

**UNDERSTANDING CANADIAN SURROGACY CONSULTANTS' PERSPECTIVES
ON THEIR ROLE AND THE LAW**

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ABSTRACT

This dissertation analyses the empirical data arising out of eight semi-structured interviews with Canadian surrogacy consultants. It provides insight into surrogacy consultants' perspectives and practices, and explores how consultants' first-hand accounts align with the existing narratives about surrogacy consultancies. Ultimately, my participants' voices provide nuance to ongoing debates and discussions. Many first-hand accounts challenge some prevalent criticisms, revealing a strong desire to help surrogates, in particular, as well as practices that can provide valuable support. However, other accounts indicate practices and that may be harmful for surrogates and intended parents, suggesting a need for increased oversight. In addition, this dissertation highlights how consultants understand and implement the law. Participants shared multiple justifications for their businesses' legality, based on their understandings of the law. Their discussions suggest that Canada's prohibition of paid surrogacy intermediaries is generally ineffective, in that the current legal regime fails to deter undesirable activities while simultaneously limiting access to potentially beneficial services. These findings cumulatively support calls for the regulation of surrogacy consultancies.

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INTRODUCTION

“Nobody wants to work in a grey zone. Hair stylists have a license! Taxi drivers have a license! I’m helping people have babies and I don’t have anything, right? You’re just in a grey zone.”

- Amy,¹ Canadian surrogacy consultant

“I think right now agencies are just skirting around the wording of the law in order to operate. And I guess we can continue doing that? Um, but there is an extremely rare opportunity for [the government] to, say, use agencies to their benefit.”

- Aja, Canadian surrogacy consultant

During the first semester of my PhD, my fantastic supervisor, Vanessa Gruben, forwarded me a then-recent article by Alison Motluk, entitled “We Should Regulate Agencies”.² Vanessa’s email included a short note that simply said “let’s talk about this”. Motluk’s pithy article called for renewed attention to be paid to surrogacy agencies, which she defined as the for-profit entities that connect surrogates with intended parents.³ Despite the *Assisted Human*

¹ Pseudonyms are used throughout this dissertation to protect participants’ confidentiality.

² Motluk, Alison, “We should regulate agencies” *HeyReprotech Newsletter* (5 November 2019), online: HeyReprotech <https://heyreprotech.substack.com/p/we-should-regulate-agencies> [Motluk, “We should regulate agencies”].

³ Motluk’s article also calls attention to egg donation agencies, which liaise between egg donors and the egg recipients. Egg donation, while fascinating, is beyond the scope of this thesis.

Reproduction Act (AHRA) prohibiting payment for arranging surrogacies,⁴ these agencies operate openly across Canada. Motluk noted that no one was really paying much attention to what these agencies were doing, nor was the law responding. “We need to keep talking about agencies”, she wrote.⁵

In conducting some follow-up research, I found there was surprisingly little written about Canadian surrogacy agencies at the time.⁶ While some believed agencies could be helpful,⁷ most outlooks were decidedly negative – in particular, there were concerns about how these agencies might exploit both surrogates and intended parents.⁸ At the time, there was limited empirical research to substantiate either position. My path forward for the next ~~four~~ six years slowly became clear.⁹ I was going to answer Motluk’s call to pay attention to surrogacy agencies. I came up with a proposal to talk to all the Canadian agents who were willing to participate. I wanted to learn more about their perspectives, what they were doing, and how they interpreted and implemented a law that seemingly prohibited their business. The resulting work is before you, now.

Before launching into Chapter 1, I would like to provide some clarifications about the language I will be using throughout my dissertation. First, surrogacy is a method of assisted reproduction where a woman agrees to bear and birth a child for another person or persons (the

⁴ *Assisted Human Reproduction Act*, SC 2004, c 2, s 6(2), 6(3) [AHRA].

⁵ Motluk, “We should regulate agencies” *supra* note 2.

⁶ As some examples, see: Samantha Yee et al, ““Not my child to give away”: A qualitative analysis of gestational surrogates’ experiences” (2019) 936 WOMB 1; Erin Nelson, *Law, Policy and Reproductive Autonomy* (Oxford: Hart Publishing, 2013); Karen Busby & Delaney Vun, “Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers” (2010) 26:1 Can J Fam L 13 at 54; Maneesha Deckha, “Situating Canada’s Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding” (2015) 61:1 McGill LJ 31. Several new scholarly articles and reports have been written since 2019.

⁷ Yee, *supra* note 6 at 6-8.

⁸ *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Minister of Government Services Canada, 1993) at 689 [*Proceed with Care*]; Nelson, *supra* note 6 at 334; Jordan Stirling Davis, “Regulating Surrogacy Consultants Through Value-Based Compliance” (2018) 43:3 J Corp Law 633 at 667; Motluk, “We should regulate agencies” *supra* note 2.

⁹ I was wonderfully lucky to have a beautiful son and take an 18-month maternity leave in the midst of my PhD.

child's intended parent(s)).¹⁰ Surrogacy can be “traditional”, where the surrogate uses her own eggs to conceive the child, or “gestational”, where embryos are created through *in vitro* fertilization (IVF) and implanted into the surrogate's uterus, meaning that the surrogate is not genetically related to the child.¹¹ Individuals who are physically capable of getting pregnant can act as surrogates.¹² In existing research, the majority of surrogates identify as women.¹³ For simplicity, I will primarily use the term woman (and the pronouns she/her) when referring to surrogates. However, I acknowledge that some surrogates may not identify with these terms.¹⁴ In writing this dissertation, I seek to be inclusive and respectful. I include gender non-binary and trans people in my definition of surrogates, while simultaneously acknowledging that the experiences of non-binary and transgender surrogates are unique.¹⁵

I use the phrase “surrogacy journey” to describe the entirety of the surrogacy process, starting from the moment an intended parent or a surrogate decides to pursue surrogacy,

¹⁰ Vanessa Gruben, Alana Cattapan & Angela Cameron, eds, *Surrogacy in Canada: Critical Perspectives in Law and Policy* (Toronto: Irwin Law, 2018) at 1 [Gruben, *Surrogacy in Canada*].

¹¹ *Ibid* at 54.

¹² Nancy Coleman, “Transgender man gives birth to a boy” *CNN* (1 August 2017), online: CNN <<https://www.cnn.com/2017/07/31/health/trans-man-pregnancy-dad-trnd/index.html>>: While not acting as a surrogate, this news article explores the story of a transgender man who gave birth to his son.

¹³ A study by Stefanie Carsley confirms that there have been surrogates who are trans and identify as men. See: Stefanie Carsley, “Reforming Quebec's Surrogacy Laws” (2023) 53:1 *Revue générale de droit* 5 at footnote 208 citing Stefanie Carsley, “Surrogacy Laws in Canada : Intended Parents' Experiences and Perspectives” [unpublished, study in progress].

¹⁴ The term “woman” is complex, and has been the source of considerable debate. See for example: Michelle Goldberg, “What is a Woman? The dispute between radical feminism and transgenderism” *The New Yorker* (4 August 2014), online: The New Yorker <<https://www.newyorker.com/magazine/2014/08/04/woman-2>; <https://time.com/5865581/transphobia-terf-harm/>>; Hugo Greenhalgh “What is a woman? Toxic debate over trans rights engulfs Britain” *Reuters* (19 October 2018), online: Reuters <<https://www.reuters.com/article/us-britain-lgbt-policy-feature-idUSKCN1MT1JY>>.

¹⁵ Shannong Price Minter, “Transgender Family Law” (2018) 56 *Fam Court Rev* 410; Eva Feigerlová et al, “Fertility desires and reproductive needs of transgender people: Challenges and considerations for clinical practice” (2019) 91:1 *Clin Endocrinol (Oxf)* 10; “Reproductive Options for Transgender Individuals” *Yale Medicine*, online: Yale Medicine <<https://www.yalemedicine.org/conditions/transgender-reproductive-options>>; Julie Comptom, “Trans dads tell doctors: ‘You can be a man and have a baby’” *NBC News* (19 May 2019), online: NBC News <<https://www.nbcnews.com/feature/nbc-out/trans-dads-tell-doctors-you-can-be-man-have-baby-n1006906>>. While not focusing on trans surrogates, specifically, these articles discuss the unique issues that arise for transgender people in their family-making journey.

following through to the birth and postpartum experience. This language is often used by surrogates, intended parents and consultants alike. Adopting this language allows me to echo the voices of my participants, and use similar terminology to other scholars doing research in this area.

I would also like to call attention to my use of the term “consultant”. Throughout this project, I use the term “consultancy” to denote a for-profit business that facilitates matching between intended parents and surrogates.¹⁶ A “consultant” is correspondingly the individual representative of the consultancy.¹⁷ While facilitating matching is a necessary component of my definition of consultancies, these organizations generally offer other services aimed at helping surrogates and intended parents navigate their surrogacy journeys. These services may include: managing surrogates’ reimbursements; coordinating medical and legal appointments; providing education about the surrogacy process; and, providing general support.¹⁸

I selected this specific language because it was used by most participants whom I sought to recruit.¹⁹ At times throughout this dissertation, I also use the word “intermediary”, synonymously. This terminology is rooted in the language used by the *Assisted Human Reproduction Act* (AHRA).²⁰ Notably, other scholars, stakeholders, and consultants may use

¹⁶ An explanation for why these language choices were made can be found in Chapter 1, Part III.

¹⁷ Consultants can be business owners, as well as employees who work with the surrogates and the intended parents

¹⁸ These services were all reported in my data. These additional services are also advertised on various consultancy websites. See for example: Canadian Fertility Consulting, “Becoming a Parent Through Surrogacy” (accessed 26 August 2025) online: <<https://fertilityconsultants.ca/future-parents-surrogates/>> ; Canadian Surrogacy Options, “Services” (accessed 26 August 2025) online: Canadian Surrogacy Options <<https://canadiansurrogacyoptions.com/services/>>.

¹⁹ I based this assumption off the consultancy names and the consultancy descriptions that were posted on their websites. An extended discussion of my choice can be found in Chapter 1, Part III.

²⁰ AHRA *supra* note 4, s 6.

different language to denote the same thing. Other frequently used descriptors include “agencies”, “brokers”, or “programs”.²¹

When I refer to consultants’ “clients”, I mean both surrogates and intended parents. Having a catchall term for the people that consultants work with helped to streamline my writing and avoid run-on and repetitive sentences.

For this dissertation, I interviewed 8 surrogacy consultants about the services they provide for their clients, and their views on Canadian surrogacy laws. In doing so, I sought to answer two main questions. First, I wanted to understand how consultants’ perspectives challenged, complicated or confirmed the various narratives about these businesses that were arising in the literature. Second, I wanted to understand how my participants understood and implemented the law. I was curious about how their practices might be shaped by their interpretations. Together, I believed these two inquiries would provide greater insight into consultants’ perspectives; their role in the surrogacy journey; and, how the current laws are working.

This study is the first to conduct qualitative interviews with Canadian surrogacy consultants. As such, it contributes data from new voices in order to generate a fuller understanding of how surrogacy is occurring in Canada. Ultimately, my study provides a more nuanced view of surrogacy consultants and their practices. In some instances, my data confirms the existence of problematic practices, in line with some of the concerns raised in the literature. In particular, my analysis highlights potential tensions arising out of power dynamics, pre-existing vulnerabilities, and the for-profit nature of these businesses. However, much of my data provides a fresh perspective on consultancies. Many participants expressed strong motivations to

²¹ See: *Proceed with Care*, *supra* note 8; Motluk, “We should regulate agencies” *supra* note 2; Surrogacy Canada (SCO), “Surrogacy in Canada Online” (accessed 25 August 2025) online: <<https://surrogacy.ca/>>.

protect and promote surrogates' interests, and tailored their services to this effect. In many places, my data suggests that consultant involvement in matching, education, coordination and advocacy can provide valuable support for the intended parents and surrogates who desire such assistance.

In terms of the law, my data suggests that consultants are interpreting the AHRA in a manner that allows them to self-justify the legality of their services. When paired with the corresponding lack of enforcement, I argue that the AHRA's prohibition of paid intermediaries is unhelpful and ineffective, in that the law is neither deterring prohibited activity nor adequately helping the individuals it purports to protect. Accordingly, I echo other scholars' calls for the legalization and regulation of surrogacy consultancies,²² in order to better promote the benefits associated with intermediaries while simultaneously mitigating the harms that can result from lacking oversight.

a) Overview

I separated this thesis into an introduction, six distinct chapters, and a conclusion. Chapter One provides important context for my research. It outlines the concerns underpinning the legislative scheme, and explores what existing research tells us about surrogacy in Canada. With this background in mind, I expand upon my research objectives and what this thesis contributes to the existing literature.

Chapter Two explores my methodology, theory and research methods. I explain the concept of feminist relational methodology and theory, and discuss how this theoretical

²² Stefanie Carsley, "Surrogacy Agencies in Canada: Intended Parents' Experiences" (2025) 36:2 Can J Fam L 61 at 99-103 [Carsley, "Surrogacy Agencies in Canada"]; Motluk, "We should regulate agencies" *supra* note 2; Nelson, *supra* note 6 at 334.

framework shapes my research and analysis throughout this project. I also discuss the procedures that I used when recruiting, interviewing and analyzing my data, as well as the limitations of my work.

Chapter Three examines the role consultants play in creating relationships between surrogates and intended parents. I present my findings regarding how consultants find surrogates and intended parents, and explore the criteria my participants use to screen individuals into or out of their consultancy programs. Lastly, I discuss how consultants facilitate matches between surrogates and intended parents.

In Chapter Four, I explore the other roles that consultants take on, beyond facilitating matches between surrogates and intended parents. Collectively, I call these other activities “surrogacy management”. I discuss the role that consultants play in coordinating the various steps of the surrogacy process, such as facilitating appointments with lawyers and health care providers. I look at how my participants manage the conflicts that arise between surrogates and intended parents. Finally, I explore how my participants provide support to surrogates and intended parents throughout the surrogacy journey.

In Chapter Five, I explore the finance-related matters that arise in my data. First, I discuss how my participants manage surrogates’ reimbursements, and examine whether these practices are being conducted in accordance with the law. Next, I explore my participants’ fee structures for their consultancy services, including amounts, timing of payment, and my participants’ justifications for these fees.

In Chapter Six, I explore how my participants understand the prohibition against paid intermediaries, as well as the prohibition against advertising intermediary services. My findings demonstrate how consultants are structuring their practices in order to justify the legality of their

services. I also touch on how the AHRA's lacking enforcement may be shaping my participants' perceptions of the law. The Chapter concludes with a discussion of my participants' suggestions for reform, as well as my own outlooks on reform based on the cumulative findings of my project.

CHAPTER 1:

RESEARCH IN CONTEXT – SURROGACY, CONSULTANTS & CANADIAN LAW

Introduction

In this Chapter, I set the groundwork for my empirical research on Canadian surrogacy consultancies. In Part I of this Chapter, I explain the legislative history behind Canada's legal framework. I first discuss the concerns that spurred the prohibition of paid surrogacy and paid surrogacy intermediaries. Next, I outline what the law prohibits, and discuss the developments that have taken place since the AHRA was enacted, including the Supreme Court Reference,²³ the development of Reimbursement Regulations,²⁴ and the general lack of enforcement. I also review some of the calls for reform that have arisen out of discontent with the legislative status quo.

In Part II of this Chapter, I explore the concerns that continue to trouble surrogacy scholars, policy-makers and stakeholders, today. First, I explore the concerns associated with surrogacy, in general. Then I look at the concerns specific to intermediaries.²⁵ Given that many of the concerns surrounding surrogacy also underpin the concerns surrounding surrogacy intermediaries, a thorough understanding of both is required in order to better understand the various narratives about surrogacy consultancies that are prevalent in the literature. In exploring these concerns, I review the current empirical evidence and discuss how this research supports or contraindicates the legislature's original fears. Finally, in Part III of this Chapter, I situate my

²³ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*Re AHRA*].

²⁴ *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193 [Reimbursement Regulations].

²⁵ As part of my analysis throughout my dissertation, I ask whether and how these concerns are manifesting in my data.

own research within this existing literature. I share my research questions, objectives, and what I hope to contribute through this project.

Part I: Canada's Laws on Surrogacy & Intermediaries

a) Legislative History

While the practice of traditional surrogacy dates back to biblical times,²⁶ Canada's legal involvement in the area is relatively recent. Throughout the 1980's, politicians were becoming increasingly concerned with how to respond to newly arising assisted reproduction techniques, such as cloning, "test tube babies", and eugenics.²⁷ At the same time, feminist advocates were raising concerns about how existing techniques, like surrogacy, were negatively impacting women and women's bodies.²⁸ These fears were further propelled by the widespread story of *Re Baby M*, a US case where a traditional surrogate fled the state with the baby after giving birth.²⁹

In response to these concerns, the federal government created the Royal Commission on New Reproductive Technologies in 1989.³⁰ Also known as the Baird Commission, the task force was headed by feminist academics in order to study the social, legal and ethical implications of assisted human reproduction.³¹ In particular, the Commission was concerned about the effects

²⁶ Surrogate.com, "History of Surrogacy – From the Bible to Now" (accessed 26 August 2025) online: <<https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/>>.

²⁷ Stu Marvel, "Laws of Conception: A Queer Genealogy of Canada's Assisted Human Reproduction Act", (2016) 12 FIU L Rev 81 at 87.

²⁸ *Ibid* at 87.

²⁹ *In the Matter of Baby M*, [1988] 109 NJ 396.

³⁰ Trudo Lemmens et al, ed, *Regulating Creation: The Law, Ethics and Policy of Assisted Human Reproduction* (Toronto: U of Toronto Press, 2017) at 27-30.

³¹ *Proceed with Care, supra* note 8 at 1-2; Annette Burfoot, "In-Appropriation - A Critique of Proceed With Care: Final Report of the Royal Commission on New Reproductive Technologies" (1995) 18:4 Women's Studies International Forum 499–506 at 500.

these technologies could have on women and children.³² After undertaking various consultations and deliberations, the Baird Commission made 293 recommendations in a report called *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Proceed with Care).³³ Many of these recommendations were followed in the resulting legislation.³⁴

With respect to surrogacy, the Commission presented quite a negative view of both commercial and non-commercial arrangements. In sum, the Commission adopted the views put forward by various stakeholders that:

[surrogacy agreements] are inherently exploitive; that they treat children as commodities; that they are dehumanizing and degrading to women and their reproductive capacity; that they are harmful to the participants and to children born as a result of these arrangements; that they foster harmful social attitudes about the role and value of women, children, and families; and that they reinforce and perpetuate sexual inequality in our society.³⁵

The Baird Commission took the position that surrogacy arrangements were exploitive by nature. The report stated that “a caring society³⁶ has an obligation to ensure that individual actions – even those intended to benefit others – do not generate greater social harms, and that public policy works to support and foster healthy family and social connections, not to undermine them or set them up to fail”.³⁷ The Commission posited that all surrogacy arrangements “inevitably and intentionally” break parental bonds and strain family relationships,³⁸ thereby negatively impacting children’s personal and emotional development.³⁹ Moreover, the Commission

³² *Ibid.*

³³ *Proceed with Care*, *supra* note 8.

³⁴ *Ibid* at 1-2.

³⁵ *Ibid* at 670.

³⁶ This reference to ‘a caring society’ is tied to the ethics of care – a theory utilized by the Baird Commission’s report. Ethics of care is also a theory from which relationalism evolved. See: Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (Toronto: University of Toronto Press, 2008), at 7; Jennifer Llewellyn & Jocelyn Downie, “Relational Theory & Health Law and Policy” (2008) *Health L J*, suppl, 193 at 202.

³⁷ *Proceed with Care*, *supra* note 8 at 692.

³⁸ *Ibid* at 688.

³⁹ *Ibid* at 677.

believed that surrogacy causes undue conflict,⁴⁰ and reinforces the perception that women are just vessels that serve men’s needs.⁴¹ The Commission rejected the proposition that surrogacy can foster autonomy, as women could not predict how they would feel about relinquishing a child before the fact.⁴²

While the Commission “deplored” surrogacy in general,⁴³ they were particularly scathing of commercial surrogacy. The Commission stated that for-profit arrangements “offend human dignity by commodifying women's reproductive capacities and commodifying children”.⁴⁴ The Commission was also concerned about how commercial surrogacy could compound surrogates’ perceived vulnerabilities.⁴⁵ They worried that racialized and economically vulnerable women would be persuaded to accept risks that they would not otherwise want to take because of the financial incentive.⁴⁶ The Commission assumed economically stable women would not want to act as surrogates.⁴⁷ They relied on a study that found that surrogates were “younger, less well educated, and of lower income than commissioning couples”⁴⁸ in order to support their idea that surrogates would have diminished bargaining power.⁴⁹ They believed that intended parents used to surrogates as a vehicle to serve their own ends.⁵⁰ Overall, the Commission believed that adding an economic incentive would make surrogacy more prevalent.⁵¹ Given their disparaging views of surrogacy, they wanted to avoid this outcome.⁵²

⁴⁰ *Ibid* at 688.

⁴¹ *Ibid* at 678.

⁴² *Ibid* at 685.

⁴³ *Ibid* at 692.

⁴⁴ *Ibid* at 683.

⁴⁵ *Ibid* at 689. These perceived vulnerabilities will be discussed at greater length in Part II, below.

⁴⁶ *Ibid* at 670, 673.

⁴⁷ *Ibid* at 670.

⁴⁸ *Ibid* at 670-72.

⁴⁹ *Ibid* at 670.

⁵⁰ *Ibid* at 684.

⁵¹ *Ibid*.

⁵² *Ibid* at 672.

Surrogacy brokers were presented as a significant part of the problem.⁵³ Brokers were defined as third parties who facilitated surrogacy arrangements.⁵⁴ The Commission's definition is significantly broader than my definition of consultants, and was in fact expansive enough to apply to any doctors and lawyers who assisted with surrogacy arrangements.

The Commission was concerned that the inequalities between surrogates and intended parents were reinforced by brokers because they adopted a service-oriented approach where the intended parents were the clients, and the child was a product that could be bought and sold.⁵⁵ The Commission believed that intermediaries acted in the interests of the intended parents because the intended parents paid for the brokers' services.⁵⁶ Furthermore, they worried that intermediaries did not adequately screen intended parents because they were financially incentivized to accept any intended parents that could pay their fees.⁵⁷ At the time, the Commission stated that it did not appear that commercial brokers existed in Canada.⁵⁸ Instead, the report relied on examples of commercial brokers' conduct in the United States.⁵⁹

Aside from these direct harms, the Commission wanted to discourage intermediaries because they believed that "the most effective way to deter non-commercial arrangements is to provide for penalties for third parties who facilitate preconception arrangements".⁶⁰ In other words, intermediaries were discouraged as a means of curtailing surrogacy, in general. This is pivotal context for framing my research. While the Commission did have some concerns about how intermediaries could commercialize women and children, the ensuing recommendation to

⁵³ *Ibid* at 672, 677.

⁵⁴ *Ibid* at 664.

⁵⁵ *Ibid* at 672, 677.

⁵⁶ *Ibid* at 685.

⁵⁷ *Ibid* at 677.

⁵⁸ *Ibid* at 663.

⁵⁹ *Ibid* at 672, 674-675.

⁶⁰ *Ibid* at 691.

ban intermediaries was overwhelmingly driven by a desire to restrict the overall practice of surrogacy. The Commission did not want anyone facilitating the creation of surrogacy relationships.

The Baird Commission ultimately recommended that the federal government criminalize paid surrogacy, acting as an intermediary (whether paid or unpaid), and advertising intermediary services. The exact text of this recommendation reads:

The federal government legislate to prohibit advertising for or acting as an intermediary to bring about a preconception arrangement ; and to prohibit receiving payment or any financial or commercial benefit for acting as an intermediary, under threat of criminal sanction . It should also legislate to prohibit making payment for a preconception arrangement, under threat of criminal sanction.

The Commission also recommended that provinces legislate to clarify that surrogacy agreements are unenforceable against surrogates,⁶¹ and that the surrogate is the legal mother of the child;⁶² that there be a mandatory wait period before parental rights could be relinquished;⁶³ and, that best interests of the child govern any custody disputes.⁶⁴ The Commission suggested that professional bodies enact consequences associated with brokering, and that facilities that participate in surrogacy (whether commercial or not) lose their licenses.⁶⁵ Lastly, the Commission stated that there should be a ban on international surrogacy.⁶⁶

The Commission reluctantly recommended permitting non-commercial surrogacy, but was emphatic that this recommendation was “not intended to sanction the practice, but simply to recognize that it is probably going to occur and that, in the absence of public policy, significant

⁶¹ *Ibid* at 690.

⁶² *Ibid* at 691.

⁶³ *Ibid* at 691.

⁶⁴ *Ibid* at 692.

⁶⁵ *Ibid* at 691.

⁶⁶ *Ibid* at 692.

harm to children could result”.⁶⁷ The Commission stressed: “we do not believe such arrangements should be undertaken, sanctioned, or encouraged ”.⁶⁸ Elsewhere, they wrote: “our goal is to halt commercial practices entirely and to discourage others from participating in these arrangements”.⁶⁹ In other words, they did not want to condone surrogacy at all, but felt the associated dangers would increase if altruistic surrogacy was prohibited outright, as the practice would likely continue underground.⁷⁰

The Commission’s concerns underpin the current state of the law, and the anxieties of lawmakers. Many of the Commission’s views were supported by subsequent Standing Committees assembled to review the draft legislation, and, ultimately, by Parliament.⁷¹ Once again, this history is particularly relevant to my research because it shows that intermediaries were primarily banned as a mechanism to curtail the practice of surrogacy in general (and, in particular, the practice of commercial surrogacy). This is because surrogacy was perceived as harmful to women and children, and the legislature wanted to protect these purportedly vulnerable groups. While some harms were attributed to the use of intermediaries themselves,⁷² these harms were not the driving force behind the prohibition of paid intermediaries.⁷³

⁶⁷ *Ibid* at 689.

⁶⁸ *Ibid* at 689.

⁶⁹ *Ibid* at 692.

⁷⁰ *Ibid* at 668, 689.

⁷¹ See for example: House of Commons Standing Committee on Health, “Assisted Human Reproduction: Building Families” (December 2001); Proceedings of the Standing Senate Committee on Social Affairs, Science and Technology, 37th Parl, 3 Sess, No 2 (25 February 2004).

⁷² As discussed above, the Baird commission worried about exacerbating inequities and creating an industry that commodified children. *Proceed with Care*, *supra* note 8 at 672, 677.

⁷³ This means the prohibition against paid intermediaries was largely put in place to prevent other (ie., non-consultant-related) harms from occurring.

b) The AHRA

It took the federal government several attempted bills over the course of nearly a decade before Bill C-6, *An Act respecting assisted human reproduction and related research*, was finally passed. The AHRA came into force in 2004.⁷⁴ Originally a very comprehensive Act, the AHRA created a system for licensing, monitoring, inspecting and enforcing assisted human reproduction activities in Canada. It covered a wide array of topics beyond surrogacy, including things like gamete donation, cloning, germline therapy and chimeras. The AHRA also provided for the creation of an administrative body, Assisted Human Reproduction Canada (AHRC), to create and enforce regulations under the Act. However, as I will discuss, below, many of these provisions were subsequently repealed.

For my purposes, the relevant subsections of the *Assisted Human Reproduction Act* read:⁷⁵

Payment for surrogacy

6(1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.

Acting as intermediary

6(2) No person shall accept consideration for arranging for the services of a surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services.

Payment to intermediaries

6(3) No person shall pay consideration to another person to arrange for the services of a surrogate mother, offer to pay such consideration or advertise the payment of it.

...

Reimbursement of expenditures

12(1) No person shall, except in accordance with the regulations,

...

⁷⁴ AHRA, *supra* note 4.

⁷⁵ *Ibid.*

(c) reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

Receipts

12(2) No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.

No reimbursement

12(3) No person shall reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy, unless

- (a) a qualified medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus; and
- (b) the reimbursement is made in accordance with the regulations.

In sum, the AHRA prohibits paid surrogacy, but allows for reimbursement in accordance with the regulations.⁷⁶ Notably, the prohibition is directed at the payers. The surrogate, herself, is not criminally liable. With respect to intermediaries, the AHRA prohibits arranging surrogacies for a profit, as well as paying intermediaries to arrange surrogacies.⁷⁷ It also prohibits advertising these services.⁷⁸ While there is no definition in the statute of what it means to “arrange for the services of a surrogate”, Health Canada has indicated that this includes the act of matching a surrogate with an intended parent.⁷⁹

⁷⁶ *Ibid*, s6, s12. Note that it took many years before any regulations were put into place, leaving much uncertainty with respect to acceptable reimbursements for over a decade.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

⁷⁹ Government of Canada, “Prohibitions related to surrogacy” (last modified 5 February 2020), online: *Health Canada* <<https://www.canada.ca/en/health-canada/services/drugs-health-products/biologics-radiopharmaceuticals-genetic-therapies/legislation-guidelines/assisted-human-reproduction/prohibitions-related-surrogacy.html>> [Government of Canada, “Prohibitions related to surrogacy”]. I include an extended discussion of how the intermediary prohibitions are being interpreted in Chapter 6.

c) Developments Post-Enactment

Reference Re: Assisted Human Reproduction Act

Throughout the process of the AHRA's enactment, members of the Bloc Québécois opposed the AHRA on the basis that it violated the division of powers between the provincial and federal governments.⁸⁰ Under the *Constitution Act*, 1867,⁸¹ the federal government has jurisdiction over the criminal law power,⁸² whereas the provinces generally have jurisdiction over health services.⁸³ As part of its opposition, Quebec argued that the governance of reproductive technologies properly fell within their powers.

Within two years of the AHRA being passed, the Attorney General of Quebec commenced a reference regarding the constitutionality of sections 8-19, 40-53, 60, and 61-68.

These provisions were meant to:

regulate donor consent (s. 8), prohibit collection of gametes from minors (s. 9), prohibit the unlicensed creation of embryos (s. 10); and the unlicensed practice of transgenics (s. 11). They regulate compensation for altruistic surrogate mothers (s. 12), prescribe the premises where reproductive technologies may be practised (s. 13), regulate information collection and disclosure (ss. 14-19), and the destruction of reproductive materials (s. 16). The impugned provisions also create a licensing regime for activities such as research with human embryos and clinical trials (ss. 40-44). Finally, they include the enforcement provisions (ss. 45-53), the penalties for breaching the Act (ss. 60-64); the promulgation of regulations (ss. 64-67); and the equivalency provision (s. 68).⁸⁴

Notably, section 6 of the AHRA, which prohibited paid surrogacy and paid intermediaries, was not contested. However, section 12, which provided for regulated reimbursements, was included

⁸⁰ See for example: *House of Commons Debates*, no 089, (25 Oct 1996) at 5623 (Hon Pauline Picard).

⁸¹ *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act*].

⁸² *Ibid*, s 91(27).

⁸³ *Ibid*, ss 92(7), 92(13), 92(16).

⁸⁴ Angela Cameron & Vanessa Gruben, "Quebec's Constitutional Challenge to the Assisted Human Reproduction Act: Overlooking Women's Reproductive Autonomy?" in Stephanie Patterson et al eds, *Fertile Ground: Exploring Reproduction in Canada* (Montreal: McGill-Queen's U Press, 2011) 1at 4.

in the challenge. Quebec’s motivation to litigate did not necessarily stem from a concern with the substance of the laws themselves. Rather, this was a move for recognition in the “ongoing struggle for constitutional power between the province of Quebec and Parliament”.⁸⁵

The Attorney General of Quebec first brought the reference to the Quebec Court of Appeal, which held that all 32 impugned sections were *ultra vires*.⁸⁶ The Attorney General of Canada appealed, and the Supreme Court of Canada’s decision was the antithesis to the Court of Appeal’s concise and unanimous ruling. The result was a 4-4-1 split decision that left multiple gaps in the comprehensive scheme that had been originally envisioned by Parliament.

Chief Justice Beverly McLachlin, writing for herself and Justices William Binnie, Morris Fish and Louise Charron, believed all of the impugned provisions were constitutionally valid.⁸⁷ According to this view, the AHRA was targeting discrete and valid harms stemming from assisted human reproduction.⁸⁸ In particular, the scheme was necessary to uphold public morality.⁸⁹ Even though some of the provisions were regulatory in nature, these provisions were “part and parcel of the scheme by which Parliament prohibits immoral and potentially harmful uses of human reproductive material, while permitting beneficial uses to continue”.⁹⁰ As a result, all provisions were considered appropriate uses of the federal government’s criminal law power to protect against “public health evils”.⁹¹

⁸⁵ *Ibid* at 5.

⁸⁶ *Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, LRQ ch R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, LC 2004, ch 2 (Dans l'affaire du)*, 2008 QCCA 1167.

⁸⁷ *Re AHRA*, *supra* note 10 at para 1-156: Sections 8-13 fell under the federal government’s criminal law power because they were related to Parliament’s moral concerns and addressed serious harms to both society and individuals. The remaining sections were valid under the ancillary powers doctrine. The ancillary powers doctrine holds that “legislative provisions which, in pith and substance, fall outside the jurisdiction of the government that enacted them, may be upheld on the basis of their connection to a valid legislative scheme” (para 126).

⁸⁸ *Re AHRA*, *supra* note 23 at para 135.

⁸⁹ *Ibid* at para 238.

⁹⁰ *Ibid* at para 150.

⁹¹ *Ibid* at paras 62-64; 156.

Justice Louis Lebel, writing for himself and Justices Marie Deschamps, Rosalie Abella and Marshall Rothstein, came to the opposite conclusion. They would have deemed all of the impugned sections *ultra vires*, with the exception of the penalties contained in sections 60 and 61, which were constitutionally valid only insofar as they related to other sections of the AHRA that were not challenged in the reference.⁹² According to their perspective, assisted reproduction was not a harm needing to be suppressed, but rather a burgeoning practice that brought benefits to many Canadians.⁹³ In the absence of inherent harm, the judges believed the true purpose of the AHRA was to establish national standards,⁹⁴ and the challenged provisions were therefore not valid exercises of the criminal law power. Interestingly, Lebel's perspective on assisted reproduction was a marked departure from the Baird Commission's negative characterization of the practice. This in line with the general public's attitudes towards assisted reproduction, which have become increasingly positive over time.⁹⁵

Ultimately, Justice Thomas Cromwell's lone opinion tipped the scale for each individual provision.⁹⁶ He upheld sections 8, 9, 12, 19, 60 and 61 as falling under the federal law power because their purpose and effect was to prohibit negative assisted reproduction practices. Sections 40(1), (6) and (7), 41-43, 44(1) and (4), 45-53, and 68 were also valid, insofar as they related to the valid provisions. However, sections 10-11, 13-18, 40(2)-(5) and 44(2)-(3) were

⁹² *Ibid* at paras 157-281. They believed that the pith and substance of the sections was to regulate assisted human reproduction as a health service. The provisions therefore properly fell under the provinces' powers over hospitals, property and civil rights, and matters of a merely local nature (para 281).

⁹³ *Ibid* at para 251.

⁹⁴ *Ibid* at para 226.

⁹⁵ Chelsea Fortin & Susanne Abele, "Increased Length of Awareness of Assisted Reproductive Technologies Fosters Positive Attitudes and Acceptance among Women" (2015) 9:4 Int J of Fertility & Sterility 452; Bart CJM Fauser et al, "Beliefs, attitudes and funding of assisted reproductive technology: Public perception of over 6,000 respondents from 6 European countries" (2019) 14:1 PLoS ONE e0211150. Increasing public acceptance of assisted reproduction is relevant to my research because it suggests that the original prohibitions may no longer reflect Canadians' opinions and desires.

⁹⁶ *Re AHRA*, *supra* note 23 at paras 282-294.

ultra vires, for the reasons espoused by Justice Lebel.⁹⁷ In terms of surrogacy, this meant that the reimbursement provision in section 12 was saved because it was characterized as an extension of section 6.⁹⁸ Cromwell’s judgment also saved the associated penalties for breaching sections 6 and 12, as well as the existence of the administrative body (AHRC), insofar as it continued to have a role in activating the saved provisions.⁹⁹

Reimbursement Regulations

While AHRC was originally meant to create the reimbursement regulations,¹⁰⁰ it was wound up in 2012 without fulfilling this objective.¹⁰¹ One of the principle reasons for its dissolution was having its mandate gutted by *Re AHRA*.¹⁰² There were also difficulties with the initial appointment process; several of the directors ended up resigning due to lack of transparency; and, there was a disconcerting lack of action, considering AHRC’s annual budget of \$10 million.¹⁰³

In the absence of AHRC, it fell to Health Canada to create regulations under the Act, and it did so at a glacial pace. The Reimbursement Regulations did not come into force until June of

⁹⁷ *Ibid* at paras 292-293.

⁹⁸ *Ibid* at para 290.

⁹⁹ *Ibid*.

¹⁰⁰ Angela Campbell, “A Place for Criminal Law in the Regulation of Reproductive Technologies” (2002) 10 Health L J 77 at 88.

¹⁰¹ Francois Baylis, “The Demise of Assisted Human Reproduction in Canada” (2012) 34:6 J Obstet Gynaecol Can 511 at 511.

¹⁰² Francois Baylis & Jocelyn Downie, “The Tale of Assisted Human Reproduction in Canada: A Tragedy in Five Acts” (2013) 25 Can J Women & L 183 at 197.

¹⁰³ Jocelyn Downie et al, eds, *Canadian Health Law and Policy*, 4th ed (Canada: LexisNexis, 2011).

2020.¹⁰⁴ As a result, for over a decade after section 6 was enacted, there was considerable scholarly debate regarding what kind of reimbursement was truly legally permissible.¹⁰⁵

Understanding the content of the Reimbursement Regulations is relevant to this project because, often times, the consultants are the ones coordinating the reimbursements. In sum, the Regulations provide a list of various expenditures for which a surrogate can be reimbursed, including maternity clothes, prenatal exercise classes, doulas, groceries, travel, care for dependents, and any other products or services that are recommended in writing by a health care professional.¹⁰⁶ The last example is intentionally broad, and can include situationally specific needs, such as snow removal.¹⁰⁷ A specific calculation scheme is in place for automobile use.¹⁰⁸ Lost work-related income can also be reimbursed, so long as the surrogate can provide: the duration and reason for not working as certified by a qualified medical professional; supporting evidence for her lost income; and a statement saying she has not been compensated for the lost income in any other way.¹⁰⁹ In order to reimburse a surrogate, a signed declaration must be provided, including all receipts and any applicable written recommendations.¹¹⁰ Once made, reimbursements must be indicated on the relevant declarations,¹¹¹ and reimbursement records

¹⁰⁴ Reimbursement Regulations, *supra* note 24.

¹⁰⁵ The Canadian Standards Association eventually released guidelines in 2015; for a more detailed discussion of the history of the regulations' creation, please see Stefanie Carsley, *Surrogacy in Canada: Lawyers' Experiences, Practices and Perspectives* (Doctor of Civil Law thesis, McGill University, 2020) at 35-41 [Carsley, Dissertation].

¹⁰⁶ Reimbursement Regulations, *supra* note 24, s4.

¹⁰⁷ Health Canada, *Guidance document: Reimbursement related to Assisted Human Reproduction Regulations* (Ottawa: Health Canada, 2019), online: <<https://www.canada.ca/en/health-canada/programs/consultation-reimbursement-assisted-human-reproduction/document.html>> [Guidance Document].

¹⁰⁸ Reimbursement Regulations, *supra* note 24, s5.

¹⁰⁹ *Ibid.*, s8.

¹¹⁰ *Ibid.*, s6

¹¹¹ *Ibid.*, s7, 9.

must be maintained for 6 years.¹¹² The Minister has the power to request those records during the six-year retention period.¹¹³

A Guidance Document, released by Health Canada, provides additional information regarding how to properly implement the regulations.¹¹⁴ Notably, the Guidance Document is not legally-binding. Therefore, the guidance contained therein should be approached with caution where it contradicts the direct wording of the Reimbursement Regulations. For example, the Guidance Document provides that surrogates can be reimbursed for income lost during the surrogate's pre-pregnancy and postpartum period, despite the fact that the regulations explicitly state that they apply "during her pregnancy".¹¹⁵

In other instances, the Guidance Document does not contradict the regulations, but merely provides additional clarifications. For example, while the regulations merely list groceries as a reimbursable expense,¹¹⁶ the Guidance document clarifies that this would not include buying groceries for the surrogate's entire family.¹¹⁷ Health Canada cautions against using this category as a form of disguised payment, though they do not prescribe an appropriate calculation method.¹¹⁸ With respect to receipts, the Guidance Document provides that a written and signed document can suffice where a conventional receipt is not generated – for example, after paying a babysitter.¹¹⁹ The Guidance Document reinforces that you cannot reimburse

¹¹² *Ibid*, s11

¹¹³ *Ibid*, s12

¹¹⁴ Guidance Document, *supra* note 107.

¹¹⁵ Reimbursement Regulations, *supra* note 24, s8.

¹¹⁶ *Ibid*, s4(i).

¹¹⁷ Guidance Document, *supra* note 107.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

anticipated expenses, or provide unaccountable allowances.¹²⁰ It also notes that the frequency of reimbursement is up to the parties.¹²¹

Enforcement

Only one prosecution has been brought under the AHRA.¹²² Leia Picard operates a consultancy called Canadian Fertility Consulting (CFC), which “links interested parents with surrogates and egg donors, and offers referrals to clinics and lawyers”.¹²³ In 2013, Picard and CFC were charged and plead guilty to purchasing eggs contrary to section 7(1) of the AHRA, and paying surrogates contrary to section 6(1) of the AHRA. Picard, alone, also plead guilty to accepting payment for arranging surrogacies contrary to section 6(2) of the AHRA.¹²⁴

Though the case was unreported, several elucidating facts can be gleaned from the Agreed Statement of Facts.¹²⁵ The conviction under section 7(1) stemmed from paying egg donors flat fees of \$5000.00, without requesting receipts for expenses.¹²⁶ The conviction under section 6(1) stemmed from paying surrogates in monthly installments, regardless of their receipted expenses, to the maximum allowed by the contract signed with the intended parents (between \$18,000.00 and \$24,000.00).¹²⁷

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *R v Picard and Canadian Fertility Consulting Ltd*, Agreed Statement of Facts, online: https://cdn.dal.ca/content/dam/dalhousie/pdf/sites/noveltechethics/AHRA_Facts.pdf [*R v Picard*].

¹²³ *Ibid.*

¹²⁴ Alison Motluk, “First prosecution under Assisted Human Reproduction Act ends in conviction.” (2014) 186:2 CMAJ E75 [Motluk, “First prosecution”].

¹²⁵ *R v Picard*, *supra* note 122.

¹²⁶ *Ibid* at 2.

¹²⁷ *Ibid* at 3-4. Notably, the intended parents bore the cost of this, though the payment was facilitated through CFC.

Picard's conviction under section 6(2) of the AHRA was connected to receiving \$31,000.00 in "referral payments" from a US fertility lawyer, Hilary Neiman.¹²⁸ Neiman sent surrogates to foreign countries in order to receive in vitro fertilization, and then falsely claimed that the original intended parents had backed out.¹²⁹ Neiman asked Picard for help finding new parents for the allegedly abandoned surrogates, in exchange for the aforementioned referral payments.¹³⁰

Notably, neither Picard nor CFC were charged for their day-to-day, for-profit, surrogacy consulting business, which facilitates the matching of intended parents with surrogates, and which manages the surrogates' reimbursements.¹³¹ Some suggest that Health Canada and the Royal Canadian Mounted Police (RCMP) only took action against CFC and Picard because of her connection to the highly-publicized controversy surrounding Neiman in the United States.¹³² Ultimately, the decision not to charge CFC for its day-to-day activities was perceived as a "gentle green light" for these services to exist.¹³³ After this conviction, more and more surrogacy consultancies were created, and doctors and lawyers seemed less concerned about working with these organizations.¹³⁴ Moreover, Picard and CFC's business thrived.¹³⁵ Upon pleading guilty,

¹²⁸ *R v Picard*, *supra* note 122; Motluk, "First Prosecution", *supra* note 124.

¹²⁹ *R v Picard*, *supra* note 122; Motluk, "First Prosecution", *supra* note 124.

¹³⁰ *R v Picard*, *supra* note 122; Motluk, "First Prosecution", *supra* note 124.

¹³¹ Canadian Fertility Consulting, "Becoming A Parent Through Surrogacy" (accessed 26 August 2025) online: <<https://fertilityconsultants.ca/future-parents-surrogates/>>: At present, the website openly advertises offering "an individualized fertility plan and profile to help match you with the perfect surrogate." and "management of all finances, receipts, and surrogate reimbursements".

¹³² See: Carsley, Dissertation *supra* note 105 at 35 citing Motluk, "First Prosecution", *supra* note 124.

¹³³ Alison Motluk, "Waiting Room" (*Hazlitt*, Longread, 30 August 2023), online: <<https://hazlitt.net/longreads/waiting-room-0>> [Motluk, "Waiting Room"].

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

Picard and Canadian Fertility Consulting were only fined \$60,000. This amount is low enough that some have called it a mere “cost of doing business”.¹³⁶

As no public judicial decision accompanied the conviction, there was no opportunity for added clarity regarding what is meant by the phrase “arranging for the services of a surrogate mother”.¹³⁷ Interpreted broadly, the phrase could potentially extend so far as to capture the activities of doctors and lawyers who are facilitating surrogacies by providing medical or legal services and advice. Interpreted narrowly, some believed that brokering altruistic surrogacies would not necessarily be captured under the term “arrangement”.¹³⁸ Health Canada has since taken the position that the AHRA’s prohibitions “include paying a surrogacy company that matches infertile couples with surrogate mothers”.¹³⁹ This suggests that many Canadian surrogacy consultancies are operating illegally.

Nevertheless, since 2013, no further steps have been taken to enforce the AHRA. My interviews suggest that Health Canada is aware that these consultancies are operating, but enforcement is still lacking.¹⁴⁰ It is likely that the inaction is due to inter-departmental inefficiencies between Health Canada and the RCMP, as well as a lack of prioritization due to limited resources within the RCMP.¹⁴¹ Regardless of the underlying cause, the government’s

¹³⁶ Francoise Baylis & Jocelyn Downie, “Wishing Doesn’t Make it So” (17 December 2013) Impact Ethics, online: <<https://impactethics.ca/2013/12/17/wishing-doesnt-make-it-so/>> [Baylis & Downie]: “Spread across all of the transactions, the \$60,000 fine represents a mere \$3,333 per transaction. In a world in which individuals are willing to spend, for example, \$149,000 for a child through a surrogacy arrangement, this does not seem much of a deterrent.”

¹³⁷ AHRA, *supra* note 4, ss 6(2), 6(3).

¹³⁸ Maneesha Deckha argues that the AHRA “does not prevent third parties from brokering—on a for-profit basis—altruistic surrogacy connections as long as this facilitation does not qualify as “arranging”. Thus far, this term is unspecified either by statute or case law”. See: Deckha, *supra* note 6 at 69.

¹³⁹ Government of Canada, “Prohibitions related to surrogacy”, *supra* note 79. For further discussion, see also Carsley, Dissertation, *supra* note 105 at 242-43.

¹⁴⁰ Several of my participants discuss having direct correspondence with Health Canada about their work, as discussed in greater length in Chapter 6.

¹⁴¹ Motluk, “Waiting Room”, *supra* note 133.

failure to enforce the AHRA has been criticized as ambivalence,¹⁴² and as not providing meaningful oversight.¹⁴³

Overall, Canada's prohibitions have not curtailed the general practice of surrogacy. In fact, surrogacy is actually on the rise in Canada.¹⁴⁴ This is likely due to increasing rates of infertility, the feasibility of novel forms of family building,¹⁴⁵ and Canada's emergence as a coveted international surrogacy destination.¹⁴⁶ The AHRA's prohibitions have also not eradicated the existence of paid surrogacy in Canada. There have been several reports of intended parents and agencies paying surrogates beyond receipted reimbursements.¹⁴⁷

Furthermore, despite the prohibition of paid intermediaries in section 6 of the AHRA, surrogacy consultants are being used regularly.¹⁴⁸ These consultancies operate openly across Canada. They have websites that broadcast their various services,¹⁴⁹ and some even list their associated fees.¹⁵⁰ Some of these consultancies use paid advertising, as evidenced by their

¹⁴² Susan G Drummond, "Eloquent (In)Action: Enforcement and Prosecutorial Restraint in the Transnational Trade in Human Eggs as Deep Ambivalence About the Law".

¹⁴³ Motluk, "We should regulate agencies" *supra* note 2. A more extensive discussion of the impacts of this lack of enforcement can be found in Chapter 6.

¹⁴⁴ Gruben, *Surrogacy in Canada*, *supra* note 10 at 1; "Surrogacy in Canada Has Increased 400% in 10 Years: More Facts" (CBC, accessed 26 August 2025), online: <<https://www.cbc.ca/documentarychannel/features/surrogacy-in-canada-has-increased-400-in-10-years-more-facts#:~:text=The%20trend%20of%20couples%20delaying,are%20choosing%20to%20become%20parents.&text=The%20average%20expenses%20paid%20by,a%20surrogate%20are%20approximately%20%2420%2C000>>.

¹⁴⁵ *Ibid.*

¹⁴⁶ Vanessa Gruben, Stefanie Carsley and Alicia Czarnowski, "Surrogacy, Feminism and LGBTQ2S+ Family Building" in Katarina Trimmings, Sharon Shakargy & Claire Achmad, eds, *Research Handbook on Surrogacy and the Law* (Northampton: Edward Elgar Publishing, 2024) [Gruben, "Surrogacy, Feminism and LGBTQ2S+ Family Building"].

¹⁴⁷ *R v Picard*, *supra* note 122; Motluk, "We should regulate agencies" *supra* note 2; Carsley, "Surrogacy Agencies in Canada" *supra* note 22.

¹⁴⁸ See for example: Yee, *supra* note 6 at 8; Gruben, *Surrogacy in Canada*, *supra* note 10 at 88-89.

¹⁴⁹ See for example: Canadian Fertility Consulting, "Surrogacy Agency" (accessed 26 August 2025), online: <<https://fertilityconsultants.ca/surrogacy-agency/>>; Surrogacy in Canada Online, "Surrogacy Process for Intended Parents" (accessed 26 August 2025), online: Surrogacy in Canada Online <<https://surrogacy.ca/intended-parents/surrogacy-process/>>; JA Surrogacy Canada, "Home" (accessed 26 August 2025), online: JA Surrogacy Canada <<https://www.jasurrogacy.com/>>.

