

**The Cost of Delivery:
Governing Gestational Surrogacy in Canada**

**by
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Ethics Statement

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Abstract

There is a lack of access to surrogacy services within Canada, restricting the reproductive freedoms of surrogates and intended parents, and pushing intended parents into international markets. This study provides a review of surrogacy issues in the Canadian context, presents case studies comparing Canada's surrogacy policies and outcomes with those of California and the UK, and delivers original findings from twenty-four key informant interviews. Policy options to address the lack of access to surrogacy services in Canada and criteria for evaluating these options are distilled from the evidence. Analysis of the policy options finds that concerns associated with decriminalizing paid surrogacy are outweighed by the benefits such a system would deliver. It is recommended that in order to address the problem of a lack of access to surrogacy services within Canada, the federal government should move to decriminalize payments for surrogacy services.

Keywords: gestational surrogacy; policy; reproductive justice; assisted reproductive technology (ART); Assisted Human Reproduction Act (AHRA); Canada

For my loving family, and for all those who seek to add love to the world by building families.

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Executive Summary

Currently in Canada, the practice of gestational surrogacy itself is legal, but compensation for surrogacy services is not. Intended parents can reimburse surrogates for their expenses, such as travel costs and wages lost due to pregnancy, but no regulations are in place to define where reimbursement ends and compensation begins, creating a legal grey zone. In December 2017, a coalition of stakeholders led by Leia Swanberg, head of Canadian Fertility Consulting, began to lobby for decriminalization of paid gestational surrogacy in Canada. On May 29, 2018, Anthony Housefather, a Liberal MP from Montreal, introduced a private member's bill with the intent of doing just that. Decriminalization of payment is one possible solution that has been identified to address the lack of access to surrogacy services currently restricting the reproductive freedoms of surrogates and intended parents in Canada.

This study provides a review of surrogacy issues in the Canadian context, presents case studies comparing Canada's surrogacy policies and outcomes with those of California and the UK, and delivers original findings from twenty-four semi-structured key informant interviews. Based on a literature review and findings from the case studies and interviews, the following policy options were identified: decriminalization of paid surrogacy allowing for a free market in surrogacy services, with federal guidelines for provincial regulation; decriminalization following an interprovincial agreement regarding surrogacy regulations; continued criminalization of paid surrogacy with a more flexible reimbursement system; and continued criminalization with Health Canada's proposed reimbursement regulations.

Five criteria were selected for evaluating these four policy options. The key criterion was the policy's ability to broadly improve access to surrogacy services. Other criteria were the policy's effect on psychological and legal outcomes for surrogates and intended parents, the policy's effect on equity of access to surrogacy services, the administrative complexity and cost of the policy, and whether the policy would stir up interprovincial tensions.

When evaluated against those criteria, decriminalizing paid surrogacy and allowing for a free market in surrogacy services is found to be the superior policy option. As such, it is recommended that the federal government decriminalize payment for

surrogacy services and accept a free market system across Canada, within which the provinces are free to regulate paid surrogacy as they choose. It is further recommended that Health Canada provide guidance to the provincial regulatory process by outlining promising practices and surrogacy community perspectives.

This recommendation aligns with a reproductive justice perspective which is committed to reducing state-imposed barriers to reproductive freedoms. It is found that, at little expense to the federal government, and with little risk to surrogacy participants, Canada can remove a significant barrier to reproductive freedoms by decriminalizing payments for surrogacy services.

The voices of surrogates, and other members of the surrogacy community, have tended to be excluded from the policy conversation in the past. Within the academic community there is still uncertainty about whether to decriminalize paid surrogacy, but the message to decriminalize is resoundingly clear amongst those the decision will affect. This study seeks to reflect the policy perspectives of those within the surrogacy community, and to offer new evidence of the lack of access to surrogacy services in Canada. Finally, this study aims to situate the discussion within the political context of 2019, when tensions between federal and provincial governments make cooperative regulation unlikely. In these ways, this research contributes a new answer to the much-asked question of payment for surrogacy services.

Chapter 1 Introduction

The first child of a modern surrogacy arrangement was born in 1985. The invention of in vitro fertilization (IVF) has allowed surrogates to carry children to whom they have no genetic relationship, and has allowed couples and individuals to become parents in a new way. This is commonly called gestational surrogacy, and its accessibility within Canada is the focus of this study.

Surrogacy is an increasingly common option for becoming a parent, with an estimated 1000% increase in popularity globally between 2006-2010. In 2013, it was estimated that 20,000 children were born through surrogacy arrangements worldwide, with more born every year. For comparison, that is greater than the number of international adoptions in 2013, a number which is decreasing annually (Scherman et al., 2016).

People who seek to become parents through surrogacy arrangements are commonly referred to as intended parents, or IPs (Söderström-Anttila et al., 2016). Surrogacy may be necessary when an intended mother is medically unable to carry her child—increasingly common as women choose to have children later in life—when the intended parent is a single man, or when the IPs are a male same-sex couple (Söderström-Anttila et al., 2016). At Create Fertility Centre in Toronto, a steady increase in utilization of surrogacy services by male same-sex couples has been observed since the legalization of same-sex marriage in Canada in 2005 (Dar et al., 2015). In 2014, about 40% of reported Canadian surrogacy cycles were for single men or male same-sex couples (White, 2018a). Figure 1 shows the growth in popularity of surrogacy in Canada from 2001 to 2017.

Today, the medical processes associated with surrogacy are commonly performed, with limited medical risks (Dar et al., 2015; Söderström-Anttila et al., 2016). A detailed account of the typical Canadian surrogacy process can be found in Appendix A. In brief, eggs and sperm are obtained from IPs and/or from donors, and an embryo is created through IVF and transferred to the surrogate's uterus. Prior to this procedure, surrogates and IPs receive psychological and legal counselling together and separately

and draw up an agreement to manage the surrogacy arrangement. Surrogacy arrangements may vary enormously from family to family (Dar et al. 2015).

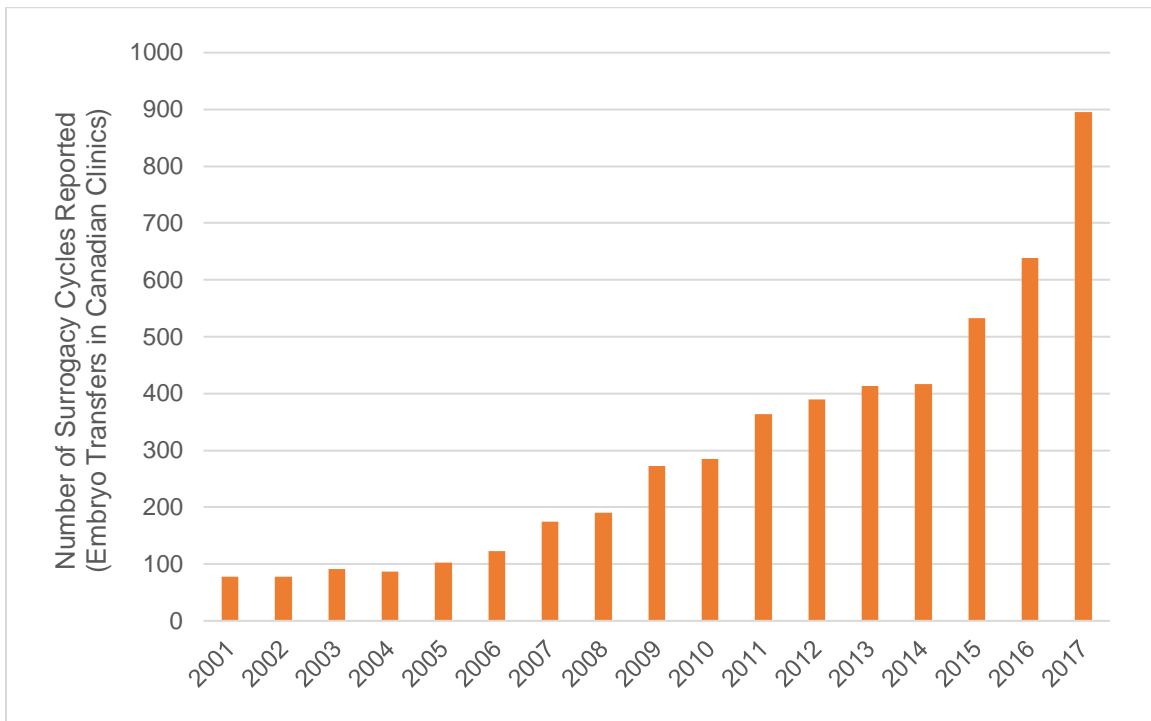


Figure 1. Reported Canadian Surrogacy Cycles, 2001-2017¹ (CFAS, 2019)

While there are cases in which relinquishment of the child by the surrogate or acceptance of the child by the IPs has proven problematic, the transfer happens smoothly in the vast majority of cases (Söderström-Anttila et al., 2016; White, 2018a; Dat et al., 2015; Busby and Vun, 2010; Teman, 2008). For example, of 333 cycles at Create Fertility Centre in Toronto, all but one cycle resulted in transfer of the child from the surrogate to the IPs as planned. In one case, the intended mother was not able to take custody of the child due to a psychiatric illness, and the child was adopted by another family (Dar et al., 2015). Most surrogates do not find it difficult to relinquish the child, as they do not consider the baby to be theirs (Söderström-Anttila et al., 2016; van Zyl and Walker, 2015). No single factor has been isolated which causes the transfer to

¹ Includes data from most, but not all, ART clinics in Canada. Does not include data on surrogacy cycles for which the embryo transfer occurs outside Canada (CFAS, 2019; White, 2018b). As such, this does not include cycles in which the surrogate is a Canadian resident and the child is born in Canada, but the transfer occurs in an American clinic. It is unknown how commonly this practice occurs, but estimates from surrogacy consultants range from less than 5% of the time to about half the time, depending on the policy of the consultant (personal correspondence, author).

be more challenging, but it is expected that psychological screening and counselling of the surrogate and IPs can largely prevent these issues (Söderström-Anttila et al., 2016).

Currently in Canada, the practice of gestational surrogacy itself is legal, but compensation for surrogacy services is not. IPs can reimburse surrogates for their expenses, such as travel costs and wages lost due to pregnancy, but no regulations are in place to define where reimbursement ends and compensation begins, creating a legal grey zone (Cattapan, Gruben, and Cameron, 2018).

In December 2017, a coalition of stakeholders led by Leia Swanberg, head of Canadian Fertility Consulting, began to lobby for decriminalization of paid gestational surrogacy in Canada (Motluk, 2018a). On May 29, 2018, Anthony Housefather, a Liberal MP from Montreal, introduced a private member's bill (C-404) with the intent of doing just that (Canada, 2018).

Housefather argues that the current system is not working for anyone involved, that it creates unnecessary uncertainty and fear, and that it only serves to divert Canadian resident IPs to other jurisdictions. Housefather believes that the federal government should decriminalize paid surrogacy and then allow the provinces to regulate as they see fit (Harris, 2018a). Though decriminalization of payment is not universally supported within Canada, it is broadly supported within the surrogacy community (personal correspondence, author). However, Housefather does not foresee his bill being passed into law before the next election (Harris, 2018a).

In research interviews for this study, doctors, lawyers, IPs, surrogates, and surrogacy consultants discuss the challenges of accessing surrogacy services in an unpaid system, the anxiety of trying to create a family under the threat of the criminal law, and the injustice of denying compensation to surrogates (personal correspondence, author). These conversations with members of the surrogacy community demonstrate that there is a lack of access to surrogacy services within Canada, restricting the reproductive freedoms of surrogates and intended parents, and pushing intended parents into international markets. It is such challenges that this study endeavors to investigate and address.

1.1 Evidence of the Problem

Canada's current surrogacy legislation is based on the ideas of a report published in 1993. Given the many technological and social changes that have occurred since that time, the growth in popularity of surrogacy, and the movement for change that is currently occurring, it is time to rethink surrogacy policy with a view to improving access for both IPs and surrogates. Literature reviewed, case studies constructed, and interviews conducted for this study show that access to surrogacy services is limited within Canada.

Chambers et al. estimate unmet demand for assisted reproductive technologies in Canada, concluding that only 21% of demand was met in 2003. Using their methodology and the most recent data, we can update that figure to 60% for 2017 (Chambers et al., 2009; World Bank, 2019; CFAS, 2019; author's calculations). This indicates both an impressive improvement and a great deal of remaining unmet need. It can be reasonably extrapolated that there is also unmet need specifically for surrogacy services in Canada, and that there have been improvements in past years, but it is unknown how closely these trends align.

An examination of policies and outcomes in Canada, California, and the UK shows that restrictions on payments to surrogates and consultants are associated with lower rates of surrogacy cycles within the population, and lower proportions of total IVF cycles devoted to surrogacy (White, 2018a; World Bank, 2019; California, 2016; Surrogacy UK, 2015; HFEA, 2011; CFAS, 2019). This evidence is explored in detail in the Case Studies section.

Surrogacy consultancies (also called 'agencies'), which facilitate matching of surrogates and IPs, as well as other parts of the surrogacy process, report surrogate-to-IP ratios between 1-3 and 1-40. Wait times for IPs to match with a surrogate are commonly reported by consultants as being up to one year after signing up with a consultant, with some IPs having to wait longer just to sign up. Interviewees report even greater difficulty for IPs to match with surrogates without the help of a consultant. A counsellor who works with IPs reports the frustration expressed by IPs at the difficulty of finding a surrogate, often exacerbated by IPs' struggles in assisted reproduction pre-dating the surrogacy process (personal correspondence, author).

Finally, there is abundant evidence that Canadian resident IPs seek surrogacy services in other countries, often at greater expense and inconvenience, or with added legal and medical risks (White, 2018a; Lozanski, 2015; Levine et al., 2017; personal correspondence, author). Interviewees raise the question: If there were adequate access to surrogacy services in Canada, why would Canadian resident IPs seek services elsewhere (personal correspondence, author)?

1.2 Transnational Surrogacy

Transnational surrogacy arrangements involve a surrogate from one country and IPs from another. Relatively inexpensive travel makes transnational surrogacy arrangements an accessible option for affluent and even middle-income IPs around the world. This can be an attractive option for IPs from countries where all forms of surrogacy are illegal, where surrogacy services are only accessible to certain types of IPs, where surrogates are scarce, or where surrogacy services are relatively expensive (Lozanski, 2015; Motluk, 2018b). It is unknown how many Canadian children are born through transnational surrogacy arrangements each year, but it is known that this occurs (White, 2018a; Levine et al., 2017; CBC News, 2015; personal correspondence, author).

