

# Respectfully Submitted



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**POLICY REPORT for Parliamentarians**  
Courtesy of the Association for Reformed Political Action (ARPA) Canada

# Surrogacy

***“You are obligated to terminate this pregnancy immediately.  
You have squandered precious time.”***

In 2013, Crystal Kelley, four months pregnant, received these words from the lawyer of the genetic parents of the child she was carrying. When an ultrasound showed the child had serious birth defects, they ordered her to abort. She refused, left Connecticut, and gave the baby up for adoption.<sup>1</sup> Crystal’s plight highlights the dangers of surrogacy, an arrangement that slices up motherhood into categories: birth mother, genetic mother, legal mother, and social mother.

In **traditional surrogacy**, the surrogate is artificially inseminated, resulting in a child genetically related to her. In **gestational surrogacy**, an embryo is implanted, using the sperm and ova of either the intended parents or donors. A child born to a gestational surrogate has no genetic relationship with her. Gestational surrogacy has become increasingly popular because it often involves a genetic relationship between the child and the intended parent(s), rather than the surrogate mother.<sup>2</sup>

## **Altruistic and Commercial Surrogacy**

A distinction is also commonly made between commercial and altruistic surrogacy. In altruistic surrogacy, the surrogate “volunteers” to carry the baby without compensation.<sup>3</sup> Commercial surrogacy, which is prohibited in Canada, involves paying a surrogate for carrying a baby to term. In practice, however, what are essentially commercial arrangements are often set up to appear altruistic – Canadian law permits reimbursing a surrogate’s expenses, but that reimbursement is not regulated and can be comprehensive (covering all living expenses) and generous.

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## ***Altruistic surrogacy: Risky favours***

In altruistic arrangements, close friends, family, or simply online acquaintances agree to gestate the baby for the intended parents and give the child up at birth.<sup>4</sup> Altruistic surrogacy is legal in Canada. Expenses related to pregnancy may be reimbursed, but no added compensation is permitted.<sup>5</sup> In some cases, contracts are drawn up by each party's lawyers, but it is not clear whether they are enforceable, since family law, not contract law, applies to custody disputes.<sup>6</sup>

***Altruistic surrogacy arrangements are not immune from exploitation, conflict, and confusion.***

Even without money changing hands, serious psychosocial and moral risks accompany altruistic surrogacy. Altruistic motivation and the emotional bond between parties to the agreement are not sufficient for avoiding or resolving the kinds of disagreements that can arise.<sup>7</sup> For example, since surrogacy depends on both the birth mother forfeiting any parental rights and the intended parents legally adopting the child (even if it is genetically related to them),<sup>8</sup> the intended parents can threaten to refuse to take custody of the child as a coercive tool to ensure that the birth mother abides by their wishes during pregnancy.<sup>9</sup> In a recent Canadian case, an altruistic surrogate was pressured to abort a child with Down syndrome. She originally refused, hoping that the intended parents might be persuaded to take custody of the child regardless, but ultimately they were not persuaded and the child was aborted.<sup>10</sup>

Intra-familial surrogacies are risky for all involved. For parents, close relationships with a surrogate heightens the probability of confusion and conflict regarding parental roles.<sup>11</sup> This also leads to identity confusion for the child when their birth mother interacts with the family. Understanding one's identity in relation to each woman can be difficult for a child.<sup>12</sup> Whether and when to inform the child about their origins can also be a source of conflict.

Altruistic surrogacy arrangements are not immune from exploitation, conflict, and confusion. Gail was a surrogate who wanted to give her brother and his partner a chance to have children. To her dismay, when she was pregnant, her brother began controlling her behaviour and their relationship fell apart. After Gail almost died from health complications, her brother said he would "get some other stupid female to have my children."<sup>13</sup> The Baird Commission Report, a non-partisan expert report that discussed emerging assisted reproduction technologies, also recognized that non-commercial surrogacy arrangements could potentially harm women, children, families, and society.<sup>14</sup>