¹⁵⁰ See for example: Ontario Surrogacy Online Ltd, "Shop", online: Ontario Surrogacy Online <<https://www.surrogacyinfo.ca/shop/>>; Canadian Surrogacy Consultants, "CSC Programs", online: Canadian Surrogacy Consultants <<https://surrogacycommunity.ca/csc-programs/>>.

websites being listed under “Sponsored” headings in Google searches, or with “Learn More” buttons on Instagram.¹⁵¹ Many consultancies also have social media accounts, and use these accounts to share about their services and their intended parents.¹⁵² Accordingly, the AHRA’s lack of enforcement has contributed to the growth of surrogacy consulting as a Canadian industry.

Calls for Reform

Since the AHRA was drafted, there have been various calls for legislative reform, particularly with respect to Parliament’s use of criminal law.¹⁵³ Some scholars have suggested that de-criminalizing surrogacy could better recognize women’s reproductive labor,¹⁵⁴ increase overall accessibility to surrogacy and family building (which is particularly important for LGBTQIA2S+ individuals),¹⁵⁵ and decrease the need for transnational family building, which can be particularly exploitive in some jurisdictions.¹⁵⁶ Various types of legal reform have been proposed. In lieu of a free-market model, Maneesha Deckha has suggested a publicly funded model, wherein surrogacy could be subsidized via Medicare.¹⁵⁷ Others have suggested re-

¹⁵¹ Some of my participants disclosed paying for advertising. See Chapter 3 for further discussion.

¹⁵² See Chapter 3 for further discussion.

¹⁵³ See for example: Anne-Isabelle Cloutier, “Decriminalizing Payment of Gamete Donors and Surrogates in Canada: An Analysis of Factors Influencing the Public Debate in Light of Bill C-404” (2019) 7:3 Health Reform Observer 1; Timothy Caulfield, “Bill C-13 The Assisted Human Reproduction Act: Examining the Arguments Against a Regulatory Approach” (2001) 11 Health L Rev 20; Timothy Caulfield, “Clones, Controversy, and Criminal Law: A Comment on the Proposal for Legislation Governing Assisted Human Reproduction” (2001-2002) 29 Alta L Rev 335.

¹⁵⁴ Cloutier, *supra* note 153.

¹⁵⁵ Cloutier, *supra* note 153, Deckha, *supra* note 6.

¹⁵⁶ Deckha, *supra* note 6.

¹⁵⁷ *Ibid.*

envisioning the reimbursement model to allow flat-rates, as opposed to requiring receipts, in order to reduce ambiguities and remove administrative barriers.¹⁵⁸

In 2017, the Canadian Fertility and Andrology Society (CFAS) released a *Position Statement on Compensation for Third Party Reproduction in Canada*, which argued that the criminal prohibition on paid surrogacy has severely limited the number of gestational surrogates available to Canadians in need.¹⁵⁹ In particular, CFAS believed this negatively affected “infertile men and women, cancer survivors, individuals who carry severe or even fatal genetic disorders who wish to break the chain of inheritance, same sex couples and single men and women”.¹⁶⁰ CFAS argued that reasonable compensation ought to be permitted in order to “prevent abuses, ensures fairness and transparency, and improves access to care for those seeking third party reproduction”.¹⁶¹

In 2018, Anthony Housefather put forward a private member’s bill, Bill C-404, to decriminalize paid surrogacy and, in accompaniment, legalize paying surrogacy consultants.¹⁶² While the Bill generated discussion in both scholarly literature and the media,¹⁶³ it was

¹⁵⁸ Angel Petropanagos, Vanessa Gruben & Angela Cameron, “Should Canada Implement a Flat-Rate Reimbursement Model for Surrogacy Arrangements? Legal and Ethical Recommendations for a Revised Approach to Reimbursement” in Gruben, *Surrogacy in Canada*, *supra* note 10.

¹⁵⁹ Canadian Fertility and Andrology Society, *Position Statement on Compensation for Third Party Reproduction in Canada* (May 2017), online: <https://cfas.ca/Library/2020positionstatements/CFAS-Position-Statement-Compensation-Third-Party-Reproduction-May_2017-EN.pdf>.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Bill C-404, An Act to Amend the Assisted Human Reproduction Act*, 1st Sess, 42nd Parl, 2018 (first reading May 29 2018) [Bill C-404].

¹⁶³ See for example: Cloutier, *supra* note 153 at 3; Françoise Baylis & Alana Cattapan, “Paying surrogates, sperm and egg donors goes against Canadian values”, *The Canadian Press* (3 April 2018); Françoise Baylis & Alana Cattapan, “Argument of Paying for Surrogacy, Sperm and Eggs based on Misinformation”, *The Star* (1 May 2018); Louise Langevin, “Féminisme, mères porteuses et femmes pauvres: un amalgame douteux”, *Le Devoir*, online: <<https://www.ledevoir.com/opinion/idees/524106/feminisme-meres-porteuses-et-femmes-pauvres-un-amalgame-douteux>>; Vida Panitch, “Time to decriminalize payment for sperm, ova and surrogacy”, *Ottawa Citizen* (10 May 2018), online: <<https://ottawacitizen.com/opinion/columnists/panitch-time-to-decriminalize-payment-for-sperm-ova-and-surrogacy>>; Anthony Housefather & Sara Cohen, “Our fertility laws can criminalize people trying to start a family. It’s time for an overhaul”, *The National Post* (9 April 2018), online: <<https://nationalpost.com/opinion/our->

ultimately not adopted by Parliament.¹⁶⁴ In 2020, Senator Lucie Moncion introduced Bill S-216, and later Bill S-202, both of which sought to repeal the prohibitions in section 6 of the AHRA, though neither passed into law.¹⁶⁵

Some scholars and reporters have also voiced a need for law reform. Alison Motluk has argued that surrogacy consultancies ought to be decriminalized and regulated akin to adoption agencies.¹⁶⁶ Stefanie Carsley has argued that the federal prohibition on intermediaries should be amended to allow consultancies to operate if they are licensed, accredited or run by the provinces.¹⁶⁷ Despite these calls for reform, Health Canada has continued to maintain its commitment to the current “altruistic” model.¹⁶⁸ While Senator Moncion continues to advocate for surrogacy law reform,¹⁶⁹ there is no suggestion that significant reform is imminent.

Part II: Today’s Concerns Surrounding Surrogacy & Intermediaries

The Baird Commission’s report was published over 35 years ago. Since that time, old and new concerns about surrogacy continue to be hotly debated.¹⁷⁰ These concerns often pertain to how surrogates, intended parents and children born through surrogacy may be vulnerable in the surrogacy process. There are also concerns about whether surrogacy consultancies might

fertility-laws-can-criminalize-people-trying-to-start-a-family-its-time-for-an-overhaul>; Sarah Sahagian & Alexandra Kimball, “Why surrogate moms deserve to be paid”, *Toronto Star* (20 August 2018).

¹⁶⁴ Cloutier, *supra* note 153 at 3.

¹⁶⁵ Bill S-216, *An Act to amend the Assisted Human Reproduction Act*, 1st Sess, 43rd Parl, 2020, (first reading 20 February 2020) [Bill S-216]; Bill S-202, *An act to amend the Assisted Human Reproduction Act*, 2nd Sess, 43rd Parl, 2020 (Second Reading 8 June 2020) [Bill S-202].

¹⁶⁶ Motluk, “We should regulate agencies”, *supra* note 2.

¹⁶⁷ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 101-103.

¹⁶⁸ Government of Canada, “Prohibitions related to surrogacy”, *supra* note 79. See also: Carsley, Dissertation *supra* note 105 at 38.

¹⁶⁹ Canada, Senate, *Debates of the Senate*, 44th Parl, 1st Sess, No 28 (24 March 2022) at 1649 (Hon Lucie Moncion), online: Senate of Canada https://sencanada.ca/en/content/sen/chamber/441/debates/028db_2022-03-24-e.

¹⁷⁰ See for example: Motluk, “We should regulate agencies” *supra* note 2; Motluk, “Waiting Room”, *supra* note 133; Carsley, “Surrogacy Agencies in Canada” *supra* note 22; Nelson, *supra* note 6.

exacerbate or exploit some of those vulnerabilities.¹⁷¹ Throughout this dissertation, I try to ascertain whether my participants' reported activities are consistent with the wider narratives about surrogacy consultancies. In doing so, I ask whether my participants' reported actions are likely to mitigate or exacerbate the vulnerabilities identified herein, in accordance with or in contradiction to other accounts of surrogacy consultancy practices.

a) Concerns with Surrogacy

Below, I explore the primary concerns that are associated with surrogacy. I divide these concerns into three categories: concerns pertaining to surrogates; concerns pertaining to children born via surrogacy; and, concerns pertaining to intended parents. In each category, I also canvass any pertinent counter-arguments that have been raised. Where possible, I look to empirical research to better understand whether these concerns are being substantiated or refuted by the available evidence.

Surrogates' Vulnerabilities

i. Exploitation

One of the most-cited concerns about surrogacy is exploitation.¹⁷² Exploitation refers to a relational transaction where what is given is less than the value of what is received in exchange.¹⁷³ This unfair dynamic harnesses a vulnerability of the exploitee, which can lead to individual or collective harm.¹⁷⁴ For conceptual clarity, exploitation should be distinguished

¹⁷¹ *Ibid.*

¹⁷² Alana Cattapan, "Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation" (2014) 29 *CJLS* 361 at 365 [Cattapan, "Risky Business"].

¹⁷³ *Ibid* at 366.

¹⁷⁴ *Ibid* at 366; Campbell, "A Place for Criminal Law", *supra* note 100 at 97.

from the related concept of coercion, which occurs when an individual is compelled to do something that they otherwise would not want to do.¹⁷⁵ Unlike exploitation, however, coercion need not harness a pre-existing vulnerability. Rather, it uses tactics like force or threats to constrain acceptable courses of action.¹⁷⁶

Both exploitation and coercion can occur in the context of surrogacy, regardless of whether the arrangement is paid or unpaid. However, scholars and lawmakers have primarily focused on the dangers of exploitation in paid surrogacy, worrying that payment may persuade racialized and/or socio-economically vulnerable women to accept physical and psychological risks that they would otherwise be uncomfortable with, resulting in a dynamic that is more beneficial for the intended parent(s) than for the surrogate.¹⁷⁷ While payment has generally been viewed as the primary factor inciting exploitation, Rakhi Ruparelia notes that exploitation and coercion can still occur in an “altruistic” (*ie.*, unpaid) surrogacies.¹⁷⁸ She focuses on intra-familial pressures, and believes these pressures can be particularly powerful where the surrogates are from non-Western, patriarchal cultures.¹⁷⁹

Surrogates’ intersectional identities can influence their vulnerabilities. It is important to be attuned to patterns of oppression and marginalization within surrogacy that may stem from gender, sex, socioeconomic status, geographic location, race and ethnicity, disability and sexual

¹⁷⁵ John Meadowcroft, *The Ethics of the Market* (London: Palgrave Macmillan, 2005) at 89.

¹⁷⁶ Allen W Wood, *The Free Development of each: Studies on Freedom, Right and Ethics in Classical German Philosophy* (Oxford: Oxford University Press, 2014) at 278.

¹⁷⁷ Cattapan, “Risky Business”, *supra* note 172 at 372-373; Alana Cattapan, “Rhetoric and Reality: Protecting Women in Canadian Public Policy on Assisted Human Reproduction” (2013) 25 Can J Women & L 202 at 210 [Cattapan, “Rhetoric and Reality”].

¹⁷⁸ Rakhi Ruparelia, “Giving Away the ‘Gift of Life’: Surrogacy and the Canadian *Assisted Human Reproduction Act*,” (2007) 23 Can J Fam L 11.

¹⁷⁹ *Ibid.*

orientation.¹⁸⁰ Membership in these various socially and politically significant groups can impact how laws, policies, and practices affect individuals.¹⁸¹ For example, Heather Dillaway argues that Black women may be particularly vulnerable to exploitation in surrogacy arrangements because they are disproportionately poorer; because they may be less likely to win custody battles if they look different than the child born through the surrogacy arrangement; and, because of the historic power imbalances at play.¹⁸² Indeed, Canadian lawmakers were particularly concerned with how social and economic disparities could exacerbate surrogates' exploitation.¹⁸³ Notably, the data from this project does not speak directly to consultants' and surrogates' social location. I did not ask my participants about their race, ethnicity, sexual orientation, gender identity, or socio-economic status. I also did not ask my participants about the socio-political characteristics of the clients they worked with. As such, my analysis does not answer questions about the unique impacts that consultancies may have when considering intersectional identities. Nevertheless, this is a pertinent concern that would benefit from further empirical research.

Looking at the global context, there is significant literature devoted to the exploitation that is occurring in the trans-national context – for example, when individuals from the Global North travel to the Global South in order to pursue surrogacy.¹⁸⁴ Maneesha Deckha poignantly describes this as “the bodies of poor brown women that now produce babies for rich (primarily)

¹⁸⁰ Susan Sherwin & Katie Stockdale, "Whither Bioethics Now?: The Promise of Relational Theory" (2017) 10:1 IJFAB 7; Catriona Mackenzie & Natalie Stoljar, *Relational Autonomy: Feminist perspectives on autonomy, agency, and the social self* (New York: Oxford University Press, 2000).

¹⁸¹ Sherwin, *supra* note 180 at 9.

¹⁸² Heather E Dillaway, "Mothers for others: A race, class and gender analysis of surrogacy" (2008) 34:2 Int J Socio Fam 301 at 317-320.

¹⁸³ *Proceed with Care*, *supra* note 8 at 670.

¹⁸⁴ Deckha, *supra* note 6.

white women and men”.¹⁸⁵ Indeed, several countries, including India and Thailand, have prohibited international surrogacy in response to such exploitation.¹⁸⁶

However, when looking at surrogacy that is occurring within the Global North, Deckha argues that there is little empirical evidence substantiating surrogates’ exploitation.¹⁸⁷ Furthermore, she notes that these women do not appear to be particularly vulnerable – most surrogates are “white, educated, and not financially desperate”.¹⁸⁸ Although intended parents do tend to be older, more educated and wealthier, the evidence generated thus far does not support substantial harm flowing from differences.¹⁸⁹ Furthermore, nearly every empirical study subsequently reviewed by Karen Busby and Delaney Vun concluded that money is rarely the sole, and infrequently the primary, motive for surrogacy.¹⁹⁰ Importantly, this does not mean that exploitation is not occurring. However, some scholars have used this lack of evidence to question whether theoretical concerns about exploitation are sufficient to substantiate Canada’s legal prohibitions.¹⁹¹ For example, Alana Cattapan argues that without evidence of harm, the mere possibility of exploitation should not merit policy intervention.¹⁹²

¹⁸⁵ *Ibid* at 36.

¹⁸⁶ Gruben, “Surrogacy, Feminism and LGBTQ2S+ Family Building”, *supra* note 146 at 177.

¹⁸⁷ Deckha, *supra* note 6 at 64-54: citing Cattapan, “Risky Business”, *supra* note 172 at 371–373; Erin Nelson, “Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy” 41:1 *JL Med & Ethics* 240 at 247.

¹⁸⁸ Deckha, *supra* note 6 at 65.

¹⁸⁹ Karen Busby & Delaney Vun, “Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers” (2010) 26:1 *Can J Fam L* 13 at 44; Cattapan, “Risky Business”, 371–373; Erin Nelson, “Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy” 41:1 *JL Med & Ethics* 240 at 247.

¹⁹⁰ Notably, most of the studies reviewed by Busby and Vun were conducted in the US: Busby, *supra* note 189.

¹⁹¹ Cattapan, “Risky Business”, *supra* note 172; Susan Drummond, “Fruitful Diversity: Revisiting the Enforceability of Gestational Carriage Contracts” in Lemmens, *supra* note 30; Busby, *supra* note 189.

¹⁹² Cattapan, “Risky Business”, *supra* note 172 at 366. Cattapan’s arguments are explored in greater depth in Chapter 2.

ii. Commercialization

Another pressing concern is that surrogacy may result in the objectification, commodification, and commercialization of children and women's bodies.¹⁹³ These three terms are distinct but highly related. Objectification refers to treating a person or a person's body as an object.¹⁹⁴ Commodification occurs when a person, body, product or activity is bought and sold to make money.¹⁹⁵ Commercialization is the application of business practices to such a commodity.¹⁹⁶ Many stakeholders are concerned that allowing for-profit surrogacy reduces children to objects that can be bought and sold, and women's bodies to objects of use that can be purchased on request (*i.e.*, commodities).¹⁹⁷ Various theorists believe the commodification of surrogates' bodies is problematic because intended parents and/or consultants are using surrogates as means to an end, as opposed to ends in themselves, thereby undermining their inalienable human dignity.¹⁹⁸ These were pivotal considerations underpinning Canada's law.¹⁹⁹

Notably, not all scholars agree that the risk of commodification justifies prohibiting payment in surrogacy.²⁰⁰ Some argue that permitting commercialized surrogacy could actually bolster surrogates' reproductive autonomy by increasing the ways that women can autonomously earn money, and by recognizing their reproductive labor.²⁰¹ Given that doctors and lawyers can

¹⁹³ See "Risky Business", *supra* note 172; Cloutier, *supra* note 153.

¹⁹⁴ Stanford Encyclopedia of Philosophy, "Feminist Perspectives on Objectification" (16 Dec 2019), online: Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/feminism-objectification/>>.

¹⁹⁵ "Commodification and Commercialization" in David Levinson & Gertrud Pfister, eds, *Berkshire Encyclopedia of World Sport* (3rd ed) (Great Barrington: Berkshire Publishing Group, 2013), online: <<https://www-oxfordreference-com.proxy.bib.uottawa.ca/view/10.1093/acref/9780190622695.001.0001/acref-9780190622695-e-66?rskey=RTDoph&result=67>>.

¹⁹⁶ *Ibid.*

¹⁹⁷ Cloutier, *supra* note 153 at 7.

¹⁹⁸ Angela Campbell, "Engaging with Surrogates' Choices: Tracing and Proscribing Viable Mothers in Law" in Angela Campbell, *Sister Wives, Surrogates and Sex Worker: Outlaws by Choice?* (New York: Routledge, 2013) at 131 [Campbell, *Sister Wives*]; Lemmens, *supra* note 30 at p 256.

¹⁹⁹ *Proceed with Care*, *supra* note 8.

²⁰⁰ Cloutier, *supra* note 153; Deckha, *supra* note 6.

²⁰¹ See: Cloutier, *supra* note 153.

currently profit from surrogacies, some believe that the surrogates should be able to profit as well.²⁰² Empowering women in this way could challenge the traditional view of women's role in society, which has often focused on providing altruistic labor within the domestic sphere.²⁰³ This empowerment could in fact bolster women's collective dignity and reproductive autonomy, as opposed to hindering it. Accordingly, some have argued that the prohibition is better characterized as an unjustified, paternalistic limit by the state.²⁰⁴

Notably, my thesis is not focused on the question of whether surrogates should or should not be paid. However, I do discuss payment to intermediaries, and how this dynamic may affect the services they provide to surrogates and intended parents. Therefore, commercialization is a live issue throughout my project, as paying intermediaries could still have the effect of commercializing surrogates, even if the surrogates themselves are only being reimbursed.

iii. Separating from the child

Historically, lawmakers and scholars were deeply concerned with a surrogate's emotional capacity to part with the child after birth.²⁰⁵ As discussed, these fears were propelled by the controversy in *Re: Baby M*.²⁰⁶ However, empirical research has found that very few surrogates refuse to relinquish the child.²⁰⁷ Furthermore, the majority of surrogates do not report difficulty separating from the children.²⁰⁸ In reviewing the literature, Karen Busby concludes that "very few women express distress [with respect to the surrogacy process] and when they do, the

²⁰² *Ibid* at 7.

²⁰³ *Ibid* at 8.

²⁰⁴ *Ibid* at 7.

²⁰⁵ *Proceed with Care*, *supra* note 8 at 685.

²⁰⁶ *In the Matter of Baby M*, [1988] 109 NJ 396 .

²⁰⁷ Busby, *supra* note 189 at 73; Viveca Söderström-Anttila et al, "Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review" (2016) 22:2 *Human Reproduction Update* 260.

²⁰⁸ *Ibid*.

distress is related to the relationship with the commissioning parents, not over relinquishing the child”.²⁰⁹ These empirical findings are supported by the very limited number of reported Canadian cases where a surrogate has contested custody.²¹⁰ However, legal cases may not serve as ideal indicators of surrogates’ desires to keep the children born of surrogacy because cases may settle outside of court; surrogates may not have the resources to start a court challenge; or, they may avoid lawyers or courts if they were paid for their services contrary to the AHRA.²¹¹ Some lawyers have reported rare situations where surrogates have changed their mind about wanting to relinquish the child, though these cases did not proceed to court.²¹² Nevertheless, such cases do not appear to be the norm. Overall, concerns regarding surrogates’ emotional capacity are not widely substantiated in the available empirical evidence.

iv. Legal, Financial and Physical Risks

While exploitation, commercialization and separation have been the most widely touted concerns with surrogacy, other situational vulnerabilities have been raised in surrogacy literature. Often times, these represent circumstances where the surrogate’s autonomy is somehow fettered in a manner that can may increase their legal, financial or physical risk. Stefanie Carsley interviewed multiple Canadian surrogacy lawyers, some of whom shared stories about surrogates who were put in vulnerable positions. One lawyer thought surrogates were not always given enough time to fully inform themselves during contract negotiations.²¹³ Another lawyer believed that some surrogates did not fully understand their contracts due the density and complexity of

²⁰⁹ Busby, *supra* note 189 at 73.

²¹⁰ A Canadian surrogate contested custody in *HLW. and THW v JCT and JT*, 2005 BCSC 1679.

²¹¹ Busby, *supra* note 189 at 73; Söderström-Anttila, *supra* note 207.

²¹² Carsley, Dissertation, *supra* note 105 at 73.

²¹³ *Ibid* at 144.

certain surrogacy agreements.²¹⁴ Carsley notes that some of the contracts also included breach of contract provisions, which could further mislead and confuse surrogates about their legal obligations and rights.²¹⁵ Breach of contract clauses may be misleading because many provisions contained within surrogacy agreements would not actually be enforced by courts, particularly where the provisions concern the surrogate's bodily autonomy.²¹⁶ In other cases, surrogates received inadequate legal representation.²¹⁷ All of these instances can adversely impact a surrogate's autonomous decision-making.

Carsley also discusses situations where surrogates were not reimbursed following miscarriages or birth.²¹⁸ Given the exorbitant cost of litigation, these surrogates were generally left out-of-pocket and without any recourse.²¹⁹ Samantha Yee's survey data also revealed a theme of surrogates being financially vulnerable as a result of intended parents refusing to reimburse expenses.²²⁰ While the majority of Yee's participants expressed positive feelings towards their surrogacy journeys and their surrogacy consultancies, some of the surrogates in Yee's study also voiced concerns that the surrogacy agencies were taking advantage of them.²²¹

Birth and pregnancy, particularly when achieved through in-vitro fertilization, carry inherent physical risks for the birthing person.²²² There may be concerns about surrogates not being treated as patients in and of their own right, and correspondingly not having their health

²¹⁴ *Ibid* at 149.

²¹⁵ *Ibid* at 177.

²¹⁶ *Ibid* at 177.

²¹⁷ *Ibid* at 122, 176.

²¹⁸ *Ibid* at 221.

²¹⁹ *Ibid* at 221.

²²⁰ Yee, *supra* note 6 at 5.

²²¹ *Ibid* at 5. Unfortunately, Yee's paper did not provide details regarding how the agencies were behaving, or why the surrogates felt this way.

²²² Nicola Davis, "Surrogates Face Higher Risk of Pregnancy Complications, Study Finds" *The Guardian* (23 September 2024), online: <<https://www.theguardian.com/lifeandstyle/2024/sep/23/surrogates-face-higher-risk-of-pregnancy-complications-study-finds>>.

prioritized during medical decision-making. One example of this is transferring multiple embryos against guideline recommendations, as multiple pregnancies carry greater medical risks for the surrogate than do singleton pregnancies.²²³ Surrogates may feel pressured to transfer multiple embryos in order to improve the intended parents' chances of having a baby.²²⁴ In a similar vein, concerns have been raised about surrogates receiving abortions when they do not actually want one,²²⁵ and not having their birth preferences respected.²²⁶

Children's Vulnerabilities

Scholars and lawmakers have also voiced concerns regarding how surrogacy may negatively impact children born of surrogacy. While my project focuses predominantly on surrogates and intended parents, I will nevertheless briefly canvass these oft-cited fears. In addition to the concerns about commercialization, objectification and commodification,²²⁷ discussed above, some have argued that surrogacy endangers children's right to identity and nationality.²²⁸ Such fears were propelled by the story of baby Gammy. In 2014,²²⁹ a Thai surrogate was hired by an Australian couple. When the couple discovered she was carrying a child affected with Downs Syndrome, they asked the surrogate to abort the child. She declined on religious grounds. The couple subsequently refused to take the baby once he was born and left

²²³ Pamela M White, "One for Sorrow, Two for Joy?: American embryo transfer guideline recommendations, practices, and outcomes for gestational surrogate patients" (2017) 34:4 J Assist Reprod Genet 431 at 431.

²²⁴ *Ibid* at 431.

²²⁵ *Ibid* at 431.

²²⁶ Some of my participants discussed conflicts arising between surrogates and intended parents regarding birth preferences. See Chapter 4.

²²⁷ Maria De Koninck, "Afterword: Legitimizing Surrogacy - A Social Setback" in Gruben, *Surrogacy in Canada*, *supra* note 10. See also: Cattapan, "Risky Business", *supra* note 172; Cloutier, *supra* note 153.

²²⁸ United Nations General Assembly, "Violence against women and girls, its causes and consequences: note by the Secretary-General", UNGAOR, 80th Sess, UN Doc A/80/158 (14 July 2025), online:

<<https://docs.un.org/en/A/80/158>>; United Nations Children's Fund, "Key Considerations: Children's Rights & Surrogacy" (Briefing Note, February 2022), online: <<https://www.unicef.org/media/115331/file>>.

²²⁹ Prior to Thailand's ban on international surrogacy.

him with the surrogate to raise.²³⁰ Some scholars viewed this as a call to action to increase protections for children born via international surrogacy.²³¹

Even in the context of domestic and altruistic surrogacies, concerns have been raised about the trauma that may be experienced by an infant when it is separated from the gestational carrier, as well as the ability of the intended parents and the child to bond.²³² Some scholars have gone so far as to call surrogacy a selfish plan “to make a child motherless”.²³³ At present, there is no empirical research substantiating these fears, nor supporting any significant harm to children as a result of being born via surrogacy.²³⁴ Moreover, no significant differences have been reported between parent-child dynamics in families created via surrogacy versus not,²³⁵ nor in the children’s psychological well-being.²³⁶

Intended Parents’ Vulnerabilities

Most of the apprehensions surrounding surrogacy have traditionally focused on concerns for the surrogates and for the children born via surrogacy.²³⁷ However, recent research, including my own, suggests that intended parents may also be uniquely vulnerable in the surrogacy

²³⁰ Sonia Allan, “Baby Gammy case reveals murky side of commercial surrogacy” *The Conversation* (14 August 2014), online: <https://theconversation.com/baby-gammy-case-reveals-murky-side-of-commercial-surrogacy-30081>.

²³¹ *Ibid.*

²³² Seow Hon Tan, “How Surrogacy Arrangements Fail Children” (Public Discourse, 16 February 2021) online: <https://www.thepublicdiscourse.com/2021/02/74041/>; Marcus Agnafors, “The harm argument against surrogacy revisited: two versions not to forget” (2014) 17 *Med Health Care Philos* 357.

²³³ Gruben, *Surrogacy in Canada*, *supra* note 10 at 279.

²³⁴ Susan Golombok et al, “Children raised in families created by assisted reproduction: a literature review” (2016) 22:2 *Human Reproduction Update* 260.

²³⁵ Vasanti Jadva et al, “Surrogacy: the experiences of surrogate mothers” (2011) 18:3 *Human Reproduction* 2196.

²³⁶ American Surrogacy, “What Are Surrogacy’s Effects on Children Born Via This Method? (accessed August 29, 2025), online: <https://www.americansurrogacy.com/blog/what-are-surrogacys-effects-on-children-born-via-this-method/>.

²³⁷ *Proceed with Care*, *supra* note 8 at 662-692; Kirsty Horsey et al, “UK intended parents’ characteristics, experiences, and views on surrogacy law reform” (2023) 37:1 *Int J of L Policy and the Family* ebad004 at 3 [Horsey, “UK intended parents”].

process, perhaps sometimes more so than surrogates.²³⁸ This vulnerability can stem from multiple sources. First, most heterosexual intended parents who are pursuing surrogacy are doing so in the wake of extensive battles with infertility, cancer treatments, or recurrent miscarriages.²³⁹ These experiences can often lead to significant physical and psychological trauma which can adversely affect the individuals' mental health.²⁴⁰ Infertility can also lead to stigma and social consequences, such as marital breakdown, domestic violence, and delays in receiving treatment, all of which can negatively impact the individuals' overall quality of life.²⁴¹

Many same-sex couples pursuing surrogacy have also experienced discrimination based on LGBTQIA2S+ status, including negative attitudes towards non-traditional family forms.²⁴² This can be particularly true for international same-sex couples who are prohibited from seeking surrogacy in their own countries.²⁴³ These individuals face additional obstacles in their family-building, including: learning about foreign legal systems; dealing with language barriers and cultural differences; spending time and money on travel; and, taking weeks or months off work to support the surrogate and/or await the birth and the issuance of travel documents for the child.²⁴⁴ For both heterosexual and same-sex individuals, following a much-wanted pregnancy from a distance can take an emotional toll.²⁴⁵

²³⁸ Horsey, "UK intended parents", *supra* note 237 at 3; Carsley, Dissertation, *supra* note 105; Carsley, "Surrogacy Agencies in Canada", *supra* note 22.

²³⁹ Horsey, "UK intended parents", *supra* note 237 at 3.

²⁴⁰ DJ Diamond et al, "The Psychology of Reproductive Traumas: Infertility and Pregnancy Loss" (2005) 83:5 *Supp Fertility & Sterility* S14.

²⁴¹ Yui Xie et al, "The impact of stigma on mental health and quality of life of infertile women: A systematic review" (2023) 13 *Frontiers in Psychology* 1093459.

²⁴² Horsey, "UK intended parents", *supra* note 238 at 3.

²⁴³ Gruben, "Surrogacy, Feminism and LGBTQ2S+ Family Building", *supra* note 146 at 169-70.

²⁴⁴ Deborah Dempsey, 'Relating Across International Borders: Gay Men Forming Families through Overseas Surrogacy' in Marcia C Inhorn, Wendy Chavkin & José-Alberto Navarro (eds), *Globalized Fatherhood* (Berghahn Books 2014) 283; Salvatore Monaco and Urban Nothdurfter, 'Stuck under the Rainbow? Gay Parents' Experiences with Transnational Surrogacy and Family Formation in Times of COVID-19 Lockdown' (2021) 11 *Italian Sociological Review* 509 at 512-13.

²⁴⁵ Monaco, *supra* note 244 at 513.

Many intended parents must face the uncertainty of whether they will ever have a child.²⁴⁶ There is a disproportionate lack of surrogates in Canada in comparison to the number of intended parents seeking a surrogate.²⁴⁷ The unfortunate reality is that not every intended parent will be successful in their pursuit of parenthood. As such, intended parents may feel pressured to accept anyone who is willing to help them.²⁴⁸ One Canadian surrogacy lawyer interviewed by Stefanie Carsley told the story of an intended parent who was so desperate to have a child, she wanted to move forward despite the fact that the surrogate was a smoker, on social welfare, and had no phone.²⁴⁹ Other Canadian surrogacy lawyers in Carsley’s study expressed that the small number of available surrogates can be used as leverage against the intended parents when negotiating surrogacy contracts.²⁵⁰ Because many intended parents are “desperate” to have children, and because they have already invested significant time and resources into the surrogacy arrangement by the time that contract negotiations begin, the intended parents do not want to “push too hard” and risk having the surrogate walk away.²⁵¹ Outside of contract negotiations, there have been reports of intended parents paying more than they believe the surrogate is actually spending out-of-pocket, because they do not want to “rock the boat” by questioning the expenses as presented by the surrogate and/or the consultancy.²⁵² These fears are

²⁴⁶ Xie, *supra* note 241.

²⁴⁷ Carsley, Dissertation, *supra* note 105 at 130. Several of my participants also believed there was a shortage of surrogates in Canada in comparison to intended parents. See Chapter 3.

²⁴⁸ See for example: Carsley, Dissertation, *supra* note 105 at 130.

²⁴⁹ *Ibid* at 130.

²⁵⁰ *Ibid* at 140

²⁵¹ *Ibid* at 145-46.

²⁵² CBC News, “Surrogacy Agencies Face Little Oversight, High Costs” (6 February 2020), online: <<https://www.cbc.ca/news/health/surrogacy-agencies-expenses-costs-oversight-canada-1.5476965>> [CBC News, “Surrogacy Agencies Face Little Oversight”].

not unfounded. One surrogate reported considering an abortion due to the intended parents “nit-picking” expenses she was claiming.²⁵³

Canada’s legal structures can further reinforce intended parents’ powerlessness.²⁵⁴ Under provincial parentage laws, the surrogate is recognized as the first parent due to her gestational connection to the child.²⁵⁵ While provinces like British Columbia and Ontario have outlined specific situations where intended parents can be registered as parents without needing a court order,²⁵⁶ other provinces require intended parents to apply for judicial declarations.²⁵⁷ As a result, intended parents are subjected to additional legal costs, as well as extended periods of uncertainty regarding their status as parents.²⁵⁸ Some lawyers have shared stories about surrogates withholding their transfer of parental rights due to disputes over contact, medical decision-making, expenses, and information disclosure.²⁵⁹

Even in the more permissive jurisdictions, provincial parentage laws generally retain space for surrogates to change their minds following the pregnancy.²⁶⁰ For example, in Ontario, the surrogate cannot relinquish her parental rights until seven days after the birth of the child.²⁶¹ Furthermore, in the event of a parentage dispute between the surrogate and the intended parent,

²⁵³ *Ibid.*

²⁵⁴ See: Carsley, Dissertation, *supra* note 105 at 146.

²⁵⁵ For further discussion see: Roxanne Mykitiuk, 'Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies' (2001) 39 Osgoode Hall Law Journal 771; Angela Campbell, 'Conceiving Parents through Law' (2007) 21 International Journal of Law, Policy and the Family 242; Karen Busby, 'Of Surrogate Mother Born: Parentage Determinations in Canada and Elsewhere' (2013) 25 Canadian Journal of Women and the Law 284; Dave Snow, 'Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario’s All Families Are Equal Act' (2017) 32 Canadian Journal of Law and Society 329; Gruben, “Surrogacy, Feminism and LGBTQ2S+ Family Building”, *supra* note 146.

²⁵⁶ Family Law Act, SBC 2011, c 25, s 29 [BC FLA]; Children’s Law Reform Act, RSO 1990, c C-12 [CLRA], ss. 10–11; Children’s Law Act, RSPEI 2021, c C-6.1, s 23 [PEI CLA]. For further discussion of the conditions that need to be met, see Gruben, “Surrogacy, Feminism and LGBTQ2S+ Family Building”, *supra* note 146.

²⁵⁷ For example: Family Law Act, SA 2003, c F-4.5 [Alta FLA]; *The Family Law Act*, CCSM c F20; *The Children’s Law Act*, 2020, SS 2020, c C-8.2, s 62.

²⁵⁸ Gruben, “Surrogacy, Feminism and LGBTQ2S+ Family Building”, *supra* note 146.

²⁵⁹ Stefanie Carsley, “Surrogacy in Canada: Lawyers' Experiences and Practices” (2022) 34:1 Can J W L 41 at 73 [Carsley, “Surrogacy in Canada”].

²⁶⁰ CLRA, *supra* note 256, s 10(4).

²⁶¹ CLRA, *supra* note 256, s 10(4).

surrogacy agreements are not enforceable.²⁶² Some provinces allow these agreements to be used as evidence of the parties' intentions, though the court will ultimately prioritize the child's best interests when resolving a parentage dispute.²⁶³ Other provinces provide very little recourse for the intended parents.²⁶⁴ While these legal structures are designed to protect the surrogates, they leave intended parents in a particularly vulnerable position. Surrogates may use their *prima facie* parental status as a bargaining chip.²⁶⁵ While uncommon, there have been some cases where surrogates have withheld parentage, not because they wanted to parent the child, but because of disagreements with the intended parents over finances or contact with the family.²⁶⁶ In the event that this bargaining leads to payment beyond reimbursement, the penalties under the AHRA would fall solely on the intended parents.²⁶⁷

These legal schemes diminish the intended parents' genetic and emotional connections to the child.²⁶⁸ Furthermore, they reinforce the general lack of control that intended parents can exercise over their parenthood journeys, the surrogacy, and its outcome. This lack of control, paired with the legal structures, as well as the possibility of pre-existing trauma, stigma or discrimination, can make intended parents uniquely vulnerable in the surrogacy process. This vulnerability has the potential to be exploited by surrogates, consultants, or other third parties in the surrogacy process.

²⁶² BC FLA, *supra* note 256, s 29(6); CLRA, *supra* note 256, s 10(9); PEI CLA, *supra* note 256, s 23(5); Children's Law Act, SS 2020, c 2, s. 62(12) [SK CLA]; Family Maintenance Act, CCSM c F20, s. 24.1(5) [FMA].

²⁶³ CLRA, *supra* note 256, s 10(8); PEI CLA, *supra* note 256, s 2; SK CLA, *supra* note 262, s 62(11); FMA, *supra* note 262, s 2(1);

²⁶⁴ Alta FLA, *supra* note 257, ss 8.1-8.2; *Adoption — 1873*, 2018 QCCQ 1693. For further discussion see: Gruben, "Surrogacy, Feminism and LGBTQ2S+ Family Building", *supra* note 146.

²⁶⁵ Gruben, "Surrogacy, Feminism and LGBTQ2S+ Family Building", *supra* note 146.

²⁶⁶ *Ibid*; Carsley, "Surrogacy in Canada", *supra* note 259 at 71-6.

²⁶⁷ AHRA *supra* note 4, s6.

²⁶⁸ Gruben, "Surrogacy, Feminism and LGBTQ2S+ Family Building", *supra* note 146; Carsley, "Reforming", *supra* note **Error! Bookmark not defined.**; Stefanie Carsley "Reconceiving Quebec's Laws on Surrogate Motherhood" (2018) 96:1 Can Bar Rev 121 at 144-45 [Carsley, "Reconceiving"].

b) Concerns with Intermediaries

As with for-profit surrogacy, the Baird Commission wanted to criminalize paid surrogacy intermediaries to curtail the overall practice of surrogacy, with the hope of preventing the purported harms of exploitation and commercialization of surrogates and children.²⁶⁹ However, there is limited evidence regarding whether and how surrogacy consultancies may be helping and/or harming surrogates. Different narratives that have arisen around consultancies and their involvement in surrogacy, though notably most are negative.

Many scholars and advocates are strongly opposed to these intermediaries, arguing that they exploit surrogates and, particularly, intended parents.²⁷⁰ This is supported by a fair amount of negative press.²⁷¹ Alison Motluk has reported consultants being unsupportive; conveying misinformation; refusing to provide clarity about how intended parents' funds are being used; refusing to provide refunds when no matches are made; and even threatening legal action against surrogates.²⁷² A CBC investigation heard that some consultancies encouraged surrogates to inflate their reimbursable expenses to meet the maximum allowable amounts stipulated in the surrogacy agreements, thereby financially prejudicing intended parents and breaching the AHRA.²⁷³ Some intended parents interviewed by Stefanie Carsley shared that they felt pressured by consultants to match with surrogates quickly, even if they did not believe the surrogate would pass medical screening; that consultants were not screening potential surrogates; that consultants

²⁶⁹ Cattapan, "Rhetoric and Reality", *supra* note 177 at 205, *Proceed with Care*, *supra* note 8 at 662-692.

²⁷⁰ Nelson, *supra* note 6 at 334; Stirling Davis, *supra* note 6 at 667.

²⁷¹ Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; CBC News, "Pressure to Have Multiple Babies Putting Surrogates at Risk" (13 January 2020), online: <https://www.cbc.ca/news/health/pressure-to-have-multiple-babies-putting-surrogates-at-risk-1.5459957> [CBC News, "Pressure"].

²⁷² Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2

²⁷³ CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252.

were reimbursing surrogates improperly; that consultants were pressuring surrogates to undergo subsequent journeys in early postpartum; and even that consultants were sometimes bullying intended parents.²⁷⁴ These reports raise concerns regarding how consultants may exploit, coerce and/or threaten the reproductive autonomy of surrogates and intended parents. In my own research, I raise some concerns surrounding consultants' conflicts of interests. In other words, I note instances where consultants may have difficulty making impartial decisions and/or acting in best interests of both the intended parents' and the surrogates', either due to personal interests or their clients'²⁷⁵ contradicting needs.

Importantly, all these concerns apply regardless of whether consultants are paid or unpaid. However, where consultancies are run for profit, additional fears are activated. Some worry that consultants are unfairly profiting off of surrogates' reproductive labor, given that the surrogates, themselves, are unable to profit.²⁷⁶ Others believe that consultants create an industry that commercializes pregnancy, women and children in a manner that collectively undermines human dignity.²⁷⁷ Many have raised concerns about the amounts these consultancies are charging.²⁷⁸ Motluk has also reported on a consultancy covertly refusing to re-match intended parents, as this would not generate as much income for the consultancy as matching new intended parents.²⁷⁹ The Baird Commission feared that the consultants would act in the best interests of the intended parents rather than in the interests of the surrogates, as the intended parents were paying the consultants' fees.²⁸⁰ Together, these concerns add a new dimension to the discussion about consultancies. Not only are there questions about how consultants'

²⁷⁴ Carsley, "Surrogacy Agencies in Canada", *supra* note 22.

²⁷⁵ When I refer to consultants' clients, I refer to both surrogates and intended parents.

²⁷⁶ Nelson, *supra* note 6 at 334; Stirling Davis, *supra* note 6 at 667.

²⁷⁷ *Proceed with Care*, *supra* note 8 at 662-692.

²⁷⁸ Carsley, "Surrogacy Agencies in Canada", *supra* note 22; Motluk, "We should regulate agencies", *supra* note 2.

²⁷⁹ Motluk, "Waiting Room", *supra* note 133.

²⁸⁰ *Proceed with Care*, *supra* note 8 ART 670, 673.

behaviours might impact surrogates and intended parents, there are also questions about how paying consultants, whether legally or illegally, can influence these behaviours and ultimately impact how these relationships are structured.

Despite all of the above, consultants are not universally scorned. Several scholars have mentioned that surrogacy consultants might act as important sources of support, and potentially play an important role in facilitating smooth surrogacy experiences for all parties involved.²⁸¹ Surrogacy can be a complicated process that might require informational, logistical and emotional support. Without consultants, some surrogates and intended parents might struggle to navigate the journey and receive the support they need.²⁸² Carsley notes that “many intended parents require assistance to find a person who is willing to act as a surrogate, and some agencies play an important role in providing information, guidance, and support for surrogates and intended parents”.²⁸³ Furthermore, despite some of the problematic practices identified in Carsley’s interviews, half of her participants were satisfied with the services their consultancies provided.²⁸⁴ Many of the intended parents in her study reported benefitting from consultants’ matching services, their support, their reimbursement management, and/or their coordination.²⁸⁵ Samantha Yee also conducted empirical surrogacy research in Canada. Based on her survey findings, she suggests that many surrogates in her study had harmonious relationships with their intended parents because the intermediaries helped match individuals with similar expectations.²⁸⁶ All of these aforementioned findings indicate that consultants can potentially

²⁸¹ Campbell, *Sister Wives*, *supra* note 198 at 140; Yee, *supra* note 6 at 6-7.

²⁸² Campbell, *Sister Wives*, *supra* note 198 at 140, Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 99.

²⁸³ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 99.

²⁸⁴ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76.

²⁸⁵ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76-78.

²⁸⁶ Yee, *supra* note 6 at 8.

help foster meaningful and positive surrogacy experiences.²⁸⁷ Accordingly, there are concerns that the current prohibition on paid intermediaries in the AHRA may prevent surrogates and intended parents from accessing beneficial support.²⁸⁸

Given these mixed perspectives, additional empirical support is important.²⁸⁹ My project aims to add new evidence to these debates and discussions. As I will expand on in the subsequent Part, one of the primary goals of my research is to generate empirical evidence that can help us better understand whether and how the various concerns about surrogacy consultancies are manifesting, and whether consultants' first-hand accounts align with the evidence we are gleaning from other stakeholders. Importantly, I would like to qualify that, throughout my data, I found significant variation across consultancy practices. As such, I believe that broad statements that label consultants as generally "good" or "bad" are neither useful nor accurate. Rather, I believe my research provides a more detailed and nuanced view of how these consultancies are operating, and how the law is influencing these practices.

Part III: Research, In Context

a) Research Questions & Objectives

My project is inspired by two primary questions. First, I ask how my participants' first-hand accounts confirm, contradict, or nuance the existing narratives about surrogacy consultancies. As I outline above, the available empirical evidence on consultancies is limited.

²⁸⁷ Yee, *supra* note 6.

²⁸⁸ Motluk, "We should regulate agencies", *supra* note 2.

²⁸⁹ Additional data from the forthcoming Surrogates' Voices project, headed by Professor Vanessa Gruben, will provide important information on surrogates' views on surrogacy agencies. Unfortunately, this data was not yet available at time of writing.

While some scholars and stakeholders believe these services can be beneficial,²⁹⁰ there is an overwhelmingly negative sentiment that consultancy practices are harming surrogates and intended parents.²⁹¹ In asking this research question, I seek to better understand how the concerns and benefits raised in the literature are manifesting in my participants' own accounts and perspectives.

The literature is generally concerned with how the delivery of these services might impact surrogates and intended parents. I am mindful that my own data cannot speak directly to the experiences of surrogates and intended parents. However, consultants' descriptions of what they are doing nonetheless provide new insight into how their practices might affect surrogates and intended parents. I employ feminist relational theory to derive these potential impacts, and to engage with what my data can tell us about the manifestation (or lack thereof) of scholars' and lawmakers' concerns with for-profit intermediaries.

Second, I ask how my participants understand and implement Canada's laws on paid surrogacy and paid surrogacy intermediaries. My objective in asking this question is to better understand how consultants' interpretations of the law might be used to justify and shape the delivery of their services. Generating novel evidence on the law's implementation allows for more informed discussions of where the AHRA is working effectively, and where the law might be failing to support surrogates and intended parents in accordance with relational feminist values. It is my hope that this information can be used to substantiate evidence-based law reform,

²⁹⁰ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 76-78; Yee, *supra* note 6; Motluk, "We should regulate agencies", *supra* note 2.

²⁹¹ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78-99; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; Nelson, *supra* note 6, *Proceed with Care*, *supra* note 8 at 662-692; CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252; CBC News, "Pressure", *supra* note 271.

if and where applicable. Evidence-based reform is law reform that is drafted in response to data generated by systemic research.²⁹²

b) Originality & Contribution

This is the first study to conduct qualitative interviews with Canadian surrogacy consultants. Prior to my research, Canadian surrogacy consultants had never been comprehensively interviewed about their practices, though some data had been collected on surrogates' and intended parents' experiences with the consultancies.²⁹³ Moreover, the pre-existing Canadian surrogacy literature rarely focused on surrogacy consultancies.²⁹⁴ Rather, consultants were generally mentioned in a cursory manner, as a tangent off the larger conversation about commercialized surrogacy.²⁹⁵ Accordingly, this project contributes empirical data from a new group of informants, which can help fill some of the existing gaps within Canadian surrogacy literature, and provide insight into how consultants' perspectives fit within the existing narratives about surrogacy consultancies.²⁹⁶ My interviews tap into hitherto unheard voices, which represent an important piece of the full picture when investigating how surrogacy is occurring in Canada. Ultimately, this project gains its importance by virtue of gathering

²⁹² Kevin E Davis, "The Limits of Evidence-Based Regulation: The Case of Anti-Bribery Law" (NYU Law and Economics Research Paper No 19-42, 1 November 2019) at 1.

²⁹³ Busby, *supra* note 189; Carsley, "Surrogacy Agencies in Canada", *supra* note 22; Carsley, Dissertation, *supra* note 105; Carsley, "Surrogacy in Canada", *supra* note 259; Horsey, "UK intended parents", *supra* note 238; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; Stirling Davis, *supra* note 6; Yee, *supra* note 6; Kévin Lavoie & Isabel Côté, "Navigating in Murky Waters: Legal Issues Arising from a Lack of Surrogacy Regulation in Quebec" in Gruben, *Surrogacy in Canada*, *supra* note 10; Isabel Côté & Jean-Sébastien Sauvé, "Homopaternalité, gestation pour autrui: no man's land?" (2016) 46:1 RGD 27; Sophia Fantus, "A Report on the Supports and Barriers of Surrogacy in Canada" (2020) 42:6 J Obstetrics & Gynaecology Can 803.

²⁹⁴ Examples of articles that focus on agencies include: Motluk, "We should regulate agencies", *supra* note 2; Motluk, "Waiting Room", *supra* note 133; Carsley, "Surrogacy Agencies in Canada", *supra* note 22; CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252. Notably, only the first citation was written at the time I began my study.

²⁹⁵ See for example: Yee, *supra* note 6; Nelson, *supra* note 6; Busby, *supra* note 189; Deckha, *supra* note 6.

²⁹⁶ These gaps are discussed in: Motluk, "We should regulate agencies", *supra* note 2.

perspectives that could be instrumental for understanding how consultants are operating, how the law is working in practice, and where the law might need to be reformed in order to better support surrogates and intended parents.

Conclusion

Canada's surrogacy laws were created in response to early fears about how assisted reproduction could harm women and children.²⁹⁷ These laws reflect the Baird Commission's belief that surrogacy was inherently risky and should be discouraged.²⁹⁸ Nevertheless, despite strict prohibitions on payment and the use of paid intermediaries, surrogacy has grown steadily,²⁹⁹ and consultancies operate openly.³⁰⁰ Weak enforcement has resulted in a system that is both restrictive on paper and ineffective in practice, fueling calls for legal reform.³⁰¹

While many historic concerns with surrogacy have not been substantiated by recent empirical evidence,³⁰² newer issues are being raised by scholars, reporters, and stakeholders. In particular, new data emphasizes intended parents' vulnerabilities in the surrogacy process, stemming from the stress of infertility, limited legal control, high financial costs, and emotional

²⁹⁷ *Proceed with Care*, *supra* note 8 at 663-692.