Some countries have developed surrogacy industries catering to transnational arrangements. For example, as of 2014, India had 3000 clinics facilitating transnational paid surrogacy arrangements (Scherman et al., 2016). The United States (US) is also a popular destination, though surrogacy services there are far more expensive (Lozanski, 2015; Levine et al., 2017). In 2015, almost half of IVF cycles at California clinics were for non-resident IPs (White, 2018a). One reason that IPs from around the world choose the US is because American clinics tend to widely publicize their pregnancy rates, leading many IPs to perceive that they have the greatest likelihood of success on the first cycle at a US clinic (Adamson, 2009; personal correspondence, author). As more and more countries close their doors to non-resident IPs, Canada is also increasingly becoming a surrogacy destination (Motluk, 2018b).

In Canada, it is relatively easy for IPs to obtain citizenship for their children born through transnational surrogacy arrangements, even when it is explicit that the surrogate was paid. In a 2015 article, Lozanski argues that this is a deep contradiction in policy that must be reconciled. The AHRA criminalizes paid surrogacy in order to prevent the

commodification of women and children. However, the AHRA does not specifically criminalize Canadian resident IPs paying for surrogacy services in other jurisdictions, and Canada has established policies for granting citizenship to children born through paid transnational arrangements. The implication of this combination of policies is that Canada is less concerned about the welfare of women in other countries than women in Canada. This, in turn, does not align with Canada's commitment to being a world leader for women (Lozanski, 2015).

Another increasingly common practice in Canada, called 'blending,' sees Canadian resident surrogates travelling to the US for their embryo transfer, but returning to Canada for the pregnancy and birth. This option allows IPs to benefit from the perceived better pregnancy rates at US clinics and also take advantage of Canada's free healthcare and unpaid surrogacy (Adamson, 2009; personal correspondence, author). Blending may create problems for surrogates due to inconsistency of medical care (personal correspondence, author), and makes it impossible to properly track Canadian surrogacy arrangements at the clinic level (White, 2018b).

Many have suggested that improving access to surrogacy services within Canada can help reduce the number of Canadian residents choosing to go abroad to find a surrogate, or to cross the border for an embryo transfer. This, in turn, would reduce the associated risks, including the potential for serious harm to surrogates in poorly regulated countries (Lozanski, 2015; Cattapan, 2014; Adamson, 2009; personal correspondence, author).

1.3 Canadian Context: The Royal Commission on New Reproductive Technologies

Following the technological developments of the mid-1980s that revolutionized assisted reproduction, a coalition formed to advocate for a Royal Commission to investigate and determine the Canadian approach to regulation. In 1989, the Royal Commission on New Reproductive Technologies was formed, with the mandate to "inquire into and report on current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest" (Canada, 1993, p. 2).

In 1991, only 400 IVF-conceived children were born in Canada, compared to 8400 in 2016² (Canada, 1993; CFAS, 2019). In 1993, assisted reproductive technologies were still considered experimental. At that time, there was little information available on Canadian surrogacy arrangements, and no evidence of paid arrangements. Of the twenty-seven fertility clinics the Commission interviewed, none facilitated surrogacy arrangements of any kind (Canada, 1993).

In 1993, drawing upon the opinions of experts, stakeholders, and the public, and the experiences of other jurisdictions, the Royal Commission published its final report. The Commission determined that all forms of surrogacy were unacceptable and should be discouraged, and recommended that the Government of Canada immediately prohibit paid surrogacy arrangements under the Criminal Code (Canada, 1993).

The Commission's decision rested largely on ethical considerations, including the following:

1. Surrogacy—paid or unpaid—encourages children to be seen as commodities which can be traded among adults, encourages women³ to be seen as a means to an end, and supports the idea that women's value is derived from their ability to bear children. This is harmful to the individuals involved, and could, over time, erode societal ethics.
2. Individuals are likely to be coerced into surrogacy arrangements, either explicitly or implicitly, by financial incentives or social pressures.
3. On a societal level, this could lead to the normalization of a 'breeding class' of low-income, less-educated individuals who provide surrogacy services for IPs of higher socio-economic status (Canada, 1993).

However, the Commission also recognized that surrogacy offered a new pathway to parenthood, and that individuals should have the freedom to make decisions regarding their own bodies, including deciding to become surrogates. As well, the Commission concluded that a law prohibiting all forms of surrogacy would likely prove impossible to enforce. Regardless of policy decisions, surrogacy arrangements would

² IVF cycles begun in 2016 resulted in 8406 births at 35 reporting clinics (CFAS, 2019).

³ Since the vast majority of individuals with the capacity to act as surrogates identify as women, it is appropriate to use the word 'women' and gendered pronouns when discussing feminist concerns surrounding surrogacy (personal correspondence, author). However, this study aims to be inclusive of gender and sexual diversity within surrogacy by avoiding gendered language whenever possible.

continue to exist, so it was preferable for these arrangements to be legal and regulated to protect the best interests of surrogates and the children they carried (Canada, 1993). In 1995, based on the recommendation of the Royal Commission, the Canadian government introduced a policy of voluntary moratorium on paid surrogacy until a decision could be made regarding criminal legislation (Lozanski, 2015).

Ethical objections to surrogacy, paid and unpaid, are still commonly brought up in discussions of surrogacy today (Dar et al., 2015; Söderström-Anttila et al., 2016; Robertson, 2015; Rotabi, Bromfield, and Fronek, 2015; van Zyl and Walker, 2015; Stefansdottir, 2018; personal correspondence, author). The main concerns remain the exploitation and commodification of women's bodies (with some comparing surrogacy to sex work or organ donation) and the commodification of children (with some comparing surrogacy to slavery) (Dar et al., 2015). However, many now view surrogacy arrangements as mutually beneficial agreements between consenting adults exercising their reproductive and economic freedoms (Scherman et al., 2016; Robertson, 2015; personal correspondence, author).

At the time of the Royal Commission, some evidence existed to suggest that the Canadian public opposed paid surrogacy (Canada, 1993; Ruiz-Robledillo and Moya-Albiol, 2016). Since then, little empirical research has been done to gauge how views may have changed (Snow, 2016; Greenaway, 2002; Daniluk and Koert, 2012; personal correspondence, author). However, the Royal Commission acknowledged that rapid developments in assisted reproductive technologies would lead to changes in public perception and that policy would have to respond appropriately. It has been a quarter of a century since the report was released, and assisted reproductive technologies have certainly evolved. At the same time, societal views have shifted on many previously controversial issues. For example, in the surveys conducted by the Commission, only 35% of respondents viewed homosexuality as acceptable (Canada, 1993). Today, asking in a survey whether homosexuality is acceptable is itself no longer acceptable (Harris, 2018b).

And yet, from the release of the final report of the Royal Commission until today, Canadian policy around surrogacy has undergone few changes. The policies of 2019 are still rooted in the ideas of that 1993 report, written in an era when the surrogacy landscape looked very different from the one we see before us twenty-six years later.

1.4 The Assisted Human Reproduction Act

The recommendations of the Royal Commission resulted in the 2004 introduction of the Assisted Human Reproduction Act (AHRA), which continues to define the federal position on gestational surrogacy today. The AHRA prohibits Canadian residents from paying for the services of a gestational surrogate, and from advertising payment for surrogacy services. As punishment, the Act allows for a fine of up to \$500,000, and/or a term of up to 10 years in prison. The AHRA characterizes paid gestational surrogacy as commodification of children and of women's bodies and cites "health and ethical concerns that justify ... prohibition." However, a surrogate may be reimbursed for pregnancy-related expenses in accordance with regulations.

The AHRA also prohibits payment for arranging surrogacy services. This means that surrogacy consultants can accept fees for other services related to surrogacy, but not for matching surrogates with IPs (personal correspondence, author).

Finally, the AHRA requires that surrogates must be at least twenty-one years old.⁴ There are no federal restrictions on who can be an IP. Parentage law varies significantly by province, including variation in whether a genetic relationship of at least one IP is required to transfer parentage from the surrogate (Snow, 2018).

There has been little effort to enforce the AHRA, and only one person has ever been charged under that Act. Leia Swanberg, owner of Canadian Fertility Consulting, a consultancy that matches surrogates with IPs, pleaded guilty to paying surrogates in 2013, and was fined \$60,000 (Cattapan, Gruben, and Cameron, 2018; Busby and White, 2018; Motluk, 2016; Pedwell, 2018; personal correspondence, author). Today, Canadian Fertility Consulting is the largest surrogacy consultancy in Canada (personal correspondence, author).

The AHRA specifies that reimbursement for surrogates' expenses is only legal in accordance with regulations. Currently, the Health Canada website states that reimbursement is legal, and lists examples of expenses eligible for reimbursement. (Health Canada, 2013). However, reimbursement regulations have never been

⁴ It is outside the scope of this study to assess whether the surrogacy age limit should remain within the criminal law. However, as will be explored in the Case Studies section, there is no comparable restriction in California or the UK (California AB-1217; UKDHSC, 2018).

introduced, prompting some to argue that all reimbursement is technically illegal until regulations are set (Cattapan, Gruben, and Cameron, 2018).

On October 26, 2018, the federal government announced a consultation process to assess new regulations which aim to clarify which expenses can be reimbursed in surrogacy arrangements (Harris, 2018a). Along with the new regulations will come enforcement mechanisms (Health Canada, 2017). Health Canada has indicated that a review of the AHRA will follow the implementation of these regulations. However, it is not at all clear that the new regulations will be established within the tenure of the current government, and as such, it is not clear that these changes will take place at all in the foreseeable future (personal correspondence, author).

1.5 Surrogacy & Canadian Federalism

Due to the gravity of their concerns, and to prevent reproductive travelling within Canada, the Royal Commission recommended uniform legislation and regulations across the country, implemented by the federal government. The Commission recognized that the provincial governments had roles to play as well, but argued that the federal government had the authority to lead the way under its mandate to promote peace, order, and good government, and its exclusive jurisdiction over the criminal law (Canada, 1993). Following this recommendation, the AHRA was a much broader piece of legislation when originally passed in 2004, including provisions for an assisted reproduction registry and an agency to administer the AHRA and monitor assisted reproduction in Canada (Cattapan, Gruben, and Cameron, 2018).

However, healthcare, family law, and contract law, three fields essential to surrogacy policymaking, fall under provincial jurisdiction. After the passage of the AHRA, the Quebec attorney general filed a reference case with the Quebec Court of Appeal to determine whether the federal government had the jurisdictional authority to regulate surrogacy. The case made its way to the Supreme Court, where most of the AHRA was found to be unconstitutional in 2010. The prohibition of payment for surrogacy services was one of the few sections that remained, given the federal government's authority over criminal law (Cattapan, Gruben, and Cameron, 2018). After the dissolution of the Assisted Human Reproduction Agency, Health Canada became the federal department

responsible for administering and enforcing the Act and any associated regulations (personal correspondence, author).

The provinces have shown varying levels of interest in exercising their authority to regulate the practice of surrogacy services and the transfer of parentage from surrogates to IPs. Five of ten provinces have no legislation at all explicitly addressing parentage transfer in surrogacy (Snow, 2018). Quebec's laws state that surrogacy contracts are unenforceable, discouraging arrangements in that province (Snow, 2018; Canada, 1993; personal correspondence, author). Ontario, on the other hand, introduced comprehensive legislation regarding assisted reproduction in 2016, and IPs can be automatically recognized as legal parents of their children as long as a few simple conditions are met, without the need to go to court (Snow, 2018).

1.6 Theoretical Framing: Reproductive Justice

The term 'reproductive justice' was coined in 1994, and has since evolved to encompass the right to have a child, the right not to have a child, the right to parent, and the actions that must be taken to achieve these rights. Reproductive justice "simultaneously demands a negative right of freedom from undue government interference and a positive right to government action in creating conditions of social justice and human flourishing for all" (Luna and Luker, 2013, 328). Key issues in reproductive justice include the criminalization of reproduction and access to assisted reproductive technologies. The literature, as far back as the Royal Commission, shows that there are inequities of access to reproductive justice (Canada, 1993; Adamson, 2009; Luna and Luker, 2013).

The analytical framework of reproductive justice raises the challenging question at the heart of this study, a question also raised by the Royal Commission (Canada, 1993): Do we have a right to become parents? The UN Declaration of Human Rights outlines the right to "found a family," but no comparable article is included in the Canadian Charter of Rights and Freedoms (United Nations, 1948; Canada, 2019). Though it may be difficult to reach agreement on a positive right to parenthood, which would require the state to substantively support individuals and couples in their pursuit of parenthood by, for example, publicly funding IVF services, it is not difficult to agree on a negative right to parenthood. A negative right to parenthood requires only that the state

not create barriers to parenthood. It is from this perspective—that individuals have the right to pursue reproduction without undue restriction by the state—that this study is approached.

Chapter 2 Methodology

To determine the policy problem, solutions, and criteria and measures, this qualitative study utilized a literature review, case studies, and key informant interviews.

2.1 Case Studies

Many jurisdictions, including France, Germany, and Sweden, disallow all forms of surrogacy. Unpaid surrogacy is allowed in many jurisdictions, such as New Zealand, the Netherlands, and the United Kingdom (UK). Some jurisdictions, such as the Czech Republic, have no legislation at all. In Australia and the US, the law varies from state to state. Jurisdictions allowing paid surrogacy include Russia, India, and California (Söderström-Anttila et al., 2016; Lozanski, 2015; Sachdev, 2018).

The United Kingdom (UK) and California were selected for case comparison based on recommendations from interviewees and availability of evidence in the literature (White, 2018a; UKDHSC, 2018; Surrogacy UK, 2015; HFEA, 2011; personal correspondence, author). Like Canada, the US has a federal system, and surrogacy policy varies greatly from state to state. California is the American jurisdiction most discussed in interviews, and has a similar population to Canada, making it in an excellent case for comparison (White, 2018a; World Bank, 2019; California, 2016). About 30% of American surrogacy births occur in California (White, 2018a). The UK was an early leader on assisted reproductive technology and legislation, and today has perhaps the most comprehensive legislation on assisted reproduction of any country in the world (Adamson, 2009; Stefansdottir, 2018; personal correspondence, author). This study examines the UK as a whole, since surrogacy legislation is the same across all regions of the country⁵ (UKDHSC, 2018).

⁵ One exception is that there is some variation between the court systems in England & Wales, Scotland, and Northern Ireland. Where this variation exists, this study will focus on the system that is common to both England and Wales, which together make up 89% of the population of the UK (UKDHSC, 2018; Office of National Statistics, 2018; author's calculations).