## ***Commercial surrogacy: Wombs for rent***

Commercial surrogacy involves a contract between the intended parents and the birth mother, in which the birth mother is paid a fee for carrying a child. Where commercial surrogacy is permitted, the nature of the exchange is always the same: money for the birth of a child. The global commercial surrogacy industry is estimated to bring in over \$3.2 billion/year,<sup>15</sup> and the profit typically goes to big fertility agencies, not surrogate mothers.<sup>16</sup> Contracts are often drawn up, but depending on the jurisdiction, may be unenforceable.<sup>17</sup> Surrogacy contracts frequently require that the birth mother refrain from activities that could harm the child, and may include clauses to cover complications, such as multiples pregnancies, disability, complications, and a change in the surrogate's attitude towards giving the baby up after birth.

The *Assisted Human Reproduction Act* criminally prohibits paying a female person to be a surrogate mother, paying an intermediary to arrange surrogacy services, and accepting payment for arranging a surrogacy.<sup>18</sup> These prohibitions are designed to criminalize domestic commercial surrogacy. ARPA Canada believes this is the right approach. However, this law is going unenforced. There has only been one prosecution. Moreover, our citizenship and immigration laws facilitate, rather than prevent, commercial arrangements with surrogates outside of Canada.

## Ethical Issues

ARPA Canada believes procreation ought to take place within marriage, and that involving a third party as a gamete donor or a surrogate crosses this boundary and causes problems.<sup>19</sup> Children should not be products of “pre-conception agreements” or “surrogacy agreements”. Children are not entitlements to be demanded or procured in any way practicable. They are gifts to be received from God. But whether you share ARPA’s foundational Christian beliefs or not, we hope you can see that there are major ethical issues with surrogacy. Surrogacy requires fracturing and reordering natural relationships, subjecting the interests of the child to the wishes of the parents, and using a woman as a means to an end.

Surrogacy arrangements, by nature, put the commissioning parents’ interests ahead of the interests of the mother and the child. The rights of the child to understand their own identity is shattered through surrogacy. Surrogacy arrangements also bring about damaging health effects upon the birth mother which tend to be downplayed or ignored. Surrogacy in Canada and abroad leads to exploitation of women, especially the poorest women in society. Canadian law must not condone a practice that puts so many vulnerable persons at risk.

## Breaking Bonds

No matter the type of surrogacy, there are risks and harms involved for both the child and the surrogate mother. The first, basic harm comes from the intentional disruption of a reciprocal bond between the birth mother and the child which develops well before the child is born. The fetus is “pre-wired” (by the hormone oxytocin) to form strong attachment bonds to the gestational mother.<sup>20</sup> Intentionally interfering with this natural design is a violation of the rights of the child.

Maternal-fetal attachment (MFA) is the emotional bond between mother and child that begins during pregnancy, extends after birth, and is beneficial to both mother and child. Weak MFA has been shown to increase the risk of pregnant mothers engaging in activities that are detrimental to the child’s health. In surrogacy, however, commissioning parents and surrogacy agencies actually prefer a weak bond between birth mother and fetus, which helps to ensure the surrogate does not resist relinquishing the child after birth. It becomes apparent then, that the interests of the child become secondary to the wishes of the intending parents to guarantee their possession of this “commodity.”



In surrogacy, the surrogate must be reconstructed as something other, something less than a mother, to avoid the ugliness of abandonment. Surrogacy depersonalizes pregnancy and child-birth and recasts a woman’s body as a “womb-for-rent”.<sup>21</sup> Surrogacy agencies minimize the meaning of gestation by



employing “cognitive dissonance reduction strategies”, which downplay the significance of the link between birth mother and child.<sup>22</sup> This objectifies women and their fertility.<sup>23</sup> As Rosalie Ber puts it,

*“The question of whether the suffering of a childless woman is greater than that of the gestational surrogate, who “abandons” her baby, is “solved” when the surrogate mother is de-personalized and looked upon solely as a “womb for rent”.”<sup>24</sup>*

Consider this testimony from surrogate a mother:

*“Sometimes it feels like this is my own child. Then I remind myself that I have to hand it over with dignity. I can’t get attached; I just have to think about the money.”<sup>25</sup>*

We ought to be uncomfortable with practices that encourage women to compare their own reproductive capacities to a business establishment to minimize natural attachment.