²⁹⁸ *Proceed with Care*, *supra* note 8 at 670.

²⁹⁹ Gruben, *Surrogacy in Canada*, *supra* note 10 at 1; "Surrogacy in Canada Has Increased 400% in 10 Years: More Facts" (CBC, accessed 26 August 2025), online: <<https://www.cbc.ca/documentarychannel/features/surrogacy-in-canada-has-increased-400-in-10-years-more-facts#:~:text=The%20trend%20of%20couples%20delaying,are%20choosing%20to%20become%20parents.&text=The%20average%20expenses%20paid%20by,a%20surrogate%20are%20approximately%20%2420%2C000>>.

³⁰⁰ See for example: Canadian Fertility Consulting, "Surrogacy Agency" (accessed 26 August 2025), online: <<https://fertilityconsultants.ca/surrogacy-agency/>>; Surrogacy in Canada Online, "Surrogacy Process for Intended Parents" (accessed 26 August 2025), online: Surrogacy in Canada Online <<https://surrogacy.ca/intended-parents/surrogacy-process/>>; JA Surrogacy Canada, "Home" (accessed 26 August 2025), online: JA Surrogacy Canada <<https://www.jasurrogacy.com/>>.

³⁰¹ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

³⁰² See Part II, above, for more in depth discussion.

strain throughout the process.³⁰³ Surrogacy consultancies, in particular, have been the subject of recent debate.³⁰⁴ The literature on surrogacy consultancies presents a mixed, but more often critical, perspective of these businesses.³⁰⁵ Various reports have raised concerns about exploitation, misinformation, illegal activities, and profit-driven practices.³⁰⁶ However, there have also been reports of consultancies providing beneficial support and guidance.³⁰⁷ Overall, these mixed narratives point to the need for more empirical research on these businesses.

This project contributes to the existing literature by gathering data from surrogacy consultants, themselves. My research is centred around two primary inquiries: first, how do surrogacy consultants' accounts support or challenge existing narratives about these businesses? Second, how do consultants interpret and implement Canada's surrogacy laws? The ensuing data provides a clearer and more nuanced understanding of surrogacy consultants' perspectives; how these businesses are actually operating in Canada; and, how the law might be impacting these dynamics for better or for worse.

³⁰³ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*; Nelson, *supra* note 6; *Proceed with Care*, *supra* note 8 at 662-692.

³⁰⁷ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; Yee, *supra* note 6.

CHAPTER 2: METHODOLOGY, THEORY & METHODS

Introduction

My research is built upon a feminist relational framework.³⁰⁸ Feminist relationalism can be understood as both a methodology and a theory.³⁰⁹ While there are various understandings and iterations of relationalism, my framework is predominantly influenced by the works of Jennifer Nedelsky, Susan Sherwin, and Jennifer Bell.³¹⁰ In Part I of this Chapter, I describe the tenets of my feminist relational methodology, and discuss how this worldview shapes my understanding of the problem at hand. In Part II, I describe my normative commitments and explain how they guide my data analysis. I focus on the importance of autonomy, dignity, flourishing, and how these can be undermined by exploitation, coercion, commercialization, power imbalances, conflicts of interest, and pre-existing vulnerabilities.³¹¹ I also discuss the role of law in my analysis. Finally, in Part III, I describe the methods I use to gather my empirical data, including a discussion of their reliability and limitations. Ultimately, my theory and my methodology shape my methods and analysis by drawing attention to the relationships between consultants and their clients; and to the way that power dynamics, vulnerabilities, the law, and payment can structure these relationships for better or for worse.

³⁰⁸ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011); Sherwin, *supra* note 180; Jennifer A H Bell, "Relational Autonomy as a Theoretical Lens for Qualitative Health Research" (2020) 13:2 IJFAB 69.

³⁰⁹ Leckey, *supra* note 36; Nedelsky, *supra* note 308; Bell, *supra* note 308.

³¹⁰ Sherwin, *supra* note 180; Nedelsky, *supra* note 308; Bell, *supra* note 308.

³¹¹ All of these terms will be defined in Part II, below.

Part I: Feminist Relational Methodology

As a methodology, relationalism involves focusing on relationships and how they are structured in order to gain a deeper understanding of specific issues.³¹² It understands humans as socially-situated and interdependent.³¹³ Individuals live within a web of overlapping relations that collectively influence their identities, preferences, beliefs, opportunities, and choices.³¹⁴ The phrase “relational web” is a term of art coined by Jennifer Nedelsky to describe this dynamic.³¹⁵ Importantly, these relations are neither romanticized nor seen as benign, as “feminists know all too well the destructive power of bad structures of relationships”.³¹⁶

Applied within my thesis, I understand surrogates’ and intended parents’ experiences and decisions as being shaped by the multitude of relations around them. Indeed, the act of surrogacy, itself, is defined by the relationships that exist between the surrogate, the intended parents, and the child, in that surrogacy is the creation of a specific relationship between these individuals.³¹⁷ However, surrogates’ and intended parents’ relational webs extend far beyond those three parties. Their experience is influenced by a myriad of interpersonal relations, potentially including (but not limited to) those with surrogacy consultants, lawyers, counsellors, doctors, midwives, clinic and hospital staff, other surrogates, friends, family, and coworkers. All of these relationships and interactions will impact the surrogates’ and intended parents’ experiences, whether for better or for worse. Ample empirical research supports this

³¹² Leckey, *supra* note 36 at 13.

³¹³ Bell, *supra* note 308 at 70.

³¹⁴ Sherwin, *supra* note 180 at 9; Nedelsky, *supra* note 308; Llewellyn & Downie, *supra* note 36; Mackenzie, *supra* note 180.

³¹⁵ Nedelsky, *supra* note 308 at 88.

³¹⁶ Nedelsky, *supra* note 308 at 32.

³¹⁷ See: Swati Shah, Christina Ergler & Bryndl Hohmann-Marriott, “The other side of the story: Intended parents’ surrogacy journeys, stigma and relational reproductive justice” (2022) 74 Health & Place 102769 at 102769-70.

proposition.³¹⁸ Moreover, all of these interactions are filtered by the individual's intersectional identity, including socioeconomic status, race, ethnicity, disability, gender identity, and sexual orientation.³¹⁹ Out of all of these interpersonal relations, my project predominantly focuses on the role that consultants play within surrogates' and intended parents' relational web. Talking to consultants provides greater insight into this portion of the surrogacy web, which is necessary for understanding the full picture of how surrogacy is working in Canada.

According to my feminist relational framework, "relations" are not limited to interpersonal connections, but rather include broader understandings of social, institutional, legal and political contexts.³²⁰ This means that surrogates' and intended parents' experience are influenced by the social and political context surrounding surrogacy in their geographic area, including aspects like social attitudes towards surrogacy; surrogacy laws enacted by the government; enforcement of these laws by government officials; hospital and fertility clinic policies; and, even the quality of education that lawyers, consultants, and healthcare practitioners receive about surrogacy-specific topics. They are also influenced by institutional factors relating

³¹⁸ H Hanafin, "Surrogacy and gestational carrier participants" in LH Burns & SN Covington (eds), *Infertility Counseling: A Comprehensive Handbook for Clinicians* (New York: Parthenon, 1999) at 372; MacPhee, David & Kathy Forest, "Surrogacy: Programme Comparisons and Policy Implications" (1990) 4:3 Int'l JL & Fam 308 at 310 citing Kathy Forest & David MacPhee, "Surrogate Mothers' Grief Experiences and Social Support Networks" 17 (1989) (unpublished manuscript, available at the Department of Human Development and Family Studies, Colorado State University) (on file with the Virginia Law Review Association); Melinda Hohman & Christine B Hagan, "Satisfaction with surrogate mothering: a relational model" (2001) 4:1 J human behavior in the social environment 61 at 61; CB Kleinpeter, TL Boyer & Kinney ME, "Parents' evaluation of a California-based surrogacy program" (2006) 13:4 J Hum Behav Soc Environ 1; H Hanafin, "Long-Term Outcomes of Surrogate Pregnancy: A Report of Surrogate Mother's Satisfaction, Life Events and Moral Judgements Ten Years Later" (1998) 70:3 *Fertility and Sterility* S28-29; Yee, *supra* note 6; K Shaw et al, "It's all settled on the right page' surrogates' feelings and reflections of surrogacy two decades on", (2024) 39:12 Human Reproduction 2734 at 2735; Jill Hobson, "Intended Parents' Experiences of Surrogacy: A Systematic Review and Meta-Synthesis" (2021, School of Psychology The University of Adelaide) at 40.

³¹⁹ Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 *Stanford L Rev* 1241.

³²⁰ Sherwin, *supra* note 180; Nedelsky, *supra* note 308.

to the nature and structure of surrogacy consultancies, such as their private, for-profit nature, and the fact that the financial burden for these services falls solely on the intended parents.

These layers of nested relations interact and influence one another in a reciprocal fashion.³²¹ Both individuals and institutions are constituted by their web of relations, in that they are continually constructed and reconstructed through the interplay of various contextual influences.³²² These interactions can create and/or mitigate different vulnerabilities.

My thesis takes a particular interest in how the law may be structuring relations between consultants, surrogates and intended parents. The law prescribes what surrogates and intended parents can or cannot do,³²³ what others can or cannot do for them,³²⁴ when money can and cannot be exchanged,³²⁵ who the first named birth parent is,³²⁶ and when parental rights can be relinquished.³²⁷ In prescribing such limits, the law also influences what resources are available to surrogates and intended parents, including financial, emotional, informational, and technical support.³²⁸ The law is always “behind, beneath, or around”³²⁹ the relations that exist between surrogates, consultancies, and intended parents, which is why it is such an important piece of my project. Put differently, the law plays an important role in structuring these relationships, and the manner in which they are structured can compound or mitigate pre-existing vulnerabilities stemming from power imbalances, infertility, economic status, and intersectional identity.³³⁰

³²¹ Nedelsky, *supra* note 308.

³²² Bell, *supra* note 308 at 70, Sherwin, *supra* note 180 at 9; Nedelsky, *supra* note 308.

³²³ For example, the AHRA preventing surrogates younger than 21, and the AHRA preventing intended parents from paying surrogates: AHRA *supra* note 4, s6.

³²⁴ For example, the AHRA prohibiting paid intermediaries from arranging surrogacies: AHRA *supra* note 4, s6.

³²⁵ Reimbursement Regulations, *supra* note 24.

³²⁶ For example, in Ontario: CLRA, *supra* note 256, s 10.

³²⁷ *Ibid*, s 10.

³²⁸ In Chapters 3, 4 and 5, I discuss at greater length how consultants provide these forms of support, and in Chapter 6 I explore how the law is curtailing access to these resources.

³²⁹ Nedelsky, *supra* note 308 at 67.

³³⁰ *Ibid* at 32.

Though I primarily focus on the law, it is important to note that the relational web is also influenced by various policies – for example, protocols that outline standard medical procedures, or guidelines that shape how the Reimbursement Regulations are understood.³³¹

While not all relational methodologies are feminist,³³² I adopt a feminist conception of the relational approach. In other words, my framework’s worldview and normative commitments will be shaped by feminist ideas. Relational feminism promotes a mode of policy analysis that upholds the tenets of critical, intersectional and transformative feminism, in contrast with traditional liberal approaches to law, which often overemphasize legal subjects’ independence and rationality.³³³ Because surrogacy primarily takes place in women’s bodies, an appropriate theoretical framework for investigating the subject must be sensitive to the underlying feminist concerns. As the current legal scheme was founded on a desire to protect women and children from exploitation and vulnerability, a feminist approach is helpful for engaging with questions about the law’s purpose and effect.³³⁴

My relational worldview brings all these important concepts together, and shapes how I understand my research questions. This methodology brings the relational dynamics that arise between surrogates, intended parents, consultants, and the law to the forefront of my analysis. It helps me assess how my participants’ reported practices and perceptions may influence (and be influenced by) the broader relational web. In conjunction with my normative commitments, this framework allows me to comment on how these multi-faceted interactions may create or mitigate various vulnerabilities, which can ultimately impact surrogates’ and intended parents’ experiences and general well-being. In doing so, I situate my own findings within the literature

³³¹ Guidance Document, *supra* note 107.

³³² Nedelsky, *supra* note 308.

³³³ Mackenzie, *supra* note 180.

³³⁴ See Chapter 1 for extended discussion. *Proceed with Care*, *supra* note 8 at 673.

to assess what my findings add, support, contradict or nuance when compared to the pre-existing narratives about surrogacy consultancies.

Part II: Feminist Normative Commitments

As a theory, feminist relationalism goes beyond merely paying attention to relationships. It actively champions the promotion of feminist values through relationships. Instead of merely observing and describing the relations at play, relational theory's normative commitments allow users to evaluate, criticize and advocate for different kinds of interpersonal relationships, institutional structures, and laws.³³⁵

These values, which are typically espoused by many strands of feminist theories, include promoting autonomy, dignity, and human flourishing.³³⁶ According to my theory, autonomy, dignity and flourishing can be understood as modes of interacting with others.³³⁷ "Autonomy" refers to the ability to find and live in accordance with one's own law.³³⁸ "Dignity" is the inherent value in humanity.³³⁹ Dignity sees all humans as equally valuable, irrespective of the similarities or differences amongst them.³⁴⁰ "Flourishing" is the pursuit of self-actualization and fulfillment, both on a collective and an individual level.³⁴¹ In plainer terms, I understand

³³⁵ Leckey, *supra* note 36 at 14-17.

³³⁶ Nedelsky, *supra* note 308 at 82; I will refer to these as "feminist values", though I recognize that not all feminist theories champion these values.

³³⁷ Nedelsky, *supra* note 308 at 55 – while Nedelsky makes this argument with respect to autonomy only, I argue that the same is true for equality and dignity.

³³⁸ Leckey, *supra* note 36 at 10; Mackenzie, *supra* note 180 at 37.

³³⁹ Robin West & Cynthia Grant Bowman, eds, *Research Handbook on Feminist Jurisprudence* (CheltenhamL Edward Elgar Publishing, 2019), online: <<http://www.oritkamir.org/wp-content/uploads/2018/11/Final-dignitarian-jurisprudence-with-signs.pdf>> at 303.

³⁴⁰ *Ibid* at 304.

³⁴¹ The concept of flourishing arises in both the literature on commercialized surrogacy, as well as the literature on feminist relational theory: National League for Nursing, "Practical/Vocational Program Outcome: Human Flourishing" (2014), online: <http://www.nln.org/docs/default-source/default-document-library/human-flourishing->

flourishing as akin to overall well-being. Human flourishing occurs when constructive relations and interactions allow the aforementioned values to develop.³⁴² For example, if a consultant supports a surrogate's ability to make decisions autonomously, that surrogate's flourishing is also enhanced. Conversely, when dignity or autonomy is harmed, flourishing is correspondingly undermined.³⁴³ Throughout this thesis, questions of flourishing are activated when I broadly ask whether consultants' reported activities are effectively supporting surrogates and intended parents. Interpreted in conjunction with the existing literature, asking this allows me to garner a fuller and more nuanced understanding of consultants' activities.

Notably, flourishing can be understood as both an individual and a collective phenomenon. Social harm, also called "collective harm", extends beyond the negative experiences of a single individual, and captures systemic harms that can affect entire groups.³⁴⁴ Social harms can be embedded in economic, cultural, legal and institutional structures, producing widespread disadvantage and reinforcing social hierarchies.³⁴⁵ In other words, social harm can be broad and abstract, shaping collective experiences, whereas individual harm targets and impacts a specific person.³⁴⁶

As an example of this distinction, if a specific surrogate is treated in a manner that undermines her autonomy, that surrogate's individual flourishing has been hampered. For

[final.pdf?sfvrsn=0](#); Lemmens, *supra* note 30 at 430 ; Campbell, "A Place for Criminal Law", *supra* note 100; Angela Campbell, "Defining a policy rationale for the criminal regulation of reproductive technologies" (2002) 11 Health L Rev 26 at 28 [Campbell, "Defining a Policy Rationale"]; LLewellyin & Downie, *supra* note 36; Shelley Day Sclater & Cambridge Socio-Legal Group, *Regulating Autonomy: Sex, Reproduction and Family* (Oxford: Hart Publishing, 2009) at 15; Nedelsky, *supra* note 308 at 3.

³⁴² Nedelsky, *supra* note 308 at 55.

³⁴³ J Kleinig & NG Evans, "Human Flourishing, Human Dignity, and Human Rights" (2013) 32 Law & Philos 539; Campbell, "A Place for Criminal Law", *supra* note 100 at 97; Campbell, "Defining a policy rationale", *supra* note 341 at 28.

³⁴⁴ *Ibid.*

³⁴⁵ Sarah Todd, 'Feminist Theory' in Nick Coady & Peter Lehmann, *Theoretical Perspectives for Direct Social Work Practice: A Generalist-Eclectic Approach*, 3rd ed (New York: Springer Publishing Company, 2016).

³⁴⁶ *Ibid.*

example, this can occur if the for-profit nature of surrogacy consultancies incentivizes a consultant to unduly pressure a surrogate into undertaking a subsequent surrogacy very soon after giving birth, in order to generate more paid matches.³⁴⁷ On the other hand, broader social harm can occur if the existence of for-profit consulting, itself, commercializes women.³⁴⁸ Commercialization can harm women's collective dignity and flourishing by devaluing the uniqueness of life, reinforcing patriarchal structures, and perpetuating gender inequalities.³⁴⁹ These examples show how commercialization can result in both individual and collective harm. When I engage with social harm throughout this dissertation, I primarily consider the collective harms that may arise from commercialization, largely in the context of my discussions around consultants being paid.³⁵⁰ Otherwise, the majority of my analysis is focused on individual harm that may stem from consultants' activities.

As the above examples demonstrate, values like autonomy, dignity and flourishing are intimately tied to feminist concerns surrounding exploitation, coercion, commodification and commercialization.³⁵¹ Paying attention to these values therefore allows for deep and critical engagement with the Baird Commission's primary concerns – namely, exploitation and commercialization.³⁵² It also facilitates my examination of whether and how concerns raised in the media and academic literature are manifesting in my own data. These reports are primarily concerned with whether consultancies are helpful or harmful to surrogates and intended parents. To engage with this despite the fact that my data does not reflect surrogates' and intended

³⁴⁷ CBC News, "Pressure", *supra* note 271. See further discussion in Chapter 3.

³⁴⁸ Campbell, "A Place for Criminal Law", *supra* note 100 at 97; Campbell, "Defining a policy rationale", *supra* note 341 at 28.

³⁴⁹ Oki, Olumide Joshua, "Commodification of the Female Body: A Feminist Reading of Ruth Chukwudebe's *Heavenly Modella*" (2025) 18:1 African J of Humanities & Contemporary Education Research 47.

³⁵⁰ See Chapter 5 for further discussion.

³⁵¹ These terms are defined in Chapter 1.

³⁵² *Proceed with Care*, *supra* note 8.

parents' first-hand experiences, I rely on my feminist relational values to analyse how my participants' reported practices might impact surrogates and intended parents. This, in turn, allows me to grapple with whether my data supports, contradicts or nuances the different narratives about surrogacy consultancies.

Application to Surrogacy

Some feminist theorists believe surrogacy in all forms is exploitative.³⁵³ These theorists argue that “surrogacy, by its nature, necessarily undermines the human dignity of both the woman and child born through such arrangements, and thus neither commercial nor altruistic surrogacy can ever be justified”.³⁵⁴ These theorists believe that the act of surrogacy, itself, commodifies women and children.³⁵⁵

In response to the idea that surrogacy is inherently exploitative, other feminist literature has argued the opposite – that engaging in surrogacy can be a form of reproductive freedom,³⁵⁶ and that the women should have the autonomy to decide what they can do with their own bodies.³⁵⁷ Some view outright bans on surrogacy as patriarchal barriers to reproductive agency, and see this as an example of the law's habituated control of women's bodies, akin to bans on contraception, abortion, and sex trade.³⁵⁸

³⁵³ Kate Galloway, “Theoretical Approaches to Human Dignity, Human Rights and Surrogacy” in Paula Gerber & Katie O’Byrne, eds, *Surrogacy, Law and Human Rights* (London: Routledge, 2015); Clara Watson, “Womb Rentals and Baby-Selling: Does Surrogacy Undermine the Human Dignity and Rights of the Surrogate Mother and Child?” (2016) 22:3 *New Bioethics* 212; Louise Langevin, “Réponse jurisprudentielle à la pratique des mères porteuses au Québec; une difficile conciliation” (2010) 26:1 *Can J Fam L* 171.

³⁵⁴ Watson, *supra* note 353.

³⁵⁵ *Ibid.*

³⁵⁶ Galloway, *supra* note 353 at 37 citing Rachel Kunde, “Australian Altruistic Surrogacy: Still a Way to Go” (2015) 3 *Griffith Journal of Law and Human Dignity* 227 at 241-2.

³⁵⁷ R Sifris, “Commercial surrogacy and the human right to autonomy” (2015) 23:2 *J Law Med* 365.

³⁵⁸ Kate Galloway, “Surrogacy and dignity: rights and relationships” (2016) 4:1 *Griffith Journal of Law & Human Dignity* 35 at 39 [Galloway, “Dignity”].

As my own starting point, I do not believe surrogacy is inherently inimical to dignity.³⁵⁹ In other words, I do not view surrogacy as inherently good or bad in the abstract,³⁶⁰ because it does not necessarily cause social or individual harm. Instead, whether surrogacy is harmful or beneficial is situationally-specific, and dependent on how practices promote or inhibit feminist values like autonomy, dignity and flourishing. As mentioned, these effects can be assessed both on individual and collective levels.

My viewpoint on intermediaries is similar. Consultants are also neither inherently good nor bad. Rather, involving an intermediary creates a new relationship which can result in a myriad of implications for the surrounding web, both beneficial and not. Intermediaries are not necessary for surrogacies to go well, and indeed consultant involvement may sometimes result in worse experiences for surrogates and intended parents.³⁶¹ The intermediaries' involvement, itself, is not determinative of either outcome. Rather, it is the quality of the interactions that matter. Throughout this thesis, my data sheds light on what kinds of interactions may be occurring. These reported interactions are inevitably filtered through my participants' perspectives. Nevertheless, through rigorous application of my theory, methodology and methods, I am able to engage thoughtfully and critically with this data.

Importantly, the likelihood of ensuing harm can be exacerbated where conflicts of interest and power imbalances exist, in particular where this coincides with pre-existing vulnerabilities. Where a consultant is involved, one power imbalance may stem from informational asymmetry. Consultants will generally have a greater understanding of the surrogacy process, the inner workings of their consultancies, their match procedures, and so

³⁵⁹ *Ibid.*

³⁶⁰ Jenny Gunnarsson Payne, Elzbieta Korolczuk, & Signe Mezinska, "Surrogacy relationships: a critical interpretative review" (2020) 125:2 *Upsala J of Medical Sciences* 183.

³⁶¹ See: Carsley, "Surrogacy Agencies in Canada", *supra* note 22; Motluk, "Waiting Room", *supra* note 133.

forth. This power imbalance can be mitigated if information is shared thoroughly and thoughtfully with the surrogates and the intended parents. Conversely, the power imbalance can be exacerbated where information is misrepresented or withheld. Another power imbalance may stem from consultants' positions as gate-keepers to their surrogacy programs, which may place additional pressure on intended parents to comply with consultants' requirements in order for them to achieve their dreams of parenthood.³⁶² Wherever such power imbalances exist, they can be harnessed, whether intentionally or inadvertently, to erode autonomy and undermine dignity and flourishing, resulting in undue pressure, coercion or exploitation.³⁶³

Conflicts of interest may also stem from the fact that surrogacy consultancies operate on a for-profit basis. Money structures social relations.³⁶⁴ Therefore, paying for services can shape underlying motivations, priorities, interactions, and dedications. While there is nothing inherently demeaning about exchanging money for services, the act of payment can change relationships and move them towards or away from feminist values, both on an individual and a collective scale. In some instances, payment can incentivize self-interested behaviour. Throughout my project, I ask how reported interactions may be influenced by the fact that consultants need to generate matches in order for their businesses to survive. I also explore the implications of intended parents bearing the financial burden of paying consultants out-of-pocket, and the relational repercussions of allowing consultants to profit from surrogacy projects, especially when surrogates cannot do the same.³⁶⁵

³⁶² Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 98-99.

³⁶³ Galloway, "Dignity", *supra* note 358 at 91.

³⁶⁴ Nedelsky, *supra* note 308.

³⁶⁵ The question of whether or not Canadian surrogates should be paid is beyond the scope of my thesis. My empirical data was not designed to speak to this question, nor is a position on this required in order to answer my research questions. I accept that paying surrogates (beyond reasonable reimbursement) is not permissible in Canada under section 6(1) of the AHRA. Nevertheless, my evaluations of 6(2) and 6(3) of the AHRA will engage with the question of whether or not intermediaries should be paid for arranging surrogacies. I believe that accepting that

Lastly, my feminist normative commitments make me mindful of the various factors that may make surrogates and intended parents particularly vulnerable in their interactions with surrogacy consultants. Many concerns have been raised about surrogates' risk of being exploited, particularly where socio-economic disparities or financial pressures exist. Surrogates may also be vulnerable due to financial loss if they are not properly reimbursed by intended parents; due to legal structures that make surrogacy contracts unenforceable and require them to be the child's first parent; and, due to pregnancy-related health complications.³⁶⁶ While historically surrogates were primarily thought to be in a disadvantaged position,³⁶⁷ more recent evidence suggests that intended parents may also be vulnerable.³⁶⁸ Many intended parents enter the surrogacy process after years of infertility, pregnancy loss, or medical treatments, and may be grappling with trauma, stigma, or discrimination (particularly in the case of LGBTQ2S+ couples). They are also disadvantaged by the chronic shortage of surrogates, which can create desperation and pressure them to accept unfavourable terms or overlook red flags. Lastly, they are legally and financially vulnerable as they solely bear the burden of the surrogacy journey's cost, and the law imposes a penalty on them if inappropriate payment occurs. These factors, combined with their limited control and high emotional investment, render intended parents uniquely susceptible to harm stemming from consultants' behaviours.

surrogates cannot be paid under the current legal scheme does not necessarily presuppose a conclusion that intermediaries should not be paid for arranging "altruistic" surrogacy projects, as the two scenarios give rise to unique relations and feminist considerations. For example, Ontario adoption agencies can accept payment for specific services, despite the fact that payment is not allowed for the adoption, itself: *General Matters under the Authority of the Lieutenant Governor in Council*, Règl de l'Ont 155/18, s 108; *Child and Family Services Act*, R.S.O. 1990, c. C.11, s 175.

³⁶⁶ Surrogates' vulnerabilities are discussed at greater length in Chapter 1.

³⁶⁷ *Proceed with Care*, *supra* note 8.

³⁶⁸ Carsley, "Surrogacy Agencies in Canada", *supra* note 22; Carsley, Dissertation, *supra* note 105.

Application to Law

Various theories have been put forth with respect to understanding the role of law and law reform. Some liberal feminist approaches conceptualize law reform as a tool for correcting gender inequalities and social change.³⁶⁹ Other critical legal theories argue that the institution of law is complicit in systemic oppression, and thus warn against over-emphasizing the importance of law, instead directing efforts towards social and symbolic change.³⁷⁰ This does not necessarily mean that reform is irrelevant, but rather that it must be framed within a broader context of social transition.³⁷¹

For my own project, I rely heavily on the works of Jennifer Nedelsky. Nedelsky's writings provides a clear road-map for how a relational feminist framework can be used to critically evaluate the law and generate strategies for its improvement. In analyzing how society and law should be ordered, the relational web should be used as a starting point. These layered relationships are assessed with a view towards understanding how they can be best structured by the law in order to promote the well-being of all those affected.³⁷² Nedelsky contrasts this method with the traditional, liberal/positivist approaches to law-making, which generally create boundaries to protect individual rights.³⁷³ At present, the AHRA utilizes a strict boundary. It bans paid intermediaries from arranging the services of a surrogate in order to protect surrogates from purported harms stemming from exploitation and commodification.³⁷⁴

While boundaries are sometimes useful, legal frameworks that are overly-focused on boundaries do not capture the true interconnectedness at play because they often mask

³⁶⁹ M Davies, "Legal theory and law reform: Some mainstream and critical approaches" (2003) 28:4.Alternative L J 168 at 169.

³⁷⁰ *Ibid* at 170.

³⁷¹ *Ibid*.

³⁷² Nedelsky, *supra* note 308 at 98.

³⁷³ Nedelsky, *supra* note 308 at 91-92.

³⁷⁴ AHRA, *supra* note 4, s 6; *Proceed with Care*, *supra* note 8.

underlying power dynamics.³⁷⁵ For example, focusing on a financial boundary between consultants and intended parents turns the focus away from non-pecuniary aspects that may be problematic. This is in line with the recent literature that suggests that the commercial/altruistic distinction is not the most helpful aspect of surrogacy to focus on, as it does not capture the true relational complexity of the matter.³⁷⁶ Nedelsky advocates for legal change that creatively promotes well-being without automatically defaulting to invoking non-interference.

Nedelsky argues that there must be a true need for a legal boundary in order for the law's use to be justified.³⁷⁷ In order to effectively protect individuals, the law must be responding to a *bona fide* threat of harm. Alana Cattapan convincingly argues that the mere existence of vulnerability is not enough to justify intervention.³⁷⁸ Rather, we must ask “whether the exploitee feels ‘forced or compelled to accept attractive offers that they otherwise would not accept and assume increased risk in their lives,’ as well as the social implications of allowing the exploitative relationships to continue”.³⁷⁹ This includes asking whether the harms outweigh the potential benefits; whether the harms are substantial enough to require government intervention; and whether there are viable interventions that could offset the harms.³⁸⁰ If the harm is purely theoretical and unsubstantiated by empirical evidence, it is unlikely sufficient to justify intervention. In the absence of *bona fide* harm, restrictions can paternalistically and unduly infringe on individual autonomy.³⁸¹

³⁷⁵ Nedelsky, *supra* note 308 at 10.

³⁷⁶ J Y Lee, “Surrogacy: beyond the commercial/altruistic distinction” (2022) 10:1 J Med Ethics 1136.

³⁷⁷ Nedelsky, *supra* note 308 at 98-108.

³⁷⁸ Cattapan, “Risky Business”, *supra* note 172 at 366.

³⁷⁹ *Ibid*, citing Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics*, 6th ed (New York: Oxford University Press, 2009) at 256.

³⁸⁰ Cattapan, “Risky Business”, *supra* note 172 at 366.

³⁸¹ *Ibid*.

I carry this relational understanding of law throughout my analysis. My project aims to shed light on how my participants understand and implement the AHRA. This data allows me to engage in more informed assessments of the AHRA's impact on consultancy practices, and where the law might be failing to support surrogates and intended parents in accordance with relational feminist values. In doing so, my project contributes evidence regarding whether or not there is justification for the current ban on for-profit intermediaries. While it is beyond the scope of this thesis to provide comprehensive recommendations for legal reform, my analysis nevertheless identifies areas that would benefit from regulatory attention, and advocates for laws that are clear, evidence-based, and effectively enforced.

Part III: Methods

My empirical methods for this project consisted of conducting semi-structured, qualitative interviews with Canadian surrogacy consultants, which I then analyzed using thematic content analysis.³⁸² Below, I describe my process in greater detail, including a discussion on ethics; recruitment; the interview guide; my interview process; transcription, coding and analysis; reliability and transparency; and, my study's limitations.

a) Ethics

I received ethics approval for this project from the University of Ottawa Research Ethics Board ("REB") on August 8th, 2021. The largest risk to participants was the risk of possible legal

³⁸² Judith Green & Nicki Throrogood, *Qualitative methods for health research*, 4th ed (Thousand Oaks: Sage Publications Ltd, 2018) at 258-265; Natasha Mack et al, *Qualitative research methods: A data collector's field guide*, (NC: Family Health International, 2005); Carsley, Dissertation, *supra* note 105.

repercussions due to the lack of clarity surrounding the meaning of “arranging for the services of a surrogate mother” in s 6 of the AHRA.³⁸³ Since there was potential for participants to disclose activities contrary to the AHRA, participation theoretically elevated risks of being charged with criminal activity, or having their employer charged. As an auxiliary risk, participants could experience psychological or emotional discomfort associated with disclosing their participation in self-perceived legally grey activities. However, given that all participating consultants are openly advertising their services on their consultancies’ websites, my project did not generate much more potentially incriminating information beyond what is already publicly available.

Nevertheless, in order to mitigate any risk to participants, I put strict confidentiality and privacy precautions into place. I have done my best to not include any identifying or indirectly identifying information in my thesis. I have anonymized all quotes and data used herein. In lieu of using names, I refer to consultancies and their consultants using pseudonyms. Notably, given the small community of Canadian consultants, this measure, alone, may not be sufficient to protect identities. For example, there is only one consultant that has been legally charged in Canada. If I spoke to this consultant and shared this story as belonging to Pseudonym A, this would inevitably reveal Pseudonym A’s identity. I have done my best to avoid including details that I reasonably believe could identify my participants (for example, remote location of practice). However, I cannot exclude all specific details or anecdotes, as this would preclude using much of my empirical data. Where I include passages with very specific details, I endeavour to assign an entirely unique pseudonym for that quotation, or else refer to the speaker generically as “one consultant” or “one participant”. That way, should a reader recognize the details of an anecdote, that reader would not be able to identify other comments made by the

³⁸³ AHRA *supra* note 4, s6.

same participant. Unavoidably, this would nevertheless reveal that that specific consultant participated in my study.

I informed all of my participants of the aforementioned risks and the corresponding confidentiality procedures via the consent form, a copy of which can be found in Appendix E. The consent form also explains that participation is entirely voluntary; that they need not answer a question if they do not feel comfortable doing so; and, that they may stop the interview at any time. I reminded participants of all of these things prior to commencing the interviews, and offered them an additional opportunity to ask any questions. In an effort to maximize transparency and informed consent, I told all participants that the interview would include questions about the law. My aim was to reduce the risk that participants would be caught off-guard, and ensure that they had an adequate opportunity to raise any concerns. Participants were also informed that they could retract their data up until the study was closed (defined as the completion of my data collection and analysis). No participants chose to retract any of their data.

In case of the highly unlikely event that any authorities would seek to seize my raw data, I anonymized transcripts and discarded the master list of participants once data analysis was complete, so that my data could not be matched to specific individuals. I also destroyed the audio recordings of the interviews for these reasons. As per the REB requirements, I will store the consent forms and the de-identified data for 5 years. As all of my relevant documents are digital, these will be password-protected on my personal laptop in an effort to best protect participants' privacy.

b) Recruitment

For the purpose of identifying participants, I define a “Canadian surrogacy consultancy” as a for-profit business located in Canada that facilitates the matching of Canadian intended parents with Canadian surrogates, in addition to providing a variety of other surrogacy-related services. A “consultant” is correspondingly the individual representative of the Canadian surrogacy consultancy. “Located in Canada” means that the business address(es) listed on the consultancy’s website are exclusively Canadian. I chose to focus on businesses located exclusively within Canada so as to and avoid additional confusion stemming from international practices and laws.

Notably, some individuals that self-identify as consultants may not be captured by my definition (for example, businesses that only provide information about surrogacy, but do not facilitate matching), and vice versa. The act of facilitating matching is pivotal for my research, as it is most obviously captured under a plain reading of the term “arranging” in s. 6 of the AHRA.³⁸⁴ Other scholars, stakeholders, and consultants may use different terminology to describe consultancies. For example, they may refer to intermediaries, agencies, brokers or programs. Some consultants associate these terms with varying levels of legality or illegality.³⁸⁵ The term “consultancy” was chosen for this project because it reflects the terminology that is most frequently used by the consultancies themselves.³⁸⁶ However, throughout this thesis I also

³⁸⁴ See Chapter 6 for an expanded discussion on the meaning of arranging; AHRA *supra* note 4, s6; Government of Canada, “Prohibitions related to surrogacy”, *supra* note 79.

³⁸⁵ See for example the SCO website, which explicitly states “we are not an agency. SCO is run by surrogacy consultant Sally Rhoads-Heinrich and her team of support workers. Our program is dedicated to assisting all those involved with third party reproduction in Canada. Under Canadian Law, commercialized surrogacy agencies are illegal as you cannot pay an individual to “arrange the services of a surrogate mother”. In Canada we have professional surrogacy consultants who run programs that can provide you with information, referrals, support and introductions to surrogate mothers.”: Surrogacy in Canada Online, “SCO FAQ – Is SCO a Surrogacy Agency?”, online: <<https://surrogacy.ca/about-us/faq.html#is-sco-a-surrogacy-agency>>.

³⁸⁶ See for example: Canadian Fertility Consulting; ANU Fertility Consultants; JA Surrogacy Consulting.

use the term “intermediary” as synonymous with “consultant”, as this term comes directly from the applicable legislation itself, and therefore has inescapable relevance.³⁸⁷

With this definition in mind, I identified potential participants using a combination of internet searches and snowball sampling. My aim was to employ census sampling, in that I sought to interview at least one representative from each Canadian surrogacy consultancy. In March 2021 I conducted initial searches via Google. I used search terms such as: “fertility/surrogacy agency/consultant/broker in Canada/[list of provinces]”; “help me find a surrogate Canada/[list of provinces]”; “match me with a surrogate Canada/[list of provinces]”; “find a surrogate Canada/[list of provinces]”; and, “surrogate needed Canada/[list of provinces]”. I repeated these searches in September 2021, and once more prior to closing my data collection in February 2022. At that time, I ultimately identified 12 consultancies via their websites that qualified under my research definition. As discussed, consultancies were excluded if they listed any non-Canadian locations, or if their websites did not make any mention of connecting surrogates and intended parents. Two other consultancies were excluded because their websites were not entirely in English, and as such I was unable to verify whether or not they met my inclusion criteria.³⁸⁸ Finally, at the end of my interviews I also asked participants whether they could recommend any other consultancies that I could reach out to (snowball sampling). One very new consultancy was identified via snowball sampling, however this consultancy was ultimately excluded from my sample. Upon further investigation, publicly available

³⁸⁷ AHRA *supra* note 4, s6(2), 6(3).

³⁸⁸ I later identified one additional Canadian surrogacy consultancy that met my inclusion criteria and was operating during the data collection period. However, because it did not appear in my searches prior to the close of data collection, and because it was not identified through snowball sampling, it was not included in the study. Since finishing my data collection, multiple other consultancies have opened up across Canada that would have qualified under my aforementioned definition. Several consultancies that existed at the time of my data collection have also been subsequently closed.

incorporation documents showed that the business had only been created in Fall of 2021, and no website or contact information was available at the time I closed my data collection phase.

I began recruitment on October 20, 2021. Using the contact information provided on the consultancies' websites, I sent recruitment emails to each of the 12 eligible consultancies. A copy of the recruitment email can be found in Appendix D. In sum, the email explained my research project, what participation would entail, confidentiality procedures, and my qualifications. The email invited consultants to respond by email or phone if they were interested in participating, or if they had any questions. The emails were addressed to whoever was identified as the lead consultant on the consultancy website. However, I explained in the email that any other employee could be designated to participate in the interview.³⁸⁹ I chose this format in order to ensure that the lead consultants were aware of and authorized the interview. This format also permitted lead consultants to choose the best representative for their consultancy. In one instance, the website did not provide the name of a lead consultant, and so the recruitment email was addressed generically.

Several consultants responded to the email quickly and agreed to participate. One consultant promptly declined, but offered to answer some of my questions with pre-recorded audio. I declined this offer in order to keep my methods consistent throughout. Several other consultants agreed to participate after I sent a follow-up email. Three individuals wanted to speak to me prior to agreeing to participate. Largely, these consultants wanted additional clarification about the study's confidentiality protocols and my reasoning for pursuing the study. Two of these consultants were quite nervous to speak to me. One wanted to express that she did not support commercialized surrogacy and did not want to participate if the purpose of my study

³⁸⁹ In nearly all instances, the interview was completed by the lead consultant whom I initially contacted.

was to advocate for paid surrogacy. I explained to this consultant that, first and foremost, my job was to remain neutral and let my empirical data shape my ultimate findings. I also explained to her that my research did not focus on whether or not surrogates should be paid. Rather, I was interested in learning about consultants' perspectives and roles in order to make findings on the laws affecting intermediaries, specifically. I provided all the consultants I spoke to in advance with the wording of what I believed would be the most sensitive question ("Some people suggest that what consultancies are doing is inconsistent with the AHRA – what would you respond to them?"), and reminded them that they could skip any question they did not feel comfortable asking. I also told them generally what kinds of questions to expect (i.e., questions about their role throughout the pregnancy, questions about their perceived benefits and challenges, and the law's impact on their work). After having an initial conversation with these consultants, all three agreed to be interviewed. Two other consultancies never responded to my recruitment email or to the three follow-up emails I subsequently sent. One consultancy was initially interested in participating and then later declined after several months of attempting to schedule an interview, citing a lack of availability.

Ultimately, I was able to interview a consultant from 8 of the 12 eligible consultancies. These consultancies were located in Ontario, Alberta and British Columbia. I asked each participant if they had any co-workers with whom I should speak, but all participants said no. As such, only one representative was interviewed from each of the 8 participating consultancies. Although I was not able to achieve a complete census, speaking with a representative of 2/3 of the eligible consultancies has provided me with enough data to meaningfully engage with my research questions.

I randomly assigned my participants the pseudonyms of Amy, Aja, Emily, Carla, Sasha, Kerigan, Roxana and Sarah.³⁹⁰ Each of my 8 participants holds a high-level position at a different Canadian surrogacy consultancy. Varying titles were used, but many called themselves owners, founders, CEOs or directors. All of my participants had acted as surrogates in the past.³⁹¹ I sincerely thank them all for their participation in this study.

c) Interview Guide

I worked closely with my supervisor and my committee members when drafting the interview guide. My focus was choosing questions that would answer my research questions, be open-ended enough to allow for new information to arise, and to ensure questions were worded clearly and in a manner that would make participants feel at ease.

After several iterations, I came up with a version that I then asked two different surrogates to review and provide feedback on. A surrogacy researcher connected me with the first surrogate via e-mail, after asking that surrogate's permission to make the introduction on September 8, 2021. This surrogate then connected me to the second surrogate, again via e-mail with the second surrogate's advanced permission, on September 16, 2021. I spoke to the surrogates on September 16, 2021 and September 30, 2021, respectively. I provided both surrogates with my draft questionnaire in advance and asked for their opinions. Note that I received permission from the University of Ottawa REB to speak with these surrogates, and that

³⁹⁰ I named the participants after important friends in my life, which sparked extra joy when writing this dissertation. Notably, I sometimes use different pseudonyms where a quote could be identifying if it is paired with other information.

³⁹¹ Throughout this thesis, I discuss multiple instances where my participants aligned themselves with the surrogates they worked with more than the intended parents. It is possible that this alignment with surrogates may stem from my participants' own experiences. Having gone through a surrogacy pregnancy first-hand, they may have been more acutely aware of the specific struggles that surrogates experience, and are accordingly seeking to mitigate the hurdles that they had previously encountered. This allegiance may have presented differently had I spoken to consultants who had previously been intended parents, or who had not had any first-hand experience with surrogacy.

the surrogates both signed informed consent forms. I did not audio-record these interviews, though I did take typed, anonymized notes with their consent. The recruitment email, consent form and interview guide that I used for my interactions with these surrogates can be found in Appendices A, B and C, respectively.

In speaking with the surrogates, neither had any criticisms or suggestions as to changes I should make to the draft interview guide. However, both surrogates had used at least one agency and spoke to me about their experiences. Through hearing about these surrogates' experiences, I decided to add some additional probes to my questionnaire, particularly with respect to consultants recruiting surrogates to undergo subsequent surrogacies not long after giving birth. Both surrogates were very open about their experiences, and I am very grateful for their help with shaping this project.

A copy of the final draft of my interview guide can be found in Appendix F. Notably, my interviews were semi-structured. In other words, while I followed an interview guide, my method allowed for flexibility within the conversation in order to alter wording for additional clarity; change the order of questions for better flow; skip questions if necessary; and, explore any unexpected topics that arose. As such, not every interview was identical in its progression. I deliberately chose a conversational tone for my interview guide in order to put participants at ease and tried to match the participants' language (for example, referring to "surrogacy journeys").

To broadly summarize the structure of my guide, I used open-ended questions followed by specific probes to ensure I was collecting data the topics we had pre-emptively flagged as important. I tried to use neutral language and structure my questions in a way that would not lead or shape the participants' answers. I started the interviews by asking "warm-up" questions which

focused on understanding how the participants became involved with surrogacy and what their roles are now (for example: “how did you become involved in surrogacy?”). These questions were also designed to ease participants into the interview process. After this, I structured my questions so as to work through the consultants’ role in a chronological order, starting with questions about their role before pregnancy; then during pregnancy; followed by birth and postpartum (for example: “walk me through what you do for your clients, before conception occurs.”). I then asked questions about how the participants are paid for their services, the benefits and challenges of their practice, and, finally, their opinions on the law and suggestions for law reform. I had saved the more sensitive questions for later in the interview so that I had time to build trust and rapport prior to asking about more delicate subjects, such as payment. Examples of more sensitive questions include: “how much do you charge intended parents for your services?” and “some people suggest that what consultancies are doing is inconsistent with the AHRA – what would you respond to them?”. I finished my interview with a few wrap up-questions, asking if there was anything else they would like to share, if there were others I should speak to, and if they wanted a copy of my dissertation.

Overall, I found my interview guide worked well. However, I noticed that in my first few interviews, when I asked participants to “walk me through what [they did] for [their] clients, before conception [occurred]”, they would often explain their role throughout the entire surrogacy. While I would then go back and ask all my necessary probes, I found it a little harder to keep track of everything, and the questions felt a little more jarring when I would ask a probe about a topic they had mentioned twenty minutes before. As such, I began providing participants with a little lay out of how the interview was structured after we finished the warm up questions. I found this worked very effectively to help me manage the interview sequence.

Apart from this, I made two other changes to my guide as my interviews progressed. I noticed that several participants expressed confusion when asked “how is your role similar or different to the roles that other third parties play in the surrogacy process (for example, lawyers, social workers, or counsellors)?”. I rephrased the question and would instead ask “what added benefit do you think consultants provide that other third parties, like lawyers, social workers or counsellors, don’t?”. While this rephrasing did not invite the participants to discuss similarities, I found this question was clearer for my participants, and still provided the data I was ultimately hoping to receive.

The second change I made to my interview guide was adding an additional probes in the law portion of the interview. Notably, I found that when asked about the law’s impacts and proposed reform, nearly every participant focused only on the ban on commercial surrogacy, and did not at all discuss section 6(2), the prohibition on payment for arranging for the services of a surrogate. As such, I consistently added probes after my law-related questions in order to hear the participants’ opinions on section 6(2), it’s impacts, and ideas for reform.

d) Process

I completed my interviews between October 26th, 2021 and November 29th, 2021. All interviews were conducted via Zoom, and audio recorded with the participants’ consent. Prior to commencing the audio recording, I would remind participants about the purpose of my study; the anticipated length of the interview; my confidentiality protocol; that they could stop the interview at any time; and, that they could skip any questions they wanted. I always asked if the participants had any further questions prior to starting my recording.

Throughout the interview, I would use active listening techniques such as repeating and summarizing participants' answers, and providing auditory prompts (such as "mhm", "yeah", and "right") or visual prompts (such as head nodding) during or after their answers. Given that my natural demeanor is very positive and bubbly, I would sometimes catch myself responding with smiles, or comments like "great" or "perfect". While I believe these reactions helped me build a positive rapport with my participants, I am aware that positive feedback may unconsciously shape the answers participants give in order to continue receiving positive feedback.³⁹² As such, I tried very hard to overcome my natural inclinations and keep my prompts neutral.

The interviews ranged in length from 51 minutes to 96 minutes. Two interviews were under an hour, one interview lasted just over an hour, three interviews lasted around an hour and twenty minutes, and two interviews lasted around an hour and a half. Prior to starting the interview, I informed participants that the interview should take approximately 90 minutes. Only one interview exceeded this anticipated timeframe, and I ensured that participant had the availability and the desire to continue speaking.

At the conclusion of each interview, I offered to send the participants my dissertation once it was complete. All the participants were eager to receive the results. Immediately after each interview, I would take detailed notes about my thoughts and feelings about how the interview went, my perceptions of the participants, and details I found particularly interesting, in order to assist with my future analysis. I officially closed the data collection phase of my project as of February 7, 2022. By this, I mean that I sent my final emails to the consultants who had not

³⁹² Mack, *supra* note 382 at 29, 38-39.

yet replied, and I did not collect any new data or contact any new potential participants thereafter.

e) Transcription, Coding & Analysis

I transcribed my interviews between January 10th, 2022 and February 9th, 2022. To do so, I would listen to my interview at a reduced speed and transcribe what I heard verbatim. After I finished transcribing each interview, I would then re-listen to the interview at regular speed to ensure accuracy. Throughout the transcription process, there were four instances where I could not make out a word that was said. In these instances, I inserted “[inaudible]” into the transcript in place of the inaudible word. I do not believe these instances impacted the overall integrity of my data or analysis, as the overall meanings of the relevant passages were still very clear. For example, in one of the instances, the inaudible word was the name of an individual, which I would have redacted even if the name had been audible. I did not transcribe any additional pleasantries that were exchanged after the interview was finished (for example, thanking the participants, their responses to this, etc.), as this did not contribute anything to my data. I ended up having 160 single-spaced pages of transcripts.

I coded my interviews throughout February and March of 2022 using Atlas.ti software. I employed both deductive and inductive coding by first coding according to my interview questions, and then subsequently adding codes according to themes that were emerging from my data.³⁹³ After coding several interviews, I sent one of the raw transcripts to my supervisor for her to code. I then compared her coded version to my own coded version, in order to ensure that I

³⁹³ Theophilus Azungah, “Qualitative Research: Deductive and Inductive Approaches to Data Analysis” (2018) 18:4 *Qualitative Research Journal* 383; Andrea J. Bingham, “From Data Management to Actionable Findings: A Five-Phase Process of Qualitative Data Analysis” (2023) *Int J of Qualitative Methods* 22.

was not missing any relevant themes. Our coding styles were quite different, with hers being more broad, and my own being more detailed with many subcategories. In response to my supervisor's coded interview, I added a handful of codes to my interviews (such as including a specific code for "global dimensions"). Overall, however, we were generally capturing the same ideas, though sometimes using different language (for example, she would use the broad code "relationships with professionals" when a consultant discussed interactions with doctors or lawyers, whereas I would code the same sentence under a subcategory of "coordination"). After incorporating her additional codes and general comments, I then sent her my coded version of the same interview for her to review. I then proceeded to code the rest of my transcripts, and continued to add or refine codes in previously coded interviews as new themes emerged.