Table 1. Case Studies – California and UK Policies

Variables	California	UK
Payment & reimbursement	Payment for surrogacy services is legal and rates of payment are set by the free market (California AB-1217; White, 2018a).	Parents and surrogates make their own arrangements for what will be reimbursed and how this will be managed, and must satisfy a judge that no payment has been made other than reimbursement in order for parentage to be transferred. There is no state guidance as to which expenses are legitimate, and no court has ever refused to transfer parentage (Petropanagos, Gruben, and Cameron, 2018).
Consultants	Consultants may receive payment for arranging surrogacy services (California AB-1217). Some fertility clinics also participate in matching (personal correspondence, author).	Arranging surrogacy services as a commercial enterprise is prohibited, and consultancies operate as non-profit organizations that charge fees only to cover costs (UKDHSC, 2018).
Advertising	There are no restrictions on advertising for surrogacy services (California AB-1217).	Advertising for surrogacy services (by surrogates, IPs, or consultants) is prohibited with few exceptions (UKDHSC, 2018).
Surrogate restrictions	There are no legislated restrictions on who can act as a surrogate (California AB-1217).	There are no legislated restrictions on who can act as a surrogate (UKDHSC, 2018).
Intended parent (IP) restrictions	There are no restrictions on who can be an IP (California AB-1217).	Currently, in order to transfer parentage, IPs must be a couple with at least one parent genetically related and at least one UK resident. The UK is in the process of changing the law to allow single IPs (UKDHSC, 2018).

Table 2. Case Studies – Canada, California, and UK Outcomes

Variables	Canada	California	UK
Surrogacy cycles per million population (per year)	10.6 (2011) (World Bank, 2019; CFAS, 2019; author's calculations)	24.9 (2010-2014 average cycles, 2011 population) (California, 2016; White, 2018a; author's calculations)	1.7 (2011) (World Bank, 2019; Surrogacy UK, 2015; author's calculations)
Surrogacy cycles as a proportion of total IVF cycles (per year)	1.5% (2011) (CFAS, 2019; author's calculations)	5.2% (2010-2014 average) (White, 2018a; author's calculations)	0.2% ⁶ (2011) (HFEA, 2011; Surrogacy UK, 2015; author's calculations)
Estimated number of consultants	14 (personal correspondence, author)	At least 13 consultants and at least 52 clinics (Surrogate.com, 2019; SurrogacyAdvisor.com, 2019; CDC, 2018)	3 (UKDHSC, 2018)
Estimated cost of surrogacy services	\$60-80K CAD (Kozicka, 2016; Sensible Surrogacy, 2019a; Surrogacy in Canada Online, 2019)	\$66-160K CAD (\$50-120K USD) (Scherman et al., 2016; Knoche, 2014)	\$34-155K CAD (£20-90K GBP) (Mowbray, 2017; Surrogacy UK, 2019; Sensible Surrogacy, 2019b)
Estimated wait times for surrogacy services (with a consultant)⁷	Up to 1 year (personal correspondence, author)	1-4 months (Circle Surrogacy, 2019; Centre for Surrogate Parenting, 2019; personal correspondence, author)	About 1 year (personal correspondence, author)

⁶ One reason for this very low proportion is that the UK has a rate of 975 IVF cycles per million population (per year, 2011) compared to 699 in Canada (2011) and 483 in California (2010-2014 average) (White, 2018a; HFEA, 2011; CFAS, 2019; author's calculations). This is likely related to

Table 1 shows UK and California policies, and Table 2 shows outcomes for Canada, California, and the UK. These case studies show the stark differences in policy in California and the UK. The UK has opted for a heavily legislated, heavily regulated unpaid surrogacy model with a fairly flexible reimbursement scheme, but with restrictions on advertising, on the actions of consultants, and on who can be an IP. California legislation places no restrictions on surrogates, IPs, or consultants.

California has more consultants, shorter wait times for IPs, and higher rates of access to surrogacy services. Access is measured by number of surrogacy cycles per million population, and proportion of total IVF cycles devoted to surrogacy. Cost is another important factor in measuring accessibility, but cost estimates range so widely that it is difficult to interpret variations in affordability of surrogacy services. Costs are also influenced by public funding for assisted reproduction services, which varies within and between studied jurisdictions (HFEA, 2019; White, 2018a; Ontario, 2018; Hendry, 2016; Manitoba, 2014; New Brunswick, 2014).

Canada currently falls between the UK and California in terms of both policies and outcomes. Canada's policies regarding advertising, consultants, and IPs are less restrictive than the UK's, and so it is perhaps unsurprising that Canada also has better surrogacy access outcomes. For this reason, policy options which further restrict advertising, consultants, or IPs will not be considered.

the UK's policy which offers publicly funded IVF services (HFEA, 2019; Adamson, 2009). IVF is not publicly funded in California or broadly across Canada, though some provinces offer limited funding or tax credits (White, 2018; Ontario, 2018; Hendry, 2016; Manitoba, 2014; New Brunswick, 2014). It is interesting that, despite this high rate of uptake of IVF services in the UK, there are still so few surrogacy cycles.

⁷ Estimates given by Canadian and UK consultants are problematic because they measure the wait times from when IPs sign up with the consultant. Some consultants, including both UK consultants I corresponded with, often shut down applications for long periods of time, and so there may be an additional wait before IPs can even apply to work with the consultant. This also does not account for the many IPs who give up on the process before matching with a surrogate. Based on estimates given by consultants, this could easily be half or more of IPs who sign up. Two Canadian interviewees also noted that American consultants are able to 'guarantee' matches (or the IPs will be refunded), while Canadian consultants are never able to make this promise (personal correspondence, author).

2.2 Interviews

In total, twenty-four key informant interviews were conducted by phone and by email with academics, consultants, lawyers, doctors, surrogates, an IP, a counsellor, a journalist, a Health Canada official, and a Member of Parliament active in the Canadian surrogacy community. Some interviewees represented multiple viewpoints from within the community—for example, all of the Canadian consultants I spoke with had also acted as surrogates themselves. Interviewees were identified in the literature, by other interviewees, and as needed to fill gaps in knowledge. The purpose of the interviews was to gain a thorough understanding of the Canadian surrogacy landscape, to define the policy problem, to inform the case studies, and to identify policy solutions and evaluation criteria. Interviewees were asked general questions about their perspectives on surrogacy issues and policies, as well as questions tailored to their roles within the surrogacy community. Appendix B gives a sample of the interview schedule.

In the course of these interviews, the following key themes emerged:

1. More information is needed about surrogacy in Canada.
2. There is a lack of access to surrogacy services in Canada for both IPs and surrogates. One major barrier to accessing surrogacy services is the criminalization of paid surrogacy.
3. The criminal law is not an appropriate mechanism for governing surrogacy arrangements.
4. Exploitation of surrogates is no more likely to occur in a paid Canadian system than in an unpaid system. Not paying surrogates is exploitative. It is unfair that everyone in the industry is being paid except the surrogates.
5. Regulation is needed to ensure that surrogacy services are offered in a safe and equitable way across Canada. However, the process to regulate surrogacy services presents a barrier to decriminalization of payments.

These themes do not represent all topics covered nor perspectives gathered in the interviews, but do represent commonly repeated ideas related to the scope of this study. In my discussion of each of these themes, reference is also made to minority opposing viewpoints.

2.2.1 More information is needed about surrogacy in Canada.

Interviewees from both academia and from the surrogacy community were adamant that more information is needed about surrogacy in Canada. As one researcher put it:

I'm struck by the fact that there is just a gaping hole in empirical research on surrogates in this country. It's quite shocking, really. We're planning to revise all these regulations, and if we're supposed to have evidence-based decision-making, I don't see the evidence.

This idea was echoed by others, and one issue that came up was the lack of surrogate perspectives in the policy-making process. Another academic in the field, discussing a potential shift toward a paid surrogacy model in the Canadian context, remarked on the need to gather evidence on surrogates' viewpoints to contribute to any decision-making:

There is no empirical data in Canada on this question or really from surrogates at all on any of these issues. And so, I think if we want to make effective policy in this space, we need to speak to the women who are acting as gestational surrogates and find out what their experiences are and what their views are. And if we were, for example, to move to a paid model, then we need to talk to women about what that might look like.

This gap in evidence has also been noted in the literature (White, 2018a; White, 2018b; Busby and Vun, 2010; Söderström-Anttila et al., 2016; Cattapan, Gruben, and Cameron, 2018). Pamela White has written about the lack of information available on surrogacy in Canada, and suggests that this may be part of a broader pattern of data on reproduction being undervalued. When this data is not valued, it may not be collected and it may not be included in policymaking (White, 2018b). Alana Cattapan also notes the lack of data on surrogacy in Canada, and contextualizes it within a pattern of policymaking to govern women's bodies based on unfounded assumptions (Cattapan, 2014).

2.2.2 There is a lack of access to surrogacy services in Canada for both IPs and surrogates. One major barrier to accessing surrogacy services is the criminalization of paid surrogacy.

All interviewees identified barriers to access to surrogacy services in Canada. Commonly discussed barriers included lack of information available to surrogates and IPs, high costs of surrogacy services, and restrictions on the activities of consultants. Policy suggestions to address these barriers were diverse, including public information campaigns, public funding for IVF services, and decriminalizing payments to consultants for matching IPs and surrogates.

Another commonly discussed issue was who should be able to access surrogacy services in Canada, and whether IPs from other countries present a barrier to access for Canadian resident IPs. Some interviewees viewed international IPs as a secondary priority for access to surrogacy services within Canada. One commonly suggested policy solution was discouraging international IPs from choosing Canadian resident surrogates by ensuring that the IPs are billed for the healthcare costs of the surrogate and/or child. On the other hand, some applauded Canada's welcoming of international IPs, who might be barred from accessing surrogacy services in their own country, feeling that the industry has self-regulated well by encouraging international IPs to take out medical insurance for their child starting from birth. Healthcare for surrogates was viewed by many interviewees as a Canadian resident right, which should not be affected by personal or professional choices. As one researcher explained:

They're Canadians and they receive the same benefits of the healthcare system as any other Canadian, and I don't see that why they're receiving the services should make much of a difference... If I need healthcare because of something that I do during my work, the healthcare system takes care of me. I mean, what's different about surrogacy is the condition is the work. But she's still Canadian, still accessing something that is part of her rights as a citizen or resident.

One issue that was discussed with all interviewees was payment for surrogacy services. Almost all interviewees identified the criminalization of payment as a barrier to accessing surrogacy services in Canada and almost all supported decriminalization. Reasons for supporting decriminalization and visions for a decriminalized system varied significantly among interviewees.

Four interviewees—three academics and one journalist—were uncertain in their positions on decriminalization. The one academic interviewee who opposed decriminalization raised several concerns. This researcher resisted the economic discourses that dominate discussions of payment for surrogacy, obscuring and instrumentalizing the individuals involved in the arrangements. The interviewee also viewed ‘demand’ for surrogacy services as a problematic, socially-constructed demand for genetic parenthood, and referenced anecdotal evidence of surrogates whose choices had been constrained by their economic relationships with IPs.

One common argument for paying surrogates was that this will allow more surrogates to enter the Canadian market. As one researcher put it:

It is, at a certain point, just basic supply and demand. You tell someone they can't make any money, they're going to be far less likely to do it.

A counsellor who works with surrogates and IPs made a similar comment regarding decriminalization of payment:

It can open up access for intended parents. It can allow surrogates to be compensated for their contributions.

This issue was framed in a particularly interesting way by one surrogacy consultant. This interviewee explained that of the estimated 10-25 applications to become a surrogate that the consultancy receives each day, only about 5-15 applicants per month end up matching with IPs—around 5% of those who apply (not counting individuals who have contacted the consultancy for information, but did not pursue an application). When asked why 95% of applicants do not advance to the matching stage, the interviewee explained that as applicants consider surrogacy, often talking it over with their partners and thinking through the impacts on their families, they may decide that they cannot take on this extra commitment without some form of compensation. The interviewee concluded that if payment could be offered, this would remove a barrier to participating in surrogacy for many individuals, and more applicants would advance to the matching stage.

Many interviewees viewed the criminalization of payment as a barrier to access to surrogacy services in and of itself, separate from the lack of payment. They described a culture of fear and uncertainty surrounding the reimbursement of surrogates in a jurisdiction where payment is illegal, and the feeling of immorality that becomes

associated with surrogacy as a result of criminalization. This is outlined well by Leia Swanberg, the head of Canada's largest surrogacy consultancy. Ms. Swanberg has become an advocate for decriminalization of payment within the Canadian surrogacy community, partnering with MP Anthony Housefather to lobby for change in Ottawa. Ms. Swanberg explained:

There is this big talk of, you know, people wanting this to be commercialized and, you know, wanting surrogates to be paid and egg donors and sperm donors to be paid. That wasn't our point. Our point was to decriminalize. Our point was for intended parents to feel safe in the interaction, to feel safe that they could have an agency source a surrogate for them... I believe that we're failing in that we haven't been able to put together legislation that makes sense for intended parents. You know, an example of that would be: we invited 250 sets of intended parents to come to our Hill Day and two came and they're both fertility lawyers. Intended parents are scared to talk about their experience. So, I think that we've done a disservice to them.

One surrogacy lawyer emphasized that the AHRA was built on the recommendation of the Royal Commission to minimize all forms of surrogacy:

I think that if the entire framework of the Assisted Human Reproduction Act is designed to discourage people from doing this, it is about *You can be criminally sanctioned. There's something bad or wrong about surrogacy.* I think that's the framework and that's what has to be stripped away.

For those who viewed criminalization as a barrier in its own right, the policy solution is to decriminalize payments and to have the government communicate this change clearly, so there is no longer any ambiguity from the government surrounding the legality or morality of surrogacy, reimbursement, or payment. This was seen as a positive step toward improving access to surrogacy services for both IPs and surrogates.

Given the lack of published empirical data available on the supply and demand for surrogacy services in Canada, there is a hesitation in the literature to state outright that this country faces a problem of inadequate access to surrogacy services. However, barriers to access are acknowledged—for example, John Robertson (2015) discusses the stigmatization associated with criminalizing reproductive activities—and the problem of lack of access to surrogacy is alluded to by some authors (Lozanski, 2015; Adamson, 2009; Busby and White, 2018). As discussed in the Introduction, Chambers et al. (2009) have demonstrated that there is significant unmet demand for assisted reproduction

services within Canada, and we can reasonably expect the same to be true about surrogacy specifically.

2.2.3 The criminal law is not an appropriate mechanism for governing surrogacy arrangements.

A related idea that was often brought up by interviewees was that the criminal law simply should not be applied to family-building. A letter submitted by fifteen prominent Canadian surrogacy lawyers to Health Canada as part of the recent process of consultation on surrogacy regulations named this as the first fundamental principle guiding the regulation of assisted reproduction. The letter includes the following statement:

The criminal law is no longer an appropriate method by which to manage the need for assisted reproductive technologies. The primary users of assisted reproductive technology should not fear criminal prosecution if they seek to have children. (document obtained via personal correspondence)

Interestingly, even some interviewees who did not support a paid system supported decriminalization, because they do not think that surrogates, IPs, or consultants working so hard together to create new life should do so under the threat of prosecution. One surrogacy lawyer supported decriminalization and a move toward a more flexible reimbursement system. This interviewee was open to surrogates receiving small compensations, but did not seek a ‘commercial’ model. Nevertheless, as evidenced by the following excerpt, this interviewee advocated removing criminal deterrents to payment:

I've always said the Act was wrong by criminalizing it... I don't have a problem with a penalty for a breach, but... I don't think it should be criminal... Surrogates and intended parents—I don't like that idea at all, that they be involved in what I call a criminal sanction.