## Commodification

Commercial surrogacy commodifies human life. The term itself suggests it—to “commercialize” requires a commodity to be bought and sold on a market. In surrogacy, the commodities are the womb and the child. Surrogacy has been described as “renting a womb” and some writers have compared it to human trafficking.<sup>26</sup>

Public policy must honour human dignity. All children possess human dignity and are worthy of love, respect, and care, because they are made in God’s image.<sup>27</sup> Canadian public policy recognizes that the commodification of human life is abhorrent, as reflected in the prohibition on commercial surrogacy in the AHRA, and in the language of the Baird Commission Report. That Report states:

*“Commodifying human beings and their bodies for commercial gain is unacceptable because this instrumentalization is injurious to human dignity and ultimately dehumanizing.”<sup>28</sup>*

Supporters of commercial surrogacy argue that intending parents are not paying for a child or for parental rights, but merely contracting for *gestational services*.<sup>29</sup> This does not withstand scrutiny, however. If the intending parents are only paying for the surrogate mother’s services and the child is not a term or commodity of the contract, they could not require the mother to relinquish the child after birth.<sup>30</sup> But that is the very object of the agreement – the transfer of a child to paying clients, the intended parents.

According to article 2(a) of the “Optional Protocol to the Convention on the Rights of the Child on the Sale of Children”, to which Canada is a signatory, “Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”<sup>31</sup> A plain reading of this demonstrates that any commercial surrogacy arrangement amounts to the sale of a child contrary to the protocol.

***Surrogacy agencies minimize the meaning of gestation by employing “cognitive dissonance reduction strategies”, which downplay the significance of the link between birth mother and child.***

Jessica Kern, herself a “product” of a gestational surrogacy agreement, is a staunch opponent of commercial surrogacy. She testifies that she felt like a commodity purchased by her adoptive parents.<sup>32</sup> Jessica’s adoptive parents, she testifies, often carried a mentality that they “paid for her” and therefore thought that she should never want to meet her birth mother.<sup>33</sup> It is immensely damaging for children to grow up feeling both abandoned by their birth mother and purchased by their legal parents. These emotions are a natural consequence of the commercialization of babies.

Commercial surrogacy is sometimes compared to adoption, since the latter also involves money changing hands. With assisted human reproduction and surrogacy, however, it is the market demand and the payment of money that brings a child into existence. With adoption, conversely, the payments do not bring children into existence, but simply cover expenses inevitably involved in transferring an already existing child in need of care into the adoptive parents’ custody. Crucially, adoption services are not-for-profit. If, however, adoption payments were found to stimulate a demand for children, such that it became profitable to bear children for sale to adoptive parents, the state would be obligated to shut down such a market. Permitting commercial surrogacy, especially in combination with a commercial trade in gametes, commodifies humans.

***The psychological cost is unpredictable, requiring the birth mother to essentially gamble her own mental health on the contract.***

It is not only the child who is commodified, however. A birth mother’s reproductive capacities are also reduced to a business asset. The commissioning parents (purport to) acquire contractual rights to use her body as an environment for their child and to make decisions about her lifestyle, healthcare, and even whether the child will be aborted in difficult circumstances.<sup>34</sup> The American College of Obstetricians and Gynecologists put it this way: “[T]o allow a woman to contract away the right to control her own health would be to institute contractual slavery”.<sup>35</sup>

## Exploitation

All forms of surrogacy can be exploitative. Poverty-stricken women often agree to be commercial surrogates out of desperation.<sup>36</sup> In areas where work opportunities are limited and poverty is extreme, surrogacy often seems like the only option.<sup>37</sup> In India, a popular place for surrogacy, surrogates often suffer separation from their families, risky multiples pregnancies, and high rates of caesarean births, for as little as 10% of the fees paid to American surrogates.<sup>38</sup> Often, impoverished women around the world are forced by their husbands or by pimps to become cogs in commercial “baby-making factories”.<sup>39</sup>

In recent years, India’s government has taken action to combat surrogacy exploitation. In 2015, India banned foreign nationals from commissioning surrogacies. In 2016, the government sponsored a bill, still pending in the legislature, that would severely restrict surrogacy and ban all non-reimbursement (commercial) payments.<sup>40</sup> Canada must follow India’s example in recognizing the exploitation that commercial surrogacy generates. We should also help India and other countries fight exploitation by preventing Canadians from finding commercial surrogates abroad.