Data analysis was an ongoing process that began with coding and continued throughout writing my dissertation. I utilized thematic content analysis, which aims to present key elements of participants' accounts by analyzing the content of interviews, identifying themes, and summarizing variation and regularities within the data.³⁹⁴ In greater detail, this method involves familiarization with the data, line-by-line analysis of content, coding using both inductively and deductively-generated codes, and identifying and organizing themes so as to highlight general trends and outliers within the data.³⁹⁵ As part of my analysis, I created various draft outlines where I organized and re-organized data in order to discover broader themes. I also created several memos on various topics which quoted my relevant data, connected the data to different reports in the literature, provided my initial impressions and conclusions, and included a draft outline for how these ideas could be organized within my dissertation. These outlines and memos were then used to draft the chapters in this dissertation.

³⁹⁴ Green, *supra* note 382 at 258-265.

³⁹⁵ *Ibid* at 258-265.

My drafts were then read by my supervisor, followed by all of the members of my committee. All chapters underwent multiple rounds of extensive edits. As I am told is common for many PhD dissertations, my committee's comments lead to significant revisions. These revisions included ample restructuring, cutting out entire chapters, shifting the way I was using my theory and methodology, and re-framing my initial research questions.³⁹⁶ Accordingly, my analysis shifted and narrowed over the course of many drafts. While the process felt maddening at times, I ultimately believe that heeding their suggestions resulted in a much stronger final product.

f) Reliability and Transparency

Self-awareness is a requirement for conducting reliable and transparent qualitative research.³⁹⁷ I drafted an in-depth reflexivity statement in order to ensure I was attentive to my various cultural, political, social, linguistic and economic characteristics that were influencing my perspectives and my analysis.³⁹⁸ Some of these characteristics included: being a Caucasian, middle-class, cisgender, woman in her early-to-mid thirties. Living in Ottawa my entire life. Being an English speaker, and a first-generation Polish immigrant. Being raised in a nuclear family. Having a father who was a doctor, and therefore generally trusting medical practitioners and medical establishments. Attending Catholic school growing up but identifying as agnostic. Being non-disabled. Being well-educated. Being in a long-term, monogamous, heterosexual

³⁹⁶ My original research questions were phrased as follows: First, I want to understand the ways that consultancy practices promote and/or undermine surrogates' and intended parents' flourishing. Second, I want to understand whether sections 6(2) and 6(3) of the AHRA meet the objective of protecting surrogates from harms such as coercion, exploitation and commodification.

³⁹⁷ Sharlene Nagy Hesse-Biber, "The practice of feminist in-depth interviewing" in Sharlene Nagy Hesse-Biber & Patricia Lina Leavy, eds, *Feminist research practice* (Thousand Oaks: Sage Publications Ltd, 2007) at 6; Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice* (Thousand Oaks: Sage Publications Ltd, 2015) at 604.

³⁹⁸ Patton, *supra* note 397 at 604.

marriage. Being pregnant and a mother to a young son. Never personally experiencing fertility issues. And, having a generally positive outlook towards assisted reproduction. In drafting my reflexivity statement, I considered how these characteristics could impact my research and analysis. Throughout my analysis, I was conscious of the biases associated with my privilege (racial, economic, etc.). In particular, I was very conscious of my personal, optimistic views on assisted reproduction and the third parties that assist with the process. Being aware of this bias helped me assess the data as neutrally as possible. I was cautious not to overstate any benefits or overlook potential harms.

In a further effort to increase the reliability of this research, I employed two methods of triangulation. First, as discussed above, I attempted to triangulate analysts³⁹⁹ by asking my supervisor to code one of the transcripts. Furthermore, portions of my data and findings were discussed with supervisor and committee members as part of the dissertation-writing process, thereby generating multiple perspectives on my data. This process aimed to reduce the potential bias that could arise when one person solely collects and analyzes the data.⁴⁰⁰

Second, I triangulated my work using other data sources to test the consistency of my findings and identify discrepancies.⁴⁰¹ This entailed comparing my research findings to other qualitative publications, as well as other news reports, that discuss surrogacy consultancies and surrogates' experiences. While no other scholars have interviewed Canadian surrogacy consultants, some researchers and reporters have obtained information from surrogates and intended parents about their experiences with consultancies.⁴⁰² I use this literature to identify the

³⁹⁹ Triangulating analysts entails having at least two people analyzing the same qualitative data and comparing their findings. See: Patton, *supra* note 397 at 665.

⁴⁰⁰ Patton, *supra* note 397 at 665.

⁴⁰¹ Patton, *supra* note 397 at 665.

⁴⁰² See for example: Carsley, "Surrogacy Agencies in Canada", *supra* note 22; Yee, *supra* note 6.

pre-existing narratives, themes, concerns, and benefits associated with consultancies. Although the data is limited, I drew on this literature to compare the perspectives of scholars, reporters, surrogates, and intended parents with those of my participants. Such triangulation helped bolster the reliability of my findings and assisted with my critical analysis.

g) Limitations

As with any study, my project is subject to several limitations.⁴⁰³ The central limitation of this study is that my data can only reflect the consultants' perspectives. It cannot offer direct insight into surrogates' or intended parents' experiences. While consultants' views are valuable in their own right, I also sought to critically assess how these accounts aligned with existing research on consultants' impacts on surrogates and intended parents. To explore how consultants' practices and consultancy structures might help or harm surrogates and intended parents, I drew on feminist relational theory. This framework allowed me to analyze how my participants' data corroborates or contradicts concerns around power imbalances, coercion, exploitation, and conflicts of interest. Through this process, I was able to generate findings regarding how some consultants' actions *might* affect some surrogates and intended parents. This further allowed me to engage more meaningfully with the literature.

In some instances, consultants shared their views on intended parents' or surrogates' experiences. In other instances, consultants shared their own experiences from acting as surrogates prior to becoming consultants. While I reference this data at points throughout my thesis, I am conscious of the fact that interview data is always mediated by the participants'

⁴⁰³ In writing the Limitations section of this Chapter, I drew upon Stefanie Carsley's dissertation on Surrogacy Lawyers' Experiences, Practices and Perspectives. Accordingly, I cite to her ideas frequently throughout this subsection. See: Carsley, Dissertation, *supra* note 105.

perceptions and potential biases.⁴⁰⁴ The goal of my data collection was to understand my participants' own perspectives, and this was often shaped by their previous experiences as surrogates, and by working closely with many surrogates and intended parents.

The main potential bias that may nuance the information shared by my participants is social desirability bias. Social desirability bias is “the tendency to underreport socially undesirable attitudes and behaviors and to over report more desirable attributes [and behaviors]”.⁴⁰⁵ Social desirability bias has two components. The first is impression management, which entails purposefully presenting oneself in a manner that is meant to please the audience, often to avoid embarrassment or repercussions.⁴⁰⁶ The second component is self-deception. Self-deception is often unconscious, and is rooted in a desire to maintain a positive self-concept.⁴⁰⁷ Together, these components may result in consultants highlighting the positive aspects of their work while glossing over or avoiding the more problematic aspects of their practices.

Despite the likely existence of social desirability bias, my starting position avoids presuming that my participants are lying merely because they may be interested in presenting their stories in a certain way.⁴⁰⁸ Rather, recognizing their potential interests and biases forms part of my analysis. Researchers are not meant to avoid or control social desirability bias.⁴⁰⁹ It also contributes little to simplistically argue whether the accounts are true or not, as participants are always sharing their own interpretations, which are mitigated by their unique thoughts, feelings,

⁴⁰⁴ Carsley, Dissertation, *supra* note 105 at 86-89.

⁴⁰⁵ Carl A Latkin, C Edwards, M A Davey-Rothwell & K E Tobin, “The Relationship between Social Desirability Bias and Self-Reports of Health, Substance Use, and Social Network Factors among Urban Substance Users in Baltimore, Maryland” (2017) 73 Addictive Behaviors 133 at 133.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ For further discussion on resisting such presumptions when conducting empirical research, see: Angela Campbell, “Wives’ Tales: Reflecting on Research in Bountiful” (2008) 23:1–2 Canadian Journal of Law and Society 121 at 130.

⁴⁰⁹ Bispo Júnior JP, “Social desirability bias in qualitative health research” (2022) 56:101 Rev Saude Publica 1 at 7.

motivations and experiences.⁴¹⁰ Accordingly, interview data is not meant to ascertain objective truth.⁴¹¹ Instead of asking “is this true”, I asked why accounts may be being framed in certain ways, and what aspects of the relational web may be shaping these narratives.

Alongside these analytical approaches, I also worked with my methods and methodology to increase the credibility of my data. I attempted to establish a strong rapport with my participants. I did not provide the majority of my questions in advance of the interview in order to get genuine reactions to questions. I avoided phrasings that were leading, and I offered ample reassurance regarding the confidentiality of the interview. I also analyzed my data for consistency within interviews, across my sample, and in triangulation with external literature.

Throughout my dissertation, I incorporated second-hand stories that my participants shared about “other agencies” practices. Often, these reports were used as foils for my participants’ own practices. As one example of this, Roxana said: “Not every agency is invested in the relationship and making sure that it’s a human experience. Um, and that’s what [Roxana’s Consultancy] brings to the table”. Roxana is criticizing other consultancies in order to distinguish her own consultancy’s practices. During her interview, Roxana repeatedly emphasized how important it was to focus on the quality of the relationship between the surrogates and the intended parents, as well as the relationship between the consultant and the clients. Her quote tells me two important things: first, that she is invested in relationships; and, second, that she believes other consultants are not. As another example, several of my participants expressed criticisms of consultancies that previously employed them, and cited these criticisms as drivers

⁴¹⁰ See William L Randall & Cassandra Phoenix, “The Problem with Truth in Qualitative Interviews: Reflections from a Narrative Perspective” (2009) 1:2 *Qualitative Research in Sport and Exercise* 125 at 130; Carsley, Dissertation, *supra* note 105 at 86-89.

⁴¹¹ *Ibid.*

behind the decision to create their own consultancies and “do things differently”.⁴¹² Many references to “other agencies” conduct appeared in my data.

These references are important because they allow me to gain a less-polished understanding of consultants’ behaviours. They allow participants to share troubling incidents that they believe are occurring within the consultancy industry, without sullyng their own reputation. Logically, participants likely feel more comfortable discussing other consultants’ problematic behaviours than they do their own. Throughout my thesis, I consider these anecdotes when assessing whether concerns raised in literature are corroborated by my data. Importantly, I cannot treat these second-hand reports in the same manner that I would weight and analyze first-hand accounts of participants describing their own problematic behaviours. Nevertheless, there is still significant value in analyzing what my participants *believe* is occurring within the consultancy industry, as well as whether and how they personally believe the reported activities are harmful. These perceptions of problems within the surrogacy industry are valuable critiques.

Another limitation of my study arises out of the nature of the participants, themselves. As participation in my study was voluntary and complete census sampling was not ultimately achieved, it is possible that the consultants who agreed to participate were qualitatively different than consultants who declined to participate (they could be more confident in their practices, more (or less) informed about the law, etc.).⁴¹³ In a similar vein, the position the participant holds

⁴¹² For example, one participant said: “I started working for a local agency for a few months and I realized this was kind of my calling. And I really liked supporting women. I was doing surrogate recruitment and support and stuff. And then – but it was clear the agency wasn’t interested in kind of expanding and changing things, and I had all these ideas. So I ended up, just, the girls were like why don’t you go off and do your own thing? And so I did! ... When I started this I had an idea in mind that I wanted to make it more personal. So the agencies that currently existed before I started, there wasn’t a lot. There was a couple of big ones that had been run for a long time. Um they, you know, had kind of set in stone how they wanted to do things, and I just really wanted to do it better. I felt like there was more opportunity for growth and making it more personal”. In general, my participants were more prone to express disdain towards larger consultancies.

⁴¹³ Carsley, Dissertation, *supra* note 105 at 86-89.

at a consultancy may influence their perceptions, expertise and understandings of the consultancy's operations as a whole. Finally, given the retrospective nature of many of my questions, participants' memories of events have likely shifted with time, and their recollections have been colored by subsequent experiences, as is human nature. While these features undoubtedly filter any objective "truth", ascertaining such "truth" is once again not the goal of my qualitative interviews, and the resulting data is still useful and important.⁴¹⁴

To compensate for these inherent limitations, it is important to collectively read my data in conjunction with findings from other studies – particularly, those that spoke to intended parents and surrogates about their experiences working with consultants.⁴¹⁵ I endeavoured to do so with the current research that was available, though at the time of writing the prevalence of such research was not particularly extensive. Accordingly, I repeatedly drew on the same small body of literature on Canadian consultancies.⁴¹⁶ Further research in this area will always be useful in order to better contextualize my data.

While I often use the overarching term, "consultancy practices", I would like to note that it is a fallacy to lump all consultancies together. Each consultancy is unique in its practices, as are all the individual consultants. Because it is impossible to interview a corporation, the data gathered from a consultant is understood as an indicators of what her associated consultancy is doing.⁴¹⁷ However, there is variation in practice across consultancies, as well as variation in consultant practices within the consultancies themselves. As such, broad statements based off my data that label consultants or consultancies as unconditionally "good" or "bad" are neither useful

⁴¹⁴ Carsley, Dissertation, *supra* note 105 at 86-89.

⁴¹⁵ Throughout this thesis, I frequently draw upon much of Stefanie Carsley's empirical research and Alison Motluk's reporting. See: Carsley, Dissertation, *supra* note 105; Carsley, "Surrogacy Agencies in Canada", *supra* note 22; Carsley, "Surrogacy in Canada", *supra* note 259; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

⁴¹⁶ *Ibid.*

⁴¹⁷ See: Green, *supra* note 382 at 54; Patton, *supra* note 397.

nor accurate. The objectives of this project are to critically analyze the data provided in order to identify how consultants' perspectives differ from or reinforce the existing narratives around surrogacy consultancies, and also to learn more about how consultants are understanding and applying the law. None of the aforementioned limitations prohibit these end goals, though they require thoughtful consideration when drawing conclusions.

Conclusion

My methods for this project involved conducting semi-structured qualitative interviews with eight high-level consultants from Canadian surrogacy consultancies. I identified participants through systematic online searches and snowball sampling, aiming to include as many consultancies as possible. Ethics approval was obtained from the University of Ottawa REB, and strict confidentiality measures, including data de-identification and secure data storage, were followed. Interviews were conducted via Zoom, recorded with consent, and transcribed verbatim. I then used thematic content analysis, combining deductive codes drawn from my interview guide with inductive codes that emerged from the data, supported by triangulation and reflexivity practices to enhance reliability.

My analysis employs feminist relational methodology, which focuses on understanding people and institutions through the relationships that connect them. Relationalism sees individuals as influenced by a web of personal, social, institutional, and legal ties. In the context of surrogacy, this highlights how surrogates, intended parents, consultants, laws, institutional structures, and broader social norms interact and influence one another. Understanding how surrogacy consultants influence, and are influenced by, this relational web is vital for

understanding the broader landscape of surrogacy in Canada. This methodology also provides a lens for evaluating how consultants understand and implement Canada's ban on paid surrogacy and paid intermediaries. By examining how the law is actually influencing these consultants' behaviours, we can learn more about whether the law's impacts are desirable or not, and whether certain aspects of the current legal regime might benefit from reform.

My theoretical framework incorporates feminist relational theory, which promotes feminist values such as autonomy, dignity, and flourishing, and is sensitive to corresponding harms stemming from exploitation, coercion, commercialization, power imbalances, conflicts of interest, and pre-existing vulnerabilities. Based on this, I am able to evaluate consultants' reported activities in terms of their potential impacts on surrogates' and intended parents' autonomy, dignity and flourishing. This allows me to engage more critically with the concerns raised in the surrounding literature, and assess how my participants' data may reinforce or challenge existing narratives about surrogacy consultancies.

CHAPTER 3: CREATING RELATIONSHIPS

Introduction

This Chapter focuses on the role consultants play in creating relationships between surrogates and intended parents. In particular, I analyze how consultants are recruiting, screening, and matching surrogates and intended parents. Many of the narratives surrounding consultants' involvement in these areas are negative. Concerns have been raised about some consultants recruiting surrogates too soon after birth, inadequately screening surrogates, pressuring intended parents into making quick decisions about matches, and withholding intended parent profiles out of economic self-interest.⁴¹⁸ However, there are also some positive reports. Some intended parents have said that they appreciated their consultant's assistance in finding a surrogate.⁴¹⁹ There is also a suggestion that consultants' involvement in matching may be beneficial where consultants facilitate like-minded pairings.⁴²⁰ In analyzing my interviews, I seek to better understand whether and how these narratives are manifesting within my own data.

This Chapter is divided into three parts. Part I explores how consultants are finding the surrogates and intended parents that they work with. Part II looks at how consultants are screening intended parents and surrogates before they officially admit them into their matching program. Finally, Part III examines how consultants facilitate matches between surrogates and intended parents. I begin each Part with a review of the existing literature, including an overview of any pertinent concerns associated with the specific activities. I then present my participants'

⁴¹⁸ Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22.

⁴¹⁹ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 76-78.

⁴²⁰ Yee, *supra* note 6 at 8.

data. I conclude each Part with a discussion of my findings, where I highlight how my data can inform the ongoing dialogue about surrogacy consultancies.

My participants shared many stories about providing thoughtful assistance aimed at helping surrogates and intended parents have positive surrogacy journeys. These stories corroborate some of the beneficial aspects of consultancies identified in the literature, such as counselling surrogates and intended parents to match based on like-minded expectations for the surrogacy journey.⁴²¹ In other areas, participants' first-hand accounts distinguished their practices from the problematic activities raised in the literature. For example, many participants emphasized that they would not approach surrogates in the postpartum period, and that they encouraged surrogates and intended parents to take their time throughout the matching process. This data adds some positive perspectives to the wider discussions about consultancies.

However, my analysis also considers the problems that can arise in this area due to consultancies operating on a for-profit basis. This institutional structuring can create a conflict of interest for consultants between generating income and effectively supporting surrogates and intended parents. This conflict may infuse self-interest into consultants' recruitment, screening, and matching practices. I further note that some of the described procedures afford consultants ample discretion, particularly in areas like program admission and profile presentation, which might increase intended parents' vulnerability.

⁴²¹ Yee, *supra* note 6 at 8.

Part I: Finding Surrogates and Intended Parents

As part of my interviews, I asked participants: “how does your consultancy attract new clients?”. Some participants asked for clarification regarding whom I meant by clients, and I explained that I was referring to both surrogates and intended parents. I use this definition of “clients” throughout this thesis. I initially asked this question to learn about whether and how consultancies were recruiting surrogates and intended parents, despite the AHRA’s ban on advertising intermediary services.⁴²² I discuss these findings in Chapter 6. However, the resulting data also informs the wider narrative about consultancies’ recruitment practices, which I explore herein.

A repeatedly raised concern is that some consultants are placing undue pressure on surrogates to undergo subsequent surrogacy journeys, very soon after giving birth. For example, a CBC investigation found that “multiple women said their agency sent them new, heart-wrenching parent profiles within days of giving birth. Some of the women said they felt ‘hounded’ to commit to a new couple right away”.⁴²³ Similarly, some of the intended parents in Stefanie Carsley’s interviews also shared perceptions that the surrogates they worked with were asked to pursue subsequent journeys very shortly after giving birth.⁴²⁴ Interestingly, the first iteration of my interview guide did not include specific questions about repeat surrogacies. I was prompted to add them after asking a surrogate to review my interview guide, and hearing about her own struggles with being recruited shortly after giving birth.

⁴²² AHRA *supra* note 4, s6.

⁴²³ CBC News, “Pressure”, *supra* note 271.

⁴²⁴ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 88-89.

a) New Clients

My participants' recruitment practices differed for surrogates and intended parents. Nearly all participants expressed that they did not need to actively recruit intended parents because of the high demand for surrogacy services. Aja said: "there's so many, unfortunately, there is so many struggling with infertility and there are so few agencies that they will always find us". Similarly, Roxana said: "I don't think any agency is ever in shortage of IPs because every – they just exist. And it's really heartbreaking to know how many thousands of them do exist. Uh, so we don't market to that". My participants generally shared a perception that there was no shortage of intended parents. As such, consultants did not devote many resources to finding them.

Instead, my participants reported that intended parents sought out agencies through word of mouth, Google searches, or their social media pages. Sasha said: "we have never advertised or anything for IPs. It's basically all word of mouth". Roxana said:

Roxana: They literally are coming to us right now by word of mouth ... from IPs that have already built their families through [Roxana's Consultancy] or are waiting to build their families through [Roxana's Consultancy]. They will refer their friends, there's, you know, Facebook, right, social media allows this group of people to combine and, and converse and you know manage their experiences and compare their experiences and that's generally how we get most of our referrals now is through word of mouth.

Amy said: "we've never done any advertising for IPs. They come to us just through Google searches or clinic or lawyer referrals". Emily said: "for the IPs, we post in the social media groups that specialize in surrogacy, as well as on [Emily's Consultancy's] page". In general, minimal recruitment efforts were reported for attracting intended parents.

By contrast, many participants expressed that it was challenging to recruit surrogates. These difficulties were generally attributed to the lack of people willing to act as surrogates. Aja said: “There’s not enough surrogates. We know that”. Amy said finding surrogates was the most challenging aspect of her practice. Two other participants also discussed this challenge at length. Because there were so few surrogates compared to intended parents, my participants needed to use a variety of tactics in order to attract surrogates to their programs. The most cited methods included social media posts (in particular, those that featured specific intended parents); word of mouth; Google searches that lead to consultancy websites; and, paid ads via sites like Facebook or Google. Less-mentioned methods included blogs, organized retreats, and attending baby fairs.⁴²⁵

Given the shortage of surrogates, Amy characterized “finding the surrogates” as the primary added value of her consultancy. She also said that recruiting surrogates was very costly. Amy said: “That’s where membership fees go ... it’s really, really hard because the demand for surrogates is so high that we need to spend a lot of money on advertising”. Amy used the cost of advertising, as well as its importance, to justify her fees. Conversely, Aja said: “Surrogates, it’s all driven by Google ad words, and mostly word of mouth, so you know, I don’t do a lot. We have our social media platform and things but I don’t do a lot of paid advertising. For one, I don’t necessarily think that’s the way to find really devoted people who are looking. I feel like the universe sort of spins people where they need to be. And so, they end up finding me”. Accordingly, not all participants reported spending significant effort and money on recruiting surrogates, though most did.

⁴²⁵ A “baby fair” is a form of trade show where retailers and service-providers showcase pregnancy and newborn-related products and services.

b) Subsequent Surrogacies

Surrogates will often undertake more than one surrogacy journey. Participants discussed that it was common for women to act as surrogates multiple times, especially in the case of sibling journeys (where the surrogate carries more than one child for the same intended parent(s)). Kerigan said that about “20% of surrogates come back for a subsequent journey”. Roxana said: “I know there are other agencies that have been around much longer that have had surrogates do, you know, 3, 4, 5 journeys for them”. For some of these subsequent surrogacies, the surrogates may be asked by the intended parents to do another journey together. In other instances, the consultants are the ones approaching the surrogates, inquiring if they are interested in carrying again. I focus on the latter situation, here. To hear about how consultants were recruiting previous surrogates for subsequent journeys, I asked all of my participants: “Do you ask surrogates if they would like to participate in future surrogacies? If so, what does that look like?”.

In their initial responses, most participants denied recruiting surrogates in early postpartum, as this was a vulnerable period. Many expressed that they did not want to “pressure” surrogates during this time. Amy said: “I let them reach out to me. I find it’s, it’s a really delicate time. I try not to pressure them or anything. I don’t want them to just be thinking about coming back to surrogacy right away either”. Aja said: “I am never going to approach a surrogate *laughs* in terms of that, after birth”. Sarah said:

Sarah: I want to make sure that people are, you know, not making decisions because they’re like ‘I was pregnant and now I’m not pregnant and I want to do it but I don’t know, like it’s crazy’. Like, you know. I want people to be making an informed choice, not an emotional one, which, you know, leads to problems.

Roxana described postpartum as a “transition from surrogate to other, whether it’s friend, family,

or nothing, um, you know that's a hard transition sometimes". These comments, along with several of the comments I will share below, show that my participants were aware that surrogates could be in a position of heightened vulnerability postpartum.

Most participants stated that subsequent journeys were initiated by the surrogates, themselves. Six of my participants expressed that surrogates will let their consultants know if they want to start another surrogacy journey, and that this happens on surrogates' own terms. Emily said: "Um, I feel like it's more organic, and – with them being – having our contact and being in some of our social media, they usually will notify us if they would like to be a surrogate again". According to Emily, the process for initiating a subsequent surrogacy is surrogate-driven, and not initiated by her team.

Several consultants explained that they would keep surrogates within their online communities, allowing surrogates to reach out to them if and when they wanted to undergo a subsequent journey. Sasha said: "We don't necessarily ask. Because we don't want to ever pressure anybody. But we don't, we don't like remove them or anything. And we are always sharing IPs and stuff. But um, yeah, we don't necessarily ask. But we continue to check in". In other words, these participants kept surrogates within their various communication spheres, especially in their social media groups. However, they did not actively reach out to surrogates to ask them to carry again, nor exert any targeted pressure on a specific surrogate.

Despite all participants stating that they would not pressure surrogates soon after birth, some still shared various ways that they would encourage previous surrogates to undertake subsequent journeys. Aja said: "Sometimes I will have an IP that comes in that I'm just like 'oh man, they would be perfect with so and so', ah and then sometimes I'll poke and say, 'hey, have you ever thought about doing this again?'" Aja described this as a "poke". Other participants

also reported nudging surrogates in a similar fashion. Roxana said: “we do follow up with our surrogates to be like ‘yeah, you know, if you are interested, this is an option’, provided the pregnancy has gone well and they haven’t had any serious complications”. These quotes demonstrate that some consultants do indeed approach surrogates to undertake subsequent surrogacy journeys. However, it is unclear from my data when these conversations take place, whether weeks or months or years after the surrogate’s previous birth experience.

My participants generally did not mention any set time limits that needed to elapse before asking a surrogate to do another journey. They also did not mention any organizational policies directing consultants to suggest another journey at a certain time. Emily said: “There’s no – there’s no like oh the baby’s 6 months lets reach out to the surrogate and see if she wants to be – I just, I don’t know, I don’t feel like that’s – that’s not something we do.” Only one participant vaguely mentioned timing. Regarding her timeline for approaching surrogates, Roxana said:

Roxana: We will wait quite a few weeks. We want them to enjoy the relationship that they have with their IPs, we want them to enjoy that transition period ... and building a different relationship with somebody else can be a bit challenging when you’re in a post-partum period and in a current relationship that you’re trying to maintain.

Roxana believed there was a transitional period during which it would be inappropriate to suggest a subsequent surrogacy. However, she described her timeline on the order of weeks, as opposed to months or years. This suggests that she did not believe that the off-limits, postpartum period was particularly long. I do not have data from any other participants suggesting how long or short they believed the off-limits, postpartum period might be. As such, it is not possible to say whether Roxana’s suggested timeframe is representative of my other participants’ practices.

Despite themselves disavowing the practice of recruiting surrogates early in the postpartum period, several participants shared their perceptions that “other agencies” were placing undue pressure on surrogates too soon after birth. For example, Amy said:

Amy: I know some companies really push that after birth, you know ‘come back! Do another surrogacy cycle’ – I think it’s really important that they take that time for them and their family. The surrogates who want to do it, I don’t have to ask. They’re going to come back to me. They’re going to be filling in an application. Um, so I’ve learned to not pressure them, because I’ve had, over the years, some say, you know “we felt really pressured by other agencies to sign up again”. They’re emotionally vulnerable. And sometimes I think the guilt comes in, that maybe I should help another couple cause I just did it, and I don’t want to, kind of, meddle with that at all.

Sarah also noted that “a lot of other agencies will start sending surrogates, like when they’re still pregnant, other profiles being like ‘so, ready for number 2?’ and I’m like. I’m – ugh. I’m like the worst sales person. So like, I could never – I don’t think I could ever, like, do that”. In both of these instances, the participants described the other agencies’ pressure tactics as a foil to their own practices, and made an effort to distance themselves from those kinds of recruitment strategies. Nevertheless, some of my participants perceived postpartum recruitment to be a problem within their industry.

c) Discussion

Given the shortage of surrogates, it would likely be difficult for consultancies to successfully operate without recruiting surrogates. The Baird Commission was aware of this, given its assessment that banning advertisements (both looking for paid surrogates and offering intermediary services) could curtail the existence of intermediaries and surrogacy in general.⁴²⁶ In practice, however, the AHRA’s advertising ban has had little effect, as the legislation is

⁴²⁶ *Proceed with Care*, *supra* note 8 at 669.

almost never enforced,⁴²⁷ and all of my participants reported recruiting surrogates in some way.⁴²⁸

The surrogate shortage may also incentivize some consultants to recruit existing surrogates for subsequent journeys. My data is mixed regarding when and how surrogates are being approached. The majority of my participants' first-hand accounts did not suggest that they were unduly pressuring surrogates very soon after giving birth. Nearly all of my participants acknowledged that postpartum was a sensitive period. They also stated that they would not recruit surrogates for subsequent journeys during this time. However, a minority of participants did report actively recruiting surrogates for subsequent journeys, though most did not discuss when these conversations occurred (ie., whether shortly after birth or a long time afterwards).⁴²⁹ The only timeframe provided was on the order of "quite a few weeks", which is still not very long considering the major physical, emotional and relational shifts that a surrogate may be undergoing. Some participants also perceived recruiting in early postpartum to be a problem amongst "other agencies" in their industry. Based on the foregoing, my data tentatively suggests that *some* consultants may be applying undue pressure not long after birth, aligning with concerns raised in the literature.

⁴²⁷ I expand on this in Chapter 6.

⁴²⁸ While my participants reported recruiting surrogates in various ways, my data is not well-suited to analyze whether the substance of their recruitment materials are accurate, educational, misleading, or manipulative. Further research on this would be beneficial, as the substance of these materials may impact viewers' abilities to make informed decisions.

⁴²⁹ Throughout this section, I refer to the postpartum period as the transitional time after a surrogate gives birth. Note that I do not place a strict limit on how long the postpartum period lasts (ie., 6 weeks or 6 months), as every surrogate may experience their postpartum period differently, and there is no definitive cut off for when this unique period of life ends for everyone.

Recruiting surrogates for subsequent journeys is problematic if it occurs soon after giving birth due to the birthing person's heightened vulnerability at that time.⁴³⁰ Surrogates, in particular, may be struggling with "losing" their relationship with their intended parents.⁴³¹ Others may be fueled off the "high" that giving birth provides.⁴³² These factors may incentivize surrogates to agree to subsequent journeys while still grieving or processing their previous journey.⁴³³ Surrogates may also be more susceptible to external pressure or suggestion at this time.⁴³⁴ Recruitment postpartum is therefore more likely to constitute inappropriate pressure, potentially leading to coercion or exploitation.

It is unclear precisely when this period of heightened vulnerability may end for each individual, though consultants, themselves, are in a poor position to make this assessment. This is because consultants face an inherent conflict of interest when recruiting surrogates for subsequent surrogacies. Although they may want to support the individual surrogate, they may also be motivated by financial gain to foster new matches and help more intended parents.⁴³⁵ This conflict may incentivize consultants to approach surrogates while they are still in a vulnerable and more influential state.

⁴³⁰ From a biological perspective, the postpartum period entails a marked hormonal shift, which may impact a birthing person's emotions. It may be easier for coercion or exploitation to occur during the postpartum period. Decision-making at this time may be fraught with doubt, fear, or conflict. See: Elizabeth Kukura, "Birth Conflicts: Leveraging State Power to Coerce Health Care Decision-Making" (2018) 47:2 U Balt L Rev 247.

⁴³¹ One surrogate discussed told CBC news that "she was in an emotionally vulnerable state in the initial weeks after giving birth. 'I think a lot of surrogates feel lost. I know I felt lost afterwards... I didn't know what else to do'": CBC News, "Pressure", *supra* note 271. See also: Jennifer Haylett, From Contracted Employee to Fictive Kin: U.S. Commercial Surrogacy as a Case of Relational Work (thesis: 2015, University of California) at 129.

⁴³² CBC News spoke to dozens of surrogates and found that: "nearly every woman described the intense emotional high they experienced right after giving birth to surrogacy babies, some describing it as addictive": CBC News, "Pressure", *supra* note 271.

⁴³³ *Ibid.*

⁴³⁴ Elizabeth Kukura, "Birth Conflicts: Leveraging State Power to Coerce Health Care Decision-Making" (2018) 47:2 U Balt L Rev 247.

⁴³⁵ Even if the conflict does not actually influence or change the consultant's ultimate behaviour, the mere appearance of a conflict can still be harmful. This is because appearances, alone, may undermine the surrogates' trust in the consultants, and harm their overall relationship.

In addition to timing, the strategy that consultants use to recruit surrogates for subsequent journeys can influence the level of pressure a surrogate may feel to agree. Even if a surrogate is being approached months or years after a surrogacy, actively and directly approaching a specific surrogate for a subsequent journey can create increased pressure. While this does not necessarily mean that surrogates must never be individually approached, it lends support to several participants' position that discussions about subsequent surrogacies may be best initiated by the surrogates, themselves.

Indirect recruitment activities are less likely to unduly pressure surrogates. Several of my participants said that they would keep in touch with surrogates, invite them on retreats, and keep them in Facebook groups. These actions may apply passive encouragement to undergo a subsequent surrogacy, in that the surrogates may still be exposed to intended parent profiles and other recruitment materials. However, it is not inherently problematic for a surrogate to undergo a subsequent journey if she genuinely desires to do so. Furthermore, keeping a surrogate within the consultancy's community may actually be desirable for reasons other than inspiring surrogates to start another journey. This represents a continuity of community, and provides a touchstone for support for those surrogates who desire it.⁴³⁶ Indeed, it could be rude, awkward or hurtful if the relationship between the consultant and the surrogate were abruptly terminated by the consultancy after birth, or if the surrogate was immediately removed or blocked from the consultancy's Facebook group or social media pages. Accordingly, keeping surrogates within consultancies' communities post-birth is not by itself concerning, and in fact may be appreciated by some surrogates.

⁴³⁶ I assume the surrogates retain the power to sever contact, unfollow, unsubscribe, and leave the online groups at any time they choose.

Part II: Screening

Several reports regarding consultancy screening practices suggest that some consultancies are not screening surrogates thoroughly enough prior to matching. For example, some intended parents have shared stories of consultants proposing surrogates who were underage;⁴³⁷ surrogates who were in poor health; surrogates who had recently completed alcohol abuse programs; surrogates who used illicit drugs; surrogates who were at high risk of complications during pregnancy; and, surrogates who were struggling financially.⁴³⁸ While the majority of the literature is focused on issues with consultants' screening practices, there have also been some positive reports where intended parents discussed appreciating their consultants' assistance with screening.⁴³⁹

To test these narratives within my own interviews, I posed a broad and general question: “walk me through what you do for your clients, before conception occurs”. In the event that participants did not raise screening criteria on their own, I included specific probes asking participants to tell me about any screening that applied to surrogates and to intended parents.

In analyzing the responses, my focus is on the consultants' screening criteria, not on clinicians' screening criteria (though there may sometimes be some overlap). Doctors have their own requirements for screening potential surrogates. For example, according to the Canadian Fertility and Andrology Society (CFAS) Guidelines,⁴⁴⁰ clinicians should screen surrogates for

⁴³⁷ Surrogates in Canada must be 21 or older: AHRA *supra* note 4, s6(4).

⁴³⁸ Some intended parents believed the consultants pushed matches so that they could collect their full fees, regardless of whether the consultants believed the surrogate was a viable surrogacy candidate: Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 86-88.

⁴³⁹ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76-78.

⁴⁴⁰ Notably, these Guidelines are not legally binding. While they may be used to inform a court about whether or not a clinician has breached their standard of care, they are not actually enforceable. Canadian Fertility and Andrology Society, *Guidelines for Third Party Reproduction AMENDED*, CFAS, 2016 [CFAS, Guidelines]; Canadian Fertility

medical, obstetrical and social history,⁴⁴¹ as well as infectious disease.⁴⁴² Surrogates should be informed of the risks associated with pregnancy.⁴⁴³ Moreover, surrogates should be non-smokers, have a body mass index below 35 kg/m³, and be under the age of 45.⁴⁴⁴ CFAS also recommends that both surrogates and intended parents should undergo counselling.⁴⁴⁵ Notably, these Guidelines are not legally binding. Clinics generally create their own criteria regarding which surrogates they will work with, and these criteria may be more or less restrictive. Analyzing clinicians' screening criteria is beyond the scope of this dissertation. However, it is important to understand that, in addition to any screening conducted by consultants, physicians will also screen surrogates.⁴⁴⁶ Clinicians' screening may occur before, after, or as a criteria of the consultants' screening. If clinicians' screening takes place after the consultants' screening, surrogates may already be admitted into a consultancy and even matched with intended parents before their medical eligibility for surrogacy has been fully confirmed.

and Andrology Society, Counselling Special Interest Group, "Assisted Human Reproduction Counselling Practice Guidelines" (August 2009) [CFAS, Counselling].

⁴⁴¹ CFAS, Guidelines, *supra* note 440 at 16-17.

⁴⁴² *Ibid* at 8.

⁴⁴³ *Ibid* at 15-16.

⁴⁴⁴ *Ibid* at 15-16.

⁴⁴⁵ *Ibid* at 11; CFAS, Counselling *supra* note 440 at 23-25. For intended parents, this counselling should include exploring motivation, readiness, acceptance, boundaries and support systems. For surrogates, this should include exploring psychosocial history, motivations, support systems, possible financial or emotional coercion, and social implications.

⁴⁴⁶ Physicians will also sometimes screen intended parents. The *Safety of Sperm and Ova Regulations* prescribe screening that health professionals must conduct on gamete donors, consisting of physical exams, screening questionnaires for various risk factors, and testing for infectious diseases. Notably, while these regulations would apply to intended parents who are using their own gametes in a surrogacy pregnancy, they would not apply to intended parents that had no genetic link to the embryo being used in the surrogacy. As such, not all intended parents are captured by this mandatory screening. See: *Safety of Sperm and Ova Regulations* (SOR/2019-192); Health Canada, *Guidance Document - Safety of Sperm and Ova Regulations* (8 December 2021), online: Canada.ca <<https://www.canada.ca/en/health-canada/programs/consultation-safety-sperm-ova-regulations/document.html>>.

a) Screening Surrogates

With respect to screening surrogates, there was significant variation in the procedures required by my participants. Two of eight consultants discussed financially screening surrogates, generally in the form of asking questions about the surrogates' financial stability. Five of eight consultants discussed requiring a psychological consultation to be done, whether via the clinic, a social worker, an outside psychologist, or a therapist on staff. Three out of eight consultants required a criminal record check. Three of eight discussed checking in on the surrogates' support systems, whether by asking the surrogate about how her partner feels about the experience, or by speaking to the partners themselves.⁴⁴⁷ Three consultants required specific medical documents or approvals prior to accepting surrogates into their programs.

To expand on the last-listed requirement, one consultant needed surrogates to be pre-approved on paper by a clinic; another needed a medical verification letter from a family physician or obstetrician-gynecologist; and, one required surrogates to be fully screened by a clinic before the surrogate would be connected to any intended parents. This latter consultant paid the upfront costs of the screening, and said she would be reimbursed for that exact amount by intended parents after they decided to match with the pre-screened surrogate. These figures would vary from surrogate to surrogate depending on the clinics' costs and required procedures. The consultant specified that the intended parents would be told how much it had cost to screen the surrogate prior to matching, so that the intended parents could make informed financial decisions.

⁴⁴⁷ I include this in my discussion of screening as these participants raised these criteria when I asked them about screening surrogates, and one participant framed this as a pre-requisite step prior to officially accepting a surrogate into the surrogacy program.

All three participants who required medical pre-screening believed this was important and immensely beneficial for intended parents. One consultant said: “We think [pre-screening] is very important because it’s such an emotional process that if we could avoid more heartbreak for the IPs, um, we’d like to do that if possible”. This “heartbreak” could occur if intended parents matched with a surrogate who was later deemed medically ineligible to proceed with the surrogacy. Lucia believed that one of the biggest benefits for her intended parents was “knowing how much work we put into it before they find a surrogate”.⁴⁴⁸ Lucia believed this was not the case for all consultancies. She said: “some of the complaints I get from people when they’ve been at other agencies is that their surrogate didn’t pass medical screening”. Accordingly, at least one participant perceived inadequate screening was a problem in the industry, and she used this as a foil to distinguish her own practices.

All eight participants discussed having surrogates fill out general questionnaires, and all eight participants included at least some medically-related questions on their questionnaire. Participants differed with respect to how they treated the disclosed medical information. For example, one consultant discussed excluding candidates from her program if they disclosed certain medical conditions, such as high blood pressure or previous premature births. In other instances, the consultants merely collected this information but ultimately left the determination of whether or not surrogates were medically suitable for surrogacy to clinicians. One participant explained:

Roxana: we don’t do any medical screening because we’re not doctors. We don’t have the ability to say, yes you do qualify, um, under these specific parameters. So we will do what we call a paper profile ... with everything they provide we can very quickly ah, figure out what clinics they’re able to work with, um, based

⁴⁴⁸ Given how few consultant discuss conducting medical pre-screening, I have used a unique pseudonym to better protect this participant’s identity.

on those – that information. And we tell them, you know, this information will go to the clinic.

In other words, this participant did not automatically exclude candidates based on the health information that was disclosed in the questionnaires. Rather, she used this information to ascertain which clinics to refer the surrogate to, presumably based on clinics' different screening criteria. The information was also collected to share with the clinicians, with the surrogates' consent.

I probed participants regarding whether they had limits on how many times they would work with a surrogate, and how soon they would work with a surrogate after she had given birth. Overwhelmingly, participants expressed that they did not have any set limits. Rather, they would defer to the clinicians' medical opinions, and wanted to respect the surrogates' autonomy to make these decisions for herself. Carla said:

Carla: There are women who have given birth 6 times that have done incredible, never had a tear, never had a complication. We've had surrogates who've given birth twice and then ended up, you know, having complications and, and it isn't a good idea for them to be a surrogate. So really it's about how they feel, medical clearance from their OB or doctor or midwife, and also medical clearance from the clinic. So we try to just find the gap that works best for them. You know. And work around that. So we don't put a cap on it, because we really believe in the autonomy of what's right for them. And also, we're not the medical voice. We haven't been from the beginning

Carla's quote highlights her awareness that she is not a medical professional, and that medical assessments and determinations ought to be conducted by the appropriate professionals. Furthermore, her quote emphasizes how each surrogate's medical and emotional circumstances are unique, and would therefore be unsuitable to one single standard. In supporting her position, she defers to the surrogates' autonomy. Similarly, Kerigan said: "The limit, I think, is, you know, around her safety and pregnancy health... I would really never have comment on her

reproductive health, so I think we just – yeah. I leave that to her”. This once again demonstrates deference towards the surrogates’ own desires and decisions.

While most participants noted that they were not in a position to provide medical advice, one participant over-stepped in this regard:⁴⁴⁹

Zeljka: The screening of the surrogates is, uh, we use an [X] page, uh, complete profile. And we pretty much know what the flags are. Like, we’ve just been doing it so long. So if see a medication, we always ask why. Like, but I do it in a way that’s respectful. ‘Do you mind sharing why you’re on this medication?’ Because I really do believe in that privacy, and that is their information, and I am a stranger to them ... I also respect that I am not their medical team. So I always ask questions. And sometimes, what I find is, um, like I had a surrogate who said ‘I am on this antidepressant’, and I completely support mental health, ‘do you mind sharing why?’ ‘Oh well, I was going through a bad divorce, and da da da’. And I’m like, ‘okay, but when I did your other questions you told me you were married now, and you know, you’ve carried on with your family,’ and she’s like ‘oh yeah, that was seven years ago’, and I’m like ‘oh’, I said ‘so you’re in a good place now?’ ‘Yeah!’ ‘Oh, have you talked to your doctor about changing any medication?’ And so I try to use it as an opportunity for education.

Although Zeljka explicitly recognized that she was not a part of the surrogate’s medical team, and although she re-directed the surrogate to a doctor, Zeljka’s conduct nevertheless blurred the boundary between consultant and medical advisor. Furthermore, while this was not stated explicitly, Zeljka’s advice may have been self-interested, as surrogates who are taking certain kinds of medication – like antidepressants – may be less desirable for intended parents who are seeking a match.

b) Screening Intended Parents

Most participants conducted some form of screening prior to accepting intended parents into their programs. Once again, the form and the extent of this screening varied significantly

⁴⁴⁹ I use a unique pseudonym for this quote. The length of this participant’s screening document has also been redacted to better protect this participant’s anonymity.

between participants. Four out of eight participants discussed screening for finances. Largely, this occurred via having conversations about finances and the cost of surrogacy. Two out of eight participants reported requiring psychological evaluations, though one of these participants specified that this was only required if the initial consultation revealed “any pieces that we think are going to be tricky for them based on past trauma, losses, etc.”. One participant discussed requiring a criminal record check.

Two participants responded that they did not do any screening for intended parents at all.

Lise elaborated on her deliberate decision not to screen intended parents. She said:⁴⁵⁰

Lise: [at first we thought] ‘well we should do financial checks, we should do psych evaluations, we should do this and this’, and then when we talked to some of the industry professionals, um, doctors and psychotherapists and stuff, they said “you should not do that on IPs because what right do we have to say who should and shouldn’t be parents”. And so we’re like, you know what, that’s a very good point. So we do have our IP application, which gives us a lot of information on them, and we go through that, but beyond that, we don’t ... Like what right do we have to make that decision of who should and shouldn’t be parents.

Lise believed that respecting the intended parents’ reproductive autonomy was of the utmost importance. She perceived screening to be an inappropriate intrusion on intended parents’ reproductive autonomy.

Despite voicing various perspectives on the extent to which intended parents should be screened, all participants conducted initial consultations with intended parents prior to admitting them into their programs. This occurred regardless of whether participants explicitly identified this as screening or not. In multiple instances, these consultations were used to assess whether the applicants would comply with the consultants’ subjective expectations of how intended parents should behave towards surrogates. For example, many participants believed that

⁴⁵⁰ A unique pseudonym has been assigned to this quote in order to better protect participants’ confidentiality.

relationships between surrogates and intended parents should be close and long-lasting. Carla said: “I’m really hoping to foster ongoing relationships for the rest of your lives. ‘Cause we change lives as surrogates. So I want to foster that if I can”. Similarly, Aja said “It’s about a long term sort of relationship”. Multiple participants echoed this desire to foster long-term relationships, and saw this as a hallmark of a positive surrogacy journey.

Some participants excluded intended parents who did not fit in with this vision. I refer to this as screening intended parents for “fit”, as this reflects the language used by many of my participants. Five out of eight participants raised this idea of screening intended parents for fit in some capacity. Madison explained that “we do a lot of filtering to make sure they’re the right fit for our idea of what a surrogacy journey should look like”.⁴⁵¹ Roxana said: “our expectation is that you are going to build a relationship with your surrogate that is going to last beyond the pregnancy. If you’re looking for something that’s more transactional, then [Roxana’s Consultancy] is not the fit for you”. Roxana deemed lasting relationships to be ideal, and filtered out intended parents if their views were not in line with her beliefs about optimal surrogate-intended parent relationships.

I include an extended quote from Madison, below, to provide an example of the informal criteria she used to screen for fit. Although the quote is lengthy, I wanted to let her own words speak to her reasoning and intentions.⁴⁵²

Madison: So the IPs side is not so much a technical side, but we do talk about what it is that – what brought them to surrogacy. [Very rarely] someone has said, ‘oh well, we’re just too busy. You know, I have a busy dental practice, and I can’t do this’, and I’m like ‘uh, that’s not a thing’ *laughs* ‘cause that surrogate is going to give up their life for you for the 2 years. How is it that their life is

⁴⁵¹ Madison is a unique pseudonym used in in order to better preserve the participant’s anonymity.

⁴⁵² I paraphrased one small portion of the quote, denoted by square brackets, in order to preserve the participant’s anonymity. I also omit several sentences that discussed screening for finances, denoted by the ellipses, because I do not categorize screening for finances as screening for fit within this thesis.

less important than yours in business? They have, you know, usually multiple children, and they are working their lives, and just because they may not be a dentist doesn't mean that they're not important. So we will immediately rule someone out like that.

Because it is Canada and we're predominantly English speaking, we ask that one of the IPs be able to communicate in English, because we're worried about them being able to not only – cause we believe in that relationship. We want them to be able to communicate with their surrogate. Now, we do have surrogates who are bilingual. Great. Then we will absolutely help support that rule to that. So it's not a hard rule, but if – it's a tool to fetter out. Um, you know, we worry about them struggling the be able to understand a contract, be able to communicate with the doctor, midwife, a doula. The surrogate asks, so you know, there can't be a translator all the time, and it doesn't foster the same relationship. So that's just something that we use as a soft buffer and a tool.

Uh, we go over um, why they're there, and of course, too, you know, what their experiences have been to date. And so we use those as markers as to how, maybe how damaged they are as well. Because it is a very damaging process. So somebody identifies as, um, 'I don't really want to know the surrogate because I – I can't commit because I've already been through so many miscarriages'. You know, we're redirecting them back to counselling. It's not that they're not going to be good parents, but maybe now isn't the right time. So we try to use those markers.

We talk about relationships. If someone is super controlling, or arguing with us every minute when we say, 'okay, this is going to be the schedule'. And they're like 'well, I don't want to do that'. And they've got their own idea. We're not a team anymore. And I've got a two year commitment to them, minimally, quite often 3, 4 years. I need someone who's going to work with us. So, um, they're obviously not going to be a good fit. So yeah, we're getting a lot more feels, a lot more um, relationships, and understanding they can't, they can't bubble wrap that surrogate. They can't control her, um, understanding that they're not in control.

Madison's quote can be broken down into four screening criteria: reason for pursuing surrogacy; language; trauma; and, personality traits. Largely, Madison presented these criteria as being in place to protect the surrogates' well-being, and to promote her vision of optimal relationships between surrogates and intended parents. Madison repeatedly raised how these factors had the potential to negatively impact relationships. To Madison, language was required for communication and connection. Trauma could impact closeness. Personality clashes could

impact trust and autonomy. While Madison was focused on promoting the surrogates' well-being, she did not address how this could impact the intended parents.