A surrogate interviewed for this study believed in Canada’s ‘altruistic’ surrogacy model, but would like to see changes to the AHRA to facilitate more flexible reimbursement, to allow for monetary or non-monetary gifts between IPs and surrogates up to \$10,000, and to do away with the anxiety that exists in the present system over the line between reimbursement and payment. This interviewee expressed concerns over the current reimbursement system in the following quotation:

It's a grey area and when there's a grey area it actually—for me, personally, it makes me feel uneasy because I don't want to break the law. I want to follow the law. But currently, for example, is a pedicure a pregnancy related expense? Can I claim that as a reimbursable expense? Well, I mean, so far, they've been saying Yes, but is it actually? Like, if I were to get audited, would I have to pay that back? Or would I get in trouble for claiming that expense?

Surrogacy consultant Leia Swanberg's story of being charged under the AHRA has been told widely in the press, and makes real the concerns of surrogates, IPs, and consultants across the country. Ms. Swanberg described the experience in the following manner:

[We] ended up being the first agency who was investigated by the Assisted Human Reproduction Act Agency, which resulted in a criminal investigation, twenty-seven criminal charges, a gun to my head, an RCMP raid, which was obviously very traumatic and horrible. And, you know, I spent everything I had to defend myself and eventually ran out of money, so plead guilty to two regulatory offences, which I was guilty of, which was paying surrogates and egg donors without the proper paperwork. The crazy part about that was with my plea, you know, there was uncertainty of whether or not I would go to jail for ten years or face a five hundred thousand dollar fine... I was, you know, a mother of three, pregnant with my fourth. You know, I was really quite terrified.

Given the struggles involved in having a child through assisted reproduction under the best of circumstances, it is the prevailing opinion of those in the surrogacy community that it is not appropriate to add further risks to the process in the form of criminal prohibitions.

The idea that criminalization of paid surrogacy adds risk to family-building and that it is time for Canada to rethink the AHRA is echoed in the literature (Millbank, 2015; Deckha, 2015; Busby and Vun, 2010; Nelson, 2013). However, the anxiety and fear expressed by members of the surrogacy community is largely absent from the literature as a reason for reform (Fisher and Hoskins, 2013; Lavoie and Côté, 2018). This is likely because the same fears that act as a barrier to accessing surrogacy services also prevent members of the community from sharing their stories (personal correspondence, author).

2.2.4 Exploitation of surrogates is no more likely to occur in a paid Canadian system than an unpaid system. Not paying surrogates is exploitative. It is unjust that everyone in the industry is being paid except the surrogates.

A common refrain heard from both researchers and members of the surrogacy community was that Canada already has a paid system—the doctors are paid, the lawyers are paid, the consultants are paid. Everyone involved is paid except the surrogate. This perspective was echoed again and again throughout the interviews, as demonstrated in the following excerpts from two researchers:

The reality is, so much money is changing hands. The parents, who are not able to pay the surrogate, are spending tens of thousands of dollars in legal fees and counselling fees and travel fees... \$10,000 for IVF as well, fertility drugs. The lawyers are being paid, counsellors are being paid, doctors are being paid. These are all for-profit industries. The only person who's not being paid is the person who's actually doing the act herself, the surrogate.

One reason I would favour decriminalization is because everyone else is making money in this business. Like, why shouldn't the surrogate, the woman who's arguably doing the most work? That, I think, is the strongest argument in favor of decriminalizing payments.

One researcher went so far as to say that, given that everyone else in the industry is making money from the labour of the surrogate, it becomes exploitative not to pay that person:

I do think that it's ironic that the only person who's not getting paid in this expensive chain of players is the one who's doing the most work, and that's the surrogate. And I just think it's insane to say, "We can't pay her because she might be exploited." I think not paying her is exploiting her and I actually think the focus on... exploitation through payment allows us to ignore the other ways that she could be exploited... such as not having certainty on birth registration once the child is born... I just don't see payments as being exploitative and it gives, you know, a way for governments... to not deal with the real exploitation—the real potential for exploitation—and the ways in which they could avoid that.

Another academic brought this up in discussing whether a maximum payment for surrogacy services should be set. This interviewee recognized the challenge of setting a maximum payment level, and described it as a struggle to balance between two forms of potential exploitation. From this researcher's perspective, if payment is too high, individuals could be unduly influenced to participate in surrogacy services, and if

payment is too low, the surrogate's services are being undervalued. A surrogacy consultant made a nearly identical observation regarding the potential for exploitation if the payment is too high or too low, and also echoed the concern that there are many other forms of exploitation a surrogate could face, including uncertainty in the parentage transfer process.

The idea that exploitation is not inevitably or exclusively linked to payments came up again and again. In the words of two researchers:

It's literally called labour and yet we're not allowed to pay people for it... Ultimately it signals a lack of belief in women's ability to make decisions on their own behalf when we say, "No, no, no. We can't let you get paid for this because otherwise women are going to want to do it and then they're going to be exploited." And... what countless other stories have shown is that women can be exploited when they're not being paid too.

I think that there are problems with surrogacy that will persist whether or not payments are decriminalized... I think sometimes when you read some of the literature on surrogacy in Canada... there's the conflation that just because you have unpaid surrogacy that it's not exploitative. And I think that's false. I think exploitation can occur whether surrogacy is paid or not... So, I think exploitation's going to be a problem that we want to protect against regardless of whether surrogacy is paid or not. I think the conditions of work, all these things, these are worrisome whether surrogacy is paid or not.

One surrogate interviewed for this study believed that an 'altruistic' system is the best way to protect surrogates from exploitation. However, when asked whether decriminalization of payment would lead to exploitation, this interviewee responded:

I think No... In any country, in any situation, and... for any reason, you know, there's always an opportunity for exploitation. So, I don't think decriminalizing a payment would encourage exploitation.

More than one interviewee gave family pressure as an example of a type of coercion that is unrelated to payments, and probably more likely in unpaid arrangements. This aligns with scholarly concerns following the passage of the AHRA (Ruparelia, 2007).

These interviewees' observations are in line with existing evidence showing that surrogacy is not systematically exploitative in Canada, the US, or the UK (Busby and Vun, 2010; Söderström-Anttila et al., 2016; Dar et al., 2015; Teman, 2008). Given that paid surrogacy is legal in parts of the US, and systematic exploitation is not found there,

and given the excellent outcomes found in Canada so far, there is no reason to believe that payment for surrogacy would lead to systematic exploitation of surrogates in Canada (Busby and Vun, 2010; Söderström-Anttila et al., 2016; Dar et al., 2015).⁸

Stories can be found in the media of surrogacy arrangements gone awry in any jurisdiction. However, there is no evidence that these negative outcomes are more common in jurisdictions where surrogates can be paid (Busby and Vun, 2010). Some jurisdictions seek to avoid these outcomes by banning surrogacy altogether, but it has been observed that, as a result, their citizens simply participate in surrogacy arrangements in other countries (Lozanski, 2015). Interviewees noted that it is likely that individuals from such countries participate in illegal arrangements, without the protection of the law, an idea that is also found in the literature (Cattapan, 2014; Cattapan, Gruben, and Cameron, 2018; Busby and White, 2018; Nelson, 2013). Interviewees agreed that it is neither practical nor desirable to ban surrogacy altogether, and so policy must aim to minimize exploitation of surrogates, whether paid or unpaid.

Academics in the field have noted the gendered expectations that underlie the idea that surrogacy should be unpaid, casting surrogacy as yet another form of caring labour that has been traditionally performed by women without compensation (Stefansdottir, 2018; van Zyl and Walker, 2015; Almeling, 2011). Alana Cattapan breaks down the ethical theory and the existing evidence and concludes that neither can support the idea that payment elevates surrogates' risks, nor the related idea that prohibiting payment will reduce risks (Cattapan, 2014).

⁸ In jurisdictions where systematic exploitation of surrogates is observed, there are other factors at play. For example, systematic exploitation of surrogates has been observed in India. There, surrogates may be required to leave their families for months at a time, they may be asked to sign documents they are unable to read, they may be forced to undergo a pregnancy termination or a medically unnecessary Caesarean delivery, and they are regularly denied 75% of their payments until they have delivered a healthy child (Kirby, 2014; Lozanski, 2015; Knoche, 2014). A likely contributing factor allowing this state of affairs is the comparatively low status of women in India. The 2018 World Economic Forum Global Gender Gap Report shows that India lags well behind Canada, the US, and the UK. India's poor health, economic, and education outcomes for women are surely a few of the reasons that systematic exploitation of surrogates was able to develop there. Though there are certainly women in Canada with poor health, education, and economic outcomes, these issues are not nearly so systematic as in India, and as such we have less reason to be concerned about the development of systematic exploitation of surrogates in this jurisdiction (WEF, 2018).

2.2.5 Regulation is needed to ensure that surrogacy services are offered in a safe and equitable way across Canada. However, the process to regulate surrogacy services presents a barrier to decriminalization of payments.

Though the need for decriminalization of payment for surrogacy was often vocalized by interviewees, this was usually paired with some idea of how a decriminalized system should be regulated, and ideas varied widely among interviewees. For example, according to one researcher:

Lots of people who advocate in favour of decriminalizing payments in Canada don't think that it should be just a free market. They believe there should be a lot of government oversight or that the amount of payments should be controlled such that we are resisting some of the free market ways in which commercial surrogacy might appear in other places.

Some interviewees brought up the challenge of balancing provincial and federal jurisdiction, and the hesitancy of the federal government to overstep in regulation after the 2010 Supreme Court defeat. MP Anthony Housefather, when asked about details of a decriminalized system, constantly pivoted to the provinces, and reiterated that it is not the role of the federal government to regulate these details.

A surrogacy consultant observed that when there is variation in provincial regulation, typically policy will converge over time as provinces observe one another's approaches—an idea also found in the literature (Snow, 2012). This interviewee saw risks associated with the gap of time in which some provinces might lag behind others, but accepted this issue as part of the nature of Canadian federalism.

Despite the Supreme Court decision, some interviewees expressed a desire for federal regulation. The perspectives of these interviewees are expressed in the following quotations:

It should remain a federal scheme... There's a lot of advice about it becoming a provincial issue, surrogacy. However, I don't feel that's right. (surrogacy consultant Leia Swanberg)

I think that for surrogacy we needed a national approach of some kind. National oversight or regulation. But healthcare is provincial... family law is provincial. So that's, like, a challenge I see with regulating surrogacy in Canada... It would just have to be a coordinated approach that the

provinces and the federal government would have to, like, come together over. (academic)

I really think that what the federal government needs to do is something they don't want to do, which is spend money on fixing this, and that means interprovincial health talks... They have to get together with the provincial health ministers, have one of those big conferences every month to discuss how each province wants to regulate assisted reproductive technology in the world where the federal government pulls out, and see if they can be the leaders to say, you know, "Will you all impose safety regulations? Will you all allow for this to thrive in your communities, you know, in a reasonable way that doesn't victimize people, you know, that does it safely without having criminal law powers involved?" And if satisfied that everybody signs on to an agreement and all the legislation gets drafted, then they can pull out and repeal the whole legislation at the time that each province puts forward its legislation and passes it and everybody has good policy in advance. (surrogacy lawyer)

A journalist who writes about surrogacy issues in Canada saw the transfer of power to the provinces and the potential for variation in regulation—or complete lack of regulation—as a major disincentive to federal decriminalization. Ideally, the federal government would lead an effort to coordinate provincial policy as part of the decriminalization process, but, given the track record of interprovincial agreements, this interviewee did not see this as likely to be successful. An academic who opposes decriminalization shared this pessimism and viewed the provincial coordination hurdle as one reason to hold on to the federal criminal law.

A counsellor who works with surrogates and IPs remarked that already the provinces hold the power to regulate most aspects of surrogacy, and already there is variation. Yes, decriminalization would offer new opportunities for inconsistencies, but, really, it would be no more concerning a situation than the current one. A surrogacy lawyer echoed this concern and raised the idea that the reason decriminalization has not occurred is the size of the undertaking of doing so properly, with interprovincial coordination. This interviewee believed that surrogacy is not a big enough priority to justify the federal government tackling it right now:

It's piecemeal right now. Provinces regulate birth registration. They have the power to regulate for the health and safety and licensing and none of them have. Like, it's insane. It's a big mess and it's a huge, huge enterprise and I don't think it's that no one wants to do it. I think it's priorities. It's not a priority because this is not the biggest problem Canadians face today.

Most interviewees agreed that regulation is needed in this area, but these interviewees also acknowledged the constitutional and political challenge this poses. For some interviewees, this challenge was seen as yet another barrier to accessing surrogacy services within Canada.

Regulation is also closely tied to decriminalization in the literature, and scholars have taken note of the challenges Canadian federalism poses to surrogacy regulation (Söderström-Anttila et al., 2016; Cattapan, 2014; Snow, 2012; Cattapan, Gruben, and Cameron, 2018; Nelson, 2013). Recognition of these issues dates back to the Royal Commission (Canada, 1993). However, interviewees situate these concerns in the recent Canadian political context of interprovincial tensions, and frame this regulatory coordination challenge as a barrier to reproductive freedom not yet identified by the literature (personal correspondence, author).

2.3 Limitations

Firstly, this study is limited by its own scope. Access to gestational surrogacy services crosses over with a number of other issue areas, including traditional surrogacy, gamete donation, adoption, and issues associated with assisted reproduction more broadly, all of which fall outside the scope of this project. This study does not consider adoption or other methods of assisted reproduction as substitutes for surrogacy services. Though there are many wonderful ways to become a parent in today's world, this study respects the freedom of IPs to choose how they wish to become parents. It is to increase reproductive freedom that this study seeks options for improving access to surrogacy services.

Another limitation is a dearth of policy options that are inclusive of lower-income surrogates and IPs. There is an assumption in the surrogacy community that both surrogates and IPs are of moderate to high income, and this aligns with what has been observed (Busby and Vun, 2010; personal correspondence, author). Assisted reproduction is very expensive, and this, of course, creates a barrier to the entry of lower-income IPs (Adamson, 2009). One academic interviewee agreed that this presents a challenge to equity, but noted that it is not the role of the surrogate to subsidize the IPs by foregoing compensation (personal correspondence, author). The World Health Organization has recognized this issue and is undertaking to examine the potential roles

of lower-income surrogates and IPs in the surrogacy community, and to determine further policy options to promote equity in this area (Adamson, 2009).

