviews also highlight the *Reimbursement Regulations*’ limitations. First, while some lawyers argued that regulations were needed to deter paid surrogacy, it seems unlikely that the *Reimbursement Regulations* will ensure increased compliance with the *AHRA*. Lawyers’ narratives confirmed that some surrogates have received reimbursements that contravene the spirit of the *AHRA*. Now that the *Reimbursement Regulations* have come into force, surrogates will likely continue to receive these kinds of reimbursements. Health Canada does not require proof of a surrogate’s monthly expenses prior to her pregnancy. As a result, surrogates may continue to claim reimbursements for items or services — like lawn mowing, fitness classes, babysitting, groceries, phone bills, internet, and snow clearing — in circumstances where they would have incurred these expenses independent of any surrogacy arrangement. Surrogates will also likely continue to receive bonuses for being an experienced surrogate, for undergoing a caesarian section, or for giving birth to twins, triplets, or other multiples. These practices have persisted not because of a lack of regulations but rather because Health Canada has done little to enforce the *AHRA*. It remains to be seen whether Health Canada will take additional steps to ensure that surrogates, intended parents, and agencies comply with the *AHRA*’s provisions now that the *Reimbursement Regulations* are in place.¹¹⁹

Second, while the *AHRA* is intended to ensure that surrogates do not experience financial hardship, my interviews showed that the *AHRA* and its *Reimbursement Regulations* may leave surrogates in a precarious financial position. The Guidance Document makes clear that Health Canada will view “[p]ayment of ‘anticipated expenses’ or an ‘unaccountable allowance’” as contravening the *AHRA*’s prohibitions.¹²⁰ This position supports the *AHRA*’s requirement that surrogates only be reimbursed for their out-of-pocket expenses. However, as lawyers explained, some surrogates have incurred substantial out-of-pocket costs and then have not been reimbursed following a miscarriage or birth. In addition, some intended parents have been paying surrogates up-front in contravention of the *AHRA* because the surrogates could not afford to pay for their expenses and later be reimbursed.

¹¹⁷ *Ibid* at 11.

¹¹⁸ *Ibid* at 10–11.

¹¹⁹ For a description of Health Canada’s compliance approach towards these regulations, see Health Canada, *supra* note 7.

¹²⁰ Health Canada, *Guidance Document*, *supra* note 112 at 5.

Finally, while the *Reimbursement Regulations* and Guidance Document provide greater clarity regarding what is a reimbursable expense, they may also generate confusion. Health Canada has drafted the *Reimbursement Regulations* such that they accord with the language of the *AHRA* but has used the Guidance Document to temper and expand the *AHRA*'s provisions. Notably, while the *AHRA* and *Reimbursement Regulations* make clear that a surrogate may only be reimbursed for lost work-related income "during her pregnancy" the Guidance Document states that "Health Canada is of the view that surrogate mothers may be reimbursed for the loss of work-related income during the pre-pregnancy and the post-partum period."¹²¹ The Guidance Document also indicates that surrogates may be reimbursed both for "extended absences from work (e.g., doctor-prescribed bedrest) and short absences from work (e.g., to attend regular doctor appointments)."¹²² By contrast, the *AHRA* and *Reimbursement Regulations* indicate that such reimbursements are restricted to situations of physician ordered bedrest.¹²³ The Guidance Document responds to some lawyers' critiques of the *AHRA*; however, it also contradicts the express language of this statute. Health Canada notes in the Guidance Document that allowing surrogates to claim reimbursement for expenses prior to and following pregnancy "gives primacy to the health and safety of the surrogate mother and the child, which is consistent with key principles underpinning the AHR Act."¹²⁴ However, Health Canada also acknowledges that the Guidance Document does not have the "force of law",¹²⁵ judges are not bound by it and in the event of a discrepancy between the Guidance Document and a statute or regulations, the latter would supersede. While allowing surrogates to be reimbursed for lost income prior to and following pregnancy may be desirable, lawmakers clearly did not intend for this to be permitted. It would be more appropriate for Parliament to amend section 12 of the *AHRA* to allow for such reimbursements.

V. CONCLUSION

Since 2004, the *AHRA* has sought to discourage commercial surrogacy arrangements while allowing surrogates to be reimbursed for their out-of-pocket costs. My interviews with fertility lawyers suggest that the long-awaited *Reimbursement Regulations* will go some way towards supporting these objectives. The list of expenses set out in the *Regulations* will enable lawyers to better advise their clients about what kinds of reimbursements are permitted and prohibited. The *Regulations* and their associated Guidance Document also codify and legitimize many practices lawyers had developed in the absence of regulations and allow surrogates to continue to claim many of the same expenses they had prior to the *Regulations*' enactment.

However, with the coming into force of these regulations, there may still be uncertainty about what is considered a legal expense; the Guidance Document's explanations with respect to the reimbursement of surrogates' lost income conflict with the language of the *AHRA* and the *Regulations*. In the absence of further oversight or enforcement, it seems likely that intended parents will continue to pay surrogates bonuses or to reimburse them for

¹²¹ *Ibid* at 13.

¹²² *Ibid*.

¹²³ *AHRA*, *supra* note 1, s 12(3); *Reimbursement Regulations*, *supra* note 6, s 8.

¹²⁴ Health Canada, *Guidance Document*, *supra* note 112 at 13.

¹²⁵ *Ibid* at 2.

expenses they would have incurred irrespective of the surrogacy arrangement. The *Regulations* may also put both surrogates and intended parents in difficult positions. Surrogates will still bear the risk that intended parents will renege on their promises and fail to reimburse them for their expenses. Some intended parents will likely continue to breach the *AHRA* and pay surrogates in advance in situations where surrogates cannot afford to pay for their expenses and later be reimbursed.

Lawyers' narratives suggest that it may be time to revisit and reform the *AHRA*. In particular, lawmakers would be well-advised to amend the *AHRA* and its *Regulations* to permit surrogates to be paid monthly installments, in advance, to cover their expenses, and to allow surrogates to be reimbursed for lost work-related income prior to pregnancy and following the birth. These reforms would eliminate contradictions between the *AHRA* and the Guidance Document. They would also better ensure that surrogates do not experience financial hardship in order to help another individual or couple build their family.