Madison's quote also suggests some self-interest in her selection process. Argumentative, controlling or otherwise difficult intended parents were excluded because they did not fit in with her team. In other words, Madison may also have been using these informal criteria to pick intended parents whom she wants to help, and to exclude those whom she subjectively disliked or did not want to work with.

c) Discussion

Some consultancies require medical screening for surrogates prior to matching. Three out of eight participants required medical practitioners to support a surrogate's eligibility, prior to allowing her to meet with and match with intended parents. Two of these three participants only asked for partial medical pre-screening, which took the form of receiving letters from health practitioners, or pre-approvals on paper from clinics. One participant required surrogates to undergo complete medical screening by a doctor prior to entering the matching program. Such full medical pre-screening represents the most comprehensive model, and provides the highest degree of assurance that an individual is physically eligible to act as a surrogate. Accordingly, full medical screening for surrogates decreases the likelihood that intended parents will need to be re-matched for medical reasons.

A medical pre-screening model also ensures that the screening is being conducted by appropriate medical professionals. Under such a model, doctors are responsible for determining a surrogate's medical eligibility – not the consultants, themselves. The consultants merely make admission into their programs contingent on approval from a medical professional. This is

important because consultants face an inherent conflict of interest when screening surrogates. While their self-reported role is to support surrogates and intended parents, they are simultaneously trying to generate many matches. For many consultants, payment is contingent on matching,⁴⁵³ and so they are incentivized to facilitate matches even if that match later falls through.⁴⁵⁴ Because of this, they are not structurally well-suited to make objective determinations about a surrogate's likely eligibility. Medical pre-screening should be conducted by appropriate medical professionals *before* a surrogate is accepted into a consultancy's program. Given that a full medical pre-screening model is being successfully implemented by at least one Canadian consultancy, it is clear that this can be a workable practice.

Unfortunately, in accordance with some pre-existing reports about consultancies inadequately screening surrogates, many of my participants' reported screening activities were quite thin. While all participants would collect medical information, several would not automatically exclude surrogates based off this information, and would rather pass this information along to future clinicians. This means that surrogates could be admitted into surrogacy programs, even if the consultants suspected that they may be medically disqualified later. This exacerbates the possibility that an intended parent may have a match fall through. In line with other empirical data,⁴⁵⁵ one of my participants shared the perception that some "other agencies" were inadequately screening surrogates prior to matching, resulting in failed matches for intended parents.

⁴⁵³ For a discussion of consultants' different fee structures, please see Chapter 5.

⁴⁵⁴ Motluk, "Waiting Room", *supra* note 133.

⁴⁵⁵ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 90-94.

Inadequate screening practices may put intended parents at risk for financial and emotional harm resulting from matching with a medically ineligible surrogate.⁴⁵⁶ In the event that an intended parent matches with a surrogate who is later deemed medically ineligible for surrogacy by a clinician, the intended parents will need to re-match with a surrogate. Often times, this is accompanied by a re-match fee.⁴⁵⁷ This suggests that intended parents may be financially vulnerable if they are matched with surrogates who are subsequently disqualified by medical professionals. Even if re-match fees are not charged, intended parents may still be financially prejudiced because they likely have to pay the costs associated with the failed medical screening. Furthermore, it is undoubtedly emotionally difficult to have a match fall through. Going through the re-match process further delays the arrival of a child. Some reports suggest that it is harder to be re-matched through a consultancy than it is to be matched in the first place due to consultants losing financial motivation.⁴⁵⁸ In admitting surrogates into their programs, consultancies therefore have some responsibility to ensure that these women are in fact medically eligible to undertake a pregnancy.

When discussing surrogates' screening, one participant shared an anecdote in which she inappropriately gave medical advice by urging a potential surrogate to stop taking her antidepressants. Consultants may be incentivized to provide inappropriate medical suggestions in order to increase the number of surrogates in their programs, and, correspondingly, their likelihood of generating profit based on creating matches. Consultants should never give medical

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 86-88; Motluk, "Waiting Room", *supra* note 133.

⁴⁵⁸ Many consultants are paid upon the initial match, and so would not be financially incentivized to re-match, as payment would already have been received. See: Motluk, "Waiting Room", *supra* note 133; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 86-88.

advice, as they do not have the appropriate medical training or accreditation.⁴⁵⁹ Even if they come from medical backgrounds, they are not acting in this capacity when screening surrogates into their consultancies.

I now turn to my participants' screening practices for intended parents. There is limited discussion of this in the literature on surrogacy consultancies, though there has been some academic debate about the extent to which screening intended parents may infringe on their procreative liberties.⁴⁶⁰ My data provides new insight into how consultants are screening intended parents, and in particular, how the common practice of screening for "fit" may prejudice intended parents' reproductive autonomy.

Screening for fit gives consultants the discretion to deny admission into their surrogacy programs based on subjective criteria, which can seriously disadvantage some intended parents in their search for a surrogate. As I discuss in Chapter 1, intended parents may be uniquely vulnerable due to a wide range of factors, including the disproportionate lack of surrogates,⁴⁶¹ trauma due infertility,⁴⁶² discrimination due to LGBTQ2S+ status,⁴⁶³ and/or lack of control in the surrogacy process. Screening for fit can compound these vulnerabilities. For example, Madison discusses filtering individuals out based on "how damaged they are". This can be construed as an unjustified distinction associated with the intended parents' infertility journeys, and may exacerbate the trauma associated with enduring prolonged fertility struggles. Similarly,

⁴⁵⁹ Even if they come from medical backgrounds, they would not be acting in this capacity when screening surrogates into their consultancies.

⁴⁶⁰ See: Ruther Walker & Liezl Van Zyl, *Towards a professional model of surrogate motherhood* (London: Palgrave Macmillan, 2017) at 153-157; Kim Gutschow, Robbie Davis-Floyd, & Betty-Anne Daviss, eds, *Sustainable birth in disruptive times* (Springer International Publishing, 2021) at 122-23; Gruben, *Surrogacy in Canada*, *supra* note 10 at 39.

⁴⁶¹ Carsley, Dissertation, *supra* note 105 at 130.

⁴⁶² Yui Xie et al, "The impact of stigma on mental health and quality of life of infertile women: A systematic review" (2023) 13 *Frontiers in Psychology* 1093459.

⁴⁶³ Horsey, "UK intended parents", *supra* note 238 at 3.

Madison’s decision to screen out “controlling” individuals compounds the lack of control many intended parents have experienced during their infertility journeys, and fails to recognize the benefits that may accompany allowing intended parents to regain control in specific situations. I recognize that consultants may not have the resources to help all intended parents. However, given the serious implications for intended parents, screening for fit should be approached with caution, requiring significant justification for rejecting a prospective intended parent.

While my participants explained that screening intended parents was meant to help surrogates,⁴⁶⁴ their assessment was often predicated on an over-simplified assumption about what all surrogates want. As shown, most of my participants believed that positive relationships between surrogates and intended parents were close and long-lasting. In reality, surrogates may gravitate towards many different kinds of personalities and relationships. While many surrogates may desire close and long-lasting connections, not all do. Some surrogates may in fact prefer more transactional or professional relationships.⁴⁶⁵ Ultimately a surrogate’s reproductive autonomy is better promoted by allowing her to decide what a positive relationship looks like, rather than making an assumption for her about what she might want out of a surrogacy relationship.

Part III: Matching

Academic articles and media reports have raised concerns regarding some consultants’ matching processes. Some intended parents have reported feeling pressured by their consultants

⁴⁶⁴ This is an example of how consultants align themselves with surrogates. I expand on this theme in Chapter 4.

⁴⁶⁵ One critical interpretive review suggests these preferences may be cultural, finding a “preference for a business-like relation by Russian and Ukrainian surrogates”: Jenny Gunnarsson Payne et al, “Surrogacy relationships: a critical interpretative review” (2020) 125:2 *Upsala Journal of Medical Sciences* 183 at 189.

to make quick decisions about whether they want to match with a surrogate.⁴⁶⁶ Alison Motluk reported that a consultancy was withholding certain intended parent profiles from surrogates out of financial self-interest.⁴⁶⁷ The consultancy would avoid presenting the profiles of intended parents who needed to re-match with a surrogate because those intended parents had already paid the consultancy fees at the time of their initial match. Thus, the consultancy was not financially incentivized to share that profile, as the business would make more money if it matched new intended parents instead.⁴⁶⁸ Other empirical data supports the existence of this problematic practice.⁴⁶⁹

Despite these issues, not all views on consultants' involvement in matching are negative. Some data suggests that consultants' assistance with matching may benefit some surrogates and intended parents. Samantha Yee has suggested that the high instances of harmonious surrogate-intended parent relationships reported in her survey may have resulted from the consultants' involvement in pairing like-minded individuals.⁴⁷⁰ In other words, some consultants may take time to ensure surrogates and intended parents have aligned expectations for their surrogacy

⁴⁶⁶ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 85-86.

⁴⁶⁷ Motluk, "Waiting Room", *supra* note 133.

⁴⁶⁸ Motluk's article explained: "Because the intended parents on the rematch list have already paid their money—and will not bring in any additional money—they are not a priority, people who have worked there told me. ... Sometimes there were explicit instructions in group chat messages to employees to avoid helping people on the rematch list, like one that read, 'Please do not make any more rematches...' and another that read, 'We cannot afford rematches at the moment.' Even when surrogates specifically request people on the rematch list, they are sometimes told those people are not available, even when that's not true, says a person who has worked there. One rematch couple I spoke to was surprised to learn that their surrogate had initially been told they were taking a break, when in fact they were 'desperate to reconnect with somebody.' (The couple did eventually have a child through CFC with that surrogate, after she said they were the only couple she wanted to work with.): Motluk, "Waiting Room", *supra* note 133.

⁴⁶⁹ Some Canadian intended parents interviewed by Stefanie Carsley believed that their consultancies were slow to offer re-matches: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 86-88.

⁴⁷⁰ Yee, *supra* note 6 at 8.

journey prior to matching.⁴⁷¹ This can lead to more positive relationships between surrogates and intended parents.⁴⁷² When surrogates self-report having positive relationships with their intended parents, their overall surrogacy experience is correspondingly positive.⁴⁷³ Accordingly, consultants involvement in matching may promote better overall surrogacy experiences.

To examine how these narratives were manifesting in my own data, I included a probe in my interview guide asking how surrogates and intended parents were matched.

a) Matching Process

Participants generally described the matching process as follows. First, profiles were created for the intended parents, with varying degrees of assistance and input from the consultants.⁴⁷⁴ Aja discussed creating profiles that helped the intended parents “put their best foot forward”. These profiles could include pictures, personal anecdotes, personal messages, geographic information, and hopes for the surrogacy process. In all but one instance, surrogates were the ones viewing the intended parents’ profiles and choosing from among them.

Consultants varied with respect to whether they would present the surrogates with all the available profiles, all profiles that matched the surrogates’ desired criteria, or a select few

⁴⁷¹ Some lawyers interviewed by Stefanie Carsley also reported that they raised important considerations for matching with their clients, including perspectives on termination and types of prenatal care: Carsley, Dissertation, *supra* note 105 at 127-28.

⁴⁷² Yee, *supra* note 6 at 8.

⁴⁷³ For example Hilary Hanafin found that “[surrogates’] satisfaction is positively correlated with a respectful and comfortable relationship with the parents. The respect shown by the parents and the contact with them appears to have significant consequences for the surrogates’ long-term comfort and satisfaction with having participated” (Hanafin, *supra* note 318 at 372). In Hohman and Hagan’s study, all 17 surrogates interviewed described their relationship with the intended parent(s) as being the key factor in their satisfaction with the surrogacy (Hohman & Hagan, *supra* note 318 at 61) Their satisfaction was closely linked to developing a close relationship with the intended parents, where they felt both needed and appreciated (Hohman & Hagan, *supra* note 318 at 69). See also: Yee, *supra* note 6; Kleinpeter, *supra* note 318; David MacPhee & Kathy Forest, "Surrogacy: Programme Comparisons and Policy Implications" (1990) 4:3 Int'l JL & Fam 308 at 310 .

⁴⁷⁴ Sometimes, profiles were also created for the surrogates.

(ranging to as little as two or three profiles). Whichever method the participants ascribed to, they generally expressed disdain for the alternative approach. For example, Amelia said:⁴⁷⁵

Amelia: That's one of the things I did hear from the surrogates, that they absolutely love that I allow them to match themselves. I know a lot of agencies will say 'here's 3 profiles', um you know, 'these are sort of the next in line, choose out of these ones, connect with these ones'. But I will not do that. And they love the fact that they get to read all the profiles. I think that's one of the things that they constantly say, like, we love how we're allowed to choose for ourselves.

For Amelia, maximizing the surrogates' choices best fosters their autonomy, and allows connection and intuition to guide the matching process. Amelia also believed this approach benefitted her intended parents, as they knew all the available surrogates would see their profiles. Similarly, Hannah said: "I do believe in giving the profiles out to everyone and kind of seeing what happens. And I always say it's kind of magical because, I always say I'd be a horrible match maker. I've been doing this [many] years and I always think this surrogate and this IP. I am consistently wrong every time".⁴⁷⁶ Hannah goes on to state that surrogacy is about the connection, and that connection can be hard to predict.

Conversely, Sandy thought that surrogates and intended parents benefited from a more guided approach:

Sandy: A lot of it also has to do with like, are you guys going to be good partners throughout this? Are you guys going to be a good match? Like, I'm not going to put a shy, kind of set of IPs with like a firecracker kind of surrogate because she's going to bulldozer them. Um, so, you know, I think I'm kind of also good at like seeing those sorts of things. And so, those kind of things come into play too. If I give the surrogate all the IPs, they're going to go 'I want to carry for all of them' and I'm going to go, 'well, now you're in a pickle' so, I generally don't send more than 3. Usually 2. And I lean on one.

⁴⁷⁵ I use unique pseudonyms throughout this subsection, as information about profile distribution could be identifying when connected to other information throughout the thesis.

⁴⁷⁶ The specific number of years has been redacted from this quote and replaced with the word "many", as denoted by the square brackets, in order to avoid identifying this participant.

Sandy believed her own interpersonal assessments could generate better matches, and that presenting fewer profiles was less overwhelming for the surrogates and could circumvent decision paralysis. Indeed, some of my participants discussed how, when they acted as surrogates in the past, they felt overwhelmed when presented with too many profiles. These sentiments have been echoed in other empirical studies as well.⁴⁷⁷

Still, other consultants, like Megan, opted for a middle ground. These consultants filtered out some intended parent profiles based on criteria that the surrogates explicitly expressed:

Megan: I kind of get an idea throughout the process, like, of if they have any criteria. And usually the only things that come up is like, location, um whether they would prefer if they already have kids or not, um, whether they prefer um like, a homosexual or heterosexual couple. Sometimes there's a preference – usually not, but sometimes there is. Um, and occasionally there is termination belief. So occasionally there is a surrogate that has strict no-termination beliefs. So then we would have to guide to IPs that have the same beliefs. Or we guide to IPs that meet any criteria that they have. But, other than that, we kind of leave it open.

Megan discussed filtering profiles based on the surrogates' preferences and opinions. Some other participants also filtered based on preferences expressed by the intended parents (for example, if the intended parents are adamant about having a surrogate who would give birth in a hospital setting), as well as clinical requirements set by the intended parents' clinics (for example, regarding the potential surrogate's age or number of previous pregnancies).

In nearly all circumstances, the matching process was surrogate-driven, in that the surrogates were the ones presented with profiles and given the power to choose whom they

⁴⁷⁷ Some intended parents reported that the surrogates they worked with felt overwhelmed in the matching process: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 89.

wanted to get to know.⁴⁷⁸ However, Roxana pointed out that a surrogate-lead process sometimes meant that intended parents could go unmatched for extended periods of time.⁴⁷⁹ In these instances, participants like Aja stated that they would workshop the intended parents' profiles in order to improve the chances that they would get chosen. Roxana also added that she would aim to be in "consistent contact" with the intended parents throughout this time in order to provide support and answer any questions.

Many participants encouraged intended parents and surrogates to take time to get to know each other before finalizing a match. Most of my participants referred to this part of the matching process as "dating".⁴⁸⁰ Some surrogates could speak to multiple intended parents at once, whereas others were only introduced to one set of intended parents at a time. "Dating" took place over an un-fixed amount of time. Sarah encouraged surrogates and intended parents to get to know each other for at least "a couple of weeks" before moving on to contracts. Sasha said: "We don't say you have to confirm in 2 weeks or it's not a match. We say, if it takes a day, or a month, or 3 months, like it's up to the IPs and the surrogate. Whenever, whenever both sides confirm, that's when it's a match, however long that takes". None of my participants reported pressuring surrogates or intended parents into making quick decisions.

⁴⁷⁸ Only one participant reported allowing intended parents to view surrogates' profiles and contact surrogates themselves.

⁴⁷⁹ Roxana stated that some intended parents had been waiting on her list for almost two years. In Stefanie Carsley's interviews with intended parents, some reported feeling pressure from consultants to quickly accept any surrogate that picks them: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 85-86.

⁴⁸⁰ While I will continue to use the phrase "dating" throughout in order to better reflect my participants' data, I do not adopt this terminology as my own.

During the “dating” phase, consultants provided varying levels of guidance, ranging from no intervention, to providing topics to discuss, to sitting in on and guiding the surrogates’ and intended parents’ first meeting.⁴⁸¹ As an example of the latter, Alexinas explained:⁴⁸²

Alexinas: So we do an introductory Skype call that’s led by us to really ask those you know, tricky questions around termination, around type of contact, um, so one another can really hear, see each other, um, gauge response ... Um, we see this as the most intimate relationship anyone will ever have with an absolute stranger. And so we want to ensure that they have some foundational building blocks around um, you know, insulating that relationship.

For Alexinas, it is important to ensure that surrogates and intended parents have similar expectations on these important topics. She sees this as the foundation upon which a successful surrogacy relationship can be built.

All of my participants identified criteria that they believed were important to consider prior to finalizing a match. For example, Amy said:

Amy: You have to be all on the same page with all the different issues that can come up. Um, like, termination or selective reduction, what kind of contact they wanna have, when they wanna get started, vaccines are a big one. Sometimes we have some that don’t believe in the covid vaccine, so you want to make sure that you match with someone you’re on the same page with on all these issues.

Like Amy, nearly all of my participants raised termination beliefs and desired levels of contact as important criteria to consider prior to matching. Other important considerations that were raised included: medical care preferences (for example, using midwives or obstetrician-gynecologists); birth preferences (for example, hospital births or home births); medical procedure preferences (for example, undergoing genetic testing); post-birth communication; desired levels of support;

⁴⁸¹ Several participants stressed that they remained uninvolved due to their understanding of the AHRA’s prohibition on matching. For a more detailed discussion of consultants’ perceptions of the law and how they are structuring their matching activities around the law, please see Chapter 5.

⁴⁸² This is a unique pseudonym to avoid identification based on the described process.

and personal factors that could impact the surrogates' reimbursement levels (for example, whether she might need childcare, details about her employment, and so forth). While some participants would bring these considerations up when their clients were navigating the "dating" phase, others addressed these in the context of profile creation and presentation.⁴⁸³ Regardless of timing, the substance of these considerations were generally similar.

All of my participants believed that having compatible outlooks on these matters could increase the likelihood of creating positive relationships between the intended parents and surrogates, and decrease the likelihood of conflicts arising throughout the surrogacy journey. Sasha said: "Um, we haven't had a whole lot of conflict, to be honest. Um, I think that also comes down to finding the right match – the way we do our matching, we've been really encouraging those right matches". Aja echoed similar sentiments, stating: "We don't have conflict. Um, because we do, and I really believe this – because we do such an extensive job in the very beginning to make sure everybody is matched appropriately. You know, that they've all chosen the person that is best fitted for them". Aja further discussed how finding a like-minded match is important because the resulting relationship is the "glue holding everything together". Overall, my participants generally believed their assistance in pairing like-minded individuals reduced conflict and increased general satisfaction with the surrogacy journey.

As the final step in the matching process, the surrogates and the intended parents would mutually decide whether or not they want to move forward with the surrogacy journey together. If they chose to proceed, the match was officially made. The matching process was then

⁴⁸³ In other words, they would ask surrogates and intended parents to fill out questionnaires detailing their opinions on termination, their birth preferences, their expected levels of communication, and so forth. These consultants would then only present surrogates with profiles where the intended parents had similar preferences.

concluded and the next steps of the surrogacy journey were put into motion, such as meetings with doctors and lawyers.

b) Discussion

My interviews suggest that consultants are putting conscious effort into encouraging surrogates and intended parents to match based on having compatible expectations and desires for their surrogacy journeys. This assistance can increase the likelihood of surrogates and intended parents having clear expectations, lower levels of conflict, and higher levels of overall satisfaction.⁴⁸⁴ I therefore believe that consultants can play a beneficial role in fostering compatible matches between surrogates and intended parents. I recognize that other sources can help surrogates and intended parents identify important considerations to discuss before matching (for example, this information can be shared through websites, social media, or other third parties like lawyers⁴⁸⁵). Consultants are self-admittedly not *necessary* for this information to be disseminated, nor for intended parents and surrogates to create positive matches. Nevertheless, their guidance may increase the likelihood of this occurring if the intended parents and surrogates are not otherwise aware of these important considerations.

My interviews also confirm that some consultants may subjectively choose which intended parent profiles are presented to the surrogates, though none of my participants discussed making this selection out of self-interest (for example, to prioritize new matches over re-matches for their own economic gain). Nevertheless, this unfettered discretion puts consultants in a

⁴⁸⁴ As discussed, this perception is supported by other sources. See: Yee, *supra* note 6; Kleinpeter, *supra* note 318; Hanafin, *supra* note 318; MacPhee, *supra* note 473; Katharina Beier & Sabine Wöhlke. "An ethical comparison of living kidney donation and surrogacy: understanding the relational dimension" (2019) 14:1 Philosophy, Ethics, and Humanities in Medicine 13.

⁴⁸⁵ Some lawyers interviewed by Stefanie Carsley also reported that they raised important considerations for matching with their clients, including perspectives on termination and types of prenatal care: Carsley, Dissertation, *supra* note 105 at 127-28.

position of power, particularly over intended parents, as the consultants have the power to decide which profiles they show, and which they do not.⁴⁸⁶ Furthermore, there may be limited transparency in how consultants select which intended profiles they present to surrogates. It was not clear based on my interviews whether intended parents were generally informed of when and/or why their profiles were withheld. Accountability around these decisions may correspondingly be limited.

Rather than having consultancies dictate how profiles are shown, it may better foster surrogates' autonomy to allow the surrogates, themselves, to decide whether they want to see all of the available profiles, only profiles that meet specific criteria, or a small selection of profiles that are hand-picked by the consultant. This would further surrogates' ability to drive the matching process, while simultaneously mitigating the extent to which intended parents could be disadvantaged as a result of consultants using their discretion to prioritize their own financial interests, as has been reported by other sources.⁴⁸⁷

None of my participants reported pressuring surrogates or intended parents into making quick decisions about matching, and several explicitly discussed the benefits of taking time to make such an important decision. I recognize that intended parents have shared first-hand reports of feeling pressured by some consultants.⁴⁸⁸ Accordingly, I do not suggest that *no* consultants are inappropriately pressuring intended parents and surrogates to match. However, my data suggests the reality may be more nuanced, in that at least some consultants recognized the importance of getting to know each other during this phase, and encouraged surrogates and intended parents to take as long as they needed.

⁴⁸⁶ This position of power may be amplified if consultants are heavily involved in overseeing and managing the “dating” process.

⁴⁸⁷ Motluk, “Waiting Room”, *supra* note 133.

⁴⁸⁸ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 85-87.

Conclusion

This Chapter offers a more detailed and multifaceted understanding of the roles consultants play in creating relationships between surrogates and intended parents. My data also provides new insight into how consultants' personal beliefs, values, and organizational structures shape their practices. Throughout, I saw significant variation in how different participants recruited, screened and matched surrogates and intended parents.

My data showed that many consultants strived to support surrogates and intended parents in thoughtful and respectful ways. Several consultants reported helpful practices, such as requiring medical screening for surrogates prior to matching, or educating about the importance of matching individuals with shared expectations. Multiple participants expressed that they would avoid any undue pressure, and sought to promote reproductive autonomy. This reinforces the overall position that some consultancies may provide beneficial assistance, as reported by some intended parents.⁴⁸⁹

However, the financial structure of these consultancies can create a conflict of interest. While consultancies are hired to support surrogates and intended parents, they are also businesses that must generate a profit in order to survive in the market. The conflict between making money and supporting surrogates and intended parents can negatively impact how decisions are made. Financial incentives may inhibit consultants from acting, or being perceived as acting, in surrogates' and intended parents' best interests. For example, financial incentives may motivate some consultants to pressure surrogates to undergo subsequent surrogacies; accept

⁴⁸⁹ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 76-78.

surrogates who may subsequently be deemed medically ineligible; or, inappropriately suggest that surrogates should change their medication protocols. These observations support some of the concerns raised in earlier reports about consultants' pressure tactics and weak screening practices.⁴⁹⁰

Some of the practices reported in this Chapter placed consultants in a position of power over intended parents, as their ability to exercise unfettered discretion could hinder the intended parents' ability to pursue parenthood. For example, some consultants would choose which intended parents they wanted to help, or which intended parent profiles they would pass along to surrogates. These decisions can have significant impacts on intended parents and their ability to create families via surrogacy. These findings suggest that interactions between consultants, surrogates, and intended parents may be more complicated than the simple, top-down exploitation and commodification of surrogates that was suggested in the by the Baird Commission.⁴⁹¹ In particular, intended parents may occupy a less empowered position than previously assumed.⁴⁹²

⁴⁹⁰ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 85-88, 90-94; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

⁴⁹¹ *Proceed with Care*, *supra* note 8 at 670.

⁴⁹² Carsley, "Surrogacy Agencies in Canada", *supra* note 22; Carsley, Dissertation, *supra* note 105 at 145-147.

CHAPTER 4: MANAGING SURROGACIES

Introduction

This Chapter focuses on how consultants manage surrogacies, beyond helping surrogates and intended parents match. In particular, I look at how consultants coordinate other service providers, how they manage conflicts that arise between surrogates and intended parents, and the various strategies that consultants use to support their clients.⁴⁹³ In general, less attention has been paid to these activities than to consultants' involvement in creating relationships. Emerging empirical evidence has generated mixed reviews regarding how consultants are managing surrogacies. There have been some accounts of consultants providing valuable assistance in coordination and support.⁴⁹⁴ However, there have also been reports of some consultants bullying intended parents, spreading misinformation, and providing little added value.⁴⁹⁵

The Baird Commission was initially concerned that consultants would inevitably prioritize the needs of intended parents over surrogates due to the fact that they received payment from the intended parents.⁴⁹⁶ The Commission wrote: “surrogacy brokers are not neutral intermediaries but rather act in the interests of the intended parents”.⁴⁹⁷ In other words, they thought the intended parents would be perceived as the clients who needed to be satisfied, and that surrogates would be treated as objects to be commodified for the intended parents' benefit.

⁴⁹³As discussed, all references to “clients” in this dissertation refer to both surrogates and intended parents. Notably, reimbursement management is also an example of how consultants manage surrogacies. I address this aspect of surrogacy management in Chapter 5.

⁴⁹⁴Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76-78; Carsley, Dissertation, *supra* note 105 at 244-45.

⁴⁹⁵Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 81-84; Motluk, “Waiting Room”, *supra* note 133; Motluk, “We should regulate agencies”, *supra* note 2.

⁴⁹⁶*Proceed with Care*, *supra* note 8 at 685.

⁴⁹⁷*Ibid.*

Throughout this Chapter, I test how these various narratives are manifesting in my participants' data.

This Chapter is divided into three parts. Part I explores the role consultants play in coordinating various service providers throughout the surrogacy process, such as doctors and lawyers. Part II discusses the different conflicts that consultants observe between surrogates and intended parents, and how consultants assist with achieving resolutions. Part III discusses the different methods my participants used to support surrogates and intended parents, as well as the duration, timing and amounts of support that were reported.

Overall, my data reveals a number of supportive practices aimed at assisting both surrogates and intended parents. A notable and recurring pattern was the tendency for consultants to align themselves with surrogates. In other words, I found that my participants were prone to sharing stories about protecting surrogates, and were particularly attuned to surrogates' needs when discussing their business practices. This challenges some of the historical assumptions about how consultancies would operate. This Chapter also explores the appropriate scope of consultants' involvement in surrogacy arrangements, highlighting concerns about consultants providing medical and legal advice that they are not qualified to give.

Part I: Coordination

Surrogacy can be a complex process.⁴⁹⁸ Beyond the surrogates and the intended parents, themselves, surrogacy journeys often enlist the help of doctors, lawyers, social workers, counsellors, and others. Often, consultants play a role in coordinating these professionals. This

⁴⁹⁸ Yee, *supra* note 6 at 6.

type of assistance is commonplace in other areas, such as using a real estate agent for purchasing a home; using an agency for navigating a private adoption; or, using a general contractor to assist with a complex home renovation.

At present, the literature on consultancies does not devote much discussion to consultants' role in coordinating surrogacy services. Some intended parents have reported finding this coordination helpful,⁴⁹⁹ and one lawyer has remarked that intended parents who use agencies are significantly better prepared.⁵⁰⁰ Still, other intended parents have found these services unnecessary – they would prefer to handle their own coordination, particularly if this would reduce consultancy fees.⁵⁰¹ As part of my interview guide, I included a probe asking “what services do you coordinate?”. My data presents new insight into how consultants are navigating this responsibility.

a) Coordinating Third Parties

When explaining their role in coordinating services, many of my participants used analogies to wedding planners or project managers. For example, Aja said: “I sort of came up with this idea that I’m a project manager. So if you think of it in terms of the one core person in the middle who is constantly connecting people to the right people ... I coordinate. My job is to really, I guess, make sure everyone else is doing their job”. Similarly, Kerigan said “we are, um, essentially a wedding planner but for family building. No one needs a wedding planner, but it’s less stressful with the wedding planner”. While my participants did not frame this service as “necessary”, they believed it could be quite helpful for some individuals.

⁴⁹⁹ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76-78.

⁵⁰⁰ Carsley, Dissertation, *supra* note 105 at 244.

⁵⁰¹ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 81-84.

My participants generally shared the view that coordination involved organizing other services and providers in order to ensure the surrogacy journey proceeded smoothly from start to finish. Roxana explained: “once [the IPs are] chosen off of the list, all the hard work kind of starts. We’re liaisoning with the lawyers, we’re making sure that all the surrogates’ paperwork is complete, that we’re getting all the psych consults, that we’re getting um, any medical records that are required”. For Roxana, matching was only the beginning of her role in the journey. She believed her consultancy continued to provide important services, post-match.

My participants reported coordinating a wide array of services and service-providers. This included lawyers (for surrogacy contracts, wills, and parentage paperwork once the child was born); counsellors (for pre-surrogacy assessments, and in the event of conflict or unexpected complications); fertility clinics (for IVF, including embryo relocation, where applicable); hospitals (for briefing hospitals on the fact that a surrogate would be giving birth there, as one example); insurance providers (for travel, health and life insurance); doulas; and, even nutrition experts. In addition, my participants reported coordinating travel and accommodations for the surrogates and the intended parents. Some also reminded surrogates and intended parents about upcoming appointments, explained what could be expected from the appointments, and kept all relevant parties abreast with new developments. None of my participants discussed receiving any financial incentives for referring clients to specialized professionals.

Not all my participants coordinated each of the aforementioned services. Some mentioned coordinating all the above, whereas others only discussed coordinating a select few. Emily expressed frustration that other consultancies were not coordinating all the services that she felt were necessary. She said: “I hear that – from talking to surrogates that have done journeys in other – with other consultancies is that they don’t – they’re not always told to acquire

life insurance, which is a little shocking, and a will".⁵⁰² In Emily's opinion, skipping these vital steps exposed surrogates to increased vulnerability if things went wrong.

The details of what coordination looked like varied depending on the participant and the service in question. For example, when arranging surrogacy contracts, nearly all of participants would offer referrals to lawyers. Beyond that, some said that they did not play an active role in the process.

Alicia: What role, if any, do you play in negotiating the surrogacy agreement?

Amy: None.

Alicia: Okay.

Amy: I don't believe I should be in there at all. If they have questions, of course I'm there ... But yeah, I don't have to get involved. I find it's kind of a non-issue. The contracts, they just kind of go seamlessly. The lawyers are really good. They do their job really well.

Amy said she did not play any active role in contract negotiation. She implied that this is not an appropriate domain for her to occupy, and that lawyers do their jobs well. Nevertheless, she still said that she would answer her clients' questions. Many of my participants said they would make themselves available if surrogates or intended parents had questions, whether about the contracts process or about the contract itself.

A few participants took on a more involved role by sharing sample contracts, or by filling out forms explaining the surrogates' potential expenses. These forms would then be provided to the lawyers to flag any individualized needs that could require special consideration. Often, in filling out these forms, the consultants were simultaneously advising surrogates about what to expect from their appointment with the lawyer, and what potential expenses they ought to turn their minds towards.

⁵⁰² In response to these issues, Emily suggested that consultants should receive training on how to properly coordinate a surrogacy journey.

When discussing their role in coordinating surrogacy contracts, many of my participants shared stories about how they advocated for surrogates. For example, Carla would provide guidance about things the surrogate should raise with her lawyer when drafting or reviewing the contract:

Carla: Usually a first-time surrogate is asking us for guidance. So we build in things like make sure that they have bed rest, a clothing allowance, and they'll be like 'oh I'm fine, I don't need clothing'. And I'm like 'no sweetheart, I want a clothing allowance in there because you might not need it, and you don't have to use it, but let's say you get pregnant during winter and you've never been, you know, 6 months pregnant during winter, and your jacket doesn't fit you. Now what? Let's put this in'. Or, 'I've never had a c-section before, I don't need that'. No, no. We're going to put it in, because every single birth is different. And you never know. So, we try to protect everybody with the, like, the really important, uh, standard and we tell everybody like, I – I appreciate your heart, that you may not need these, but we need to put them in in case you need them. And then it's available to you, and if in the end you decide you don't want to reimburse that, that's absolutely your choice. We want it there for a buffer.

Two other participants shared similar anecdotes where they counselled surrogates to consider expenses they had not otherwise thought to include. One participant shared a story where she suggested increasing expenses that could be reimbursed if the surrogate were put on bedrest. Another shared a story about telling a surrogate to increase the maximum number of weeks of bedrest in the event of a miscarriage, as that particular surrogate had had complications in the past. In all of these stories, my participants advocated for the surrogate during the contract creation process in order to ensure that the surrogate would not be out-of-pocket for unexpected expenses.

Notably, nearly all of my participants' discussions focused on helping the surrogates navigate this process, as opposed to the intended parents. Only two participants mentioned helping intended parents with contracts, beyond providing a referral to a lawyer. None of my

participants acknowledged or commented on why surrogates might be receiving more support in this area.

Some participants were selective about the lawyers, doctors, clinics, and/or hospitals they would work with. Three out of eight expressed that they would only work with certain third-party service providers. For some, this meant they would only provide referrals to specific providers. For others, this meant they would refuse to work with intended parents who wanted to work with providers that the consultants did not approve of. Aja falls into the latter category. She explained her reasoning for this as follows:

Aja: So some people prefer to work with some clinics. They'll recommend some clinics. Other people don't care. I care immensely because what happens is, and I've seen it time and time again, um, people who get to a clinic that they don't coordinate well, they don't do the third-party process well, um, it's hard for the surrogate, it's hard for me to maintain communication. IPs get upset. There's, um, a very clear direct process that works. And I have, over the years, vetted my own clinics to say these are the clinics I actually want to work with. So if they come in and they don't have a clinic, I send them there. Um, there are two clinics in Ontario that I send people to, and then there's a few clinics out west. And so, um, I'll say here you go. Now, if they don't, I actually will pick and choose if IPs come in and they have their embryos somewhere where I don't want to work with the clinic, I tell them right off. I say, "I'm sorry, I don't work with this clinic". Um, and that's my choice as the program director, to be able to say, look, I know this will be hard for a surrogate, and I'm here to protect and advocate for everybody. Um, and you can move your embryos if you want. Um, that's a very easy process, we do it all the time, especially cause of covid.

Aja believed that mandating certain providers was an asset, because it ensured her surrogates and intended parents would only work with professionals who were competent in the third party reproduction process. Carla voiced similar reasoning with respect to selecting lawyers, saying: "We do all the referrals to the lawyers because, while there's hundreds and thousands of really great lawyers out there, there's only a handful that we really work with because they understand

how the contracts work, and it's just smoother, quicker, easier and, and fluid for everybody". Carla believed that using her vetted providers would result in a better experience for everyone.

Sasha, however, worried that this practice could negatively impact surrogates and intended parents. Sasha said:

Sasha: When people ask us like, "what lawyers do you work with", "what clinics do you work with" – we'll work with whoever is the right fit for IPs or surrogates, because we believe that every step of the process needs to be right for the IPs and for the surrogates in order for them to have a positive journey. So we're not going to limit them by saying, well, we'll only work with these clinics, and we'll only work with these lawyers, because we don't think that's fair to them.

Sasha emphasized that allowing surrogates and intended parents to choose their own providers better promoted fairness, and recognized the uniqueness of each individual and situation.

In general, my participants believed their assistance with coordination could reduce stress and ensure that all of the necessary steps for a successful surrogacy journey were followed. Sasha said: "without us, like, they'd have to go to all those individuals on their own, but we can help them coordinate everything. So it kind of takes a lot of that stress out. Cause with my own experience [as a surrogate], like we did a lot of that on our own, and it was a lot. It was a lot of work. It was a lot of stress". Amy said: "I think I'm really more making sure that everything is on the right path. Doing things properly. Cause a lot – there is a lot of corner cutting going on in surrogacy. People try to cut corners. Understandably, cause it's expensive".⁵⁰³ My participants perceived that their assistance in coordination could improve the overall surrogacy experience for both surrogates and intended parents.

⁵⁰³ Amy later expanded on what "doing things properly" entailed. Some specific examples included making sure that the surrogates had their own lawyers, that they obtained life insurance, and that they talked to their partners prior to starting their journeys.

b) Discussion

Consultants' involvement in coordination may provide valuable assistance for those who desire it. As my participants suggest, professional support in organizing this multifaceted journey can reduce stress, disseminate important information, and help ensure that all necessary steps are followed. Structurally, having a specific, informed individual in charge of coordinating the entire journey promotes continuity, and can prevent components from being over-looked due to an assumption that another person is responsible for its organization. For example, making sure that both parties have received independent legal advice, or making sure that a surrogate is aware of the benefits of acquiring life insurance.

My data suggests that my participants are particularly concerned with ensuring surrogates are protected throughout this process, which stands in contrast to the Baird Commission's concern that consultants will inevitably prioritize the needs of intended parents.⁵⁰⁴ In coordinating surrogacy contracts, my participants were adamant about preventing surrogates from being financially compromised by virtue of undertaking a surrogacy pregnancy, despite the fact that this could increase costs for intended parents.⁵⁰⁵ Across my interviews, my participants were more likely to share anecdotes about advocating for surrogates' interests, more inclined to consider situations from a surrogate's perspective, and more likely to discuss how their services

⁵⁰⁴ *Proceed with Care*, *supra* note 8 at 685.

⁵⁰⁵ Notably, including additional or expanded expense categories within the surrogacy agreements does not necessarily mean intended parents will need to pay increased amounts. Surrogacy contracts generally set out maximums and various categories of reimbursable expenses. The outlined permissible expenses do not have to be claimed.

could benefit surrogates. Cumulatively, this gave the impression that my participants were particularly protective of the surrogates they worked with.

Notably, my data shows significant overlap between consultants' self-reported contribution in coordinating surrogacy agreements and the lawyers' proper role.⁵⁰⁶ Lawyers can and should be ensuring surrogates are not financially compromised, providing legal advice, and answering legal questions. Some of my consultants' reported discussions about what to include in surrogates' contracts could constitute legal advice,⁵⁰⁷ which should only be provided by a licensed lawyer. I did not ask my participants why they believed this advice was necessary given that surrogates had their own lawyers, and my participants did not offer any explanations on their own.

Although my data revealed varying levels of coordination assistance between participants, this is not inherently problematic as consultants' organizational assistance is self-admittedly not necessary for a successful surrogacy. While it is important for surrogates and intended parents to understand all the steps that need to take place, some individuals may not want or need help with coordinating them.⁵⁰⁸ Different models may attract people with different needs. For example, some intended parents may want full-service assistance with all aspects of the surrogacy and its coordination, whereas others may prefer to only receive assistance with

⁵⁰⁶ For an in-depth discussion of lawyers' roles in the surrogacy process see Carsley, Dissertation, *supra* note 105.

⁵⁰⁷ Legal information is general information about the law that applies to everyone. Legal advice applies the law to a specific situation and provides a specific recommendation. Legal advice can only be provided by lawyers. Centre for Public Legal Education Alberta, "Legal Information vs. Legal Advice: What Is the Difference?" (Web Page), online: CPLEA <<https://www.cplea.ca/legal-information-vs-legal-advice-difference/>> (accessed September 23, 2025).

⁵⁰⁸ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 82-84.

matching, and handle the rest of the coordination themselves.⁵⁰⁹ Ideally, lower levels of coordination involvement would correspond with lower consultancy fees.⁵¹⁰

I further believe that some participants' reported practice of mandating certain service providers may be problematic for intended parents, in particular. There can be value in consultants suggesting providers who they believe do good work based on the consultants' experience in the industry. However, these remain subjective assessments. Presenting this as a condition for working with the consultant, as opposed to a suggestion, may hamper both surrogates' and intended parents' autonomy to work with service providers of their choosing based on their own preferences. Intended parents, in particular, may feel desperate for a consultancy's help with finding a surrogate, and may therefore feel pressured to use whichever provider is mandated by the consultancy. Requiring the use of certain clinics may increase overall costs by requiring intended parents to pay for embryo relocation; to pay for surrogates to travel farther for certain clinics; or, to pay for more expensive clinics or lawyers than they might otherwise have chosen.

None of my data suggested that consultants were receiving financial kick-backs for referring clients to specific providers, nor that they were providing referrals out of self-interest.⁵¹¹ Their self-reported motivation for using certain providers was to improve surrogates' and intended parents' experiences. However, as the only conviction under the section 6(2) of the

⁵⁰⁹ Stefanie Carsley's interviews with intended parents show that some appreciated consultants' help with coordination while others did not: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 76-78, 82-84. Notably, a match-only model would be clearly illegal under the current law.

⁵¹⁰ For a discussion of how consultancy fees are currently structured, please see Chapter 5.

⁵¹¹ One publicly available consulting agreement from SCO specifically states that "Referral fees are not paid to SCO": Surrogacy in Canada Online, "SCO Intended Parent Consulting Agreement" (Web Page), online: *Surrogacy in Canada* <<https://surrogacy.ca/application/sco-intended-parent-consulting-agreement/>> (accessed September 23, 2025).

AHRA stemmed from accepting \$31,000 in referral fees from a US fertility lawyer,⁵¹² I recognize there is historic evidence of this occurring, and that some may continue to worry about consultants promoting their own financial self-interest through their provider recommendations.

Part II: Conflict Management

Throughout a surrogacy journey, conflicts may arise between surrogates and intended parents, both big and small. When these disagreements arise, consultants can actively help to achieve a resolution. Some lawyers have recognized this beneficial role.⁵¹³ However, there have also been reports suggesting that some consultants may use their position of power to bully intended parents into compliance.⁵¹⁴ For example, Alison Motluk spoke to an intended parent whose surrogate had stopped communicating with him. His consultant suggested that he buy the surrogate flowers. When the intended parent rebuked this suggestion, the consultant replied: “Do you want to get your baby? You better do what I say”.⁵¹⁵ This is one example of how a consultant could coerce or intimidate an intended parent into reaching a resolution that goes against his or her best interests.

To learn more about how consultants address disagreements between surrogates and intended parents, I included two conflict-related probes for my participants: “What kind of conflicts can arise between surrogates and intended parents?” and “What happens if a conflict arises between the intended parents and the surrogate?”. I share their responses, below.

⁵¹² Motluk, “First Prosecution”, *supra* note 124.

⁵¹³ Some lawyers interviewed by Stefanie Carsley believed they saw fewer disputes because of agency involvement: Carsley, Dissertation, *supra* note 105 at 118, 189-190.

⁵¹⁴ Motluk, “Waiting Room”, *supra* note 133.

⁵¹⁵ Motluk, “Waiting Room”, *supra* note 133. The consultant did not confirm that she made this comment.

a) Conflicts Reported

When asked about what kind of conflicts my participants saw in their practice, five out of eight of my participants reported that they saw little to no conflict. For example, Emily said: “it does really go smoothly much more often than it doesn’t”. Many of these participants believed they saw so few conflicts precisely because of their involvement:

Alicia: Do you see conflicts arising between surrogates and IPs? And if so, what do you do about that?

Aja: To be honest, there have been so little, if any, I can think of, really, um. We don’t have conflict. Um, because we do, and I really believe this - because we do such an extensive job in the very beginning to make sure everybody is matched appropriately. You know, that they’ve all chosen the person that is best fitted for them. ... It’s about making sure that we design the process that allows them to find their best fit. And so that’s driven forward, and when that happens, and we’ve gone through all of the appropriate steps, legals, counselling, supports, you know, what the expectations and communication especially will be, we don’t see conflict. Like, I really can’t even pull something out of my head. *Laughs* which is great.

Aja believed that her matching assistance prevented future conflicts because she helped surrogates match with intended parents that had aligned expectations for how the surrogacy journey would go. Aja also believed that her role in coordinating contracts, coordinating counselling, and providing support worked to circumvent future conflict. For many similar reasons, Amy said that using her consultancy services could “prevent a lot of train wrecks”.

Despite many participants initially expressing that they encountered little conflict (often citing one or more of the aforementioned reasons for this), all of my participants nevertheless reported that they had encountered some conflicts. Carla bluntly stated: “it’s an interesting world because it’s the deadliest. You’re dealing with money and emotions. Deadly”. Her quote suggests that perhaps there is more tension in surrogacy arrangements than some of my other

participants wanted to admit. Indeed, all of my participants eventually provided some examples of conflicts they had managed. For example, Sasha said: “we haven’t had a whole lot of conflict, to be honest. Um, I think that also comes down to finding the right match – the way we do our matching, we’ve been really encouraging those right matches. But, we have had a couple of conflicts”. Similarly, Sarah said: “I’m gonna say that like most of the time things are really great. And when things are kind of awkward, it’s generally because of a miscommunication. Um or people not expressing their boundaries or needs”. Sarah’s quote also introduces some of the frequently-cited causes behind intended parent-surrogate conflicts.

The most commonly reported reason for conflict was lack of communication between surrogates and intended parents.⁵¹⁶ Six out of eight of my participants listed this as one of the conflicts they encountered. Kerigan pithily phrased this as conflict rooted in “misunderstanding, miscommunication, [or] language barriers”.

Half of my participants reported conflicts rooted in an intended parent’s perceived need for control.⁵¹⁷ Carla said: “we joke that they want to bubble wrap [the surrogates] and spoon feed them ... sometimes they get very excited, and they try to micromanage”. Mary⁵¹⁸ shared a story about an intended parent telling a surrogate to get rid of her cat, so that the surrogate would not need to change cat litter. Mary also shared a story about an intended parent refusing to allow a surrogate to order a Coca Cola at dinner. Mary went on to say:

Mary: I hear [intended parents] all say ‘we feel like we have no control’. And I always have to say, ‘well, you don’t. You don’t have any control. It’s complete trust that you have in this other person’. Um, you know, one Coke is not gonna

⁵¹⁶ Several lawyers interviewed by Stefanie Carsley also perceived that breakdown in communication was a cause for dispute between surrogates and intended parents. See: Carsley, Dissertation, *supra* note 105 at 192. Carsley, “Surrogacy in Canada”, *supra* note 259 at 65-67.

⁵¹⁷ Several lawyers interviewed by Stefanie Carsley also perceived that control over a surrogates’ behaviour was a cause for dispute between surrogates and intended parents. See: Carsley, Dissertation, *supra* note 105 at 199.

⁵¹⁸ I use a unique pseudonym here due to the specificity of the anecdote.

hurt anything at all. It's maybe not the best, healthiest choice, but that's what she enjoys and that's fine.

Mary held the opinion that it could be difficult for some intended parents to avoid being “overbearing or controlling”. Roxana shared stories that were similar in nature – intended parents calling obstetricians too much, or contacting surrogates too frequently. However, Roxana characterized the conflict somewhat differently:

Roxana: I don't think it's because the IPs feel like they need to have control. I think it's just hard. It's just hard to understand what your limitations are, what your boundaries are, and, sometimes it can be, um, a little humbling sometimes to say 'okay, I need to step back and just let this develop. I can't make that phone call. I can't demand things.'

Roxana's assessment holds a lot of empathy for the intended parents' unique situation. Rather than perceiving their actions as a need for control, Roxana suggested that boundaries within surrogacy can be tricky to navigate.

Half of my participants also reported conflicts between surrogates and intended parents pertaining to medical procedures.⁵¹⁹ These issues arose when surrogates and intended parents had opposing preferences. Sasha provided the following example:

Sasha: Like a breach baby – IPs of course are thinking about complications that can go wrong with a breach baby. Surrogate definitely doesn't want a c-section, is thinking about complications after, how difficult recovery can be, so wants to do everything in her power to turn baby. IPs are thinking: 'well, how hard can it be? It's just a surgery. It happens all the time'. That creates some tension.

Sasha explained that, in these situations, surrogates are often concerned about how the procedure might affect their own health and lifestyle. For example, she discussed how surrogates might

⁵¹⁹ Several lawyers interviewed by Stefanie Carsley also perceived medical decisions to be a cause for dispute between surrogates and intended parents. See: Carsley, Dissertation, *supra* note 105 at 199; Carsley, “Surrogacy in Canada”, *supra* note 259 at 65-67.

want to avoid surgery if they have young children at home who still need very hands-on care. Conversely, intended parents were often focused on selecting procedures that lowered the health risks for the baby. Kerigan described this as “weighing [the surrogate’s] health versus the pregnancy health” and said that this was “a conversation that really needs to be unpacked”.