Finally, as has been discussed above, there is a lack of empirical evidence available on the subject of surrogacy in Canada. This, in itself, is a limitation of this study. Surrogacy research that exists has tended to lack large or representative samples, and has often excluded the voices of surrogates and IPs themselves (Yee, Hamalal, and Librach, 2019; Söderström-Anttila et al., 2016; White, 2018b; Rotabi, Bromfield, and Fronek, 2015; Cattapan, Gruben, and Cameron, 2018; Teman, 2008; Fisher and Hoskins, 2013; personal correspondence, author). This study falls into that pattern, including as interviewees only one IP who is also a surrogacy lawyer and only five surrogates, four of whom also work as surrogacy consultants. It is hoped that by speaking also with those in the surrogacy community who work closely with surrogates and IPs every day, the perspectives of surrogates and IPs can be represented in this work. This study brings a new effort to integrate the policy ideas of surrogates and other members of the community into the discussion.

Chapter 3 Policy Analysis

Policy options were drawn from the literature, case studies, and interview findings, as were criteria and measures against which to evaluate policy options. Policies were evaluated against the selected criteria to determine a recommendation.

3.1 Policy Options

Many policy options were initially considered, and most were ultimately excluded from this policy analysis. To narrow the field, the scope of analysis was set to include only policy options which could be pursued by the federal government, and which were projected to substantially improve access to surrogacy services in Canada.⁹ Therefore, policy options that were included in this analysis focus on the criminal law and reimbursement regulations, and Health Canada's ability to take a leadership role on policy coordination.

There are infinite possibilities for systems of payment and reimbursement for surrogacy services, with many variations found throughout the literature, case studies, and interview responses (Petropanagos, Gruben, and Cameron, 2018; personal correspondence, author). This analysis will focus on three policy options which best

⁹ By limiting the scope to federal options, many provincial jurisdiction policies which would likely improve access to surrogacy services were discarded, including public funding for IVF services and/or surrogacy services, changes to family law to facilitate parentage transfer, and billing IPs who are not Canadian residents for the healthcare of their child and/or surrogate. These policies currently vary from province to province, with some provinces having better access to surrogacy services than others (Snow, 2018; Ontario, 2018; Hendry, 2016; Manitoba, 2014; New Brunswick, 2014; personal correspondence, author). Another policy option which was repeatedly identified was the creation of a registry to track surrogacy arrangements in Canada and improve access to information on this issue for researchers, policymakers, surrogates, and IPs (White, 2018b; personal correspondence, author). This was attempted after the initial passage of the AHRA, but the federal government's power to create a registry was struck down by the Supreme Court (Cattapan, Gruben, and Cameron, 2018). It has been suggested that the federal government could instead take a leadership role in encouraging the creation of, and coordinating data from, provincial registries (personal correspondence, author). Improving access to this information would no doubt improve access to surrogacy services as well (personal correspondence, author). However, given that this option does not directly seek to improve access to surrogacy services, and given the jurisdictional concerns, it has been excluded from the policy analysis.

reflect the suggestions of members of the surrogacy community for improving access to surrogacy services in Canada, plus Health Canada's policy proposal.¹⁰

3.1.1 Policy Option #1: Free Market & Guidelines

The only option for decriminalization of payment that is fully within the federal government's power is to repeal the sections of the AHRA which criminalize payment for surrogacy services, payment for arranging surrogacy services (including consultants matching surrogates and IPs), and advertising payment for surrogacy services. Given that this would be a major policy change, it would be appropriate to give one year's warning to the provinces and the surrogacy community before the paid system came into force (personal correspondence, author). Such a significant change should also be accompanied by ongoing monitoring from Health Canada to ensure no unexpected and negative outcomes occur.

In a decriminalized system, the provinces could then choose independently whether and how to regulate paid surrogacy. For example, some provinces may choose a system of maximum payments or maximum gifts, and some may choose to continue to prohibit paid surrogacy, enforced through fines or administrative penalties. Provinces choosing unpaid systems could develop their own systems for reimbursement, perhaps modelled on options explored in this study.

This option requires the federal government to accept the possibility that paid surrogacy will go unregulated in some or all of the country much as it does in California. The federal government would also need to accept the possibility of greatly varied policies from province to province within Canada, as exists in the United States (White, 2018a). This could create interprovincial inequities in access to surrogacy services and could encourage interprovincial reproductive travel.

In order to mitigate these risks, Health Canada should develop a set of guidelines for provincial regulation, drawing on promising practices in the field and consultation with the surrogacy community. Special efforts would need to be made to engage surrogates

¹⁰ No option modelled after the UK reimbursement system is presented, because that system relies on the use of family law, which is under provincial jurisdiction in Canada (Snow, 2018; Petropanagos, Gruben, and Cameron, 2018).

and IPs in the consultation process. Based on interviews conducted for this study, it is expected that this process may lead to a recommendation for a system of maximum payments (personal correspondence, author). Provincial governments would not be bound by Health Canada's recommendations, but the guidelines would give them a starting point from which to regulate. It is hoped that this would encourage provinces to regulate, and would also encourage a greater degree of policy convergence among provinces (Snow, 2012).

3.1.2 Policy Option #2: Interprovincial Agreement

In this option, Health Canada would take the lead on interprovincial talks with the goal of ensuring regulation and maximizing policy convergence within Canada. Health Canada would bring together leaders from all provinces, territories, and Indigenous health authorities and provide information on promising practices in order to facilitate cooperative policymaking in advance of decriminalization. The federal government would only repeal the sections of the AHRA which criminalize payment for surrogacy services, payment for arranging surrogacy services, and advertising payment for surrogacy services once Health Canada was satisfied with the regulatory framework(s) in place. Comparisons could be drawn to the Pan-Canadian Framework on Clean Growth and Climate Change, or to the process for legalizing cannabis use.

For this option, it is assumed that decriminalization of payment for surrogacy services would ultimately be achieved, but it is unclear how long this process would take, or what the decriminalized system would look like. Ideally, this process would result in an agreement to a set of harmonized policies for all of Canada. Realistically, it is expected that there would still be some interprovincial variation in policy, but it is hoped that there would be more coordination than in Policy Option #1.

3.1.3 Policy Option #3: Flexible Reimbursement

Of the infinite possible systems of reimbursement, this policy option attempts to bring together the key features described by interviewees in the surrogacy community that are needed for a system to be truly workable for surrogates and IPs. Those features are:

1. 'Preimbursement' for expenses by IPs. This is perhaps the single most important feature differentiating Policy Option #3 from Policy Option #4. IPs must be allowed to pay for some expenses directly, or to 'preimburse' surrogates for those expenses. For example, if a surrogate needs to fly across the country to meet with the IPs, the IPs could pay for the plane ticket, or could send the surrogate money to purchase the plane ticket, as opposed to the surrogate paying for the plane ticket and then being reimbursed by the IPs. Receipts or records of expenses would still need to be kept, but there would not be a requirement to demonstrate the chronological order of expenses and reimbursements.
2. Guidelines, guidance, and enforcement from Health Canada. In this option, Health Canada would establish a list of reimbursable expenses, such as travel, and a list of non-reimbursable expenses, such as rent. Health Canada would develop an auditing system to check reimbursement records and ensure no surrogates were being compensated beyond reimbursement. In addition to the lists of reimbursable and non-reimbursable expenses, Health Canada would allow for other 'reasonable' expenses to be reimbursed. An official from Health Canada would be available to answer questions and make clarifications regarding what is considered reasonable for members of the surrogacy community.
3. Comprehensive list. The guidelines for reimbursable expenses would be developed in close consultation with members of the surrogacy community. Recent consultations have revealed certain categories to be lacking from the current Health Canada proposed reimbursement system (Policy Option #4), such as provisions for groceries (including groceries for the surrogate's family in the case that IPs request the surrogate follow a special diet during pregnancy) and reimbursement for lost work for any medical or psychological reason during and following pregnancy. An interviewee also noted that reimbursement systems must allow for reasonable reimbursement of expenses for some period of time following the pregnancy, such as counselling for post-partum depression, if needed.

A reimbursement system as described above would be very similar to what is currently occurring in Canada, without regulation or enforcement, and seems to be working well for the surrogacy community. This system would continue to require surrogates to track expenses, and does not remove the threat of criminal sanctions. However, it would provide some clarity and guidance for members of the surrogacy community which would hopefully reduce the anxiety associated with criminalization of payment.

3.1.4 Policy Option #4: Health Canada Proposed Reimbursement

This policy option represents the system proposed by Health Canada in the recent consultation process on the regulation of assisted reproduction. This reimbursement system provides a list of reimbursable expenses, and an opportunity for further expenses to be reimbursed under certain circumstances, if authorized by a doctor (Health Canada, 2017). Consultation with members of the surrogacy community has revealed that this is not a reasonable use of doctors' time, and pursuing doctors to sign off on expenses is not a reasonable use of the time of surrogates, IPs, consultants, or lawyers.

Given the difficulty of obtaining authorization for reimbursements not found on the list, members of the surrogacy community have expressed concerns with certain omissions from the list. Notably, the proposed regulations expressly permit reimbursement for lost wages during pregnancy, but make no express mention of reimbursement for lost wages in the post-partum period. The guidelines also make no mention of food for surrogates during pregnancy, including food for surrogates and their families in the case that IPs request a surrogate abide by a restrictive diet. For example, if IPs request that a surrogate follows a strict kosher diet, and the surrogate agrees, it is not reasonable to ask the surrogate to purchase separate ingredients, cook separate meals, and cook those meals in a separate kitchen from the meals that will be eaten by the rest of the surrogate's family. The surrogate should have the option to purchase and cook kosher meals for the whole family, with any associated expenses reimbursed by the IPs.

The Health Canada proposal lays out a system for auditing of reimbursement records, and does not expressly permit 'preimbursement' (Health Canada, 2017). When asked by email whether preimbursement would be allowed under the proposed system, a Health Canada official responded:

With respect to your question about reimbursement and pre-paying expenses, only a court can ultimately decide whether an action is in contravention of the AHR Act based on the relevant legislation and the totality of a specific factual scenario. However, the Department has published guidance on the matter, in which it is suggested that payment of "anticipated expenses" or an "unexplained allowance" would be seen as violating the prohibition in the AHR Act.

This means that members of the surrogacy community would not be able to preimburse expenses without risking jail time. It follows that most IPs and consultants would seek to avoid that risk, and therefore the costs of surrogacy arrangements would have to be paid by surrogates up front before being reimbursed by IPs. Interviewees have expressed that it is not reasonable for surrogates to be out-of-pocket for these expenses, which may top \$10,000 in a single month, and risk not being reimbursed by IPs in a timely fashion or at all.

Given the concerns detailed above, there is some uncertainty among members of the community about whether Health Canada's proposed regulations would improve access to surrogacy services in Canada or restrict it. It is unclear whether the drawbacks of the proposed system outweigh the benefits provided by clarifying regulations and reducing the associated anxiety over the legality of reimbursements.

3.2 Criteria & Measures for Policy Evaluation

Five criteria have been developed against which to evaluate the four policy options. Informed by the literature, case studies, and interviews, five fundamental objectives for improving access to surrogacy were selected, including three societal objectives and two governmental objectives. As this study is premised on the goal of improving reproductive freedoms, Freedom was selected as the key objective for this policy analysis. Criteria and measures associated with each objective provide increasing clarity around how each policy option is scored in the policy analysis. For some objectives, the distinction between objective, criterion, and measure is subtle, while for others this distinction is important. Objectives, criteria, and measures are presented in Table 3.

Due to the qualitative nature of these measures, policy options will be ranked using a High / Medium / Low scale. Since four options are being considered, a High / High Medium / Medium Low / Low (H/HM/ML/L) scale is used. Since the two governmental objectives aim to minimize issues, a High ranking will indicate a high level of minimization. In other words, the higher the ranking, the better the policy option.

A policy matrix was used to conduct the policy analysis, comparing the four policy options against the five measures, and then against one another. Table 4 is a

policy matrix using the H/HM/ML/L rankings, and Table 5 converts those ranking into numeric scores. For most of the measures, a score of 4 is equivalent to a High ranking and a score of 1 is equivalent to a Low ranking. For the measure of the key objective, scores were double weighted,¹¹ reflecting the importance of the key objective.

3.2.1 Evaluating Policy Options – Freedom

There is acceptance in the literature that systems of paid surrogacy reduce barriers to participation by compensating surrogates for the effect that pregnancy has on their lives (Lozanski, 2015; Busby and White, 2018). Case studies demonstrate that access to surrogacy services, measured by number of surrogacy cycles per capita and surrogacy cycles as a proportion of total IVF cycles, is greater in jurisdictions with fewer restrictions on the actions of surrogate, IPs, and consultants. Specifically, in California, where payment for surrogacy services is legal, there is much greater access to surrogacy services than in Canada or the UK (World Bank, 2019; CFAS, 2019; California, 2016; White, 2018a; HFEA, 2011; Surrogacy UK, 2015; author's calculations). These findings were confirmed by interviewees in the Canadian surrogacy community, who also noted the anxiety induced by criminalization and the unpaid labour of tracking expenses for reimbursement as barriers to accessing surrogacy services in Canada's current unpaid system (personal correspondence, author.)

¹¹ A policy matrix with numeric scoring and no double-weighting can be found in Appendix C for comparison. The matrix without weighting does not lead to a different recommendation, but does cast the non-recommended options differently in comparison to one another, and shows clearly that the difference in the quality of Option #1 and Option #2 is based on governmental concerns rather than societal ones.

Table 3. Objectives, Criteria, and Measures for Policy Analysis

Objective	Criterion	Measure (H/HM/ML/L)
SOCIETAL OBJECTIVES		
Freedom (Key Objective)	Reproductive freedom for IPs and surrogates within Canada ¹²	Projected proportion of willing IPs and surrogates able to participate in surrogacy arrangements within Canada
Security & Protection	Positive psychological and legal outcomes for IPs and surrogates within Canada ¹³	Projected proportion of IPs and surrogates with positive psychological and legal outcomes within Canada
Fairness & Justice	Equitable access to surrogacy services for IPs and surrogates within Canada	Projected equity of access to surrogacy services for IPs and surrogates within Canada, considering income inequities for IPs and interprovincial inequities for both IPs and surrogates
GOVERNMENTAL OBJECTIVES		
Administrative Complexity & Cost	Minimized administrative complexity, and associated costs, to the federal government of Canada	Projected minimization of administrative complexity, and associated costs, to the federal government of Canada (H = less complexity, lower cost)
Intergovernmental Issues	Minimized intergovernmental issues between the federal, provincial, and territorial governments and Indigenous health authorities within Canada ¹⁴	Projected minimization of intergovernmental issues between the federal, provincial, and territorial governments and Indigenous health authorities within Canada (H = fewer intergovernmental issues)

¹² This analysis is limited in scope to surrogacy arrangements within Canada, meaning that the surrogate involved is a Canadian resident and the birth of the child occurs in Canada. In these arrangements, the IPs may or may not be Canadian residents, and the embryo transfer may or may not occur within Canada. Consideration was also given to including outcomes for surrogates in other countries, which we have seen can be affected by Canada's policies. However, if we assume (with support from the literature) that outcomes for surrogates in Canada are as good or better than any other jurisdiction, then we are maximizing positive outcomes for surrogates in all jurisdictions by creating policy that encourages more surrogacy arrangements to take place entirely within Canada (Dar et al., 2015; White, 2018a; Söderström-Anttila et al., 2016; Nelson, 2013).