In an American study, 45% of surrogates had some form of an axis I disorder, which includes panic disorder, social anxiety disorder, bi-polar disorder, and anorexia.<sup>41</sup> A Columbia Law research study showed that American surrogates experience exploitation similar to surrogates in India, such as a lack of informed consent, severe health risks, and economic coercion.<sup>42</sup> Recently, Sweden's government did a careful study of surrogacy and the resulting report concluded that all forms of surrogacy should be restricted.<sup>43</sup> Other countries, such as France, Germany, and Italy, have completely banned surrogacy *in any form*, recognizing the many dangers connected to it.<sup>44</sup>

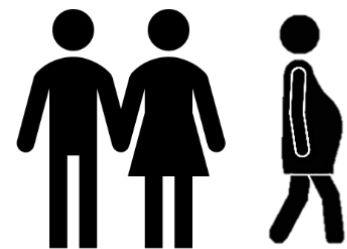
Surrogacy contracts are also inherently dangerous to women because they require a birth mother to sign away her parental rights prior to becoming pregnant. The psychological cost is unpredictable, requiring the birth mother to essentially gamble her own mental health on the contract. A surrogate named Heather spoke passionately about this. As a paid surrogate, she had completed a successful surrogacy and felt good about a second. This time, the intended parents pressured her to abort the child she was carrying because he was disabled, but when she refused and gave birth, they claimed him anyway. Giving up the child she carried to the people who had wanted him aborted was psychologically and emotionally excruciating for Heather.<sup>45</sup>

## Surrogacy in Canada

Canada has a criminal prohibition on paying for surrogacy, but it has been ineffective. The Canadian Medical Association says that commercial surrogacy arrangements take place covertly in Canada, appearing as altruistic arrangements, with no protection for surrogates.<sup>46</sup> Since the criminal prohibitions took effect in 2004, there has only been one prosecution.<sup>47</sup> Researchers believe that commercial surrogacy is still taking place, despite the absence of prosecutions.<sup>48</sup>

Quebec MP Anthony Housefather intends to decriminalize commercial surrogacy in Canada.<sup>49</sup> He argues that it is “paternalistic” to ban surrogacy on the grounds that it commodifies women and babies, because women are competent to make decisions about their own body.<sup>50</sup> Indeed, the purpose of a ban on commercial surrogacy is in part to uphold the human dignity of women by preventing the commodification of their bodies and exploitation. By that standard, many laws designed to uphold human dignity and protect the vulnerable could be dismissed as paternalistic, but both are important and legitimate objectives of our laws. Markets have moral and legal limits.

Canada tacitly approves and facilitates international commercial surrogacy arrangements through a streamlined process for granting citizenship to children born through potentially exploitative surrogacy arrangements.<sup>51</sup> When Canada grants citizenship to these children, we facilitate a practice internationally that we have banned at home, effectively outsourcing exploitation and outsourcing the ethical debate.<sup>52</sup> Simply refusing citizenship is not a viable solution,<sup>53</sup> but if Canada is to be taken seriously in its stand against the commodification and exploitation of women and children, we must end our willing participation in transnational commercial surrogacy.