The last type of conflict reported by nearly half of my participants pertained to reimbursements.⁵²⁰ Emily explained that this usually occurs when “a surrogate feels that something is surrogate or pregnancy related, and the IPs don’t feel that it is”. However, Emily also shared that these conflicts can manifest as intended parents wanting surrogates to behave in ways that would minimize their reimbursable expenses. For example, in an effort to avoid reimbursing lost wages, “sometimes IPs will ask the surrogate to go to appointments like, on their days off, which is a little bit of a sore subject because the surrogate feels like her time off should be spent with her family”. Reimbursements were accordingly characterized as a source of tension in some surrogacy journeys.

b) Conflict Resolution Strategies

My participants believed they played an important role in resolving disagreements between surrogates and intended parents. They stressed the importance of fostering communication, honesty, trust, and healthy boundaries when repairing these relationships. Roxana said: “I don’t want to provide a little steri-strip that’s going to hold them together for the next 6 to 8 weeks. I want to provide a solution that’s gonna help them to build that lifelong

⁵²⁰ Several lawyers interviewed by Stefanie Carsley also perceived reimbursements to be a cause for dispute between surrogates and intended parents. See: Carsley, Dissertation, *supra* note 105 at 194-198. Carsley, “Surrogacy in Canada”, *supra* note 259 at 65-67.

relationship”.⁵²¹ To achieve this end, my participants reported employing various conflict resolution strategies.

One frequently-cited method of conflict resolution simply involved listening to the individuals. Carla explained that part of her role in conflict resolution is: “making them feel heard. So that’s the biggest, ah, you know, tool that I could use, is making someone feel heard. ‘Okay. You’re frustrated here. Share it with me. Let me listen. Let me see if I can help’”. Listening did not necessarily involve any other forms of intervention. Sometimes, my participants said that just being heard was enough to resolve the conflict. Other times, listening was used in conjunction with the other conflict resolution strategies described below.

Participants described using education and explanation as an effective tool for conflict resolution.⁵²² Emily said that, in the face of a conflict, she is “explaining, explaining, explaining everything all the time. Um and that usually helps”. Sasha said that reimbursement conflicts can be resolved by educating surrogates and intended parents about the law. Kerigan shared that education was a particularly powerful tool in the case of international intended parents, who may be accustomed to different legal and/or medical schemes: “what prenatal care is in France is very different from what is in Canada. Um, IPs will often run ahead with a surrogate who says she wants midwifery care, and then realize ‘oh my gosh, what is midwifery care?’. Um, so we often find that we are, um, just providing some education”.

In some situations, participants reported acting as a “middle-man” or mediator between the disagreeing parties. This method of conflict resolution was described in many different ways.

⁵²¹ As discussed in Chapter 3, this quote once again demonstrates my participants’ general perception that close, long-lasting surrogacy relationships were optimal. This may, or may not, be in line with what surrogates and intended parents desire out of their surrogacy relationship.

⁵²² I define “surrogacy education” as the transmission of knowledge about the general practice of surrogacy in Canada, which can include providing information about the law and how to take steps to initiate the surrogacy process.

Broadly, I define this as occurring when the consultant would act as a go-between for the parties by relaying information or suggestions aimed at resolving the conflict. One example of this comes from Carla, who said:

Carla: If someone feels micromanaged ... I'll immediately get on a Zoom call and I'll talk [the intended parents] through it. Like 'hey, this is really positive, your surrogate has come to us with a concern. This is positive, because it means she's communicating, she's not shutting down. Here's what the problem is. Here's some of my ideas that I have to fix this. What do you think?' And generally I can get everyone to come and meet me in the middle.

Carla's quote also introduces the final method of conflict resolution – problem solving.

Problem solving occurs when consultants generate and suggest solutions aimed at resolving the conflict. Sarah said she often relies on previous experiences when suggesting solutions: "that's the way that I help kind of get them to navigate that situation. By giving them examples. Or I say 'oh, you know, this family does this, or this family does this'. You know, find something that works for you guys". Sarah explained that she drew upon previous experience to generate more potential solutions.

If these methods did not resolve the conflict, some of my participants noted that they would refer the surrogates and intended parents to professional mediators and/or counsellors. However, these participants expressed that this rarely occurred.

c) Discussion

Multiple participants originally stated that they saw little to no conflict, but later provided numerous different examples of conflicts they had encountered in their practice. This internal inconsistency within interviews may signal that social desirability bias is particularly activated. Participants may want to present a positive picture of surrogacy, or else demonstrate that their

consultancy experiences little conflict, or prevents conflict from occurring. This may also reflect their genuine perceptions that surrogacy journeys generally proceed smoothly, notwithstanding the presence of occasional exceptions.

When conflict was acknowledged, the conflict resolution strategies that my participants reported included many tactics that are generally supported by research. Listening has been shown to build trust, respect and foster a better understanding of experiences.⁵²³ Education is considered to be a powerful tool for lowering power imbalances that stem from any existing informational asymmetry, and for making knowledge accessible and useable.⁵²⁴ Mediation and problem-solving can be effective tools for generating solutions.⁵²⁵

My data did not reveal any instances of consultants bullying intended parents or surrogates during the conflict resolution process, though I recognize that there have been first-hand reports of this occurring from other sources.⁵²⁶ While it is possible that none of my participants have ever engaged in such conduct, I am also mindful of how social desirability bias may impact what my participants were willing to share. From a structural perspective, surrogates and consultants may be in a position of power over intended parents due to the limited availability of surrogates,⁵²⁷ as well as many intended parents' desperation to have a child.⁵²⁸ I also observe that many of my participants demonstrated a tendency to want to protect the surrogates they work with. Examples of this can be seen when my participants discuss

⁵²³ Marijan Tustonja et al, "Active listening—a model of empathetic communication in the helping professions" (2024) 1:1 *Medicina Academica Integrativa* 42.

⁵²⁴ See Chapter 2 for a discussion of how vulnerabilities may arise out of or be compounded by power imbalances.

⁵²⁵ JA Wall, JB Stark & RL Standifer, "Mediation: A current review and theory development" (2001) 45 *Journal of Conflict Resolution* 370.

⁵²⁶ Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

⁵²⁷ I recognize that consultants may also hold a position of power over surrogates. However, this concern was not generally activated in my own data, as my participants appeared to be quite protective and conscientious of surrogates.

⁵²⁸ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 80.

preventing surrogates from being “micro-managed” by the intended parents. Together, these two factors (*i.e.*, position of power and alignment with surrogates) may create a climate where intended parents are more susceptible to being coerced, pressured or bullied into accepting resolutions that are more advantageous for surrogates and consultants. Nevertheless, no examples of any such coercion arose in my participants’ data.

Part III: Support

I broadly define support as the act of assisting another. This assistance can be emotional (for example, through providing love, trust, empathy, and esteem); instrumental (for example, through devoting practical resources, including tangible items, as well as time and effort, to aiding another); informational (for example, by providing advice or education); and/or appraisal (for example, by giving feedback and affirmation).⁵²⁹ Given this broad definition, what support looks like, and what being un-supportive looks like, can vary tremendously.

In examining the literature, some intended parents have reported appreciating their consultants’ support throughout their surrogacy journeys.⁵³⁰ Examples of helpful support include answering questions; listening; brainstorming ideas; and, being available whenever needed.⁵³¹ Conversely, other intended parents have reported that their consultants’ support was grossly inadequate.⁵³² Examples of inadequate support include consultants being unavailable and

⁵²⁹ Betty D Cooke et al, “Examining the Definition and Assessment of Social Support: A Resource for Individuals and Families” (1988) 37:2 Family Relations 211 at 211.

⁵³⁰ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76-78.

⁵³¹ *Ibid.*

⁵³² Motluk, “Waiting Room”, *supra* note 133; Motluk, “We should regulate agencies”, *supra* note 2; Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 79-84.

evasive; providing minimal assistance; bullying both surrogates and intended parents; threatening legal action; and, spreading misinformation.⁵³³

To examine how these mixed narratives are activating within my own research, I included two probes in my interview guide relating to support (“What support mechanisms do you offer to surrogates, if any?” and “What support mechanisms do you offer to intended parents, if any?”). I rarely needed to use these probes because nearly all of my participants readily raised this topic on their own. Discussions about support arose frequently throughout all of my interviews.

a) Methods of Support

In summarizing my participants’ methods of providing support, I focus on: creating communities; connecting via communication; providing education; and, designating specialized staff to provide specific types of assistance. However, the other activities outlined in this thesis (matching assistance, conflict resolution, coordination, gift-giving, reimbursement management, etc.) also constitute support according to my broad definition. In order to reduce redundancy, I do not re-address those activities here.

Community

Nearly all my participants discussed the importance of creating a community for their clients. Notably, while community for intended parents was sometimes mentioned, my participants’ discussions generally focused on the communities they created for their

⁵³³ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22; Motluk, “Waiting Room”, *supra* note 133; Motluk, “We should regulate agencies”, *supra* note 2.

surrogates.⁵³⁴ Some participants strived to create these community connections in-person through retreats or meet-ups. However, in-person gatherings were sometimes logistically challenging due to the wide geographic distribution of their surrogates. Face-to-face interactions were further complicated by the COVID-19 pandemic restrictions. Accordingly, most participants created communities virtually through online support groups hosted on platforms like Facebook. These groups were generally reserved for members of their surrogacy programs.⁵³⁵ Some consultancies had separate groups for surrogates and intended parents.

Seven out of eight of my participants discussed that online support groups were helpful for fostering comradery, particularly between surrogates. Carla said: “Having someone understand what fertility injections are like, and how tired you can be, and how nauseous you can be. Um, to complain about your kankles, or to understand how much you cry when they go home - and it’s not the baby that you’re crying for, it’s the parents - and getting it. Having someone else understand what you’re going through”. Similarly, Roxana said: “They’ve come here all for the same reason. Um, they’re all doing the same thing, so it allows them to connect over those things. Um, and kind of, and helps them to build friendships”. In both these quotes, the groups provided a medium through which surrogates and intended parents could bond over shared experiences.

Unfortunately, Sarah perceived that not all surrogacy support groups were, in fact, supportive:

⁵³⁴ For example, several participants stated they had online support groups for intended parents. However, they did not elaborate beyond this. Conversely, when discussing community for surrogates, they were more likely to provide more examples of community building, and explain why this was important for surrogates. This is in line with the recurring theme of my participants’ alignment with surrogates.

⁵³⁵ Other, free online support groups exist that are not run by consultants. These can often be accessed via Facebook, and can be for surrogates only, intended parents only, or both. See for example:

Sarah: there's so many surrogacy groups on Facebook, but they're kind of all like, garbaggio. They're all like, you know, just people kind of talking crap to each other ... And so it's nice to have a space where it's not so big that everybody doesn't know each other and – but that there's lots of different interpretations and stories and backgrounds. Um. And I feel like that's the thing that everybody loves the most out of this.

Sarah pointed out that a lot of online groups can be vehicles for online bullying.⁵³⁶ Sarah distinguished her own consultancy's support group as a caring and close-knit space where meaningful relationships could develop between surrogates bonding over shared experiences.

In part, Sarah attributed her group's positivity to the fact that the group is small and closed to the general public. Aja also attributed some her community's positivity to its small size. She said the surrogates included were all “looking for something personal, intimate, [and] driven by that relationship piece”. According to Sarah and Aja, it may be easier to foster feelings of closeness and intimacy when support groups are small enough for participants to get to know each other individually and personally. They believed this distinguished their communities from larger consultancies' groups, as well as from unaffiliated surrogacy support groups that were open to the general public.

Communication & Connection

Nearly all of my participants provided examples of using communication and connection as tools for supporting both intended parents and surrogates. For some consultants, this looked like “touching base” at various steps throughout the journey, or if they suspected a client was going through a difficult time. Emily said: “we want to meet every person with compassion, treat them with dignity and respect, and listen attentively and offer the support and care that each

⁵³⁶ It is unclear whether Sarah is referring to other consultancies' Facebook groups, or whether she is referring to online groups that are not affiliated with any consultancies.

individual person needs. And staying connected with them intentionally throughout the entire process. And being there for them, ah, with all the ups and downs of surrogacy”. For others, communication entailed being “an ear” or a “sounding board” for the surrogates and intended parents. Still, others described themselves akin to “cheerleaders”. Regardless of its format, my participants used communication to build intentional connection and offer individualized support to their surrogates and intended parents.

Education

Many participants described educating surrogates and intended parents about the general surrogacy process, the costs of surrogacy, the surrounding laws and regulations, permissible reimbursements, IVF, and associated medical procedures.⁵³⁷ Many of these topics involve specialized medical and legal knowledge.⁵³⁸ For example, Amy said that her surrogates would ask her many medical questions: “There’s a lot of questions that come up that they need help with. Medication questions a lot. Like, their needles, what should they do, am I using the right size, um, all these types of things”. Kerigan said:

Kerigan: [We’re] making sure the IPs are feeling very supported. That they know what’s coming next. So, your surrogate’s nine weeks, we want you to know that the Harmony test is available between week 9 and 11. If your surrogate’s 23 weeks, we know next week she’s going to have her gestational diabetes test, what does that mean, what will the results mean? Um, while we aren’t medical professionals, we want to make sure that IPs are following along with the pregnancy and have all of the information that is necessary.

Kerigan mentioned that she was not a medical professional. This means that, while she could provide general medical information, she could not provide any medical advice.

⁵³⁷ I classify education as a form of informational support. See: Cooke, *supra* note 529 at 211.

⁵³⁸ I outline the legal information that consultants discuss in Part I, above.

In addition, some of my participants also educated intended parents about practical matters that could help prepare them for life with a newborn. As an example, Roxana would share the following with her intended parents:

Roxana: We want to make sure that they're bringing the right things. Um, don't bring 6 month sleepers, don't even buy them until you get here, because baby, you know, baby shows up 2 weeks early, what you have might not fit. ... they need to have a car seat and you want to have a car seat that's made in Canada, because a car seat made in a different country doesn't always comply with the Canadian transport regulations.

Roxana believed it could be helpful for intended parents to be aware of these details, particularly if they were first-time parents, or from foreign jurisdictions.

My participants conveyed this education to surrogates and intended parents in a variety of different ways. Often, this education occurred through one-on-one discussions. Carla said: "We spend a lot of time educating and talking about how surrogacy works, but also that it's not just a, a quick commitment. It is a long process, so we want to make sure that people are in the right space". These one-on-one conversations allowed ample opportunity for specific questions to be asked, and were personalized based on the individuals' specific needs and prior understandings.

Several participants also discussed creating knowledge dissemination tools such as online courses, information booklets, and infographics. These handouts could be referred to multiple times throughout the surrogacy journey, and provided consistent information between all surrogates and intended parents. As one example of this, Bertha⁵³⁹ created a virtual course:

Bertha: we have an intended parent course that we created online for them to kind of do at their own will at home. ... all of these steps are kind of laid out in a video where I go through each piece. And then we also have interviews in the course with lawyers, um to discuss the contracts stages and how that should unfold and why, um, we have, um, two of my favourite doctors, my REs, who are, um, on as an interview and I ask them questions from everything from, um,

⁵³⁹ A pseudonyms are used to avoid identification based on the educational materials discussed herein.

embryo creation to PGTA testing to you know, all those stuff people might want to know. Um, so that's why we built the course.

Importantly, Bertha's course engaged professionals with specialized medical knowledge to ensure the course's information was accurate.

One participant believed that other consultants were not providing accurate information to intended parents. Amy said: "I see some really bad advice happening out there. IPs are giving money to consultants and they weren't even candidates to do surrogacy! I hear all kinds of horror stories and things that, just, information wasn't given to them properly. So I think a lot of them weren't trained". Amy's quote suggests that some other consultants may be misleading intended parents, whether negligently or intentionally. Amy further suggested that some other consultants in the industry were ill-informed and could benefit additional training.

Specialized Staff

Participants would often incorporate specialized staff into their programs to provide niche assistance. Some examples included having doulas for birth support, counsellors for psychological support, trainers for fitness support, nutritionists for dietary support, and even nurses to answer surrogates' medical questions if a primary provider was unavailable. While some of these individuals were hired by the consultancies (some of my participants made reference to having doulas and therapists on staff), it is unclear how the others were incorporated under the organizational structures (*ie.*, whether surrogates and intended parents were merely referred out to these specialized providers, or whether the providers were contracted or employed by the consultancy).

Several of my participants' consultancies hired a designated intended-parent support staff member, in addition to special support staff for the surrogates. Roxana said this designated support is meant to ensure that "no IP is ever left to deal with a hurdle on their own". Sasha explained that, without having a designated intended parent support person, it can be difficult to navigate conflicting interests between surrogates and intended parents:

Sasha: And it's difficult to sometimes navigate those conflicts. Because while IPs are paying us, and it's like, we want – they're paying us, and we support them, but they're also paying us to support their surrogate. Right? And so it's like, you've got to support both sides. But that's also why we have it like, we have our IP support side, which is different from surrogate support side. Like we – we don't usually have cross-over.

To these participants, having separate support staff for surrogates and intended parents helped ensure that both intended parents' and surrogates' needs were met in the face of an adverse events, and that both perspectives were heard and considered.

One participant explicitly recognized that "other agencies" had a tendency to focus on helping surrogates. She critiqued this, suggesting that intended parents needed equal or increased attention and protection: "You'll hear this from agencies time and time again: 'Well, I wanna keep this surrogate safe. I want to make sure she gets her money. I want to make sure she's supported. I want to make sure she's not exploited.' When, in reality, IPs are vulnerable. IPs are in a position where that may be the case for them, in my experience". Her observation is in line my own broader data, where throughout my interviews participants were more likely to discuss how their actions protected or helped surrogates.

Only one of my participants identified that she was "primarily responsible for IP side" of their consultancy – in other words, that she was her consultancy's designated intended parent support person. This participant was noticeably more likely to raise issues from the intended

parents' perspectives, for example, when discussing her role in conflict management. She was also more likely to discuss how her consultancy's operations were structured so as to better support intended parents.⁵⁴⁰ For example, by not limiting what providers the consultancy would work with in order to allow intended parents to have autonomy in making that selection, or by providing intended parents with refunds if a match fell through. Accordingly, out of all of my participants, she was the least prone to align with surrogates over intended parents.

It can be particularly beneficial to have a intended parent support staff who has lived experienced as an intended parent. Aja said:

Aja: we realized that it was important to have someone who's been through what they've been through. So that's where [redacted: IP support person] comes in. So [redacted: IP support person] is available for calls if IPs um, need to talk. Uh, we just had a scenario this week where we had an intended mom, um, she didn't get chose. She was talking to a surrogate and she didn't get picked, and she went through a really emotional day. And we, we suggested she reach out to [redacted: IP support person], and they had a really great talk. Um, you know, and I think it brought her back to starting fresh, you know. How to adjust with the emotional roller coaster. And she was able to share her experiences in terms of what she's been through herself. Because her journey wasn't perfect either. And she went through a lot of, um, interesting scenarios. So, it's really great. She has amazing perspectives.

The intended parent representative at Aja's consultancy provided support and advice that was rooted in first-hand experience and empathy.

b) Duration, Timing and Amounts

There was variability amongst my participants regarding how long support was provided for, when the support was provided, and how much support was provided.

⁵⁴⁰ It is likely that my data would present differently if I had interviewed more individuals who held this kind of specialized role.

With respect to duration, most of my participants reported providing support to both surrogates and intended parents from the time they joined the consultancy until between 6 to 12 weeks postpartum. Some qualified that this range was flexible. For example, Kerigan said: “we stay in touch, um you know, very closely in the first six weeks and until they have all their paperwork and they’re either travelled back to whatever province or country or where ever they’re going, but then as well for 6 months, ah, they have access to our therapist and so does the surrogate. So we kind of hang on to them for, for that period of time”. For Kerigan, most support services terminated after 6 weeks or once the intended parents returned home. However, some support services, like access to the specialized counsellor on staff, continued for up to 6 months. Sarah said that, according to their contract, the period of support was “technically” 6 weeks, but that she would continue to provide support indefinitely on an as-needed basis. She said: “if in 3 years you say ‘I really regret doing this surrogacy journey and I’m really struggling with it’, I’m not going to be like ‘sorry’. You know what I mean? I’m going to talk you through it and talk with you and listen to you”. Accordingly, the 6 week mark was not a strict cut-off time.

Several of my participants stated that their support for surrogates, in particular, was ongoing and did not end at a specific time. For example, Sasha said: “our support doesn’t end. Um it continues on as long as needed”. Similarly, Emily said: “we realize the importance of physical and mental and emotional support from the beginning until at least 12 weeks after. Although we do, um, stay in touch with all of our surrogates even after they’ve given birth. Once a surrogate joins our program, as well as IPs, they become part of our family”. These consultants frame their support as being offered indefinitely.

Notably, some participants reported terms of support that were shorter for intended parents than for surrogates. For example, Roxana said: “then post-birth, with IPs we’re usually in

contact with them for about 6-10 weeks post birth depending on what their needs are. The surrogate has ongoing support available to her all the time. Um, it doesn't really ever end". This suggests that some consultancies may prioritize supporting surrogates over intended parents, or else that they perceive surrogates' support needs as being greater postpartum.

With respect to timing, participants most frequently discussed providing support to surrogates and intended parents in the pre-conception period and during the pregnancy. However, some participants did discuss providing support to surrogates during the birth, and nearly all mentioned support to both surrogates and intended parents during the postpartum period as well. During birth, some participants discussed acting as or providing doula services. A few participants attended births, though this became less common during and post the COVID-19 pandemic. Postpartum, participants most frequently discussed providing support via communication. For surrogates, this was often raised in the context of surrogates who were struggling with the "baby blues" or with diminishing contact with their intended parents. Continued access to specialized staff, like counsellors, was also often mentioned. Many participants said that surrogates would continue to be members of their online support groups. For intended parents, some participants mentioned coordination support in the context of transfers of parentage, organizing travel documentation, and ensuring that reimbursements were properly finalized.

With respect to amounts of support, several participants expressed that they would provide as much support as each individual client needed. However, some of my participants believed that "other agencies" were not providing adequate support for surrogates and intended parents. One participant had worked as a surrogate with another consultancy prior to becoming a consultant herself. She said that that agency had "been around for a while, and didn't have the

best reputation for a long time. I was in a situation in points in my journeys where support was not a thing”. As such, although all of my participants discussed providing support, my data contained anecdotes suggesting that at least some consultancies were not providing adequate amounts of support to those in need.

In addition to variation between consultancies in amounts of support, my data also showed variation in support levels within consultancies. Many participants described providing varying amounts of support to different individuals, depending on personal needs. For example, Sasha said:

Sasha: We're the type of agency, consultancy, that is as hands-on as everybody wants us to be. So there are some that are very needy, like they want us there every step of the way, or there are some that are more independent, and don't want us there, but then, when something comes up, they're like 'hey we need you guys' and we're like 'absolutely, we're here, whatever you need'.

Sasha believed that not all surrogates and intended parents needed to receive the same amounts of support. Similarly, Sarah said: “I had an IP that I spoke to every day, and he cried on the phone every other day. And there's some people that need that. And there's some people that don't need that”. Roxana said: “there's really no definitive flow chart for support with a surrogate because, again, each one is unique”. In response to different situations and different needs, different levels of support were provided.

If a client did need them, many participants said they would make themselves available to assist no matter the time of day. Half of my participants noted that they worked “24/7”. For example, Sasha talked about waking up to call intended parents in Spain at 2:00 AM, as well as helping surrogates with travel issues at 4:00 or 5:00 in the morning. Roxana talked about dropping everything to get on a plane to attend a birth. Carla talked about booking flights at 7:00 AM on a Sunday. These anecdotes suggest that many consultants are dedicated to supporting

surrogates and intended parents in need, and do not restrict their assistance to typical business hours.

c) Discussion

True to the mixed narratives in the literature, my data suggests that the question of whether or not consultancies are supportive cannot be answered through a simple yes or no. The majority of my first-hand data suggests that many consultants are employing a variety of important strategies, at many hours of the day, in an effort to support both surrogates and intended parents. However, my data also revealed second-hand accounts that “other agencies” were unsupportive, or providing misinformation, thereby confirming that some participants perceived this to be a problem within their industry. On balance, it seems that *some* consultancies may be successfully supporting *some* surrogates and intended parents. In other words, some consultancies may be better at delivering support than others. Furthermore, even within a single consultancy, there was significant variability in how much support was given to different individuals.⁵⁴¹

My data suggests that many consultants are particularly concerned with supporting surrogates. Within this Part, this manifested as participants sharing more stories about supporting surrogates than intended parents, and reporting longer durations of support for surrogates than intended parents. However, many more examples of consultants aligning with surrogates are raised throughout this dissertation.⁵⁴² By this, I mean that my participants shared many stories

⁵⁴¹ It is not inherently problematic to provide varying levels of support to different people, so long as individual needs are being met. Some people may simply need more connection and guidance than others in order to feel comfortable.

⁵⁴² For example, my participants sharing more stories about advocating for and protecting surrogates from controlling parents, as discussed in Part II, above; my participants helping surrogates avoid financial vulnerability,

about protecting surrogates and advocating for their interests. They often identified with the surrogates that they worked with (for example, by telling anecdotes from “when I was a surrogate”).⁵⁴³ They were generally more likely to analyze a situation from a surrogate’s point of view than they were from an intended parent’s perspective. They were also more likely to discuss procedures they put in place to maximize the surrogates’ well-being, as opposed to the intended parents’. Many of my participants appeared to structure their consultancy practices with surrogates in mind.

To be clear, I do not mean to imply that my participants did not consider intended parents during the course of their work, nor that they did not seek to protect intended parents’ interests. Rather, I observed that, in most of my interviews, the consultants talked about the surrogates’ perspective more often than they did the intended parents’. Importantly, the sole intended parent support person I interviewed was noticeably more focused on discussing the intended parents’ experiences and needs. As such, it is unclear whether this trend of aligning with surrogates would have been as prominent if my participant sample had included more consultants whose roles were dedicated to intended parent support.

While it is undoubtedly important to support surrogates, it is equally important to ensure that intended parents are being prioritized and cared for. My data suggests that having an employee designated to specifically look after intended parents might promote this objective. Ideally, this role is filled by someone with lived experience as an intended parent in order to better foster empathy and understanding. This model is already implemented by some

despite the financial disadvantage this may place on intended parents, as discussed in Chapter 5; and, screening out intended parents to protect surrogates’ well-being, as discussed in Chapter 3.

⁵⁴³ All of my participants acted as surrogates prior to becoming consultants.

consultancies. However, I note that hiring any form of specialized staff may ultimately increase consultancy fees for the intended parents, which may correspondingly impact affordability.

Lastly, while it can be beneficial for consultants to share accurate medical information about the surrogacy process, consultants should be careful to avoid giving surrogates and intended parents any medical advice.⁵⁴⁴ Amy did not explain how she answered questions about needle sizes – however, if she told the surrogate what needle to use, this would constitute medical advice. Medical advice should only come from qualified healthcare professionals.⁵⁴⁵ Consultants should ensure they maintain a clear boundary between sharing medical information (for example, when gestational diabetes testing normally occurs) and giving medical advice (for example, what size of needle to use), to avoid giving any recommendations that fall beyond their scope of expertise.⁵⁴⁶

There may be situations where it is helpful for consultants to provide medical or legal information. For example, surrogates and intended parents may benefit from knowing what the law permits with respect to payment versus reimbursement before signing up with a consultancy. Similarly, it is important for surrogates to be aware of the general surrogacy process, including what surrogacy might require medically, prior to signing up to be matched. Furthermore, some surrogates and intended parents may want to be prepared for what to expect when they meet with a lawyer or doctor. Consultants can be well-positioned provide this kind of information, particularly if they are the client’s first touchpoint in the surrogacy journey, before any other professionals have become involved. However, it is imperative that this information be accurate.

⁵⁴⁴ Medical information is general information about medicine. Medical advice applies medical knowledge to a specific situation and provides a recommendation.

⁵⁴⁵ Notably, even if the consultant comes from a medical background, medical advice should still be avoided as the consultant would not be acting in that professional capacity.

⁵⁴⁶ This is true for legal advice as well, as I discuss in Part I.

My data did not provide any first-hand examples of consultants providing misinformation, though this concern was raised by another participant as a problem with some other consultancies.

Conclusion

In conclusion, my data provides a nuanced view of consultants' surrogacy management practices, some of which corroborate reports in the existing literature, while others challenge or complicate prior assumptions. In particular, this Chapter contributes new empirical insight into the activities consultants undertake when managing surrogacy journeys, including how they interpret their role, the degrees of support they seek to provide to both surrogates and intended parents, and the professional boundaries they navigate.

A notable finding across multiple interviews was the tendency for consultants to align themselves with surrogates. My participants generally appeared to be more protective of surrogates, more concerned with advocating for surrogates, more prone to assessing situations from a surrogate's point of view, and more likely to discuss how services would benefit surrogates. Within this Chapter, this was most apparent when my participants described their role in coordinating surrogacy contracts. My participants were markedly more likely to describe assisting surrogates in this process, even when their suggestions could financially prejudice intended parents.

This pattern stands in stark contrast to concerns raised by the Baird Commission, which feared that consultants would inevitably prioritize intended parents' interests due to the financial structure of their engagement. While I cannot make generalizable claims about all consultancies,

the interview data presented here does not substantiate this concern. There was no indication in any of my interviews that intended parents' interests were being consistently placed ahead of surrogates'. There was also no suggestion that my participants' allegiances were swayed by the fact that they receive payment from the intended parents.

Given my participants' focus on the surrogates, it is important to ensure that intended parents are not over-looked. In line with several of my participants' own observations, I suggest that hiring an intended parent support person with lived experience might productively shift the focus more evenly across parties. I also suggest that consultants should avoid mandating the use of specific third party providers to avoid hindering intended parents' autonomy, and to be cautious about unduly pressuring intended parents when managing conflicts, given their potential to occupy a vulnerable position within surrogacy structures.⁵⁴⁷

In managing surrogacies, consultants should respect the boundary between providing medical or legal information versus giving professional medical or legal advice. While many participants were careful to note that they were not lawyers or healthcare professionals, several also described practices that infringed on professional domains. For example, some participants reported advising surrogates on contract terms, or fielding questions about needle sizes. Earlier, in Chapter 3, I also reported on a participant suggesting that a surrogate change her medical protocol. In nearly all of these instances, these interventions were framed as supportive, aimed at ensuring surrogates were prepared or protected. Nevertheless, consultants are not appropriately trained or licensed to provide such advice, and doing so should be strictly avoided. While it may be beneficial for consultancies to contract specialized providers who are appropriately trained to

⁵⁴⁷ As I discuss in Chapter 1, intended parents may be uniquely vulnerable due to a wide range of factors, including the disproportionate lack of surrogates, trauma due infertility discrimination due to LGBTQ2S+ status, and/or lack of control in the surrogacy process. This may be compounded in consultancy settings, given the consultants' position as gatekeepers to their surrogacy programs.

give such advice, I also recognize that this would undoubtedly inflate overall costs for intended parents, thereby further reducing the affordability of consultancy services.

Consultants' management activities are self-admittedly not necessary for a successful surrogacy journey. Indeed, the literature suggests that some intended parents appreciate consultants' assistance in managing surrogacies, while others do not.⁵⁴⁸ Individual needs differ, as do different consultants' proficiencies in delivering such support. Many of the activities reported herein could be fulfilled by other third parties involved in the surrogacy process (for example, doctors and lawyers providing education; counsellors helping with conflict resolution; etc.). All of these third party services could be coordinated by the intended parents and surrogates themselves.

Despite this, there can be real benefit to designating one specific person to manage the surrogacy from start to finish, to create a community, and to provide more emotional support to both surrogates and intended parents. Many of my participants' reported activities were designed to help surrogates and intended parents who require or desire this assistance. It remains a subjective assessment as to whether these additional benefits justify the costs of consultancy services.

Taken together, the findings in this Chapter contribute to the literature by offering detailed accounts of how consultants describe and enact their roles across different phases of the surrogacy journey. This data provides new empirical insight to inform ongoing debates about consultants' leanings, their provision of support, and their appropriate roles within the surrogacy process. While my findings are not necessarily representative of the entire industry, they offer

⁵⁴⁸ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 76-78, 82-84.

valuable insight into how some consultants understand their responsibilities and how these understandings shape their interactions with both surrogates and intended parents.

CHAPTER 5:

MONEY

Introduction

This Chapter explores the ways that consultants receive and manage money. I focus on two particular situations – where consultants manage reimbursements between surrogates and intended parents, and where consultants are paid by intended parents. These financial aspects of consultancy work have been frequently criticized.⁵⁴⁹ While a few intended parents have expressed appreciation for consultants' help with reimbursement management,⁵⁵⁰ there have been multiple reports of consultants behaving illegally by paying flat fees, inflating costs, or failing to collect receipts.⁵⁵¹ Consultancies have also been criticized for illegally charging intended parents excessive and/or unwarranted fees.⁵⁵² Many have worried about how such payment may commercialize or commodify surrogates and children.⁵⁵³ Throughout this Chapter, I examine how these narratives are activating within my own data.

This Chapter is divided into two parts. Part I explores how my participants manage surrogates' reimbursements; the self-perceived benefits of this service; and the compliance of my

⁵⁴⁹ *Proceed with Care*, *supra* note 8 at 683, 689; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 102; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; Nelson, *supra* note 6 at 334; CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252.

⁵⁵⁰ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 76-78.

⁵⁵¹ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 83-84, 94-99; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252.

⁵⁵² Stefanie Carsley interviewed Canadian intended parents, and found that many of her participants were upset about the fees that agencies charged. Some of the intended parents felt the agencies exploited their desperation to be parents by charging exorbitant fees. Others felt that the amounts charged were disproportionate to the service received: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78-84. See also: Motluk, "We should regulate agencies", *supra* note 2.

⁵⁵³ See for example: *Proceed with Care*, *supra* note 8 at 683, 689; Nelson, *supra* note 6 at 334; Gruben, *Surrogacy in Canada*, *supra* note 10 at 278; Suze G Berkhout, "Buns in the oven: Objectification, surrogacy, and women's autonomy" (2008) 34:1 *Social theory and practice* 95; Stephen Wilkinson, "The exploitation argument against commercial surrogacy" (2003) 17:2 *Bioethics* 169.

participants' reported practices with the Reimbursement Regulations. Part II discusses how much consultants are paid, when they are paid, what these fees go towards, and some of my participants' general outlooks on profit-related matters.

In summary, my data suggests that most consultants have a strong understanding of the Reimbursement Regulations,⁵⁵⁴ and many seek to facilitate reimbursements ethically and transparently. Although several participants reported first-hand contraventions of the Reimbursement Regulations, they explained that their actions were meant to support surrogates and/or protect them from financial vulnerability. Their reasoning suggests that perhaps the Reimbursement Regulations, themselves, are overly cumbersome and under-inclusive.

Importantly, my data also suggests that some intended parents may be particularly vulnerable where finances and consultancies intersect. Intended parents are legally vulnerable if consultants reimburse surrogates illegally, or if they pay consultants for arranging a surrogacy, as both are a breach of the AHRA.⁵⁵⁵ High consultancy costs may also compound intended parents' financial vulnerability, or limit intended parents' ability to afford consultants' assistance, potentially complicating their efforts to build families through surrogacy.

Notably, my participants justified their fees by stating that the amounts covered advertising, taxes, and overhead costs associated with important services like around-the-clock support. Several participants further expressed that they did not make much personal profit from their work. My participants' voices therefore add a new perspective to the ongoing discussions surrounding consultants' payment.

⁵⁵⁴ These substance of the Reimbursement Regulations is reviewed in Part I, below.

⁵⁵⁵ AHRA *supra* note 4 ss 6, 12.

Part I: Reimbursement Management

The AHRA prohibits paying surrogates except in accordance with the Reimbursement Regulations.⁵⁵⁶ Section 6(1) of the AHRA provides that no person shall pay consideration to a surrogate.⁵⁵⁷ However, section 12 of the AHRA qualifies that surrogates can be reimbursed for their receipted, surrogacy-related expenses.⁵⁵⁸ This must be done in accordance with the Reimbursement Regulations.⁵⁵⁹ The Reimbursement Regulations provide general categories of expenditures that can be reimbursed, including maternity clothes, exercise classes, groceries, travel, care for dependents, automobile use,⁵⁶⁰ lost income,⁵⁶¹ and any other products or services that are recommended in writing by a health care professional.⁵⁶² Health Canada has released a Guidance Document clarifying how the Reimbursement Regulations can be applied in practice.⁵⁶³ The Guidance Document cautions against disguised payment, and prohibits pre-paying anticipated expenses, as well as giving surrogates advance allowances.⁵⁶⁴

Reimbursement management entails facilitating the accounting and payment of surrogacy-related expenditures between surrogates and intended parents. This service is often offered by surrogacy consultancies. Some reports suggest that this can be important for surrogates and intended parents who wish to avoid discussing finances directly with the other party.⁵⁶⁵ It can also be important for those who might find the Regulations or the accounting procedures

⁵⁵⁶ AHRA *supra* note 4, ss 6, 12; Reimbursement Regulations, *supra* note 24; Guidance Document, *supra* note 107.

⁵⁵⁷ AHRA *supra* note 4, s 6.

⁵⁵⁸ AHRA *supra* note 4, s 12.

⁵⁵⁹ AHRA *supra* note 4, s 12; Reimbursement Regulations, *supra* note 24.

⁵⁶⁰ A specific calculation scheme is in place for automobile use. See: Reimbursement Regulations, *supra* note 24, s5.

⁵⁶¹ Reimbursement Regulations, *supra* note 24, s8.

⁵⁶² Reimbursement Regulations, *supra* note 24, s4.

⁵⁶³ Guidance Document, *supra* note 107. Notably, the Guidance Document is not legally-binding.

⁵⁶⁴ Guidance Document, *supra* note 107.

⁵⁶⁵ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 76-78.

confusing, time-consuming or stressful.⁵⁶⁶ Some intended parents rely on consultancies to assure themselves that their reimbursements are handled in compliance with the law.⁵⁶⁷

While some individuals have reported appreciating these benefits, the literature also emphasizes serious concerns with some consultants' reimbursement management practices.⁵⁶⁸ In 2013, Picard and CFC pled guilty to paying surrogates maximum-allowable monthly installments, regardless of their receipted expenses.⁵⁶⁹ This is the only reimbursement-related misconduct that has been prosecuted. However, many other reports of misconduct exist.⁵⁷⁰ Consultants have been accused of reimbursing surrogates for non-surrogacy-related purchases.⁵⁷¹ Some reports suggest that consultants regularly reimburse surrogates the full monthly amount allowed under the surrogacy agreement, regardless of the actual expenses submitted (in other words, paying surrogates flat fees).⁵⁷² Some claim that consultants counsel surrogates to artificially inflate their reported expenses.⁵⁷³ Others state that their consultants failed to collect receipts from surrogates, as required by law.⁵⁷⁴ Lastly, there have been reports of consultants refusing to show intended parents receipts; pressuring intended parents to reimburse expenses

⁵⁶⁶ *Ibid.*

⁵⁶⁷ An intended parent in Stefanie Carsley's research expressed that "there was "huge value" to having his agency manage the surrogate's expenses because he felt he could rely on them to comply with the AHRA": Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78. Other empirical research also suggests that using an agency gave intended parents the impression that their reimbursements were handled in compliance with the law: Gruben, *Surrogacy in Canada*, *supra* note 10 at 100-101.

⁵⁶⁸ CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252; Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 94-99.

⁵⁶⁹ Motluk, "First Prosecution", *supra* note 34.

⁵⁷⁰ CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252; Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 94-99.

⁵⁷¹ CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252; Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 94-99.

⁵⁷² CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252; Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 94-99.

⁵⁷³ CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252; Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 94-99.

⁵⁷⁴ Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 94-99.

that they do not believe should be reimbursed; and, bullying or stonewalling intended parents who question any reimbursements.⁵⁷⁵

In these articles, only one consultancy is ever publicly named. Accordingly, it is unclear whether this misconduct is pervasive across many Canadian consultancies, or whether this misconduct is isolated to one or a select few consultancies. In order to understand whether and how these behaviours are manifesting in my own data, I asked my participants “What role do you play in facilitating the surrogates’ reimbursement?”.

a) Reimbursement Procedures

Two out of eight participants reported that they did not manage surrogates’ reimbursements. At these consultancies, surrogates and intended parents would manage their own reimbursements, with little involvement from the consultants apart from providing some education about the law surrounding reimbursable expenses. Katie,⁵⁷⁶ who does not undertake any reimbursement management practices, argued that it was important for surrogates and intended parents to discuss finances directly:

Katie: It’s a respect thing, to be able to talk to each other. And again, because I push this and foster this kind of relationship, it takes out the awkwardness of the money. Because a lot of people go in with the mindset that ‘oh, I don’t want to talk about money, I don’t want to talk about this’ and I’ll say ‘you know what? You’re going to have a lot more uncomfortable things coming down the hatch. Um, and having to be challenged to talk about the things that are uncomfortable is what’s going to build that relationship and get you through this. Um, and that can be anything. You might have failed transfer; you could have a miscarriage; you could have things that really challenge you. Money is not a challenge.

⁵⁷⁵ CBC News, “Surrogacy Agencies Face Little Oversight”, *supra* note 252; Motluk, “We should regulate agencies”, *supra* note 2; Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 94-99; Motluk, “Waiting Room”, *supra* note 133.

⁵⁷⁶ Unique pseudonyms are used in this section where reimbursement practices could potentially identify a consultancy.

Katie believed that discussing finances could foster respect and build a solid foundation for when other hurdles in the surrogacy journey arose.⁵⁷⁷

Six out of eight consultancies provided some reimbursement management services. These participants generally reported collecting receipts from the surrogates, vetting receipts to ensure expenses were surrogacy-related, following the reimbursement provisions outlined in the respective surrogacy agreements, filling out declarations, and collecting signatures prior to dispensing reimbursements. For example, Vanessa said:

Vanessa: So the surrogate uses an app, um puts all of the receipts in the app, uploads it to the receipt management support person, um they will go over everything with the surrogate. They actually put it in the form for the surrogate, cause we found that was a big hurdle with the new addition of that form. Um, then they sign it. The support person sends it to the IPs to review and to sign and then the IPs send the e-transfer. We do the e-transfers biweekly, because we just feel that having the surrogate wait a month is just not okay.

The form Vanessa refers to above is the sample declaration form created by Health Canada for surrogates to use in order to request reimbursements. While Vanessa's reimbursements were done bi-weekly, other consultants reported doing monthly transfers. In lieu of e-transfers from the intended parents, some consultants reimbursed surrogates directly via trust funds set up in advance by the intended parents.

Multiple participants emphasized the importance of transparency when managing reimbursements. For example, Emily said she wanted to make sure "there's nothing ever hidden and the IPs know exactly what the – what every reimbursement, every expense is". Emily further

⁵⁷⁷ Katie also suggests that many of her intended parents enjoy having control over this aspect of the journey: "I have this idea that when you give back control to the parents, because they have so little control over anything in their lives by the time they reach me, um, they've had to go through trauma a lot of times, they've had to give up the traditional idea of how they were gonna have their family. We want to give them as much control to make decisions for themselves as possible. ... We've have zero issues with this – with them handling it themselves. The intended parents love it because then they know exactly what they're paying for, they know exactly what their reimbursements are for, and the surrogates just send them their receipts".

stated that transparency was one of her “guiding principles”. Several participants stressed that they made sure all parties were aware of exactly what was being reimbursed at all times. Stephanie emphasized that all parties had ample opportunity to review and question expenses prior to disbursement.

Stephanie: I include all receipts on the declaration. And then I send it through Docusign. So it goes to the surrogate first. She signs it saying I swear these are all surrogacy related and everything. If anything has come off, if it's not surrogacy related or anything, she has the chance then to question me about it. Um, and then once she signs it, it goes on to an IP to sign. They have the opportunity again to question anything. Um, and, cause they see all the receipts there. And then once they sign it, it comes back to me and I fill out my portion and release the funds, because we have a trust account that they pay into and once a month I also send an expense report off to IPs showing what their opening balance in the trust account was, any reimbursements that went out, which of course they already see because they sign all the declarations, and then their closing balance, so they know if they have to top off the trust account.

The above quote shows the many checks and balances Stephanie has put in place to ensure there is complete transparency regarding what expenses are being reimbursed. In addition, earlier in her interview, Stephanie explained that she created her own declaration template, as she found the declaration template provided by Health Canada to be poorly formatted.

All of the participants who managed their clients' reimbursements stressed the importance of following the surrogacy contract. For example, Carla emphasized: “We follow the contract. So whatever is signed at the end of the day is the contract”. In discussing this, several participants voiced strong deference towards the lawyers' opinions on permissible reimbursements, as expressed through the terms of the contract. Carla said: “we lean on our lawyers a lot”. This helped her ensure that all reimbursements were “receiptable and accountable under the Canadian law”. If there were questions about whether a claimed reimbursement was

surrogacy-related or not, some participants said they would refer the question to their legal experts.⁵⁷⁸

Many participants who managed their clients' reimbursements hired specialized staff or contracted outside accountants to assist with reimbursement management. For example, Alana said:

Alana: so our accountant will – well she's a third party. She's actually not [my consultancy's] accountant. We actually employ her to do this process. So there's no bias involved. There's no need to approve something if it shouldn't be approved, or decline something if it shouldn't be declined. So she will go through the process of auditing all of those receipts.

Alana believed that hiring a third party to manage reimbursements could mitigate bias that individual consultants might have, since an accountant would not be inherently incentivized to approve or decline any expenses.

b) Perceived Benefits of Reimbursement Management

Many participants who managed reimbursements believed this service helped foster positive relationships between surrogates and intended parents because it “stops money from becoming a factor in their relationship”. Angela said: “[surrogates and intended parents] don't want to talk about the money side of things – it makes them feel kind of icky”. Multiple participants shared the perception that facilitating reimbursements allowed intended parents and surrogates to have smoother relationships.⁵⁷⁹

⁵⁷⁸ For a discussion of whether or not consultants' reimbursement management is in fact being conducted in accordance with the law, please see Chapter 5.

⁵⁷⁹ While these are my consultants' perspectives, similar sentiments have been voiced by intended parents in other empirical research. For example, one intended parent said that reimbursement management “allowed him to have a “great relationship” with his surrogate”: Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 78.

Several participants said that reimbursement management was also valuable because independently navigating the reimbursement regulations could be complicated, time-consuming and stress-inducing. Two participants called the Reimbursement Regulations a “pain” to deal with. Sarah said:

Sarah: I don't feel bad for the surrogates because I'm doing all that work for them, but like, for other people who want to do independent journeys, or anything like that, I'm like, man oh man, like you know you're saying you don't want agencies but then you're kind of making it really difficult and very intricate as to how they're to be doing this.

Sarah criticized the complexity of the Reimbursement Regulations. Like many other participants, she felt that consultants' involvement in reimbursement management could relieve surrogates and intended parents from unnecessary worry or strain.

A few participants suggested that reimbursement management eased intended parents' concerns about complying with the law. Isabel said: “I think for IPs to have, um, someone else taking care of the financial piece, so that they don't have to worry about Health Canada coming to them. They can say no, our agency is doing it. I think there's a benefit there”. Isabel's comment suggests that using an agency to manage reimbursements may provide intended parents with a sense of legitimacy and legality. Notably, however, none of my participants mentioned that using an agency did not absolve intended parents of their legal duty to reimburse surrogates properly.

My participants also discussed how reimbursement management could be beneficial for surrogates. Throughout my interviews, I noticed many participants being protective of surrogates, and advocating for surrogates' rights to be reimbursed for specific expenditures. For example, Emily said:

Emily: the IPs are encouraged – strongly encouraged to reach out to us if they have any questions regarding a reimbursement. So we do let them know that it's really important not to – um, stress the surrogate out while she's pregnant. So just to reach out to us first, and then we can more often than not answer their questions without them having to ask the surrogate

This quote shows how Emily is protective of the surrogates she works with, wanting to shelter them from any unnecessary stressors. When intended parents do come to her with concerns about a potential reimbursement, Emily continued:

Emily: we would just help them to understand. I would say 99.9% of the time they understand and end up doing the reimbursement. Um, if not then, if I feel that it's surrogacy related or pregnancy related then I will refund it out of the agency funds, because I don't feel like the surrogate should go without.

It is clear in the foregoing quotes that the surrogates' wellbeing is Emily's primary concern, to the extent that if the intended parents refuse to pay for an expense, she will fund the reimbursement herself. This demonstrates how Emily puts the surrogates' well-being above her own desire for profit.

c) Legal Compliance

With few exceptions, my participants' understandings of the Reimbursement Regulations accurately reflected the wording of the law and the accompanying Guidance Document. For example, my participants generally correctly identified what surrogacy-related expenses looked like. Roxana said:

Roxana: if they have a Costco receipt, basically take off what's not pregnancy related. You know, things like that. Like your kids' toys are not pregnancy related, so they're not being reimbursed. Uh, your general daycare if you're – if you have a full-time job and you're putting your kids in daycare already, those are not reimbursable expenses, because you're already paying those. Um, there's a common misconception, and I probably don't need to tell you this, that rent, car payments, insurance payments – none of them are reimbursable because

they're things that you're already paying for, so, and you already need to live – you do need a place to live.

Roxana's quote shows how she distinguishes between every-day expenses and surrogacy-related expenses. This distinction is important in order to prevent disguised payment, as the law prohibits surrogates from making a profit.⁵⁸⁰ Many of my participants shared similar processes.

My participants generally believed that they were reimbursing surrogates in accordance with the law. For example, Emily said: "I know that our consultancy definitely has always followed um, even before the Guidelines came out, we were making sure that the IPs knew 100% about what each reimbursement was, um, and we were always making sure that it was pregnancy or surrogacy related". Similarly, Sasha said: "we make sure everybody knows about the current regulations and make sure everybody complies 100%". Multiple participants expressed confidence that they understood and implemented the Reimbursement Regulations correctly.

While the majority of my participants' reported practices complied with the relevant laws, I nevertheless heard some first- and second-hand accounts of practices that contravened section 12 of the AHRA and the Reimbursement Regulations. These pertained to pre-paying surrogates for anticipated expenses; giving surrogates gifts, or encouraging intended parents to give surrogates small gifts; and, paying flat fees.