¹³ Based on existing evidence, there is no reason to believe that any of these policy options would affect medical outcomes for IPs or surrogates, or medical, psychological, or legal outcomes for children born through surrogacy arrangements (Söderström-Anttila et al., 2016).

¹⁴ For simplicity of language, territorial governments and Indigenous health authorities are not referred to throughout this report, but they can be considered to be part of any interprovincial agreement process referenced, and variation among laws in the territories can also be considered when variation between the provinces is referenced.

Table 4. Policy Matrix – H/HM/ML/L Ranking

Measure	Policy Option #1: Free Market & Guidelines	Policy Option #2: Interprovincial Agreement	Policy Option #3: Flexible Reimbursement	Policy Option #4: HC Proposed Reimbursement
Projected proportion of willing IPs and surrogates able to participate in surrogacy arrangements within Canada (H/HM/ML/L)	H	HM	ML	L
Projected proportion of IPs and surrogates with positive psychological and legal outcomes within Canada (H/HM/ML/L)	HM	HM	ML	ML
Projected equity of access to surrogacy services for IPs and surrogates within Canada, considering income inequities for IPs and interprovincial inequities for both IPs and surrogates (H/HM/ML/L)	L	ML	HM	HM
Projected minimization of administrative complexity, and associated costs, to the federal government of Canada (H/HM/ML/L; H = less complexity, less cost)	HM	L	ML	ML
Projected minimization of intergovernmental issues between the federal, provincial, and territorial governments and Indigenous health authorities within Canada (H/HM/ML/L; H = fewer intergovernmental issues)	H	L	H	H

Table 5. Policy Matrix – Numeric Scoring

Measure	Policy Option #1	Policy Option #2	Policy Option #3	Policy Option #4
Projected proportion of willing IPs and surrogates able to participate in surrogacy arrangements within Canada (H/HM/ML/L)	8 (key objective weighted x2)	6 (key objective weighted x2)	4 (key objective weighted x2)	2 (key objective weighted x2)
Projected proportion of IPs and surrogates with positive psychological and legal outcomes within Canada (H/HM/ML/L)	3	3	2	2
Projected equity of access to surrogacy services for IPs and surrogates within Canada, considering income inequities for IPs and interprovincial inequities for both IPs and surrogates (H/HM/ML/L)	1	2	3	3
Scores (Societal Objectives)	12	11	9	7
Projected minimization of administrative complexity, and associated costs, to the federal government of Canada (H/HM/ML/L; H = less complexity, less cost)	3	1	2	2
Projected minimization of intergovernmental issues between the federal, provincial, and territorial governments and Indigenous health authorities within Canada (H/HM/ML/L; H = fewer intergovernmental issues)	4	1	4	4
Scores (Governmental Objectives)	7	2	6	6
TOTAL SCORES	19	13	15	13

Based on findings from the literature, case studies, and interviews, Policy Option #1 is projected to best promote reproductive freedom. A free market should allow for individuals to become surrogates if they wish, without concern for lack of compensation. This should lead to more Canadian residents becoming surrogates, which will allow more IPs to become parents. This system allows for those who wish to participate in paid surrogacy arrangements to do so, without preventing unpaid surrogacy arrangements for those who prefer an 'altruistic' model. Finally, this system removes any need for surrogates to track expenses for reimbursement. Of course, it is acknowledged that some provinces may create regulations which limit these benefits and provide others instead. However, compared to the other policy options, this one allows for the greatest freedom for provinces and individuals to make these choices.

Decriminalization following an interprovincial agreement provides much the same level of freedom, but delays it, perhaps significantly. A flexible reimbursement system provides for greater freedom than the Health Canada proposed reimbursement system, but both of these options are limited by their inclusion of criminal sanctions for payment, and by their requirement for surrogates to track expenses.

3.2.2 Evaluating Policy Options – Security & Protection

Though more research is needed in this area, existing evidence shows that psychological outcomes for surrogates and IPs are positive within both Canada and the US, where paid surrogacy is legal throughout much of the country. There have been very few legal challenges to parenthood in either country. Though negative psychological and legal outcomes do occur in both jurisdictions, these are exceptional cases, and there is no evidence to suggest that payment makes negative outcomes more likely (Busby and Vun, 2010; Söderström-Anttila et al., 2016; Ruiz-Robledillo and Moya-Albiol, 2016; Agnafors, 2014; Teman, 2008). These findings in the literature are supported by the observations of interviewees within the Canadian surrogacy community (personal correspondence, author). Therefore, the psychological and legal outcomes for surrogates and IPs within Canada are not expected to vary greatly among these policy options.

Within a criminalized system, there is the added legal risk of prosecution. As was heard from interviewees, this risk also brings with it a pervasive anxiety (personal

correspondence, author). As such, the policy options which include criminalization and enforcement are expected to lead to poorer legal and psychological outcomes for surrogates and IPs.

3.2.3 Evaluating Policy Options – Fairness & Justice

Drawing from the literature and from consultants' estimates, the case studies show a wide variation in projected costs to IPs for surrogacy services in all studied jurisdictions. There are many factors contributing to this—namely, the share of the cost that is publicly borne. However, it appears that there is greater potential for higher costs within a paid system (Mowbray, 2017; Surrogacy UK, 2019; Sensible Surrogacy, 2019a; Sensible Surrogacy, 2019b; Scherman et al., 2016; Knoche, 2014; Kozicka, 2016; Surrogacy in Canada Online, 2019; HFEA, 2019; White, 2018; Ontario, 2018; Hendry, 2016; Manitoba, 2014; New Brunswick, 2014). It is only logical that, all other things held constant, costs will be higher in a paid system, simply because there is the added cost of paying the surrogate. Interviewees stated that some IPs currently choose to participate in Canadian arrangements over American arrangements for just this reason. It is also found that some Canadians take pride in the 'altruistic' nature of the Canadian system for the reason that it is more accessible to lower-income IPs (personal correspondence, author). As such, the policy options which include decriminalization can be considered less equitable for lower-income IPs seeking to access surrogacy services.

There is ample evidence in the literature of the added burdens to both surrogates and IPs of interjurisdictional travel to facilitate surrogacy arrangements. Reproductive travelling adds expense and inconvenience to the arrangement, and can lead to discontinuity in medical care. If a surrogate must travel to a different jurisdiction to give birth, she may be separated from her family for an extended period, adding stress and subtracting support (Busby and Vun, 2010; Söderström-Anttila et al., 2016; Lozanski, 2015; Ruiz-Robledillo and Moya-Albiol, 2016; Inhorn and Patrizio, 2009). Reproductive travel can also place disproportionate burden on the healthcare systems of one jurisdiction over another. Concerns over the confusion, unfairness, and inconvenience of interjurisdictional policy variation within Canada were also raised by interviewees (personal correspondence, author). A free market with federal guidelines provides no firm protection against interprovincial policy variation, or associated interprovincial inequities in access to surrogacy services. Decriminalization following an interprovincial

agreement attempts to resolve this issue. The two reimbursement options allow for uniformity across Canada regarding payment and reimbursement.

No policy option received a High ranking against this objective, since access to surrogacy services in Canada is inherently inequitable. The high cost for IPs to participate in surrogacy arrangements, regardless of whether surrogates are paid, makes surrogacy less accessible to many lower-income IPs (Adamson, 2009). Canada's federal system, which delegates jurisdiction to the provinces on health policy, family law, and contract law leads to unavoidable interprovincial inequities in access (Snow, 2018).

3.2.4 Evaluating Policy Options – Administrative Complexity & Cost

All of the policy options considered require some amount of heightened up-front administration, and associated cost, and a lower level of ongoing administration. At minimum, all options require an initial gathering, analysis, and dissemination of information by Health Canada, and then an ongoing monitoring effort.

Policy Option #1 requires Health Canada to develop federal guidelines and repeal sections of the AHRA up-front, and then to monitor the effects of the policy going forward. This monitoring would be expected to require the part-time attention of one Health Canada employee.

The two reimbursement options require Health Canada to draft reimbursement regulations up-front, and so are projected to require similar initial administrative effort and cost to Option #1. However, these systems will require ongoing administration and enforcement efforts projected to require the full-time attention of at least one Health Canada employee.

Like the first option, Policy Option #2 requires an eventual change to the AHRA and ongoing monitoring. However, an interprovincial agreement also means a projected greater up-front administrative effort and cost—providing information to provinces and coordinating provincial policymaking summits. The immense cost of hosting such an exercise, including travel, accommodation, and security for delegations from across Canada, is expected to make this the most expensive option, particularly if the value of long-term costs is discounted.

No policy option received a High ranking against this objective (reflecting minimized administrative complexity and associated cost), since all options require a commitment to ongoing investment in governing gestational surrogacy. As such, all options represent an increase in spending on this issue area. This is justified by the clear message from the literature and from interviewees that more federal attention to surrogacy policy is needed (personal correspondence, author; Snow, 2012; Busby and Vun, 2010; White, 2018b).

3.2.5 Evaluating Policy Options – Intergovernmental Issues

Neither the free market nor the reimbursement models require the federal government to engage in a dialogue with the provinces. In comparison, the interprovincial agreement requires sustained engagement with the provinces and requires the federal government to take responsibility for producing an agreement between governments that have not tended to cooperate well in recent months (Seskus, 2018; Wells, 2018). This creates great uncertainty over the viability and value of the interprovincial agreement option.

As has been addressed in the previous measure, there would be a great cost associated with brokering an interprovincial agreement under the best of circumstances. The inclusion of this additional measure, and the much lower ranking for Policy Option #2, reflects the added financial and political cost to the federal government of pursuing such a course of action in this era of interprovincial tensions. It is likely that disagreements between the provinces would draw out the regulatory process and undermine federal efforts to encourage collaborative decision-making toward a uniform framework for Canada. Any province opposed to decriminalization could postpone regulating as a tactic for postponing decriminalization. In the end, the result might be an ‘agreement’ similar to the Pan-Canadian Framework for Clean Growth and Climate Change that is constantly challenged by provinces’ diverging ideas on the issue area (Wells, 2018). Recent interprovincial and provincial-federal grievances around issues such as the Pan-Canadian Framework would require significant political capital to be overcome.

Putting regulations in place can help protect surrogacy participants from negative medical, psychological, or legal outcomes. Multiple pregnancies (twins, triplets, etc.)

present unnecessary medical risks for surrogates and the children they carry. Provinces could choose to mandate single embryo transfers or dual embryo transfers to reduce medical risks, or could require medical counselling about this option (Kapfhamer and Van Voorhis, 2016; Söderström-Anttila et al., 2016; Dar et al., 2015; personal correspondence, author). Provinces could help surrogacy participants avoid further risks by requiring that the parties receive medical, psychological, and legal counselling together and separately. The goals of this counselling would be to develop the relationship between surrogates and IPs, which has been shown to be an important determinant of positive psychological outcomes; to ensure that all participants have full understanding of the arrangement, their rights, and their options; and to help each participant arrive at a place of meaningful consent, or withdrawal from the process (Scherman et al., 2016; Ruiz-Robledillo and Moya-Albiol, 2016; Söderström-Anttila et al., 2016; Dar et al., 2015; personal correspondence, author). Provinces could also regulate consultant practices, data collection and information sharing, parentage transfer processes, payments of hospital bills by international IPs, and mechanisms of payment for surrogacy services, in order to streamline the surrogacy process and further improve access (Snow, 2018; White, 2018b; Busby and White, 2018; Lozanski, 2015; personal correspondence, author).

Despite these benefits of regulation, provinces may also differ in the amount of interest they show in the issue. As has been seen in the literature and in interviews, provinces have varied greatly in the amount of attention given to this policy issue so far (personal correspondence, author; Snow, 2018; White, 2018b; Cattapan, Gruben, and Cameron, 2018). Even if the federal government were to elevate surrogacy's place on the policy agenda, there is no guarantee that the provinces would do the same. This lack of priority could prove an additional challenge to developing a regulatory framework for paid gestational surrogacy.

3.3 Recommendation

After distilling four policy options and five measures from the literature, case studies, and interview findings, the policy options were evaluated against the measures in a policy matrix. Numeric scoring allows for simple interpretation of the results of this exercise, with Policy Option #1, a free market system with federal guidelines, scoring highest. As such, it is recommended that the federal government decriminalize payment

for surrogacy services and accept a free market system across Canada, within which provinces are free to regulate paid surrogacy as they choose. It is further recommended that Health Canada provide guidance to the provincial regulatory process by outlining promising practices and surrogacy community perspectives.

Policy Option #2, decriminalization following an interprovincial agreement, provides similar improvements in access to surrogacy services within Canada, but significant administrative and intergovernmental roadblocks make it a less desirable option. It is possible that a free market system will ultimately lead to a similar outcome (each province doing as it pleases) without the challenges and expense of trying to reach an agreement.

Policy Option #3 and Policy Option #4 represent two versions of the status quo. The flexible reimbursement system is a codification of Canada's current, unregulated system, which works relatively well for all involved. The Health Canada proposed reimbursement system is where Canada may very well be headed. Neither of these options allows for payment of surrogates, both require surrogates to track expenses, and both retain the threat of criminal sanctions that in itself seems to deter surrogates and IPs from participating in surrogacy arrangements. As such, and in comparison to Policy Option #1 and Policy Option #2, these options do not substantially improve access to surrogacy services within Canada. In fact, many interviewees argue that the Health Canada proposed reimbursement system will further restrict access to surrogacy services.

There are few lessons for Canada to learn from California with regard to implementing the recommended policy change, due to the differences in legal contexts between the jurisdictions. In California, paid surrogacy was never outlawed. There, case law was developed over the last three decades in support of paid surrogacy arrangements, and legislation explicitly allowing the practice came into force in 2013. The passage of pro-surrogacy legislation followed from the growing normalization of surrogacy in California, and the demand for law reflecting this evolution. The push for legislation was spearheaded by the activism of surrogacy consultants (Pace Law School Library, 2018; Caballero, 2016; Vorzeimer and Randall, 2013).

Canada does not have the same body of case law to fall back on, and the process of changing an existing criminal law is different from creating legislation to support ongoing practices (Snow, 2018). However, surrogacy is increasingly normalized in Canada, and a movement for decriminalization has begun, led by surrogacy community activists (Motluk, 2018a). These parallels with California law-making provide hope that the Canadian stage is set for change.