## Recommendations

As the Baird Report stated, a key public policy goal is to avoid creating situations where conflict affecting children is likely to occur.<sup>54</sup> With this goal and the harms that we have canvassed in mind, it is clear that Canadian law should not condone surrogacy. What needs to be done? Canada should:

1. Follow the lead of European countries such as France, Italy, and Germany, by prohibiting all forms of surrogacy and explicitly declaring surrogacy contracts to be legally invalid.
2. Amend section 6 of the AHRA to include extra-territorial jurisdiction for the offence of paying a surrogate or acting as or paying intermediaries. If it's not acceptable in Canada, we should not export the practice to more vulnerable countries instead.
3. After Recommendation 2 has been implemented,
  - a. Citizenship & Immigration Canada should end the streamlined process of granting Canadian citizenship to children born through commercial surrogacy arrangements, and
  - b. In the case of an international commercial surrogacy, the custody and citizenship of the child should be determined by a court guided by the best interests of the child.

## Notes:

<sup>1</sup> Kevin Dolak, "[Surrogate Mother Flees Halfway Across US to Save Baby From Intended Parents](#)," *ABC News*, (March 6, 2013).

<sup>2</sup> Mark E. Lones, "[A Christian Ethical Perspective on Surrogacy](#)," *Bioethics in Faith and Practice*: Vol. 2: No. 1, (2016).

<sup>3</sup> Marcus Agnafors, "[The harm argument against surrogacy revisited: Two versions not to forget](#)," *Medicine, Health Care, and Philosophy*, Vol. 17 No. 3, (2014) 358.

<sup>4</sup> Ruth Walker and Liezl Van Zyl, "Surrogate Motherhood and Abortion for Fetal Abnormality," *Bioethics*, vol. 29 no. 8, (2015) 533.

<sup>5</sup> *Assisted Human Reproduction Act*, (2004), c.2, AHRA Act, s. 6(1).

<sup>6</sup> André Picard, "[New Surrogacy laws: We still haven't got it right](#)," *The Globe and Mail*, (April 6, 2017).

<sup>7</sup> *Supra* note 4.

<sup>8</sup> Family law presumes that the birth mother is the legal parent, meaning that a legal process (whether it is called "adoption" or not) is necessary to transfer legal custody from the surrogate to the intended parents.

<sup>9</sup> *Supra* note 4.

<sup>10</sup> *Ibid*.

<sup>11</sup> G. de Wert et. al, "Intrafamilial medically assisted reproduction," *Human Reproduction*, vol. 26 no. 3, (2011) 2.

<sup>12</sup> *Ibid* at 4.

<sup>13</sup> Jennifer Lahl and Matthew Epinette, "[Breeders: A Subclass of Women?](#)" *Center for Bioethics and Culture Network* (2014).

<sup>14</sup> Canada, "Proceed with Care: the final report of the Royal Commission on New Reproductive Technologies" (1993) Ottawa: Privy Council Office, 691.

<sup>15</sup> *Supra* note 3.

<sup>16</sup> Jennifer Lahl, "[Surrogacy: No Laughing Matter](#)," *Public Discourse*, (April 15, 2018).

<sup>17</sup> Nicole Bromfield and Karen Smith Robati, "Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations," *Global Social Welfare*, vol. 1, no. 3, (2014) 125.

<sup>18</sup> *Supra* note 5, at s 6 (1), (2), (3).

<sup>19</sup> J. Douma, *Ten Commandments: Manual for the Christian Life*, (Phillipsburg: P&R Publishing 1996), 253.

<sup>20</sup> *Supra* note 3 at 360-361.

<sup>21</sup> Matthew Tieu, "Altruistic Surrogacy: the necessary objectification of surrogate mothers", *Journal of Medical Ethics*, vol.35 no.3, (2009) 173.

<sup>22</sup> Janice C. Cicarelli and Linda J. Beckman, "Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy", *Journal of Social Issues*, vol. 61 no. 1 (2005) 36.

<sup>23</sup> *Supra* note 14 at 173.

<sup>24</sup> *Ibid*.