Pre-Payment

Three of my participants encouraged intended parents to pre-pay surrogates for anticipated expenses. For example, Hannah said: "we do believe that a surrogate shouldn't be out of pocket. Like, they don't have money for a plane ride. They don't have money for a hotel. So

⁵⁸⁰ Guidance Document, *supra* note 107.

we help book those things, pre-pay for them, get them to their destination. They need to pay their babysitter, we send them babysitter money, but we make sure that a receipt comes in”. Claire said: “I typically have IPs, um, that are also really good to send surrogates money in advance. So they may send them – they know she’s going for a transfer, they’ll send her enough money to make sure she has her car, her taxi, her mileage, her lost wages. And then she sends her receipts the same day”. While Claire mentioned that they would always receive the accompanying receipts, she did not explain what would happen if a surrogate was overpaid. Claire also said: “I always tell IPs make sure she’s not using her own money, um, to go. So make sure she’s got – so a lot of them do like a – a, pre-paid VISA, or like a second debit card. So she can just swipe if she needs things. So they already have the receipt. They see it on the online banking”. Similarly, Rosemary advocated for buying things for surrogates directly, as opposed to reimbursing them. She said: “Some surrogates, they work pay cheque to pay cheque, and they don’t have a ton of money to be putting out for things. So they will actually ask the IPs to go buy things directly, so they don’t even have to reimburse, which we encourage. So things like flights”. Purchasing items directly mitigated the risk of overpayment.

In all four of the aforementioned quotes, the consultants were concerned about the surrogate paying out-of-pocket. They wanted to avoid any financial prejudice to the surrogates that could result from this. Several participants also shared stories of surrogates contacting them with worries about lost or forgotten receipts. Many believed that their surrogates found the receipt requirement to be cumbersome or stressful. They saw pre-payment as a way to circumvent this stressor. Notably, none of my participants voiced any suggestion that this conduct contravened the law.

Gifts

Half of my participants raised giving gifts to the surrogates they worked with. These gifts were generally described as either material forms of support given in response to specific hardships, or else as congratulatory presents given upon reaching various milestones. As an example of the former category, Aja discussed sending personalized grief packages following traumatic events such as miscarriages, still-births, or ending a surrogacy journey without a baby. These packages would include items like journals and grief-related books. Similarly, Sasha talked about gifting meals to surrogates who were struggling: “I’ve sent dinner before. Like a surrogate is really stressed so I’m like, ‘you know what? I’m going to send you dinner. What would you like?’ I’ve sent Chinese food and stuff. Like, little things to show appreciation. When I know they’re struggling, we’re going to do something to ease that stress.” In the face of hardship, Sasha felt that these tangible offerings could provide some comfort and demonstrate solidarity. Sasha further expressed that international intended parents were particularly grateful when consultants provided surrogates with this kind of material support, as they often felt helpless being so far away.

Congratulatory gifts were more commonly raised by my participants. They described sending surrogates “milestone gifts” for specific occasions, such as embryo transfers, first ultrasounds, etc. These packages could include a variety of items, ranging from practical products like pregnancy tests, to food that is often associated with pregnancy cravings like chocolate and chips, to flowers, to knick-knacks like beauty products and jewellery, to branded swag like clothing or cards that could be displayed in social media posts. None of the reported gifts were exorbitant in cost. Many of my participants believed these gifts made the journey more “fun” for the surrogates, and that gifts could be meaningful for some people.

Some participants recognized that gift-giving likely contravened the AHRA. Several also believed that some intended parents experienced anxiety around gift-giving because of the legal prohibition. These participants believed that many intended parents wanted to show appreciation for their surrogates but were afraid of the legal consequences of doing so. Aja was critical of this prohibition, saying: “Some lawyers will put the fear of God in intended parents – say ‘if you buy her gifts, that could be, you know, considered paying your surrogate off’, or something, and I think holy cow, we are all human beings. She’s not doing this for a birthday present”. Several participants observed that varying comfort-levels around gifts led to surrogates being treated differently, as some intended parents were willing to provide gifts while others were not.

Despite being aware of the law, none of my participants expressed concern about the legal repercussions that could result from their gift-giving. Sasha said: “we’re had IPs who, of course, the lawyers say like, you can’t send gifts or anything. And we know that Health Canada isn’t going to come down on them for sending their surrogate flowers or small gifts. But if they’re feeling really uncomfortable about it, we will do that”. Sasha recognized the law’s stance against giving gifts to surrogates. Despite this awareness, Sasha continued to send surrogates gifts. She alluded to the AHRA’s lack of enforcement as a reason not to worry about giving small tokens of appreciation. This suggests that the AHRA’s and Reimbursement Regulations’ lack of enforcement may be creating some disregard or indifference towards the legality of gift-giving. In other words, because Sasha did not believe Health Canada would enforce the law, she was not worried about getting into trouble for giving small gifts, and thus continued to do so, regardless of the fact that it was legally impermissible.

Flat Fees

While none of my participants provided first-hand accounts of paying flat fees, one participant shared that, when she was initially looking to act as a surrogate, another consultancy offered to pay her a flat fee:

Sasha: the consultancy called and she's like 'so you're okay making the \$2000 a month?' and I was like, 'well, if that's what my expenses are?' I was like whaaat. That was like, all they asked me – you're okay with the \$2000 a month and I was like – and I was like, that just doesn't make sense. And I was like, uh, because I knew surrogates can't profit.

Though I did not ask Sasha when this reported conversation occurred, her phrasing insinuates that the prohibition was in force at the time the anecdote took place. Timing is relevant, as the law against paid surrogacy only came into force in 2004.⁵⁸¹ Sasha's quote suggests that at least one consultancy was, at one point, encouraging flat fees instead of receipted reimbursements in contravention of the AHRA.

d) Discussion

While external literature provides multiple accounts of consultants acting in a non-transparent manner when conducting reimbursements (for example, by refusing to show receipts to intended parents, or stonewalling intended parents who questioned reimbursements),⁵⁸² my participants were generally adamant about their openness in managing reimbursements. My data suggests that at least some consultants are making surrogates' receipts available for intended parents to see at all times, and that consultants are available and willing to answer any questions that surrogates and intended parents may have about their reimbursement-related decisions. My

⁵⁸¹ AHRA *supra* note 4.

⁵⁸² Motluk, "Waiting Room", *supra* note 133.

participants' voices therefore offer a different perspective when compared to the negative rhetoric that seems to dominate in the literature.

My data also suggests that consultant involvement in reimbursement management may be particularly helpful for surrogates. Multiple participants shared anecdotes where they advocated for a surrogate's rights to be reimbursed for an expense, and many were very protective of surrogates in this regard. Indeed, in contrast to the Baird Commission's assumption that consultants would inevitably prioritize intended parents, my participants were markedly more likely to discuss advocating for a surrogate's right to be reimbursed, than they were to discuss protecting intended parents' from reimbursing non-surrogacy-related expenses. Consultants' ability to advocate for surrogates and liaise with intended parents on contested expenditures may protect surrogates from unnecessary confrontation, conflict, stress and financial hardship.⁵⁸³ While it was evident that surrogates' reimbursements were prioritized by consultants, my data did not include any accounts of consultants pressuring intended parents into reimbursing expenses that they did not believe should be reimbursed, as reported by other sources.⁵⁸⁴

I did, however, identify several instances where reported conduct contravened the AHRA and the Reimbursement Regulations. For example, my participants' practice of pre-payment and the use of pre-paid Visas constitutes payment of anticipated expenses, in breach of the law. Health Canada's Guidance Document specifically states that "payment of 'anticipated expenses' or an 'unaccountable allowance' would be considered by Health Canada as a contravention of

⁵⁸³ Once again, the fact that consultants are paid by the intended parents does not seem to dissuade them from advocating for surrogates' reimbursements, contrary to the Baird Commission's original concerns that consultants would default to promoting intended parents' interests due to payment structures: *Proceed with Care*, *supra* note 8.

⁵⁸⁴ For example, Motluk reported on some consultants bullying or stonewalling intended parents who question any reimbursements: Motluk, "Waiting Room", *supra* note 133.

the prohibition in the AHR Act”.⁵⁸⁵ Even though these participants stated that receipts were always submitted promptly, this practice still contravenes the Reimbursement Regulations.

Gift-giving also likely contravenes the law. Neither the Regulations nor the Guidance Document address gifts. However, given the laws requiring receipted reimbursements, it is likely unacceptable to give surrogates gifts, as this could be considered a form of disguised payment.⁵⁸⁶ My data suggests that at least some of my participants are aware of this, but are unconcerned about the legal repercussions.

Lastly, paying flat fees undoubtedly contravenes the law. All of my participants expressed that they were only reimbursing (and not paying) surrogates. Although I did not hear any first-hand accounts of such conduct, one participant suggested that another consultancy had offered to pay her a flat fee in the past. Cumulatively, this lends support to the reports in the literature that not all consultancies are reimbursing surrogates based solely on receipted, surrogacy-related expenditures.

This data also highlights some of the practical problems associated with the Reimbursement Regulations. First, my participants’ motivations for pre-paying surrogates stemmed from concern for the surrogates’ well-being. My participants worried about surrogates being financially prejudiced if they were required to make surrogacy-related purchases out-of-pocket. This concern has been raised by other scholars, who note that requiring surrogates to pay upfront puts them at risk for non-reimbursement, delays in reimbursement, interest changes, and potential inability to pay for necessary expenses.⁵⁸⁷ Requiring receipts can also create practical difficulties for surrogates, including remembering to collect receipts, identifying which receipts

⁵⁸⁵ Guidance Document, *supra* note 107.

⁵⁸⁶ AHRA *supra* note 4, ss 6, 12.

⁵⁸⁷ Gruben, *Surrogacy in Canada*, *supra* note 10 at 167-168.

are reimbursable, storing and organizing receipts without losing them, and remembering to submit receipts as needed.⁵⁸⁸

Allowing pre-payment in certain instances could better protect surrogates without necessarily financially prejudicing intended parents or subverting Canada's altruistic surrogacy model. Items that are entirely surrogacy-related, such as plane tickets, medication, and pregnancy tests, could be purchased by intended parents directly, or purchased using pre-paid VISAs. This approach still prevents surrogates from profiting, but avoids the surrogate needing to pay costs up front. However, pre-payment would be more complicated in the context of expenses that are only partially surrogacy-related. If, for example, a surrogate charges her entire family's grocery bill to an intended parent's pre-paid Visa, she would be getting compensated for non-surrogacy-related expenses. In order to maintain an altruistic system, surrogates would need to re-pay any such overpayment. However, requiring re-payment could result in financial hardship for surrogates. Accordingly, if laws are to be reformed to permit pre-payment, it is important to establish safeguards against overpayment. None of my participants addressed overpayment or explained how they adjusted for it if it occurred.

Consultants' gift-giving also stemmed from a desire to support surrogates and recognize their important role. Some of the gifts were surrogacy-related and could have been permissible as reimbursements (for example, pregnancy tests or foods to satisfy specific cravings), though not as gifts since that could be equivalent to pre-payment. Furthermore, none of the gifts reported in my study were particularly lavish or expensive. It did not appear as though any of the reported gifts were an attempt at disguising payment. As some participants note, a blanket prohibition on gifts can lead to illogical consequences such as the an inability to give a surrogate a modest

⁵⁸⁸ *Ibid* at 168.

birthday gift or holiday present, or the inability to give a surrogate a pregnancy test. Accordingly, a strict interpretation of the law is not reflective of the lived reality of these relationships.

Irrespective of my participants' good intentions in contravening the law, intended parents may be particularly harmed by consultants' misconduct in reimbursement management. Neither the plain wording of the legislation nor any of Health Canada's documents suggest that intended parents will be absolved of liability for paying surrogates merely because they delegate the reimbursement management to a consultancy. Accordingly, intended parents may be liable for paying surrogates even if the reimbursements are managed by a third party. This makes transparency and legal compliance in reimbursement management incredibly important. Even though the law is not enforced, intended parents may feel considerable stress if they believe they are complicit in illegal activity.

Part II: Paying Consultants

Stakeholders, scholars, and policymakers have expressed significant concerns about paying surrogacy intermediaries.⁵⁸⁹ In particular, many have worried that creating a commercialized industry around surrogacy could exploit, commodify, objectify, dehumanize and commercialize women and children in a manner that undermines their basic human dignity.⁵⁹⁰ Commercialization is a form of social harm, in that it is thought to be injurious to society at large.⁵⁹¹ Social harm can influence economic, cultural, legal and institutional structures,

⁵⁸⁹ Gruben, *Surrogacy in Canada*, *supra* note 10 at 278; *Proceed with Care*, *supra* note 8; Berkhout, *supra* note 553; Stephen Wilkinson, "The exploitation argument against commercial surrogacy" (2003) 17:2 *Bioethics* 169.

⁵⁹⁰ These terms are defined in Chapters 1 and 2. Gruben, *Surrogacy in Canada*, *supra* note 10 at 278; *Proceed with Care*, *supra* note 8; Berkhout, *supra* note 553; Wilkinson, *supra* note 589.

⁵⁹¹ See Chapter 2 for further discussion.

producing widespread disadvantage and reinforcing social hierarchies for entire groups of people.⁵⁹² Commercializing women's bodies, for example, is thought to devalue the uniqueness of life by positioning women as commodities that can be bought and sold.⁵⁹³ Commodifying female bodies can in turn reinforce patriarchal structures by focusing on women's reproductive capacity instead of their abilities and rights, and perpetuate gender inequalities by allowing others to profit from their reproductive labour.⁵⁹⁴

Concerns over commercialization profoundly shaped the AHRA. Indeed, the AHRA contains an explicitly-stated principle that "trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition".⁵⁹⁵ In furtherance of this principle against commercialization, the AHRA prohibits intermediaries from accepting payment for arranging surrogacies.⁵⁹⁶ It also prohibits intended parents from paying intermediaries for their surrogacy arranging services.⁵⁹⁷

Despite this prohibition, it is clear that surrogacy consultants are charging intended parents for their services. Various individuals have raised concerns about the amounts that surrogacy consultancies are charging,⁵⁹⁸ and the perception that surrogacy is emerging as an

⁵⁹² Todd, *supra* note 345.

⁵⁹³ Martha C Nussbaum, "Objectification" (1995) 24:4 *Philosophy & Public Affairs* 249; Catherine A MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge, Mass: Harvard University Press, 2006).

⁵⁹⁴ Olumide Joshua Oki, "Commodification of the Female Body: A Feminist Reading of Ruth Chukwudebe's *Heavenly Modella*" (2025) 18:1 *African Journal of Humanities & Contemporary Education Research* 47; Martha C Nussbaum, "Objectification" (1995) 24:4 *Philosophy & Public Affairs* 249; Catherine A MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge, Mass: Harvard University Press, 2006).

⁵⁹⁵ AHRA *supra* note 4, s2(f).

⁵⁹⁶ AHRA *supra* note 4, s 6(2).

⁵⁹⁷ AHRA *supra* note 4, s 6(3).

⁵⁹⁸ Stefanie Carsley interviewed Canadian intended parents, and found that many of her participants were upset about the fees that agencies charged. Some of the intended parents felt the agencies exploited their desperation to be parents by charging exorbitant fees. Others felt that the amounts charged were disproportionate to the service received: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78-84.

economic industry.⁵⁹⁹ Some scholars further worry that consultancies are taking economic advantage of intended parents' anxieties,⁶⁰⁰ and profiting off of surrogates' labor, despite the fact that the surrogates themselves are not profiting.⁶⁰¹ Other intended parents have voiced that consultancy fees are disproportionate to the services provided.⁶⁰²

To engage with these concerns, I asked each of my participants: “how much do you charge intended parents for your services?” Notably, at the outset of each interview, I had advised all participants that they could skip any questions I asked for any reason. Two out of eight participants decided to skip this question, though they still provided information on their payment structures.⁶⁰³ I did not require my participants to provide any justifications for why they wanted to skip any question. However, I suspect their reluctance here may have been due to concerns over the legality of charging fees, and/or due to concerns over how the amounts would be perceived.

In addition to the consultancy costs, themselves, my participants' answers also revealed important information about the legality of their financial activities, and how my participants may be structuring their practices around their understandings of the law in order to justify the legality of their services to themselves and to others. I explore these ideas at length in Chapter 6. Here, I lay the groundwork for what my participants are charging, what their fee structures look like, and what this payment is going towards. I also examine how my participants perceive and justify their fees.

⁵⁹⁹ See: Nelson, *supra* note 6 at 334; Karen Gilchrist, “The Commercial Surrogacy Industry Is Booming as Demand for Babies Rises” (7 Mar 2023), *CNBC*, online: *CNBC* <https://www.cbc.com/2023/03/07/womb-for-rent-more-women-are-working-in-commercial-surrogacy-industry.html>> (accessed 23 Sept 2025).

⁶⁰⁰ Nelson, *supra* note 6 at 334.

⁶⁰¹ Wilkinson, *supra* note 589.

⁶⁰² Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 81-84.

⁶⁰³ Apart from the payment question, only one other question was skipped – one participant elected not to share how long she had been working at her current consultancy because she worried that this information would be identifying.

a) Consultancy Fees

Some of my participants' consultancies offered various types of programs. Where this was the case, I chose to look at their basic surrogacy program when deducing the figures below. In other words, I excluded figures provided for programs that combined egg donation with surrogacy; programs for intended parents who were bringing in an already-matched surrogate; programs specifically tailored for sibling journeys; and, programs that were for managing reimbursements only. The latter three programs were less expensive than the basic surrogacy programs, whereas the combined egg donation programs were more expensive.

Overall, the lowest fee cited for a basic surrogacy program was \$8,500 CAD, and the highest fee cited was \$20,000 CAD. The average amount was \$15,100 CAD, and the median amount was \$16,050 CAD. These figures are based on data from the six out of eight participants who agreed to answer this question. Notably, my participants' responses varied regarding whether the amounts cited were inclusive or exclusive of taxes, and several did not specify. These figures did not include additional amounts that would need to be paid to lawyers, counsellors, and/or clinics. These figures also excluded the reimbursements that would be made to surrogates. In all instances, these amounts were paid by the intended parents, alone.

I did not include a question in my interview guide regarding the availability of refunds. However, several participants mentioned that partial refunds would be offered if an intended parent withdrew from their program, or if a surrogate could not go through with the surrogacy contract (for example, if she did not pass medical screening). In these conversations, no exact refund amounts or percentages were provided. Only one participant shared a loose method for how she would calculate reimbursements:

Gwen: there's a clause in our contract that says it is refundable, and we don't have a specific amount set in that clause, because it depends on the situations. And like we've had IPs signed on that are signed on with multiple different companies, and they've matched within like a week with a different one – like within a week of signing on with us, and we hadn't done anything for their file yet. So we give them a full refund cause we're like, we haven't put any money in yet. Whereas we had another couple, the signed on with us, we had ads running for them the whole time, for a year and a half we were trying to get a hold of them and they were ghosting us. We had surrogates who were like 'well who's been with you the longest?' and we're like 'oh these ones!' and we were trying to get a hold of them because we knew they were signed on with another agency as well, and we would try to get a hold of them, and they were completely ghosting us, like not responding at all, and then they came back and they're like 'oh we're not happy with your services, can we get a refund?'. And we're like 'yeah, you know what, we'll refund like half', because we put so much money out in ads and stuff that were specifically for them, right? They weren't general ads or anything.

Gwen's refund amounts varied based on how many expenses her consultancy incurred up until the point of the intended parents' withdrawal. She believed this formula could generate fairer, situationally-specific outcomes for both the consultancy and the intended parents.

Overall, there was significant variation amongst my participants with respect to fee structures and timing of payment. Only one participant asked for the entire sum upfront. Two out of eight participants required the entire sum to be paid after a match was made. Most of my participants (five out of eight) required different portions of the payment to be made at various points in the surrogacy journey. For example, some required a portion of the payment to be made upfront, with the remainder to be paid upon matching. Others required a portion upfront, with the remainder to be paid once a matched surrogate passed medical screening. Another fee structure entailed receiving payment after specific milestones, such as matching, contract signing, and successful screening. Several participants explained that they timed their fee collection so as to avoid the perception that they were paid for matching – I will expand on this theme in Chapter 6.

While I did not directly ask my participants what services their fees covered, several of my participants characterized these fees as paying for advertising,⁶⁰⁴ administration, profile creation, screening, ongoing services, reimbursement management, coordination, taxes, and/or support. These fees were never characterized as going toward matching services. Notably, although my participants reported providing varying levels of support for their clients based on individual need,⁶⁰⁵ none of my participants reported fee structures on a corresponding sliding scale.

I did not ask my participants about their take-home salaries, nor about the salaries of their staff. I also did not directly ask any of my participants whether they felt that they received adequate compensation. As such, my project did not generate vast quantities of data on consultants' opinions on their compensation. However, some participants did share that they did not make much profit from their consultancy businesses. Amy said: "half [of the amount we charge] goes to tax, unfortunately. The other half is pretty much eaten up by advertising. So I am kind of non-profit ... We use a lot of [my family's income from another source] to pay for things like the care packages and ongoing support". Amy did not feel that she was making an exorbitant amount off of her consultancy business. In passing, Aja also mentioned that she does her work for "so little money". Multiple participants felt their work permeated most aspects of their life, particularly those working at smaller consultancies. More than one participant said she worked "24/7". Together, these quotes suggest that at least some consultants do not perceive themselves as being overpaid for the work that they are doing, particularly given the all-encompassing nature of occupation.

⁶⁰⁴ For a discussion of the legality of advertising consultancy services, please see Chapter 6.

⁶⁰⁵ See Chapter 4.

Though none of my participants shared beliefs that their fees were excessive, some of my participants felt that consultancy costs could be difficult to justify to others. Aja said:

Aja: I'm sure you've heard – there's been a lot of negative, um, reference to agencies. 'Oh agencies take people's money, and they match you, whoop-dee-doo, and they have this huge amount' ... I still see in like the one group I occasionally frequent, and it's like, you know 'oh agencies suck', 'you should go independent', 'you should do this', 'you don't need to pay an agency', 'agencies don't do anything anyways' ... but I think it's because they're not well educated [about what we do].

Aja was disheartened by the negative perceptions of consultancy costs, but believed these perceptions stemmed from a misunderstanding of what consultancies really contributed. Roxana shared that one of the biggest challenges of her job was helping intended parents understand the value of what they are paying for.

Roxana: For IPs, I think [the challenge] is the understanding of the value. Uh, we have a very large support team, and they do not work for free, and they should never work for free. Nobody should ever work for free. But they are experts in the industry, in an industry that is not – you can't go to school for this. You can't go to school to be a surrogate support person. You can't go to school to be an IP support person. Uh we have people on our team that have expertise. And you can't teach character. And you can't teach integrity. Those are things that our team has. And they will treat you with the ultimate respect because of the way they're built. So understand – I think understanding that bottom line value.

Roxana's quote demonstrates her belief that she and her team are providing a valuable service, and that they deserve to be paid for their work. Undoubtedly, in order for individuals to provide this service, they need to be paid for their work in some way. Roxana further stated that:

Roxana: You pay your mortgage broker uh to write your mortgage. You pay your insurance broker to write your insurance. Uh, those are experts in the field. They have been doing it. They've been involved. Uh, you know, the clinic, they get paid. The clinics get paid. The doctors get paid. IVF is very expensive, so that's often where the bulk of the fees go. Uh, lawyers are paid to do all of their work. Um, creating the documents and making sure the agreements are legal. They are the experts. Um, counsellors are paid. They are the experts. So being

an expert in facilitating relationships and making sure that there's no gaps, and making sure the paper work's done appropriately, making sure the surrogate does meet your clinic's requirements, um, all of those things are things that we offer as experts. So I do think consultancies should be paid for their services. And not minimum wage because you know, we're offering more than a minimum wage service.

Roxana described herself as an expert in facilitating relationships. Like other experts, she believed her services were valuable and ought to be compensated with a living wage.

b) Discussion

Consultancy services can be costly. My participants' reported fees (between \$8,500 CAD to \$20,000 CAD for their basic surrogacy programs) are generally in line with other reports of consultancy costs.⁶⁰⁶ Interestingly, my consultants' fees were similar to what regulated, non-profit, private adoption agencies charge in Ontario (with adoption agency fees ranging between \$15,000-\$30,000).⁶⁰⁷ While surrogacy and adoption are not perfectly analogous comparators, many of the services provided by private adoption agencies are similar to those provided by surrogacy consultancies, including assistance with matching and coordination.⁶⁰⁸ Both also operate within an otherwise-altruistic sector.⁶⁰⁹ I do not have enough information to argue persuasively whether adoption agency fees are justified or not. However, I believe it is notable that surrogacy consultancy fees are similar to what is charged in a sector that is highly regulated. Private adoption agencies are legally required to operate as non-profit organizations, and can

⁶⁰⁶ Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78-80: Carsley's interview data suggests that some consultancies charge upwards of \$30,000 CAD, however it is not specified whether these upper-end figures were for basic surrogacy programs.

⁶⁰⁷ Ontario Ministry of Children, Community and Social Services, "Private Domestic Adoptions" (Web Page), online: *Government of Ontario* <<https://www.ontario.ca/page/private-domestic-adoption>> (Accessed 24 Sept 2025).

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Section 240 of the *Child, Youth and Family Services Act* provides that payment for adoption is illegal, and section 241 creates a penalty for adoption agencies if they authorize or permit someone to pay for adopting a child: *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1 [CYFSA].

only charge for certain expenses that are listed in the regulations.⁶¹⁰ This may suggest that adoption agency fees are warranted, or else that the adoption agency regulations are ineffective at curtailing fees.

Despite these similarities, there is a common narrative that surrogacy consultancy fees are excessive and unwarranted.⁶¹¹ Indeed, several of my participants recognized that some intended parents found consultants' fees to be disproportionate to the services they provided.⁶¹² My data provides some insight into how these fees are being used. My participants broadly suggested that fees covered taxes, advertising, and overhead costs associated with providing services like around-the-clock support. Without more detailed accounting information, it is difficult to state whether these purported business costs justify the amounts that are charged to intended parents. However, it is notable that a few participants were adamant that they were not making much personal profit. One participant voiced that she provided a valuable service that deserved justified compensation. While I do not generalize these comments and conclusions to all consultancies, this data nevertheless provides a new perspective regarding the conversation around consultancy costs.

Irrespective of my participants' own experiences and perceptions, the reported sums can undoubtedly compound intended parents' financial vulnerability given the already expensive costs of IVF, legal fees, and surrogacy reimbursements.⁶¹³ As consultancies may mediate access to surrogates, some intended parents may feel compelled to pay more than they believe the services are worth in order to pursue parenthood. For other intended parents, these fees may be

⁶¹⁰ *O Reg 200/99, General (under Child, Youth and Family Services Act)*, s 6 [O Reg 200/99].

⁶¹¹ Some intended parents in Stefanie Carsley's research expressed this: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78-84.

⁶¹² *Ibid.*

⁶¹³ Intended parents in Stefanie Carsley's interviews found that consultancy fees exploited intending parents' desperation to create a family, and that these fees were not commensurate with the services they received: Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78-84.

completely cost-prohibitive, thereby curtailing their ability to access consultancy services. Accessibility can be important for promoting family building through surrogacy, as some intended parents may struggle to match or coordinate surrogacy services without the assistance of an intermediary.⁶¹⁴ At the same time, the continued availability of these services depends on some form of compensation for service providers. This creates a tension that is difficult to resolve without government funding, which I discuss further in Chapter 6.

My data is not well-suited to speak to theoretical concerns about how paying surrogacy consultants may be commercializing, commodifying, objectifying, or dehumanizing women and children.⁶¹⁵ Social harm is inherently difficult to substantiate using empirical evidence, as deep and subconscious shifts in collective perception are difficult to assess, quantify and qualify. At its core, commercialization is a moral claim, not an empirical claim. As such, my data can neither confirm nor deny whether women are in fact being commodified and de-humanized as a result of consultants being paid. However, as one participant notes, many other professionals, like doctors and lawyers, are paid to facilitate surrogacy using their own expertise. Therefore, surrogacy is already part of a larger, profit-based, fertility industry, despite the fact that surrogates themselves cannot be paid. This suggests that there are circumstances where it is currently legally acceptable to pay for assistance in surrogacy without necessarily undermining the altruistic nature of the surrogacy arrangement itself.

⁶¹⁴ Some intended parents have reported benefitting from these services: Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76-78. See also: Motluk, “We should regulate agencies”, *supra* note 2.

⁶¹⁵ These terms are defined in Chapters 1 and 2. See: Gruben, *Surrogacy in Canada*, *supra* note 10 at 278; *Proceed with Care*, *supra* note 8; Berkhout, *supra* note 553; Wilkinson, *supra* note 589.

Conclusion

This Chapter offers new insight into how Canadian surrogacy consultants handle money, both in managing reimbursements between surrogates and intended parents, and in charging intended parents for consultancy services. In particular, my data highlights how consultants understand and apply the Reimbursement Regulations, and how they perceive and justify their fees.

With respect to reimbursement management, the majority of my participants reported following the law carefully and trying to be transparent with clients. Nevertheless, my data revealed some first-hand accounts of consultants contravening the letter of the law through pre-paying surrogates and giving them gifts. My data also revealed a second-hand account of a consultant offering surrogates flat fees. This lends support to allegations in the literature that some consultancies are not reimbursing surrogates in accordance with the law.⁶¹⁶ It also provides new perspectives on *why* some consultants may be breaking the law, as the reported contraventions largely stemmed from a desire to protect surrogates from financial and/or procedural hardship. These explanations suggest that processes required by the Reimbursement Regulations may be burdensome for surrogates in practice. In nearly all of my interviews, my participants were quite protective of surrogates' right to be reimbursed for surrogacy-related expenditures, and desired to protect them from any financial hardship or inconvenience that could result from undertaking a surrogacy journey.

⁶¹⁶ Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; Motluk, "First Prosecution", *supra* note 124; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 94-99.

Consultancy fees reported in my study were in line with those reported by other sources,⁶¹⁷ as well as with fees that are being charged by regulated, non-profit, private adoption agencies in Ontario. My data sheds light on surrogacy consultants' perspectives on these amounts. Multiple participants suggested that the bulk of their fees covered advertising and overhead costs associated with the provision of valuable services, as opposed to personal salaries. Some participants highlighted that they did not generate significant profit from their work, with one participant likening her consultancy to a non-profit organization.

Irrespective of whether consultants believe their fees are justified, intended parents may be legally and financially vulnerable in the financial interactions covered by this Chapter. Since consultancies can control access to surrogates, intended parents may feel obligated to pay fees they perceive as excessive in order to pursue parenthood. Others might not be able to afford consultancy assistance at all, which may hinder their ability to use surrogacy as a pathway to parenthood. Intended parents are also exposed to legal risk when they pay consultants for arranging a surrogacies,⁶¹⁸ and when consultants engage in reimbursement practices that violate the law.

⁶¹⁷ Motluk, "We should regulate agencies", *supra* note 2; Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 78-80.

⁶¹⁸ It is illegal for intended parents to pay consultants to match them with a surrogate: AHRA *supra* note 4, s 6. I will expand on this in Chapter 6.

CHAPTER 6: THE LAW

Introduction

This Chapter explores how my participants understand section 6(2) of the AHRA, and whether their reported behaviours are in line with the law’s wording and intent. It also explores consultants’ thoughts on reforming the laws relating to paid surrogacy arrangements. With some exception,⁶¹⁹ many scholars, reporters, and stakeholders are of the opinion that consultants are operating in contravention of the law.⁶²⁰ Many have called for enhanced legal oversight and regulation in order to address perceived issues with the current scheme.⁶²¹ In analyzing my interviews, I seek to understand whether my participants believe they are breaking the law, and what proposals they have for reform, if any.

This Chapter is divided into four parts. In Part I, I examine how my participants understand and work around the prohibition against paid intermediaries.⁶²² In Part II, I examine how my participants understand and work around the prohibition against advertising paid intermediary services.⁶²³ In Part III, I examine how the government’s failure to enforce the AHRA may be impacting my participants’ understanding and compliance with the law. Finally, in Part IV, I examine the law reform suggestions made by my participants, and make my own

⁶¹⁹ Maneesha Deckha states that the AHRA “does not prevent third parties from brokering — on a for-profit basis — altruistic surrogacy connections as long as this facilitation does not qualify as “arranging”. Thus far, this term is unspecified either by statute or case law”: Deckha, *supra* note 6 at 69.

⁶²⁰ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 66-68; Motluk, “First Prosecution”, *supra* note 124; Sophia Fantus, “A Report on the Supports and Barriers of Surrogacy in Canada” (2020) 42:6 *Journal of Obstetrics and Gynaecology Canada* 803 at 804.

⁶²¹ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 99-103; Nelson, *supra* note 6 at 334; Motluk, “Waiting Room”, *supra* note 133; Motluk, “We should regulate agencies”, *supra* note 2.

⁶²² AHRA *supra* note 4, s 6(2).

⁶²³ *Ibid.*

suggestions regarding what law reform may be helpful based on by my cumulative findings throughout this dissertation.

In summary, this Chapter provides first-hand accounts of the strategies that surrogacy consultants are using to work around the wording of section 6(2) of the AHRA. Many participants described narrowly interpreting terms like “matching”, delaying payments until after a match is made, and characterizing payment as being for auxiliary services like coordination and support. My participants used these strategies to justify their compliance with the law. Some participants actively corresponded with Health Canada about their consultancies’ business activities, and used these interactions to bolster their position that they were abiding by the law. Others expressed some ambivalence towards the law due to its lack of enforcement. These findings contribute to the existing literature by providing empirical insight into how consultants interpret, navigate, and justify their positions within a largely unenforced legal scheme.

Cumulatively, my data suggests that the current legal framework is not effectively curtailing the activities it seeks to prohibit. However, despite identifying gaps and inconsistencies in compliance, I do not recommend stricter enforcement of the current regime. Rather, I argue that a legal scheme that legalizes, licenses and regulates consultancies would more effectively mitigate the risks associated with consultancy practices while preserving the benefits that intermediaries can offer. Regulating and licensing consultancies could promote accountability, clarity, and best practices, while still ensuring that surrogates and intended parents can access support in surrogacy if they so desire.

Part I: Arranging

Section 6(2) of the AHRA does not allow intermediaries to “accept consideration for arranging for the services of a surrogate mother, [or] offer to make such an arrangement for consideration”.⁶²⁴ However, an exhaustive definition of what it means to “arrange” is not provided in the AHRA nor in any accompanying regulations. It is clear that, at the very least, paid matching is prohibited.⁶²⁵ Accordingly, many scholars and stakeholders believe consultants are breaking the law by virtue of providing their services.⁶²⁶ As part of my interviews, I asked my participants a series of law-related questions including “can you tell me a bit about the law and how it impacts your work?” and “some people suggest that what consultancies are doing is inconsistent with the AHRA - what would you respond to them?”. My participants’ responses provide new insight into how they understand the law, and how they perceive the legality of their operations.

a) Participants’ Understanding of the “Arranging” Prohibition

When discussing Canada’s prohibition on consultancies, nearly every participant correctly expressed that it was illegal to charge money for the act of matching surrogates with intended parents. For example, Amy said: “the government’s made it quite clear, you can’t pay for a match”. Similarly, Sasha said: “it’s illegal to charge for matching in Canada”. Throughout the course of the interview, most participants made this understanding clear, in similar language. Only one participant raised the illegality of matching when discussing the prohibition without

⁶²⁴ AHRA *supra* note 4, s6(2).

⁶²⁵ Government of Canada, “Prohibitions related to surrogacy”, *supra* note 79.

⁶²⁶ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 66-68; Motluk, “First Prosecution”, *supra* note 124; Sophia Fantus, “A Report on the Supports and Barriers of Surrogacy in Canada” (2020) 42:6 *Journal of Obstetrics and Gynaecology Canada* 803 at 804.

explicitly qualifying that it was only *paid* matching that was prohibited. Emily said: “in Canada we can’t provide matching services”. It is unclear whether she misunderstood the content of the prohibition, or if she assumed the payment aspect was implied in her statement. Overall, my participants’ answers implied that *only* the activity of paid matching was captured under the intermediary prohibition.

While my participants all expressed that they could not be paid to match, they had different interpretations of what “matching” meant. Some of my participants took an exceedingly narrow reading of the term. Take the following interaction with Roxana:

Alicia: some people suggest that um, consultancies are acting as paid intermediaries that are against the AHRA, um, so what would you respond to them?

Roxana: we don’t, like we’re not facilitating a match, per se. Like, it’s all, choosing. It’s all autonomous. Um, we’re not saying that you only can work with this person, or you can only work with that person.

Roxana’s answer once again demonstrates her belief that the prohibitions relating to consultants apply only to matching services. Interestingly, Roxana’s answer also provides some context regarding what she believes the term “matching” means. Based on the foregoing quote, Roxana believes that “matching” entails pairing one specific surrogate with one specific set of intended parents. This understanding is reinforced by a quote from earlier in her interview. When I asked Roxana to “tell me a bit more about the matching with the IPs and surrogates”, she immediately qualified that “matching for our service is actually not the best word to use for it because um, we don’t match. We don’t do this, ‘oh you’re going to work with this person’. ... So it’s very much, um, not a matching process. Like, match is not the right, definitive word to use. So – because everybody gets to choose”. There is a clear nervousness around use of the term “matching”. This is understandable, given that the term is couched in illegality. However, this quote again suggests

that Roxana believes that she is not participating in matching because her consultancy allows surrogates and intended parents to pick one another, even though her consultancy is providing a medium via which these individuals can find one another.

Roxana was not the only participant to express such a narrow understanding of the term “matching”. Amy said:

Amy: Yeah, so, cause the legislation states that we’re not supposed to arrange a match. Um, so I literally take that to the law that I don’t arrange it. I send all the profiles to everyone, so everyone had equal access. I don’t give one profile to five couples and say you guys have 20 minutes to decide. You know, none of this stuff is going on.

Amy’s interpretation suggests that merely acting as a conduit via which surrogates and intended parents can connect is not sufficient to entail “matching”.

Not all of my participants subscribed to this view. The majority of my participants did indeed believe that they participated in matching. However, they qualified that they did not participate in *paid* matching, which is why they viewed their services as legal. I expand on this idea, below.

b) Participants’ Self-Perceived Legality

Most of my participants were adamant that they operated legally because they were not paid for matching.⁶²⁷ This assertion was made despite the fact that consultancies were paid and provided a medium via which intended parents and surrogates could connect. For example, Kerigan said: “we don’t get paid for matching, so I feel, I feel, you know fine about that”. The majority of participants did not acknowledge any broader definitions of what arranging might

⁶²⁷ As explained, above, my participants generally expressed that the ban on paid intermediaries only prohibits paid matching.

mean.⁶²⁸ Only a few consultants voiced apprehensions about their consultancy's status under the law. These participants generally expressed that they were operating in a legal "grey zone", suggesting an awareness that there is no legal definition of what it means to arrange, and that perhaps consultants' legality is more ambiguous than other consultants wanted to admit.

I identified three primary justifications for why my participants believed they were not being paid for matching: adopting a narrow definition of matching; only receiving payment after a match was made (*ie*, after the surrogate and intended parent decide to move forward in the surrogacy journey together, but before the contract process begins); or, characterizing payment as being for services other than matching, such as support. I will elaborate on each method, in turn. Notably, many of my participants relied on more than one of the aforementioned justifications. So, for example, only receiving payment after matching, as well as characterizing the payment as being for support services.

The first justification entailed adopting a very narrow interpretation of "matching". As I discussed in Subsection A, above, several of my participants suggested that matching entailed picking one specific surrogate to work with a specific set of intended parents. This implied that other matching-related activities, such as sharing profiles with intended parents and/or surrogates, did not constitute matching according to their interpretation. Adopting this narrow definition allowed my participants to justify that they were not engaging in paid matching, and therefore that their consultancy activities were legal according to their understanding of the law.

The second justification entailed accepting payment only once a match had been made. This reasoning is well illustrated in the following interaction with Lizy:⁶²⁹

⁶²⁸ In other words, they believed the prohibition only pertained to paid matching.

⁶²⁹ Unique pseudonyms are used whenever I discuss payment, as payment structures are sometimes publicly known.

Alicia: But so, as long as, in your opinion, your consultancy is getting payment after the match is made, you feel confident in saying you're not participating in any matching?

Lizy: Uh, we are participating in matching. We are participating in matching. We are not participating in *paid* matching.

Lizy believed that, because her consultancy helped connect surrogates with intended parents, she was participating in matching. However, she correctly qualified that this, in and of itself, was not illegal. Rather, it was the payment associated with the matching that was forbidden. Lizy's consultancy was not paid until after a match was made. Therefore, she believed her consultancy's services were legal based on her interpretation of the law. Debbie offered similar reasoning:

Alicia: The law in the AHRA that talks about um, paid intermediaries, um, is that creating any barriers for you at all, or?

Debbie: I would say more with language. It, like, because we're not charging our fee until they're already done all the other pieces in the front. So our fee really goes into place for ongoing services ... So we feel very confident that we're following the laws appropriately, and if we ever run into a question, we're always going back to our lawyers. Cause I love everybody, but I am not prepared to get into trouble for anybody.

.... that's why we've really leaned away from charging at the front. Because we felt that it wasn't within the law. Like it just felt like it was too grey for us. It makes it difficult because we are doing quite a bit of work in the front, and we've had people walk away, and I think, so I just paid my staff for all those hours they put in to that for that IP, and it's out of my pocket. So, I really do struggle on that side.

Debbie's quote reveals multiple interesting details. First, Debbie believed that receiving payment up front was legally risky. Because she received payment only after a match was made, and because she characterized this payment as being for "ongoing services", she felt safe in her position of legality. She implied that her lawyers feel similarly. For Debbie, her circumvention gave rise to other issues. More specifically, she shared that delaying payment without even

receiving a deposit exposed her to financial vulnerability, as she could invest significant time and money into helping certain intended parents without ever being compensated for her work.

Debbie's quote also illustrates the third justification my participants used to validate the legality of their services – characterizing payments as being for services other than matching. Debbie said that she was paid for ongoing support. Throughout my interviews, participants described payment as being for support, profile creation, screening, reimbursement management, coordination, advertising profiles, administration, and/or ongoing services. As another example, Sarah also described her fees as being for support: “We aren't charging anybody for matching, right? So we are um, we're there as like – we're being basically hired as a support. Basically. Throughout the thing. So it's, I think the big thing that people are focused on is that you're not getting paid for matching”. Sarah's justification hinged on her understanding that paid matching was the only legally objectionable activity covered by the prohibition of paid intermediaries. If *only* paid matching was prohibited, providing other paid services (such as assisting with conflict management, coordinating clinical and legal services, and/or managing the surrogates' reimbursements) would be permissible. In other words, on this interpretation, while consultants could not be paid to match, they could be paid for their other surrogacy-related services.⁶³⁰

A few of my participants questioned the legal validity of framing payments as being for services unrelated to matching. For example, while Aja believed the law was unclear, she also felt that interpreting the ban solely as prohibiting paid matching was effectively sidestepping the law:

Alicia: Some people are even suggesting that, ah, you know, being a paid intermediary is inconsistent with the criminal law. So what would you respond to those people?

⁶³⁰ Notably, I am not claiming that this interpretation is legally correct. Rather, I am merely reporting that this reasoning frequently arose throughout my interviews.

Aja: I think that they're probably not wrong. Um, because I think that the law is not really very clear in terms of agency roles. And I think they just skirted around it by saying we can't charge money for matching. Right? So the law is just about what you can and can't do. So of course, that's why we don't match. ... But, I think right now, agencies are just skirting around the wording of the law in order to operate.

Amy was particularly skeptical when the alleged paid service was general support:

Amy: The agencies are all operating differently. So some are: everyone can join and the surrogate picks and then those people will match. But they don't say you're paying for a match, they're saying you're paying for services of us supporting you. Um, I mean, the service of support, what is that? To me it's all fluff, because really it's the relationship between the surrogate and the couple.

Amy's quote suggests that consultancy assistance is really about creating relationships between surrogates and intended parents – in other words, matching. Justifications that ignore this fact are essentially “fluff” to Amy.

Sasha was also frustrated with how some consultancies were characterizing their fees as being for non-matching services, when they in fact seemed to be for matching:

Sasha: we make it clear that matching is not part of our fees. Just like, one of the most common questions we get asked is ‘what is your re-match fee?’ And I'm like, ‘matching isn't part of our fees, why would we have a re-match fee?’ And they're like, ‘oh, well we talked to this agency or consultancy and they – they charge this much, but they say it's an administration fee’. *Sighs* No, no, no. I'm like, we're not going to find a loophole and say it's an administration fee. I'm like, matching isn't – charging for a match is illegal. We don't charge for a match. We're not going to say it's an administration fee just to charge for rematching. I'm like no. Whether you need one surrogate or 30 surrogates, our fees are all-inclusive for your entire journey. Like we see it until you get your baby. Like, there's not added fees for that. Like it's illegal to charge for matching. We don't charge for matching. That's not part of our fees. And we make sure that that's clear. So when people ask us about that, we say that's not technically part of our fees.

Sasha did not believe that characterizing re-match fees as administrative fees was lawful. Her anecdote demonstrates how the law is merely causing consultants to change their wording and labels, as opposed to substantively changing their behaviours.

c) Discussion

I believe that my participants are engaging in matching. In Chapter 3, I discussed the various ways that my participants facilitated matching. In general, consultancies were vehicles for surrogates and intended parents to exchange profiles and meet one another. Although “matching” is not explicitly defined by any official source, these reported activities likely constitute matching based on my plain language understanding of the term. I do not find my participants’ narrow interpretation of the term “matching” (ie., requiring consultants to pick one specific surrogate to work with one specific intended parent) to be persuasive. I was surprised to hear more than one participant rely on such a restrictive reading. There is no support for such a narrow interpretation of the term “matching” in any of the applicable legislation, scholarly literature, or guidance from Health Canada.⁶³¹ Therefore, I believe that accepting payment for the reported matching assistance would be illegal according to section 6(2) of the AHRA.

It is possible that the perception of whether or not these services are paid, and therefore prohibited, could be impacted by the timing of payment. However, I believe the distinction between accepting payment before versus after facilitating matching is largely meaningless. For example, if the law’s purpose is to prevent surrogacy, then delaying payment until after a match does not change the fact that a surrogacy connection has been created. Conversely, if the purpose

⁶³¹ Notably, none of these sources explicitly contradict this narrow interpretation of matching, either. Nevertheless, given the objective behind the law (ie., curtailing the creation of surrogacy relationships to protect surrogates from purported harms), I believe it is unlikely that the legislature would have intended such a narrow application.

is to prevent the commercialization of women and children, then the timing of the payment is irrelevant – what matters is that money is exchanged at all. If a law can be entirely side-stepped by merely deferring payment, that law cannot genuinely promote the objective behind the legal boundary.⁶³²

In terms of my participants' third justification, it is difficult to determine whether it is legal to accept payment for auxiliary services (like coordination and support) in a situation where individuals have already been matched. All of my participants believed that only paid matching was prohibited by section 6(2) of the AHRA – undoubtedly, this understanding incentivized them to characterize their payment as being for non-matching services. The common interpretation that paid “arranging” is equivalent to paid “matching” likely stems from Health Canada’s website.⁶³³ However, the actual text on Health Canada’s reads: “Under the *AHR Act*, it is illegal in Canada: To pay, offer to pay or advertise the payment to a third party to arrange the services of a surrogate mother. This would include paying a surrogacy company that matches infertile couples with surrogate mothers [emphasis added]”.⁶³⁴ The use of the phrase “would include” suggests that that matching may not be the *only* activity covered by the term “arranging”. Rather, matching may simply be the only example Health Canada provides. If Health Canada meant that arranging was equivalent to matching, it could have used much more precise language, such as: “This *means* paying a surrogacy company *for* matching infertile couples with surrogate mothers”.

Equating arranging to matching is also not in line with the legislature’s original intent for section 6(2). The Baird Commission’s original definition for “surrogacy brokers” was broad

⁶³² As I will discuss in Part III, below, I do not necessarily believe the Baird Commission’s objective of curtailing surrogacy should be promoted.

⁶³³ Government of Canada, “Prohibitions related to surrogacy”, supra note 79.

⁶³⁴ *Ibid.*

enough to apply to any person that facilitated a surrogacy arrangement in any way.⁶³⁵ As evidenced by the Proceed with Care Report, a primary objective underlying section 6 of the AHRA was to curtail the practice of surrogacy (whether paid or unpaid) and thereby protect children and surrogates from harms like exploitation and commercialization.⁶³⁶ If the purpose of the legislation is to curtail surrogacy, a broader interpretation of the activities captured under the term “arranging” would better align with this stated objective.⁶³⁷ Of course, it is likely that the government no longer seeks to entirely curtail surrogacy. Many years have passed since the AHRA was enacted, and attitudes towards surrogacy have generally become more positive.⁶³⁸ This may explain why the law is not being enforced as originally intended. Nevertheless, rather than ignoring the original intention of the law, or indeed, ignoring the law completely, it is better to have laws that actually reflect Canadians’ current interests, values, and needs. I return to this idea in Parts III and IV, below.

At present, it is difficult to provide a precise list of what paid activities fall within the definition of “arranging” a surrogacy, other than matching. If a consultancy were to only provide re-imbusement management services to individuals who were already matched, would this be permissible? Or, if pre-matched individuals only sought assistance with coordination, could a consultancy be legally paid for this activity? Because these questions cannot be definitively

⁶³⁵ *Proceed with Care*, *supra* note 8 at 664. While the Baird Commission’s definition would have included doctors and lawyers, it is now generally accepted that the “arranging” prohibition does not apply to doctors who are paid to facilitate IVF, nor to lawyers who are paid to draft surrogacy agreements, so long as these professionals are not also matching. See: Carsley, Dissertation, *supra* note 105 at 19-20; Government of Canada, “Prohibitions related to surrogacy”, *supra* note 79.

⁶³⁶ *Proceed with Care*, *supra* note 8 at 672-696. Another important purpose was the prevent the commercialization of children. For an extended discussion, see Chapter 1.

⁶³⁷ Notably, curtailing surrogacy is not an objective that I subjectively seek to promote, as I will discuss below.

⁶³⁸ Research Co, “Fertility Canada: Most Canadians Support Surrogacy, IVF and Egg Freezing” (24 January 2024), online: Research Co <<https://researchco.ca/2024/01/24/fertility-canada>> (accessed 25 Sept 2025).

answered, I argue that the legislation and accompanying guidance from Health Canada is not sufficiently clear regarding what consultancy activities are permissible versus not.

Part II: Advertising

Section 6(1) of the AHRA prohibits advertising for paid surrogates and section 6(2) of the AHRA prohibits advertising the arrangement of surrogacies.⁶³⁹ For consultants, this means that the wording of the law forbids them from advertising that they will pay surrogates beyond reasonable reimbursement, and prohibits them from advertising their arranging services.