Chapter 4 Conclusion

This research advances understanding of surrogacy issues in the Canadian context through examination of case studies and analysis of key informant interviews. Evidence produced in this research demonstrates that decriminalization of payment for surrogacy services is strongly supported in the surrogacy community, and that concerns associated with a paid system are outweighed by the benefits such a system would deliver. It has been recommended that in order to address the problem of a lack of access to surrogacy services within Canada, the federal government should move to decriminalize payments for surrogacy services.

Unlike much of the research that has come before it, this study rests on the policy ideas put forward by members of the surrogacy community, as well as the ideas of academic experts and the case study findings. Data collected in interviews and assembled in case studies provides new evidence of the lack of access to surrogacy services in Canada, and analysis of the issue in the context of the current political climate makes for a new perspective on the recommended solution.

This study will be distributed within the Canadian surrogacy community, including to the leading advocates for decriminalization of payment, MP Anthony Housefather and surrogacy consultant Leia Swanberg. It is hoped that this work will provide another piece of the much-needed evidence on surrogacy in this country, and contribute to better policy-making in the field. Further research is needed to add to our understanding of surrogacy in Canada, specifically on the short-term and long-term psychological outcomes of surrogacy, the details of transnational surrogacy arrangements, and the perspectives of surrogates and IPs themselves (Söderström-Anttila et al., 2016; White, 2018a; White, 2018b; Ruiz-Robledillo and Moya-Albiol, 2016; Adamson, 2009; Cattapan, Gruben, and Cameron, 2018; personal correspondence, author).

There is no consensus on what a decriminalized system should look like, but there is little question that decriminalization should occur. When asked about barriers to decriminalization, interviewees cited the ethical concerns of those outside the surrogacy community, and the low priority of the issue within the federal government. This study aims to give voice to those within the community, and to invite the voices of those seeking to join it, who view the current policy as restricting their reproductive freedoms.

The recommendation to decriminalize payment aligns with the reproductive justice perspective that the state should not create barriers to reproductive freedoms, and that all individuals have the right to pursue parenthood without state-imposed impediments (Luna and Luker, 2013). It has been the aim of this study to investigate the evidence that exists on state-imposed barriers to participation in surrogacy services within Canada. It has been found that, at little expense to the federal government, and with little risk to surrogacy participants, Canada can remove a significant barrier to reproductive freedoms.

Between this study and the future research on surrogacy that is needed, it is hoped that we can address the “health and ethical concerns” that are the justification for criminalization of payment. From there, perhaps we can move the conversation beyond decriminalization to the question of how surrogacy, whether paid or unpaid, should be regulated by our provinces to promote the best possible outcomes for surrogates, IPs, and children. It is time to re-examine the ideas on which the AHRA was built, to govern with the goal of facilitating safe and informed surrogacy arrangements, to allow individuals to make their own choices about their bodies, and to promote equity in family-building across Canada.

References

- Adamson, G. David. "Global cultural and socioeconomic factors that influence access to assisted reproductive technologies." *Women's Health* 5, no. 4 (2009): 351-358.
- Agnafors, Marcus. "The harm argument against surrogacy revisited: two versions not to forget." *Medicine, Health Care and Philosophy* 17 (2014): 357-363.
- Almeling, Rene. *Sex Cells: The Medical Market for Eggs and Sperm*. Berkeley, CA: University of California Press, 2011.
- Busby, Karen, and Delaney Vun. "Revisiting *The Handmaid's Tale*: Feminist Theory Meets Empirical Research on Surrogate Mothers." *Canadian Journal of Family Law* 26, no. 1 (2010): 13-93.
- Busby, Karen, and Pamela White. "Desperately Seeking Surrogates: Thoughts on Canada's Emergence as an International Surrogacy Destination." In *Surrogacy in Canada: Critical Perspectives in Law and Policy*, edited by Vanessa Gruben, Alana Cattapan, and Angela Cameron, 213-243. Toronto: Irwin Law, 2018.
- Caballero, Stephanie M. "Gestational Surrogacy in California." In *Handbook of Gestational Surrogacy*, edited by E. Scott Sills, 296-303. Cambridge University Press, 2016.
- California. "E-4 Population Estimates for Cities, Counties, and the State, 2011-2016 with 2010 Census Benchmark," May 2016. Accessed January 28, 2019. <http://www.dof.ca.gov/forecasting/demographics/Estimates/E-4/2011-20/>
- Canada. "Constitution Acts, 1867 and 1982." January 8, 2019. <https://laws-lois.justice.gc.ca/eng/Const/page-15.html>
- Canada. "LEGISinfo - Private Member's Bill C-404 (42-1)." Accessed November 1, 2018. <http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9863117>.
- Canada. *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies*. Ottawa: Canada Communications Group, 1993.
- Canadian Fertility & Andrology Society (CFAS). "CARTR Annual Reports." Accessed February 6, 2019. <https://cfas.ca/cartr-annual-reports.html>
- Canadian Fertility & Andrology Society (CFAS). *Guidelines for Third Party Reproduction*. 2016. Accessed January 28, 2019. <https://cfas.ca/clinical-practice-guidelines.html>
- Cattapan, Alana. "Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation." *Canadian Journal of Law and Society* 29, no. 3 (2014): 361-379.

- Cattapan, Alana, Vanessa Gruben, and Angela Cameron. "Introduction: Regulatory Past and Futures." In *Surrogacy in Canada: Critical Perspectives in Law and Policy*, edited by Vanessa Gruben, Alana Cattapan, and Angela Cameron, 1-28. Toronto: Irwin Law, 2018.
- CBC News. "International Surrogacy Is Problematic and Exploits Women, Legal Expert Says," January 28, 2015. <https://www.cbc.ca/news/canada/british-columbia/avoid-international-surrogacy-says-expert-in-wake-of-b-c-couple-s-fight-for-twins-1.2934746>.
- Centers for Disease Control and Prevention (CDC). *2016 Assisted Reproductive Technology National Summary Report*. Atlanta: 2018. Accessed February 7, 2019. <https://www.cdc.gov/art/artdata/index.html>
- Centre for Surrogate Parenting. "Become a Parent." Accessed January 28, 2019. https://www.creatingfamilies.com/parents/become-a-parent/?gclid=CjwKCAiA99vhBRBnEiwAwpk-uLQmpvFh9zu3aFWeHVkqntJ_Wv-NSVv_JAIEIwZcNVBXuNtGU1EfdBoCfMgQAvD_BwE&gclid=CjwKCAiA99vhBRBnEiwAwpk-uLQmpvFh9zu3aFWeHVkqntJ_Wv-NSVv_JAIEIwZcNVBXuNtGU1EfdBoCfMgQAvD_BwE
- Chambers, Georgina M., Elizabeth A. Sullivan, Osamu Ishihara, Michael G. Chapman, and G. David Adamson. "The economic impact of assisted reproductive technology: a review of selected developed countries." *Fertility and Sterility* 91, no. 6 (2009): 2281-2294.
- Circle Surrogacy. "Becoming a Parent: The Circle Surrogacy Process." Accessed January 28, 2019. <https://www.circlesurrogacy.com/parents/how-it-works>
- Daniluk, J. C., and E. Koert. "Childless Canadian men's and women's childbearing intentions, attitudes towards and willingness to use assisted human reproduction." *Human Reproduction* 27, no. 8 (2012): 2405-2412.
- Dar, Shir, Tal Lazer, Sonja Swanson, Jan Silverman, C. Wasser, Sergey I. Moskovtsev, Agata Sojecki, and Clifford L. Librach. "Assisted Reproduction Involving Gestational Surrogacy: An Analysis of the Medical, Psychosocial and Legal Issues: Experience from a Large Surrogacy Program." *Human Reproduction* 30, no. 2 (February 1, 2015): 345–52. <https://doi.org/10.1093/humrep/deu333>.
- Deckha, Maneesha. "Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding." *McGill Law Journal* 61, no. 1 (2015): 31-86.
- Fisher, Ann M., and Marie L. Hoskins. "A Good Surrogate: The Experiences of Women Who Are Gestational Surrogates in Canada." *Canadian Journal of Counselling and Psychotherapy* 47, no. 4 (2013): 500-518.
- Greenaway, Norma. "Paying surrogate mothers OK -- poll: Gov't survey finds public more liberal-minded than MPs." *Edmonton Journal*, August 17, 2002.

- Harris, Kathleen. "Liberals Pitch New Rules on Payments for Surrogates, Sperm Donors," October 26, 2018a. <https://www.cbc.ca/news/politics/assisted-reproduction-surrogate-sperm-1.4879572>.
- Harris, Sophia. "Surveys asking if men are superior, whether gays deserve equal rights spark a research rethink," June 21, 2018b. <https://www.cbc.ca/news/business/aeroplan-air-miles-offensive-survey-questions-market-research-mria-1.4714593>
- Health Canada. "Prohibitions Related to Surrogacy," July 10, 2013. <https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-related-surrogacy.html>.
- Health Canada. "Toward a Strengthened Assisted Human Reproduction Act: A Consultation with Canadians on Key Policy Proposals," July 11, 2017. <https://www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction/document.html>
- Hendry, Leah. "Price Tag Too High? IVF Treatments Drop Dramatically in 6 Months since Quebec Funding Cut," May 12, 2016. <https://www.cbc.ca/news/canada/montreal/ivf-quebec-funding-1.3577865>.
- Human Fertilisation & Embryology Authority (HFEA). *Fertility treatment in 2011: trends and figures*. 2011. Accessed January 28, 2019. <https://www.hfea.gov.uk/about-us/publications/research-and-data/>
- Human Fertilisation & Embryology Authority (HFEA). *Code of Practice 9th Edition*. 2018. Accessed January 28, 2019. <https://www.hfea.gov.uk/about-us/news-and-press-releases/2019-news-and-press-releases/new-version-of-the-code-of-practice-has-been-launched/>
- Human Fertilisation & Embryology Authority (HFEA). "Costs and funding." Accessed January 28, 2019. <https://www.hfea.gov.uk/treatments/explore-all-treatments/costs-and-funding/>
- Inhorn, Marcia C., and Pasquale Patrizio. "Rethinking reproductive 'tourism' as reproductive 'exile'." *Fertility and Sterility* 92, no. 3 (2009): 904-906.
- Kapfhamer, Joshua, and Bradley Van Voorhis. "Gestational surrogacy: a call for safer practice." *Fertility and Sterility* 106, no. 2 (2016): 270-271.
- Kirby, Jeffrey. "Transnational Gestational Surrogacy: Does It Have to Be Exploitative?" *The American Journal of Bioethics* 14, no. 5 (May 4, 2014): 24–32. <https://doi.org/10.1080/15265161.2014.892169>.
- Knoche, Jonathan W. "Health concerns and ethical considerations regarding international surrogacy." *International Journal of Gynecology and Obstetrics* 126 (2014): 183-186.

- Kozicka, Patricia. "Surrogacy in Canada: What you need to know," August 14, 2016. Accessed January 28, 2019. <https://globalnews.ca/news/2879259/surrogacy-in-canada-what-you-need-to-know/>
- Lavoie, Kévin, and Isabel Côté. "Navigating in Murky Waters: Legal Issues Arising from a Lack of Surrogacy Regulation in Quebec." In *Surrogacy in Canada: Critical Perspectives in Law and Policy*, edited by Vanessa Gruben, Alana Cattapan, and Angela Cameron, 81-111. Toronto: Irwin Law, 2018.
- Levine, Aaron D., Sheree L. Boulet, Roberta M. Berry, Denise J. Jamieson, Hillary B. Alberta-Sherer, and Dmitry M. Kissin. "Assessing the use of assisted reproductive technology in the United States by non-United States residents." *Fertility and Sterility* 108, no. 5 (2017): 815-821.
- Lozanski, Kristin. "Transnational Surrogacy: Canada's Contradictions." *Social Science & Medicine* 124 (January 2015): 383–90. <https://doi.org/10.1016/j.socscimed.2014.10.003>.
- Manitoba. "FAQ's About the Fertility Treatment Tax Credit," July 15, 2014. <https://www.gov.mb.ca/finance/>.
- Mathews, Joe. "California's Population to Hit 40 Million — and about to Fall – Orange County Register," July 15, 2018. <https://www.ocregister.com/2018/07/15/californias-population-to-hit-40-million-and-about-to-fall/>.
- Millbank, Jenni. "Rethinking 'Commercial' Surrogacy in Australia." *Bioethical Inquiry* 12 (2015): 477-490.
- Motluk, Alison. "After Pleading Guilty for Paying Surrogates, Business Is Booming for This Fertility Matchmaker," February 28, 2016. <https://www.theglobeandmail.com/life/health-and-fitness/health/business-is-booming-for-fertility-matchmaker-leia-swanberg/article28930242/>.
- Motluk, Alison. "Fertility Advocates Protest Criminal Sanctions in Assisted Reproduction Act." *CMAJ: Canadian Medical Association Journal*, January 15, 2018a.
- Motluk, Alison. "How Canada Became an International Surrogacy Destination," October 5, 2018b. <https://www.theglobeandmail.com/opinion/article-how-canada-became-an-international-surrogacy-destination/>.
- Mowbray, Nicole. "To Have and to Hold: The Rise of Surrogacy in Britain," September 27, 2017. Accessed January 28, 2019. <https://www.vogue.co.uk/article/surrogacy-in-the-uk>
- Nelson, Erin. "Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy." *Journal of Law, Medicine & Ethics* Spring (2013): 240-253.

- New Brunswick. "Infertility Treatment Fund Announced," July 15, 2014.
https://www2.gnb.ca/content/gnb/en/news/news_release.2014.07.0857.html.
- Office of National Statistics. "Estimates of the population for the UK, England and Wales, Scotland and Northern Ireland," June 28, 2018. Accessed February 22, 2019.
<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/populationestimatesforukenglandandwalesscotlandandnorthernireland>
- Ontario. "Get Fertility Treatments." Accessed November 1, 2018.
<https://www.ontario.ca/page/get-fertility-treatments>.
- Pace Law School Library. "Student Project: Surrogacy Research Guide: California," December 14, 2018. Accessed April 4, 2019.
<http://libraryguides.law.pace.edu/c.php?g=452971&p=3156883>
- Pedwell, Terry. "Ottawa Proposes Partial Easing of Sperm Donation, New Surrogacy Regulations," October 26, 2018. <https://www.theglobeandmail.com/life/article-ottawa-proposes-partial-easing-of-sperm-donation-surrogacy/>.
- Petropanagos, Angel, Vanessa Gruben, and Angela Cameron. "Should Canada Implement a Flat-Rate Reimbursement Model for Surrogacy Arrangements? Legal and Ethical Recommendations for a Revised Approach to Reimbursement." In *Surrogacy in Canada: Critical Perspectives in Law and Policy*, edited by Vanessa Gruben, Alana Cattapan, and Angela Cameron, 155-183. Toronto: Irwin Law, 2018.
- The Practice Committee of the American Society for Reproductive Medicine and the Practice Committee for the Society for Assisted Reproductive Technology (ASRM). "Recommendations for practice using gestational carriers: an ASRM Practice Committee guideline." *Fertility and Sterility* 97, no. 6 (2012): 1301-1308.
- Robertson, John A. "Legal Change and Stigma in Surrogacy and Abortion." *Journal of Law, Medicine & Ethics* Summer (2015): 192-195.
- Rotabi, Karen S., Nicole F. Bromfield, and Patricia Fronek. "International private law to regulate commercial global surrogacy practices: Just what are social work's practical policy recommendations?" *International Social Work* 58, no. 4 (2015): 575-581.
- Ruiz-Robledillo, Nicolás, and Luis Moya-Albiol. "Gestational surrogacy: Psychosocial aspects." *Psychosocial Intervention* 25 (2016): 187-193.
- Ruparelia, Rakhi. "Goving Away the 'Gift of Life': Surrogacy and the Canadian Assisted Human Reproduction Act." *Canadian Journal of Family Law* 23, no. 1 (2007): 11-54.