- <sup>25</sup> Vidhi Doshi, “[‘We pray this clinic stays open’: India’s surrogates fear hardship from embryo ban](#)” *The Guardian*, (January 3, 2016).
- <sup>26</sup> *Supra* note 4 at 531.
- <sup>27</sup> [Matthew 18:10](#), [Mark 10:14](#), [Psalm 127:3-5](#).
- <sup>28</sup> *Supra* note 14 at 55-56. See also: Renate Klein, *Surrogacy: A Human Rights Violation*, (North Geelong: Spinifex Press 2019), Chapter 3: “What of the child born from surrogacy?”
- <sup>29</sup> *Supra* note 4 at 531.
- <sup>30</sup> John Tobin, “To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy,” *International and Comparative Law Quarterly*, vol. 63, no. 2 (2014) 341.
- <sup>31</sup> United Nations, “[Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#),” (May 25, 2000).
- <sup>32</sup> Jennifer Lahl, “[The Other Side of Surrogacy: Jennifer Lahl Interviews Jessica Kern](#),” *CBC Network*.
- <sup>33</sup> *Ibid*.
- <sup>34</sup> *Supra* note 4 at 531.
- <sup>35</sup> *Supra* note 4 at 532.
- <sup>36</sup> Stephen Wilkinson, “[Exploitation in International Surrogacy Arrangement](#),” *Journal of Applied Philosophy*, vol.33 no. 2, (2016) 128.
- <sup>37</sup> *Supra* note 17 at 126.
- <sup>38</sup> *Supra* note 37.
- <sup>39</sup> Kishwar Desai, “[India’s surrogate mothers are risking their lives/ They urgently need protection](#),” *The Guardian*, (June 5, 2012).
- <sup>40</sup> Nita Bhalla, “[India’s proposed surrogacy law raises trafficking risk for foreign women – expert](#),” *Reuters*, (April 19, 2017).
- <sup>41</sup> G.S. Bruss and K.M. Nunno, “[Axis I and personality profiles of gestational surrogates](#),” *American Society for Reproductive Medicine*, Vol. 77 Supp. 3, (2002) P-20.
- <sup>42</sup> Alex Finkelstein et. al, “[Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking](#),” *Columbia Law School Sexuality & Gender Law Clinic*, (2016), 25.
- <sup>43</sup> Kajsa Ekis Ekman, “[All surrogacy is exploitation – the world should follow Sweden’s ban](#),” *The Guardian*, (February 25, 2016).
- <sup>44</sup> Kim Armour, “[An Overview of Surrogacy Around the World](#),” *Nursing for Women’s Health*, Vol. 16, Iss. 3, (2012), 234.
- <sup>45</sup> *Supra* note 13.
- <sup>46</sup> Shannon O’Neil and Dr. Jeff Blackmer, “[Assisted Reproduction in Canada: An overview of ethical and legal issues and recommendations for the development of national standards](#),” *Canadian Medical Association*, (2015) 8.
- <sup>47</sup> Alison Motluck, “[After pleading guilty to paying for surrogates, business is booming for this fertility matchmaker](#),” *Globe and Mail*, (February 28, 2016).
- <sup>48</sup> Karen Busby, “[Canada becoming a go-to destination for those seeking surrogate mothers](#),” *Canadian Lawyer*, (July 17, 2017).
- <sup>49</sup> Kathleen Harris, “[Liberal MPs, advocates want to legalize fees for surrogate moms and sperm donors](#),” *CBC News*, (March 27, 2018).
- <sup>50</sup> *Ibid*. Housefather has said there are not enough surrogates in Canada, though the number of surrogates has reportedly climbed from 285 in 2012 to 700 in 2017.
- <sup>51</sup> Kristin Lozanski, “Transnational Surrogacy: Canada’s Contradictions,” *Social Science & Medicine*, vol. 124 (2015) 387.
- <sup>52</sup> *Ibid*.
- <sup>53</sup> This is the essence of the ECHR judgment in [Mennesson & Labassee v. France](#): the best interests of the child prevail. In this landmark judgment of June 2014, the Court, availing itself of the “best interests of the child” principle, clarified that France had violated Article 8 of the European Convention on Human Rights in refusing to recognize the legal parent-child relationship of a genetic father with his surrogate-born children. See also: Petra De Sutter, “[Children’s Rights Related to Surrogacy](#),” *Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly, Council of Europe*, (2016), para 16.
- <sup>54</sup> *Supra* note 14 at 687.