- Sachdev, Chavi. "Once the Go-to Place for Surrogacy, India Tightens Control over Its Baby Industry." *Public Radio International*, July 4, 2018. <https://www.pri.org/stories/2018-07-04/once-go-place-surrogacy-india-tightens-control-over-its-baby-industry>.
- Scherman, Rhoda, Gabriela Misca, Karen Rotabi, and Peter Selman. "Global Commercial Surrogacy and International Adoption: Parallels and Differences." *Adoption & Fostering* 40, no. 1 (2016): 20–35. <https://doi.org/10.1177/0308575915626376>.
- Sensible Surrogacy. "Surrogacy in Canada." Accessed January 28, 2019a. <https://www.sensiblesurrogacy.com/surrogacy-in-canada/>
- Sensible Surrogacy. "Surrogacy in the UK." Accessed January 28, 2019b. <https://www.sensiblesurrogacy.com/surrogacy-uk/>
- Seskus, Tony. "5 things to know about the Trans Mountain pipeline battle," April 9, 2018. Accessed January 28, 2019. <https://www.cbc.ca/news/business/trans-mountain-pipeline-1.4610770>
- Snow, Dave. "Assisted Reproduction Policy in Federal States: What Canada Should Learn from Australia." *University of Calgary School of Public Policy SPP Research Papers* 5, no. 12 (2012).
- Snow, Dave. "Criminalising commercial surrogacy in Canada and Australia: the political construction of 'national consensus'." *Australian Journal of Political Science* 51, no. 1 (2016): 1-16.
- Snow, Dave. *Assisted reproduction policy in Canada: framing, federalism, and failure*. Toronto: University of Toronto Press, 2018.
- Söderström-Anttila, Viveca, Ulla-Britt Wennerholm, Anne Loft, Anja Pinborg, Kristiina Aittomäki, Liv Bente Romundstad, and Christina Bergh. "Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review." *Human Reproduction Update* 22, no. 2 (2016): 260-276.
- Statistics Canada. "The Daily — Canada's Population Estimates, Second Quarter 2018," September 27, 2018. <https://www150.statcan.gc.ca/n1/daily-quotidien/180927/dq180927j-eng.htm>.
- Stefansdottir, Astridur. "Is 'surrogacy' an infertility treatment?" *Clinical Ethics* 13, no. 2 (2018): 75-81.
- SurrogacyAdvisor.com. "Surrogacy agency ratings and reviews." Accessed January 28, 2019. <http://surrogacyadvisor.com/directory/agencyratings/>
- Surrogacy in Canada Online. "Cost of Surrogacy." Accessed January 28, 2019. <https://surrogacy.ca/intended-parents/cost-of-surrogacy.html>

- Surrogacy UK. "FAQs." Accessed January 28, 2019. <https://surrogacyuk.org/faqs/>
- Surrogacy UK. "Surrogacy in the UK: Myth busting and reform: Report of the Surrogacy UK Working Group on Surrogacy Law Reform," November 2015. Accessed January 28, 2019. <https://www.kent.ac.uk/law/research/news/?view=1127>
- Surrogate.com. "California Surrogacy Professionals." Accessed January 28, 2019. <https://surrogate.com/surrogacy-by-state/california-surrogacy/california-surrogacy-agencies/>
- Teman, Elly. "The social construction of surrogacy research: An anthropological critique of the psychosocial scholarship on surrogate motherhood." *Social Science & Medicine* 67 (2008): 1104-1112.
- United Kingdom Department of Health & Social Care (UKDHSC). *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales*. London: 2018. Accessed January 28, 2019. <https://www.gov.uk/government/publications/having-a-child-through-surrogacy>
- United Nations. "Universal Declaration of Human Rights," December 10, 1948. <http://www.un.org/en/universal-declaration-human-rights/>
- van Zyl, Liezl, and Walker, Ruth. "Surrogacy, Compensation, and Legal Parentage: Against the Adoption Model." *Bioethical Inquiry* 12 (2015): 383-387.
- Vorzeimer, Andrew, and David Randall. "California Passes the Most Progressive Surrogacy Bill in the World," January 25, 2013. Accessed April 4, 2019. <http://www.path2parenthood.org/blog/california-passes-the-most-progressive-surrogacy-bill-in-the-world>
- Wells, Paul. "A carbon tax? Just try them," November 7, 2018. Accessed January 28, 2019. <https://www.macleans.ca/politics/ottawa/a-carbon-tax-just-try-them/>
- White, Pamela M. "Commercialization, Altruism, Clinical Practice: Seeking Explanation for Similarities and Differences in Californian and Canadian Gestational Surrogacy Outcomes." *Women's Health Issues* 28, no. 3 (May 2018a): 239–50. <https://doi.org/10.1016/j.whi.2018.01.004>.
- White, Pamela M. "'Why We Don't Know What We Don't Know' About Canada's Surrogacy Practices and Outcomes." In *Surrogacy in Canada: Critical Perspectives in Law and Policy*, edited by Vanessa Gruben, Alana Cattapan, and Angela Cameron, 51-80. Toronto: Irwin Law, 2018b.
- World Bank. "Population, total." Accessed January 28, 2019. <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=CA-GB>

World Economic Forum (WEF). *The Global Gender Gap Report*. Geneva: 2018.
Accessed January 28, 2019. <https://www.weforum.org/reports/the-global-gender-gap-report-2018>

Yee, Samantha, Shilini Hemalal, and Clifford L. Librach. "'Not my child to give away': A qualitative analysis of gestational surrogates' experiences." *Women and Birth* (2019). Accessed April 4, 2016. <https://doi.org/10.1016/j.wombi.2019.02.003>

Appendix A. The Surrogacy Process

Dar et al.'s 2015 article describes the surrogacy process followed by the Create Fertility Centre (CFC) in Toronto, a clinic associated with the University of Toronto. CFC facilitated 333 surrogacy cycles using fresh (not frozen) eggs from between 1998-2012, and is the largest surrogacy program in Canada (Dar et al., 2015). Dar et al.'s report on CFC's process and results represents the largest cohort study of clinical gestational surrogacy to date (Söderström-Anttila et al., 2016).

At CFC, it is the responsibility of the intended parents to recruit a surrogate. About one quarter of the time, the surrogate is found by the intended parents through personal connections, but usually it is through a consultancy. As dictated by CFC's ethics board criteria, surrogates must be between 21-45 years of age and must have had at least one previous uncomplicated pregnancy resulting in the birth of a healthy child (Dar et al., 2015).

Surrogates undergo thorough medical and psychological screening, and receive detailed medical and psychological counselling to review all of the risks involved in surrogacy without the intended parents present. If the surrogate has a partner, he or she attends the counselling as well, and must indicate his or her support of the arrangement. If the surrogate chooses to continue, surrogates and intended parents then receive further counselling together. Intended parents are given the opportunity for private counselling as well. Continued support is offered throughout the process, and surrogates and intended parents are equipped with strategies for communicating. Decisions are made regarding the number of embryos to be transferred, conditions for terminating the pregnancy, process for transferring the child to the intended parents after delivery, and other matters (Dar et al., 2015).

While some promising practices recommend separate physicians for the surrogate and the intended parents, CFC recommends one shared physician to eliminate communication and coordination issues (Dar et al., 2015).

CFC requires the surrogate and intended parents to retain independent legal counsel, and to sign a contract. Among other things, the contract details any reimbursements for expenses that the surrogate will receive. Generally, lawyers are

selected who specialize in surrogacy cases, and legal fees for both lawyers are paid by the intended parents. The surrogate waives medical privilege and agrees to keep the intended parents informed throughout the process. The intended parents designate a guardian to take custody of the child should they be unable to (Dar et al., 2015).

A letter is also written to the hospital where the child will be delivered, giving details of the arrangement. The letter informs the hospital that the surrogate is to make all decisions regarding her own care, and regarding care for the child until the umbilical cord is cut, after which the intended parents will make medical decisions on behalf of the child. The surrogate designates a third party to make decisions in case the surrogate is unable to make decisions for herself or himself and for the child. The letter is signed by the surrogate and the intended parents (Dar et al., 2015).

Once these preparations are complete, the surrogate synchronizes her menstrual cycle with that of the intended mother or egg donor using birth control pills and undergoes other medical preparations for in vitro fertilization. Eggs are retrieved from the intended mother or donor, fertilized using IVF with the sperm of the intended father or donor, and transferred to the surrogate's uterus (Dar et al., 2015).

In the third trimester, the surrogate and intended parents visit the hospital to deliver their letter and discuss any issues with a hospital social worker. Depending on which province they are from, the intended parents may require additional legal documentation in order to be recognized as the child's parents at the time of birth. CFC encourages intended mothers to breastfeed their children to improve bonding, and refers mothers to lactation specialists to induce lactation. Surrogates and intended parents are given the option to continue counselling with CFC after the child's birth (Dar et al., 2015).

Leia Swanberg, head of Canada's largest fertility consultancy, confirms that in her experience, the CFC process described by Dar et al. (2015) is typical of clinics across Canada (Leia Swanberg, interviewed by Emma Lee on November 29, 2018).

CFC has gone from supporting fewer than ten surrogacy cycles per year in the late 1990s to more than fifty in 2012. About half of the cycles used donor eggs, and 41% of the cycles resulted in live births. Seventy per cent of the birth were singletons, and 30% were multiple births, for a total of 175 children born (Dar et al., 2015).

Ten per cent of the cycles which resulted in live births experienced pregnancy or delivery complications, including one case in which a hysterectomy was necessary following a twin birth. The relatively low rate of complications is likely due to the selection of surrogates with previous uncomplicated pregnancies. None of the cycles resulted in the death of a surrogate. (Dar et al., 2015).

The greatest medical risk associated with surrogacy arrangements is the increased risk to the surrogate and children associated with multiple pregnancies. Multiple pregnancies increase risks of complications during pregnancy and delivery, and risks of pre-term delivery (Söderström-Anttila et al., 2016). For example, at Create Fertility Clinic in Toronto between 1998-2012, 45% of surrogate twin pregnancies resulted in premature births (delivery before 37 weeks), compared to 6% of surrogate singleton pregnancies. Both surrogate triplet pregnancies resulted in premature births. All six of the triplets and about half of the twins were born with low birth weights (less than 2.5 kg), compared to 12% of singletons (Dar et al., 2015; author's calculations). A promising practice growing in popularity to address this concern is elective single embryo transfer (Söderström-Anttila et al., 2016).

Even in paid surrogacy arrangements, many studies have found that altruistic concern for the intended parents is the primary reported motive for becoming a surrogate. Of course, in paid arrangements, financial incentive is also a motive, but few surrogates report it to be the primary factor (Söderström-Anttila et al., 2016).

The international pregnancy rate per embryo transfer is 19-33% in surrogacy arrangements, and 30-70% of arrangements ultimately result in the birth of a child (Söderström-Anttila et al., 2016).

Appendix B. Sample Interview Questions

Do you think that there are any issues with the way gestational surrogacy is handled in Canada?

Do we have a mismatch of supply and demand for surrogacy services in Canada?

- What evidence do we have of this?
- Can you suggest any policy options for addressing this?

Do we face any other barriers do we face to participating in surrogacy arrangements in Canada?

- What evidence do we have of this?
- Can you suggest any policy options for addressing this?

As you probably know, the Assisted Human Reproduction Act (AHRA) is the key piece of legislation governing surrogacy arrangements in Canada. What are your thoughts on the AHRA?

- Is the Act well-enforced?
- Do you think that paid gestational surrogacy should be decriminalized?
- What are the barriers to decriminalization?
- If paid surrogacy were to be decriminalized, how do you envision a system of payments for surrogacy services?
- If paid surrogacy were to be decriminalized, do you think this would lead to exploitation of Canadian surrogates?
- If paid surrogacy were to be decriminalized, do you think this would pose any issues for lower-income intended parents?
- If paid surrogacy were to be decriminalized, provinces would have almost total freedom to regulate this area. Do you think this would present any issues?
- Do you think paid surrogacy should be regulated differently than unpaid surrogacy?

In your opinion, how do Canada's outcomes for intended parents and surrogates compare to other jurisdictions?

- Can you suggest examples of other jurisdictions that approach this issue in a better way than Canada currently does?
- Do you see any issue with Canadian intended parents entering into arrangements with surrogates in other countries?
- Do you see any issue with intended parents from other countries entering into arrangements with Canadian surrogates?

Do you think that further regulating surrogacy—for example, as proposed by Health Canada—would improve access to surrogacy services in Canada?

Do you think that there are any other issues with the way gestational surrogacy is handled in Canada?

- Do you have any other suggestions for improving Canada's policies governing surrogacy arrangements?
- Do you have any suggestions for further resources that I should consult, or interviews I should conduct?

Appendix C. Policy Matrix Without Double-Weighting

Table 6. Policy Matrix – Numeric Scoring, No Double-Weighting

Measure	Policy Option #1	Policy Option #2	Policy Option #3	Policy Option #4
Projected proportion of willing IPs and surrogates able to participate in surrogacy arrangements within Canada (H/HM/ML/L)	4	3	2	1
Projected proportion of IPs and surrogates with positive psychological and legal outcomes within Canada (H/HM/ML/L)	3	3	2	2
Projected equity of access to surrogacy services for IPs and surrogates within Canada, considering income inequities for IPs and interprovincial inequities for both IPs and surrogates (H/HM/ML/L)	1	2	3	3
Scores (Societal Objectives)	8	8	7	6
Projected minimization of administrative complexity, and associated costs, to the federal government of Canada (H/HM/ML/L; H = less complexity, less cost)	3	1	2	2
Projected minimization of intergovernmental issues between the federal, provincial, and territorial governments and Indigenous health authorities within Canada (H/HM/ML/L; H = fewer intergovernmental issues)	4	1	4	4
Scores (Governmental Objectives)	7	2	6	6
TOTAL SCORES	15	10	13	12