Similar to the reasoning behind the prohibition against paid arrangement, the bans on advertising surrogacy and advertising intermediary services were proposed by the Proceed With Care Report primarily as a tactic to further curtail the practice of surrogacy (especially, paid surrogacy). While the Report does not explicitly state that this is the purpose behind the provisions, it does point to international jurisdictions using advertising prohibitions for this very reason:⁶⁴⁰

The Commission's review showed that the trend internationally has been to discourage and even criminalize commercial preconception arrangements. Outright legislative bans on preconception agreements are rare, but most jurisdictions that have taken a position to prohibit commercial arrangements, primarily by making it illegal to advertise for a gestational woman, to act as a broker or intermediary (even if no commercial motive is involved), or to pay for or accept compensation in any form in connection with a preconception arrangement.

⁶³⁹ AHRA *supra* note 4, s 6. Note that s6(3) also prohibits intended parents from advertising that they would pay for the arrangement of a surrogacy.

⁶⁴⁰ *Proceed with Care*, *supra* note 8 at 669.

On my relational understanding, the AHRA is creating a boundary around advertising with the objective of preventing surrogacy relationships from forming to protect vulnerable surrogates from exploitation.⁶⁴¹ In other words, suppressing advertising is a mechanism to ultimately suppress surrogacy, which is connected back to the Commission's underlying goal of protecting surrogates from purported harms.

Understanding the scope of section 6's advertising prohibition therefore requires a deeper investigation of what it means to "advertise", as the term is not defined in the AHRA.⁶⁴² Unfortunately, there is very little literature discussing the advertising prohibitions specifically in the context of section 6 of the AHRA. Various general definitions of "advertising" are provided in dictionaries, scholarly literature, and Canadian case law, and not all these definitions are perfectly aligned. For example, Gayle Kerr and Jef Richards define advertising as "paid, owned, and earned mediated communication, activated by an identifiable brand and intent on persuading the consumer to make some cognitive, affective or behavioural change, now or in the future".⁶⁴³ According to this definition, a necessary component of advertising is paying for the mediated communication. Under this definition, actions such as sharing information on a consultancy Instagram account or Facebook page would not be captured. Some Canadian caselaw supports this understanding. For example, in *Corel Corp. v. Guardian Insurance Co. of Canada*, Justice Backhouse defined advertising as "any paid form of non personal presentation and promotion of ideas, goods or services by an identified sponsor".⁶⁴⁴ Moreover, Black's Law Dictionary also

⁶⁴¹ See Chapter 1 for an extended discussion of the Baird Commission's goal to protect vulnerable surrogates, as well as a discussion of how empirical research has called into question the true vulnerability of surrogates in the Global North.

⁶⁴² There have also been no cases decided under the AHRA that could provide any clarification.

⁶⁴³ Gayle Kerr & Jef Richards, "Redefining Advertising in Research and Practice" (2021) 40:2 *International Journal of Advertising* 175.

⁶⁴⁴ *Corel Corp v Guardian Insurance Co of Canada*, [2001] OJ No 368, 2001 CarswellOnt 308 (Ont SCJ) at para 18 (emphasis in original).

includes a payment component, defining the verb “advertise” as “buying an advertisement to get new customers or improve relations with the old customers”.⁶⁴⁵

However, not all caselaw includes a requirement for payment. In *Beaumier v Brampton (City)*, Justice Clarke states that “the word ‘advertising’ means *drawing attention to* and is not limited to commercial use. Rather, the meaning of ‘advertising’ is sufficiently flexible and broad to encompass social political and commercial signs”. This broader definition could encompass unpaid activities like social media posts. It could even encompass one-on-one interactions, such as asking a surrogate whether she wants to carry again for another set of intended parents, as this would technically constitute drawing attention to the consultancy service.

Given the many different approaches to defining advertising, I think it is helpful to look towards more analogous legislation, like the *Food and Drugs Act* (FDA).⁶⁴⁶ The FDA and the AHRA both aim to address concerns related to exploitation, power imbalances, and citizens’ overall well-being. In the context of advertising, the FDA is worried about information asymmetry, which occurs when consumers have less knowledge than health product companies, and when consumers may rely on companies’ disclosure to make informed decisions about their health. In surrogacy, similar information asymmetry can exist between consultants (who know a lot about surrogacy) and the surrogates and intended parents (who may be new to the topic). In both contexts, businesses can control what information they share, and when they share it. These businesses may use the extent and timing of disclosure to influence others’ decision-making for the businesses’ benefit, sometimes at the expense of the individuals. The FDA attempts to reduce this imbalance, in part, through its advertising regulations. Accordingly, the FDA’s definition of

⁶⁴⁵ The Law Dictionary, s.v. "Advertise," online: <<https://thelawdictionary.org/advertise/>> (accessed 25 Sept 2025).

⁶⁴⁶ *Food and Drugs Act*, RSC 1985, c F-27, s 1 [FDA].

advertising may serve as a useful reference, given the relevance of the harm that the FDA is trying to mitigate.

The FDA defines advertisement as “any representation by any means whatever for the purpose of promoting directly or indirectly the sale or disposal of any food, drug, cosmetic or device”,⁶⁴⁷ and prohibits any such advertising to the general public.⁶⁴⁸ This definition is quite broad and captures a range of activities. It primarily focuses on the aspect of promotion, regardless of whether such promotion is paid or unpaid. The purpose of adopting such a broad definition is to ensure that all promotional interactions, whether direct or indirect, are subject to legislative safeguards in order to best protect public health and safety.⁶⁴⁹ Unlike for the AHRA’s advertising prohibition, multiple guidance documents exist to assist with interpreting the FDA’s ban.⁶⁵⁰ Health Canada stipulates that each message must be assessed on its own, in its entirety, in order to ascertain whether or not an activity constitutes prohibited advertising.⁶⁵¹ An activity may be promotional if it is presented in a manner that associates it with a specific product; if it is mainly product-focused; and/or if it is aimed at a targeted population.⁶⁵²

⁶⁴⁷ *Ibid*, s 2.

⁶⁴⁸ *Ibid*, s 3.

⁶⁴⁹ Health Canada, *Policy on the Distinction Between Advertising Activities*, online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/regulatory-requirements-advertising/policies-guidance-documents/policy-distinction-between-advertising-activities.html>> (accessed 25 Sept 2025).

⁶⁵⁰ *Ibid*; Advertising Standards Canada, *Consumer Advertising Guidelines for Marketed Health Products (2020)*, online: <<https://adstandards.ca/wp-content/uploads/2020/02/Consumer-Advertising-Guidelines-for-Marketed-Health-Products-2020.pdf>> (accessed 25 Sept 2025); Health Canada, “Stop Illegal Marketing of Drugs and Devices”, online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/marketing-drugs-devices/illegal-marketing/stop.html>> (accessed 25 Sept 2025).

⁶⁵¹ Health Canada, *Policy on the Distinction Between Advertising Activities*, online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/regulatory-requirements-advertising/policies-guidance-documents/policy-distinction-between-advertising-activities.html>> (accessed 25 Sept 2025).

⁶⁵² More factors are listed in the guidance document. See: Health Canada, *Policy on the Distinction Between Advertising Activities*, online: <<https://www.canada.ca/en/health-canada/services/drugs-health-products/regulatory-requirements-advertising/policies-guidance-documents/policy-distinction-between-advertising-activities.html>> (accessed 25 Sept 2025).

If I were to adopt a similar definition for section 6(2) of the AHRA, the ban on advertising would prohibit any activities aimed at the general public for the purpose of promoting arranging services, whether directly or indirectly. Moving forward, this is the definition of advertising that I will use in this thesis. My definition applies to the promotion of paid arranging services, regardless of whether the medium used for promotion is paid or unpaid. However, the promotion must be aimed at the general public. In other words, promotions would need to target general audiences, as do advertisements on social media or on search engines like Google. One-on-one interactions would not be captured. It must also promote the consultancy's arranging services. As such, actions like providing general education about surrogacy would not be captured.

I will use the broader term “recruitment” to refer to activities that are used to attract surrogates or intended parents to a consultancy, regardless of whether these activities meet my definition of advertisement, and regardless of whether these activities would be captured under the AHRA's prohibitions or not. For example, activities like one-on-one conversations would fall under my definition of recruitment, though they would not be captured by my definition of advertising.⁶⁵³

a) Participants' Understanding of the Advertising Prohibition and their Self-Perceived Legality

My interviews did not produce much data regarding my participants' understanding of the advertising prohibition. Most participants did not raise the issue of legality when they discussed their recruitment practices, nor when they were asked about any challenges the law

⁶⁵³ I want to explicitly qualify that this is my own interpretation and my own terminology. As such, this may or may not be in line with the legislature's and Health Canada's understanding of the advertising prohibition in section 6(2).

was posing for them. Out of eight participants, only two raised the prohibition on advertising without prompting. Of those two, one participant's discussion revealed some a potential misconception regarding the relevant advertising laws. When I asked Roxana whether the AHRA's advertising prohibitions were causing her any challenges, she said:

Roxana: Well, we don't advertise for IPs. We are not advertising to facilitate journeys. We're advertising to bring in surrogacy candidates. Like we don't go out and put marketing ads being like 'hey [IPs] come to [Roxana's consultancy]' ... we actually don't market to the IP community at all. So I don't see any challenges with that.

This quote suggests that Roxana believes the AHRA's prohibition on advertising consultancy services would only apply if she marketed to intended parents. She did not elaborate on why advertising consultancy services to attract surrogates would not constitute prohibited advertising.

None of my participants expressed that they were advertising illegally. Several participants did not mention the legal restrictions surrounding advertising whatsoever. As a result, my participants' understandings of the advertising prohibition were less clearly described in my data.

Nevertheless, where my participants did recognize that the law restricted advertising activities, I once again observed attempts to structure advertising practices so as to achieve self-perceived legality. For example, when I asked Kerigan about how her consultancy attracts new clients, she immediately said: "When it comes to surrogates, we work a lot with mom blogs, we work a lot with um, influencers. In Canada it's illegal to advertise. And so we work a lot with word of mouth". Regrettably, I did not ask Kerigan to expand upon her interpretation of permissible versus impermissible recruitment. However, her examples of recruitment activities included mediums that were likely unpaid, and were stemming from sources other than the consultancy (word of mouth, mom blogs, and potentially social media influencers). This suggests

a belief that unpaid and indirect mediums are permissible. In using these recruitment methods rather than direct, paid methods, it seems Kerigan is trying to structure her recruitment activities around her understanding of the law.

Sarah also distinguished her recruitment activities by focusing on their substance and format. Because of this, she did not perceive any challenges arising from the AHRA's prohibitions on advertising.

Alicia: What about the prohibition on advertising for surrogates? Has that caused you any issues, or?

Sarah: No. Um. Because the way that I kind of um, add it is from an educational standpoint, right? I think surrogacy is amazing, obviously, that's why I'm here. And so I kind of send out a bit more information being like, these are the kind of things that we, you know, look for in surrogates at [Sarah's Consultancy]. These are – this is examples of like surrogacy experiences. If you want to learn more we can send you the guide, you can, you know, um. And then we kind of wait for them to come to us. So um. Whenever we do any kind of like, advertisement or education or anything like that, um, everybody has to come to us and give us their phone number before we reach out to anybody.

Sarah framed her recruitment as education, likely to distinguish her recruitment methods from traditional advertising. From Sarah's perspective, educating others about surrogacy, including her consultancy's role in surrogacy, did not infringe the AHRA. Several other participants also framed their recruitment methods as surrogacy education.⁶⁵⁴ This was the most frequently used justification within my interview data.

Roxana talked at length about the challenges that the AHRA's advertising laws were creating for her consultancy:

⁶⁵⁴ For my purposes herein, I define "surrogacy education" as the transmission of knowledge about the general practice of surrogacy in Canada, which can include providing information about the law and how to take steps to initiate the surrogacy process. Surrogacy education can fall under the umbrella of recruitment when it is conducted with the goal of attracting new clients to a specific surrogacy consultancy.

Roxana: It's a challenge. It's a huge challenge to, um, I don't want to use the word recruiting because it's not the right word, but it's very hard to market to uh, the correct demographic, because of the laws around advertising, um, and because of the laws around surrogacy. We did face a challenge where we were like, oh my gosh, how do we reach these people without our ads being censored on Facebook, right? Without them being censored on Instagram or TikTok, whatever platform we were using. So we've had to be very creative with how we word things.

Roxana believed that her ads were being censored on social media platforms due to the provinces' prohibitions on buying and selling organs. However, I believe it is also possible that the censorship could have been due to the specific platform's policies, as well as the AHRA's prohibitions. Roxana's reference to using creative wording in the above quote suggests that she tried to structure her marketing in a way that would allow her to attract clients without being censored by the platform. Notably, being censored did not stop Roxana from marketing. It merely prompted her to try again using new wording.

b) Discussion

Overall, I do not believe that my participants had a strong understanding of the advertising ban. Of the two participants that raised the legality of advertising, one appeared to be confused by what activities were lawful. Most participants did not speak about the advertising prohibition at all. Their general silence leads me to believe that they do not understand this portion of the law; that they are feigning ignorance of the law; or, that they genuinely do not believe they are breaking the law. Given my participants' general sentiment that they were not

engaging in paid arranging, it is possible that they did not believe that the associated prohibition on advertising paid arranging applied to them.⁶⁵⁵

Irrespective of the reasons, my data cumulatively suggests that the advertising laws are not being implemented as intended, which can diminish the efficacy and credibility of the legal scheme. In Chapter 3, I explored how my participants recruited surrogates and intended parents. My participants reported recruiting via social media posts, word of mouth, Google searches that lead to consultancy websites, and paid ads via sites like Facebook, Instagram or Google, blogs, organized retreats and baby fairs. Though no participants acknowledged this, it is evident that some of these reported activities run contrary to the plain wording of the AHRA. For example, paying for Facebook Ads, Instagram Ads or Google Ads in order to advertise paid matching services would be captured under any interpretation of section 6(2).

While some activities clearly constitute advertising, other reported recruitment activities are less straightforward to assess. Questionably legal activities include things like posting on social media about matching services, or creating consultancy websites. These activities would likely be captured under my definition of advertising, which focuses on whether or not an activity promotes matching services to the general public. Other reported recruitment activities, like unpaid endorsement by word-of-mouth from former clients, or providing free public education about the surrogacy process, are unlikely to be captured by my definition. However, education posts could still qualify as advertising if the posts were mainly focused on educating about the consultancy's services in a manner that was meant to promote matching services.

⁶⁵⁵ I do not have any data that explicitly supports this speculated reasoning – in other words, no participant explicitly voiced this. However, it is rational that someone would ignore a prohibition if they held a *bona fide* belief that it did not apply to them.

Part III: Enforcement

The AHRA is largely unenforced. Only one consultant has ever been charged under section 6(2) of the AHRA, and she was not charged with respect to her day-to-day business activities, but rather in conjunction with her involvement in a larger “baby-selling” scandal in the United States.⁶⁵⁶ It is unclear why the RCMP chose not to charge Leia Picard for her day-to-day business. Today, consultancies openly facilitate matching without legal repercussions. Even the most blatant instances of advertising paid matching services have never been persecuted.

This lack of enforcement extends beyond section 6(2). Indeed, all of the AHRA’s surrogacy-related provisions have been woefully unenforced. For example, despite multiple allegations of surrogates being paid,⁶⁵⁷ no charges have been laid apart from that against Leia Picard back in 2013.⁶⁵⁸ Many scholars have criticized this lack of enforcement.⁶⁵⁹ Below, I explore my participants’ view on section 6’s enforcement, and how this may impact their modes of practice.

a) Participants’ Views on Enforcement

Several of my participants recognized that the AHRA was not enforced, and some of their quotes suggested that the lack of enforcement influenced how they interpreted and responded to the law. Ursula stated that: “people have kind of chilled out cause nothing’s happened, no one’s been penalized, no one’s been investigated. It’s kind of – but it is a grey

⁶⁵⁶ *R v Picard*, *supra* note 122; Motluk, “First Prosecution”, *supra* note 124. For an extended discussion, please see Chapter 1. While Picard and CFC were not charged with their day-to-day arranging, they were charged with paying surrogates in contravention to section 6(1) of the AHRA.

⁶⁵⁷ Motluk, “We should regulate agencies”, *supra* note 2; CBC News, “Surrogacy Agencies Face Little Oversight”, *supra* note 252; Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 94-99.

⁶⁵⁸ *R v Picard*, *supra* note 122; Motluk, “First Prosecution”, *supra* note 124.

⁶⁵⁹ Drummond, *supra* note 189; Motluk, “We should regulate agencies”, *supra* note 2.

zone”. Ursula believed that the government’s apathy allowed consultancies to exist in a questionably legal space. Ursula mentioned a “grey zone”, which suggests the lack of enforcement has created confusion with respect to what consultancy activities are permissible versus not. Aja said: “to be honest, the law is a little ridiculous in that, um, who’s mandating it? Who – like – is the CRA going to comb over someone’s – audit their expenses? How does that work? How does anyone even get charged for doing this?”. While Health Canada and the RCMP are responsible for enforcing the legislation, no action is being taken. Aja’s quote suggests that her respect for the law may be lessened by the lacking of enforcement.

Some participants’ beliefs about the lawfulness of their businesses seemed to be reinforced by communications they reported having with Health Canada. When asked how the law impacted her work, Sasha said:

Sasha: well, we have to make sure that everything is within the law, of course, but I guess I’m so on top of it, like, I don’t think about it that much ... when we started this company, I had reached out to Health Canada, so they e-mail me any time there’s any change or proposed changes or anything. So I’m on top of all of that. So, I just, like I say, I know it all, so I just – it’s, I don’t really have to think about it so much anymore.

While I was not privy to the exact words that were exchanged, Sasha’s quote suggests that she was in open communications with Health Canada, and that Health Canada had given her some sort of reassurance about the legality of her services. Kerigan also mentioned reaching out to Health Canada from time to time, in order to receive guidance about specific reimbursement questions. Comments like these suggest that some consultants believe that Health Canada shares their perceptions about the general legality of their operations. At the very least, these comments indicate that Health Canada is aware that these consultants are operating, and that some consultants infer from this that they are operating within the confines of the law.

b) Discussion

Although Health Canada is aware that consultancies are operating for profit, it is clear that section 6(2) of the AHRA is not being enforced. The government's inaction is likely attributable, at least in part, to the RCMP's limited resources and accompanying low prioritization of matching-related crimes.⁶⁶⁰ Inter-departmental inefficiencies between Health Canada and the RCMP may also play a role in the lacking enforcement.⁶⁶¹

Multiple problems may arise when the law is not enforced. First, this may lead to confusion regarding the legislature's intentions, and what activities are actually impermissible.⁶⁶² Second, if laws are broken without repercussions, respect for the rule of law and the overall legal system can be eroded.⁶⁶³ Third, enforcement apathy may be construed as implicit condonation of the allegedly prohibited activity.⁶⁶⁴ Relatedly, lack of enforcement can lead to deliberate lack of compliance.⁶⁶⁵ Finally, lack of enforcement may allow outdated prohibitions to linger despite no longer being in accordance with public opinion. This can all further degrade confidence in the legal system.⁶⁶⁶

My data suggests that a number of the academic concerns outlined above may be manifesting in the context of paid surrogacy arrangement. In particular, some consultants may be experiencing apathy towards the law due to its lack of enforcement. The lack of enforcement

⁶⁶⁰ Motluk, "Waiting Room", *supra* note 133.

⁶⁶¹ *Ibid.*

⁶⁶² J J Spigelman, "The Rule of Law and Enforcement" (2003) 26(1) UNSW LJ 200.

⁶⁶³ "In Our View: An Unenforced Law Is Worse Than No Law at All" (13 September 2022) *The Columbian*, online: <<https://www.columbian.com/news/2022/sep/13/in-our-view-an-unenforced-law-is-worse-than-no-law-at-all/>> (accessed 25 Sept 2025); David H Bayley, "Law Enforcement and the Rule of Law: Is there a Tradeoff?" (2002) 2:1 *Criminology & Public Policy* 133 at 143-44; M B Rodriguez Ferrere, "Animal Welfare Underenforcement as a Rule of Law Problem" (2022) 12(11) *Animals* 1411 at 4.

⁶⁶⁴ Motluk, "Waiting Room", *supra* note 133.

⁶⁶⁵ Bayley, *supra* note 663 at 143-44; Ferrere, *supra* note 663 at 4.

⁶⁶⁶ "In Our View", *supra* note 663.

may also be causing some confusion about which activities are acceptable and which are not. Ultimately, I believe this lack of enforcement has created a space for consultants to knowingly or unknowingly operate in a manner that may be prohibited, without any deterrence.⁶⁶⁷

Despite my aforementioned criticism of the lacking enforcement, I do not think the government should strictly enforce the existing laws – rather, I believe the current law should be reformed. Throughout this thesis, I identified multiple instances where consultancy involvement could help certain surrogates and/or intended parents. In my interviews, I heard about consultants advocating for surrogates in the context of reimbursement management and other surrogacy-related conflicts. Indeed, consultants’ alignment with and protectiveness over surrogates was a recurring theme throughout my research. Many of my participants believed that surrogates and intended parents benefited from their assistance in promoting matches based on aligned expectations, as well as their involvement in reimbursement management, conflict resolution, coordination, education, and general support. When conducted professionally, consultants’ involvement in surrogacy may reduce stress and frustration for some individuals, and may potentially decrease conflicts throughout the surrogacy journey. Other empirical research provides some support for these ideas.⁶⁶⁸

Adopting a broad interpretation of sections 6(2) and 6(3) and strictly enforcing the prohibition would curtail access to support that may benefit some surrogates and intended parents. Accordingly, I believe that the law should be reformed to allow consultants to operate under enhanced government oversight, as this could promote the benefits associated with

⁶⁶⁷ Motluk suggests the lack of enforcement has been perceived as a “gentle green light” for consultancies to operate: Motluk, “Waiting Room”, *supra* note 133; Ferrere, *supra* note 663 at 4.

⁶⁶⁸ Several intended parents in Stefanie Carsley’s study expressed these benefits: Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 76-78. Samantha Yee suggests that consultant involvement in matching may have contributed to the high number of positive experiences seen in her survey: Yee, *supra* note 6 at 6.

intermediaries while simultaneously mitigating against the harms that can result from unregulated activity. Ideally, this new scheme would be diligently enforced so as to foster clarity about the legal boundary, command respect for the legal system, and promote overall compliance.

Part IV: Reform

Multiple individuals have called for section 6(2) of the AHRA to be reformed.⁶⁶⁹ Most often, these calls for reform stem from a desire for increased oversight.⁶⁷⁰ Stefanie Carsley has suggested that federal government could amend the AHRA to allow consultants to arrange surrogacies so long as they are licensed, accredited or run by the provinces, ideally with a requirement to operate on a non-profit basis.⁶⁷¹ Similarly, Alison Motluk has called for surrogacy consultancies to be regulated, and has referenced Ontario adoption agencies as a useful comparator.⁶⁷² Erin Nelson has argued that an arm's-length body could provide the services that surrogacy consultancies are providing (such as coordinating services), in exchange for a small fee aimed at cost-recovery.⁶⁷³ All of these suggestions for reforming the AHRA are complicated by Canada's division of powers. While the AHRA is a federal statute grounded in the federal

⁶⁶⁹ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103; Nelson, *supra* note 6 at 334; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

⁶⁷⁰ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

⁶⁷¹ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at p 99-103.

⁶⁷² Motluk, "We should regulate agencies", *supra* note 2. As per section 229 of the *Child, Youth and Family Services Act*, private adoption agencies must be licensed, and licenses can only be issued to non-profit organizations. License can be revoked and license renewals can be rejected if any of the accompanying regulations are contravened, or if the agency prejudices children's health, safety or welfare. The regulations provide for a list of expenses that can be charged by the adoption agencies. These include expenses for fees incurred in the course of administering and coordinating the adoption. Generally, the fees charged by adoption agencies fall between \$15,000 CAD and \$30,000 CAD. Notably, these figures are similar to what surrogacy agencies are charging. See: CYFSA, *supra* note 609 at ss 231, 232; O Reg 200/99, *supra* note 610, s 6; Ontario Ministry of Children, *supra* note 607..

⁶⁷³ Gruben, *Surrogacy in Canada*, *supra* note 10 at 210.

government's criminal law authority, decriminalizing the activities it governs would likely shift regulatory responsibility to the provinces.⁶⁷⁴

Quebec has recently reformed its surrogacy laws to include an expanded role for notaries in the surrogacy process.⁶⁷⁵ Notaries, who are paid by intended parents, are responsible for drafting surrogacy agreements, confirming that counselling has occurred, setting out and potentially overseeing reimbursements through trust, and recording consent.⁶⁷⁶ While it has been suggested that this model has the potential to eliminate the need for consultants,⁶⁷⁷ notaries would not be assisting with matching, coordinating medical appointments, providing emotional support, or creating a wider community – all of which were identified by my participants as key aspects of their role.

In order to learn about my participants' perspectives on law reform, I asked: "If you could change the law, what changes would you make?". The majority of my participants responded by discussing their views on whether surrogates should or should not be paid.⁶⁷⁸ As a result, I needed to explicitly probe my participants in order to hear their thoughts about the prohibition against intermediaries. Even with this probe, only half of my participants meaningfully engaged with the question. In discussing their ideas for reform, these participants referenced various legal terms associated with reform, including decriminalization,⁶⁷⁹

⁶⁷⁴ The Constitution Act, 1867, 30 & 31 Vict, c 3. For an extended discussion of division of powers and the AHRA, please see Chapter 1.

⁶⁷⁵ *An Act to reform family law with regard to filiation and to protect children born as a result of sexual assault and the victims of that assault as well as the rights of surrogates and of children born of a surrogacy project*, SQ 2023, c 13, amending *Civil Code of Québec*, CQLR c CCQ-1991.

⁶⁷⁶ *Ibid.*

⁶⁷⁷ Alain Roy, *Traité de droit de la famille, tome 1 : La filiation* (Montréal : Éditions Thémis, 2024) at 179.

⁶⁷⁸ I do not include those discussions herein, as the question falls outside the scope of my thesis.

⁶⁷⁹ Decriminalization refers to a process of decreasing or removing criminal penalties associated with a criminal activity. Decriminalization has various benefits, including: reducing arrests, fines and incarceration; enhancing access to services, in that businesses operate in conventional ways; reducing stigmatization; and, increasing willingness for individuals to come forward and report misconduct. However, unfettered decriminalization (in other words, decriminalization that is not accompanied by other forms of legitimate oversight) has been criticized for

legalization,⁶⁸⁰ regulation,⁶⁸¹ self-regulation,⁶⁸² licensure,⁶⁸³ and certification.⁶⁸⁴ However, I am not sure to what extent my participants were aware of the formal differences between these models, as some of these terms may be used interchangeably in common parlance.

providing inadequate oversight. See: Ronald Weitzer, "Criminalization, Decriminalization, and Legalization" in *Sex for Sale: Prostitution, Pornography, and the Erotic Dancing*, 3rd ed (London: Routledge, 2023) at 378-382.

⁶⁸⁰ Legalization would entail removing the criminal prohibition against surrogacy intermediaries. Unfettered legalization, without any accompanying oversight mechanisms, presents similar benefits and drawbacks to unfettered decriminalization, discussed in the footnote above. It also reduces stigma and enhances access, but fails to provide checks and balances to prevent potential harms to surrogates and intended parents. Often times, legalization is accompanied by other forms of government oversight, such as regulation. See: *Ibid* at 382; Cambridge Dictionary, "Legalization," online: <<https://dictionary.cambridge.org/dictionary/english/legalization>> (accessed 25 Sept 2025).

⁶⁸¹ Regulation refers to the control of a specific activity exercised by a public persona or organization: The government delegates some of its law-making power to a certain person or body, like the Minister of Health. Regulations can then be created, amended or repealed without requiring the full legislative process that is used for legislative Acts. This makes regulations more flexible than legislation, and can allow for greater specificity in content. Regulation can help achieve a variety of objectives, including protecting citizens from harm by controlling certain activities (for example, through setting minimum standards of conduct); mandating the disclosure of certain information; and/or harnessing or restraining free-markets in the area. However, it costs both time and money to create and enforce regulations. See: Christel Koop & Martin Lodge, "What Is Regulation? An Interdisciplinary Concept Analysis" (2017) 11:1 *Regulation & Governance* 95 at 95; Department of Justice Canada, "How New Laws and Regulations Are Created", online: <https://www.justice.gc.ca/eng/laws-lois/index.html>> (accessed 25 September 2025); Robert Baldwin, Martin Cave, & Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 2012) at 106-131.

⁶⁸² Self-regulation refers to the capacity of social professions to govern themselves autonomously. As one example of this, doctors in Ontario are self-regulated through the College of Physicians and Surgeons of Ontario, which sets standards for entry and practice; investigates complaints; and, disciplines members. A primary benefit associated with self-regulation is the specialized expertise that can be employed when prescribing best practices and governing members. However, these models are often criticized for putting the professionals' own interests ahead of the public's. See: An Kooiman & Martijn van Vliet, "Self-Governance As a Mode of Societal Governance" (2000) 2:3 *Public Management: An International Journal of Research and Theory* 359; Margot Priest, "The Privatization of Regulation: Five Models of Self-Regulation" (1997-98) 29:2 *Ottawa Law Review* 234 at 268, 270; Ascend, "Self-Regulation and Licensing in Canada," online: <<https://ascend.thentia.com/insight/self-regulation-licensing-canada/#:~:text=By%20self%2Dregulating%2C%20professionals%20can%20ensure%20that%20the,the%20people%20who%20know%20their%20profession%20best.&text=If%20legislation%20were%20passed%20to%20increase%20the,ensure%20higher%20quality%20standards%20across%20the%20industry>> (Accessed 25 Sept 2025); Tracey L Adams, "Self-Regulating Professions: Past, Present, Future: Table 1" (2016) 4:1 *Journal of Professions and Organization* 70 at 70.

⁶⁸³ Licensure is a process through which a governing body grants permission for a someone to enter the profession and/or to provide specified services when certain criteria (like training or examinations) are met. Generally, licensure is mandatory for operation within the sector, and maintenance of licensure is an ongoing requirement for continued practice. See: Anne L Rooney & Paul R Van Ostenberg, *Licensure, Accreditation, and Certification: Approaches to Health Services Quality* (Bethesda, MD: Center for Human Services, Quality Assurance Project, 1999) at 3.

⁶⁸⁴ Certification occurs when a governing body merely recognizes that a person or organization has met a specific set of criteria. For example, certifying that an individual has completed certain training, or that a business complies with certain standards. Certification is largely voluntary, as opposed to being required by law. See: *Ibid* at 3-5.

a) Participants' Suggestions for Reform

Half of my participants made suggestions for improving the laws that prohibit paid intermediaries. One of those participants expressed that she would appreciate clarity with respect to what the law actually prohibits. Notably, such clarity would not necessarily require law reform, but could take the form of guidance from Health Canada. Three participants were enthusiastic about the idea of allowing consultancies to operate while simultaneously increasing oversight either through regulation, decriminalization, licensure, self-regulation, and/or certification. Amy said:

Amy: I would love to be licensed. I would love to be regulated. It'd be nice to have that recognition of all the work you've been doing for 20. And still you sit in this grey zone. Nobody wants to work in a grey zone. Hair stylists have a license! Taxi drivers have a license! I'm helping people have babies and I don't have anything, right? ... I think we should be licensed. I think we should be regulated. I think we should have guidelines we should follow. Um, maybe they can put caps on what we can charge?

Aja said:

Aja: And some agencies are worried that [regulation will] take away our liberties to decide what to do with our programs. But I think, I don't think it would. I think we're allowed, as business owners, to do some of the things that structure our businesses uniquely. But I do think that we need to be on the same page with um, with – with some of the things that need to be advocated for. ... I always have this dream of – agencies all have to be registered. They have to have a registration number. You are a valid agency. You have to follow these policies. You have to stay, um, ahead of certification every year, or something like that. ... I think they should be tested. Just like when you go to get a driving test. They would present all of these scenarios that happen between couples and surrogates, and what you would do, and actually grade them, and if you don't have the right answers you can't run a consultancy ... They should almost have to go through some kind of government training, like have a manual, um, on all this.

Aja further suggested that, if regulated, the government could require consultancies to gather important data on surrogacies, which could increase public knowledge and understanding.

Kerigan said:

Kerigan: I wish that outside of the legislation, that there were, that there was a um, a self-run sort of governing body within our industry. To keep us all accountable, to create best practices like there are in the US with the ASRM, SEEDS, these types of organizations. Um, that really take it from you know, from our perspective, from an RCMP view to a self-regulating, self-governing, um, group. Uh and so, I'm hoping that in the decriminalization, which, which is going to come at some point, that there's also conversations around, you know, regulating within our industry.

All three of these quotes recognize the importance of permitting consultancies to operate with increased oversight. However, different models were proposed for achieving this outcome (i.e., licensure versus regulation versus decriminalization versus self-regulation versus certification). In terms of substantive areas to address, these participants suggested capping fees, requiring training, and creating guidelines and best practices.

b) Discussion

My data suggests that at least some consultants welcome the idea of law reform. Some of my participants believed that reform would help to legitimize and standardize consultancy practices. They also believed that reform could benefit surrogates and intended parents by increasing general oversight of consultancies. This was important to them, given some of the problems they perceived with how “other agencies” were operating.⁶⁸⁵

⁶⁸⁵ These problems with “other agencies” are discussed throughout this thesis. Some examples include perceptions that “other agencies” are providing bad advice, charging for matching, charging re-match fees, paying surrogates beyond receipted reimbursements, and providing inadequate support and coordination.

Overall, this project's findings support other authors' calls for the regulation and increased oversight of surrogacy consultancies.⁶⁸⁶ My cumulative data revealed specific areas that would benefit from increased oversight. First, I found that the for-profit nature of consultancies created a structural incentive for consultants to prioritize their own self-interest above their clients'. For example, desire for financial profit could incentivize consultants to pressure surrogates to undergo subsequent surrogacies soon after giving birth; to accept surrogates into their programs even if the surrogates would subsequently be deemed medically ineligible for surrogacy; or, to inappropriately suggest that surrogates should change their medication protocols in order to increase the likelihood that the surrogate would will match.

My findings also suggested that some reported practices could compound intended parents' vulnerability throughout the surrogacy process. Some consultants held a position of power over intended parents because the consultants had the ability to exercise unfettered discretion in a manner that could directly impact intended parents' abilities to build families through surrogacy. For example, consultants sometimes decided which intended parents they were willing to assist, which profiles they would share with surrogates, and which third-party providers intended parents could work with. Intended parents were also vulnerable if consultants inadequately pre-screened surrogates' profiles prior to matching, as this exposed intended parents to potential emotional and financial hardship resulting from the increased likelihood of a re-match being required.⁶⁸⁷ Furthermore, intended parents were legally and financially vulnerable by virtue of paying consultants in contravention of the AHRA, or if consultants managed surrogates' reimbursements illegally.

⁶⁸⁶ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103; Nelson, *supra* note 6 at 334; Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2.

⁶⁸⁷ See Chapter 3 for extended discussion.

Lastly, my data raised concerns about consultants giving legal and/or medical advice. Some interviews suggested that participants provided medical advice, such as advising surrogates to stop taking certain medications, or discussing what needle sizes to use for injections. Some interviews also suggested that consultants may be providing legal advice regarding the surrogates' contracts. This is inappropriate as consultants do not have the proper accreditation and education to provide this advice. Notably, I do not suggest that these are universal problems across all consultancies, as the aforementioned concerns were only raised in some of my interviews. Nevertheless, these findings reinforce the calls for reform in the pre-existing literature.

In response to these concerns identified throughout, I believe surrogacy consultancies should be legalized, licensed and regulated. A regulatory scheme can better promote the benefits associated with intermediaries while simultaneously mitigating the harms that can result from unfettered activity, in comparison to what could be achieved by either enforcing a blanket prohibition or legalizing consultancies outright. While prescribing a specific reform scheme is beyond the scope of this thesis, I am generally a proponent of the solution proposed by Stefanie Carsley, which would entail formally amending sections 6(2) and 6(3) to include an exception for consultancies to operate if they are licensed, accredited or run by the provinces.⁶⁸⁸ As Carsley acknowledges, a primary issue with this model is that it would require buy-in from the provinces, which has been historically lacking.⁶⁸⁹ Furthermore, province-specific schemes may result in a lack of uniformity across the country.⁶⁹⁰ Unfortunately, these issues are difficult to avoid given Canada's division of powers.

⁶⁸⁸ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *Ibid.*

Canada's division of powers allocates legislative authority between the federal and provincial governments. Historically, the division of powers has created significant obstacles for the regulation of assisted reproduction in Canada. In 2010, the Quebec government successfully challenged large parts of the AHRA, claiming multiple sections fell outside of the federal government's criminal law jurisdiction.⁶⁹¹ The resulting Supreme Court decision, *Re AHRA*, found that many of the regulatory sections of the original AHRA were an inappropriate intrusion on the provinces' jurisdiction over property, civil rights and matters of a merely local nature.⁶⁹² *Re AHRA* suggests that the regulation of consultancies would also fall within provincial jurisdiction.⁶⁹³ By creating a carve out in the criminal law and deferring the regulation of consultancies to the provinces, Carsley's suggestion for reform respects the division of powers between federal and provincial governments, while still creating a scheme under which consultants can be licensed and regulated.

While one participant suggested that consultancies could be self-regulated, I believe regulation and licensure is preferable. Self-regulation models, which allow professionals to govern and oversee their own industries, are often criticized for putting the professionals' own interests ahead of the public's.⁶⁹⁴ Given the current distrust of consultancies,⁶⁹⁵ I am skeptical of whether self-regulation is best-suited to promote the public's confidence.

In terms of substance, my data suggests that provincial regulations should address concerns associated with consultants' monetary incentives, either by capping consultants' fees,

⁶⁹¹ *Re AHRA*, *supra* note 23.

⁶⁹² *Ibid.* For extended discussion see Chapter 1.

⁶⁹³ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 90.

⁶⁹⁴ Priest, *supra* note 682 at 271-272; Adams, *supra* note 682 at 70.

⁶⁹⁵ Some of my participants lamented the "bad press" associated with consultancies. See for example: Motluk, "Waiting Room", *supra* note 133; Motluk, "We should regulate agencies", *supra* note 2; CBC News, "Surrogacy Agencies Face Little Oversight", *supra* note 252; CBC News, "Pressure", *supra* note 271.

requiring consultants to operate on a non-profit or not-for-profit basis,⁶⁹⁶ or by having services delivered through a government agency.⁶⁹⁷ Such reform could help reduce perceived or actual conflicts of interests, and safeguard against practices that are driven by a desire for profit.⁶⁹⁸ In particular, a scheme that avoids private payment could mitigate concerns with commercialization,⁶⁹⁹ as intended parents would not need to personally pay for these services. Removing private fees could correspondingly increase accessibility for intended parents.

Provincial regulations should further pay particular attention to how intended parents may be impacted by consultancies, rejecting the historical assumption that intended parents are in a position of power. Regulations must recognize and address intended parents' legal, emotional and financial vulnerabilities, and ensure that both surrogates and intended parents are protected by the regulations. As one example, this could be achieved in part by implementing standards around medical screening required for surrogates prior to matching.

Lastly, regulations should ensure that consultants are properly trained and educated to provide accurate information without over-stepping into lawyers', doctors' and counsellors' professional domains of expertise. Such education could promote consultants' competency in

⁶⁹⁶ Non-profit and not-for-profit organizations are terms that are sometimes used synonymously, and sometimes used to denote slightly different purposes, with non-profits having a greater emphasis on public good: Shopify Staff, "Nonprofit, Not-for-Profit & For-Profit: What's the Difference?" (11 December 2024) *Shopify*, online: <<https://www.shopify.com/ca/blog/non-profit-vs-for-profit>> (accessed 25 Sept 2025); Community Legal Education Ontario (CLEO), *Different Group Structures* (18 June 2024), online: <<https://nonprofitlaw.cleo.on.ca/start-a-nonprofit/different-group-structures/>> (accessed 25 Sept 2025).

⁶⁹⁷ It is theoretically possible that this could be a federal agency, if the overall scheme was characterized as promoting the valid criminal law purpose behind section 6 of the AHRA. However, given the decision in *Re AHRA*, it is likely that the regulation of consultancies would be seen as falling under the province's proper jurisdiction, and that services would need to be delivered by provincial agencies. See: *Re AHRA*, *supra* note 23.

⁶⁹⁸ Carsley, "Surrogacy Agencies in Canada", *supra* note 22 at 99-103.

⁶⁹⁹ Collective harm here refers to theoretical concerns over how commercializing surrogacy may exploit, commodify, objectify, dehumanize and commercialize women and children in a manner that undermines their basic human dignity. See: *Proceed with Care*, *supra* note 8; Gruben, *Surrogacy in Canada*, *supra* note 10 at 278; Berkhout, *supra* note 553; Wilkinson, *supra* note 589.

delivering services, and hopefully mitigate concerns about consultants providing medical or legal advice.

Conclusion

This chapter explored the extent to which consultants' practices are consistent with section 6(2) of the AHRA. Drawing on interview data, I examined how consultants conceptualized the legality of their activities, how they structured their practices in response to the legal prohibitions, and what reforms they envisioned. Across these discussions, several themes emerged that speak to the limited efficacy of the current legal framework.

Nearly all of my participants expressed seemingly genuine beliefs that their consultancies were operating in line with the AHRA. My participants generally understood the prohibition on paid arrangement to mean a ban specifically relating to accepting money for matching. Other consultancy activities did not, in their opinion, fall under the prohibition. My participants justified the legality of their businesses by adopting a narrow definition of matching; structuring payment so as to be paid after a match is made (which they suggest meant they were not paid for the match, itself); and/or, by characterizing the payments as being for other services, such as being for support provided throughout the entirety of the surrogacy journey. Despite all believing they were operating legally, several of my participants were nevertheless skeptical of some of these justifications. I further note that these interpretations are not in line with the original objectives for the legislation espoused by the Baird Commission.

With respect to the prohibition on advertising, my participants did not demonstrate a clear understanding of what advertising activities were permissible versus not. Some participants

attempted to creatively structure their recruitment activities around the current prohibitions in ways that they believed were legally acceptable – for example, by framing social media posts as surrogacy education. However, according to my definition of advertising, I believe that some consultants are breaking the current law, though none of my participants admitted to being aware of this.⁷⁰⁰

My participants all recognized that the AHRA was largely unenforced, and some of their responses suggest that the lack of enforcement is influencing their perceptions of the law. Despite the negative impacts of an unenforced legal scheme, I do not advocate for a strict enforcement of the ban against paid surrogacy arranging, as I believe this would curtail access to many of the benefits associated with using intermediaries that I have discussed throughout this thesis. Rather, I argue for the regulation of surrogacy consultancies so as to mitigate harms, while simultaneously allowing for these businesses to offer services legally and professionally. Some of my participants voiced similar recommendations, suggesting there is at least some appetite for law reform amongst consultants.

In sum, this research illustrates that Canada’s current legal framework is neither deterring prohibited activity nor adequately protecting the individuals it purports to serve. It lends further support to the growing calls for law reform in the literature.⁷⁰¹ Reforming sections 6(2) and 6(3) to allow for licensed, regulated consultancies would provide a clearer legal standard; promote more ethical and transparent practices; and, help ensure that the benefits of intermediary support can be accessed legally and affordably.

⁷⁰⁰ This conclusion presumes that consultants are in fact being paid to arrange surrogacies.

⁷⁰¹ Carsley, “Surrogacy Agencies in Canada”, *supra* note 22 at 99-103; Nelson, *supra* note 6 at 334; Motluk, “Waiting Room”, *supra* note 133; Motluk, “We should regulate agencies”, *supra* note 2.

CONCLUSION

In writing this dissertation, I was motivated by two specific research questions relating to surrogacy consultancies. I wanted to learn about consultants' first-hand perspectives in order to reconcile how these accounts confirmed, contradicted, or nuanced the existing narratives about surrogacy consultancies. I also wanted to understand how surrogacy consultants understood and complied with the law. To accomplish this, I analysed the data arising out of interviews with 8 Canadian surrogacy consultants, triangulating my data with the existing literature on surrogacy consultancies.

In response to my first research question, my data raised many similar themes to those found in the existing literature, highlighting both benefits and concerns that could be associated with consultants' involvement in surrogacy. However, through incorporating the consultants' first-hand perspectives, my data provided a richer understanding of how and why these dynamics might be occurring. In some instances, my participants' perspectives explicitly contradicted some of the general criticisms associated with consultancies. As some examples: some participants expressed that they were very transparent in their reimbursement management; some participants shared anecdotes where they prioritized surrogates' interests over their own financial gain; and, some participants had very thorough screening processes for surrogates prior to matching. Overall, my data showed that there was significant variability in how different consultancies were operating, underscoring the uniqueness of each individual situation.

In general, my participants expressed a strong interest in helping surrogates and intended parents. They reported thoughtfully structuring their practices to provide ongoing assistance throughout the surrogacy journey. I identified various practices that could be helpful for some

surrogates and/or intended parents, including requiring full medical screening for surrogates prior to matching; educating about the importance of matching individuals with shared expectations; offering around-the-clock individualized support; creating communities; and, assisting with comprehensive coordination, accurate and transparent reimbursement management, and conflict resolution. My participants were particularly vocal about assisting surrogates, and I identified multiple instances where consultants reported protecting and advocating for surrogates' interests. Together, these findings temper some of the negative perceptions about surrogacy consultancies, and suggest there may be instances where these services are valuable beyond merely connecting surrogates to intended parents. My findings also challenge some of the historical assumptions that consultants inevitably prioritize intended parents' interests.

However, my analysis also raises some potential problems with how consultancies may be structured and operated. For example, the profit-driven nature of these businesses may create a conflict of interest, whereby consultants are structurally incentivized to prioritize their own financial self-interest over the best interests of their clients. Intended parents may be especially vulnerable within these power dynamics due to consultants' ability to exercise unfettered discretion in a manner that can significantly impact intended parents' ability to pursue surrogacy; the legal frameworks that assign liability to intended parents; and, the fact that intended parents shoulder the full financial burden of these expensive endeavours. Lastly, my data suggests some professional boundaries are being blurred, resulting in consultants' roles inappropriately overlapping with doctors' and lawyers' proper domains. Taken together, these findings shed light on why and how some of the problematic practices identified in the existing literature may be occurring.

In response to my second research question, my data demonstrates how consultants justify the legality of their operations. Given the legislature's original intention to curtail surrogacy, I suggest these justifications are likely not in line with the intention behind the law. Accordingly, it is likely that consultancies are breaking the law when they accept payment for their matching-related services. My data further indicates that some consultants' reimbursement management practices contravene the Reimbursement Regulations. Despite these violations, I do not advocate for a strict enforcement of the law. Rather, I advocate for the legalization, regulation and licensure of surrogacy consultancies, ideally in a manner that addresses the for-profit nature of their operations, and that is sensitive to intended parents' vulnerability in these dynamics. I believe this course of action would best promote the benefits associated with intermediaries, while simultaneously mitigating some of the problems that stem from unfettered activity.

My hope is that this research will help inform evidence-based law reform, should the political appetite for action ever arise. At present, no serious discussion of surrogacy reform has occurred since Senator Lucie Moncion introduced two separate bills in 2020 to repeal section 6 of the AHRA.⁷⁰² While Senator Moncion continues to advocate for surrogacy law reform,⁷⁰³ there is no suggestion that significant reform is imminent. Nevertheless, I remain hopeful that Canada's surrogacy scheme can continue to improve in order to better help thousands of individuals create the families they have long dreamed of. I also hope that my research can fill a gap in Canadian surrogacy literature about surrogacy consultants' first-hand perspectives on their work, their value, and their interpretations of the law.

⁷⁰² Bill C-404, *supra* note 162.

⁷⁰³ Canada, Senate, *supra* note 169 at 1649.

As discussed earlier, my research is not without limitations. In particular, I am conscious of the way that social desirability bias might shape my participants' answers. My research was never meant to stand alone. To balance my participants' perspectives, it is important to read my data alongside existing and emerging empirical research from other fantastic surrogacy scholars across North America, several of whom sit on my dissertation committee. I have done my utmost to triangulate my data with the existing research, without letting it overpower the voices of my own participants. My research is current to August of 2025.

My triangulation would greatly benefit from more data on Canadian surrogates' experiences with surrogacy consultancies. While Vanessa Gruben and her team have already begun collecting data to this effect, I was generally unable to pull from this emerging knowledge as their data analysis is still ongoing. I am interested in how their findings will align with my participants' perspectives and how their research as a whole will contribute to the evolving discussion surrounding Canadian surrogacy consultancies.

In conclusion, I would like to thank all of my participants, once again. I endeavoured to reflect your voices and perspectives as honestly as I could. Thank you to everyone who has taken the time to read this dissertation, whether in full or in part. I hope you learned something new – I know I did.

APPENDIX A: Recruitment E-mail (Surrogates)

Dear _____,

I am writing on behalf of one of my PhD students, Alicia Czarnowski. Ms. Czarnowski is conducting a qualitative study of Canadian surrogacy consultants that will culminate in recommendations for law reform. She will be asking surrogacy consultants about what services they provide; how they facilitate the relationship between surrogates and intended parents; and, how they are impacted by the law. This will be the first empirical project to interview surrogacy consultants in Canada, and the results will be published in a peer-reviewed journal.

Given your experience with surrogacy, I am inviting you to provide your opinions on the interview guide that will be used for this study. A virtual interview would be scheduled at a time convenient for you. Your conversation with Ms. Czarnowski would take approximately 20-30 minutes, depending on how much information you would like to share. Your input would help shape important research that can be used to spur policy change in Canada.

If you are interested in reviewing the interview guide, or if you have any other questions about the project and your involvement, please let me know by replying to this e-mail or by phoning me at the number listed below. Once I hear from you, I will put you in touch with Ms. Czarnowski. She can send you the Informed Consent Form and the interview guide for your review. Your participation would be incredibly appreciated, as your voice is invaluable for the success of this project.

Thank you so much for your time and I look forward to hearing from you.

Sincerely,
Vanessa Gruben
University of Ottawa, Faculty of Law
[REDACTED]

APPENDIX B: Informed Consent Form (Surrogates)

Principal Investigator: Alicia Czarnowski
PhD Candidate, Faculty of Law, University of Ottawa



Supervisor: Vanessa Gruben
Faculty of Law, University of Ottawa



Introduction

Given your experience with surrogacy, you are invited to provide your opinions on an interview guide that will be used to interview surrogacy consultants in Canada. Please read this Informed Consent Form carefully and contact me with as many questions as you would like before deciding whether to participate.

Study Purpose and Procedure

The purpose of this study is to gather data on Canadian surrogacy consultants in order to generate meaningful recommendations for law reform. If you decide to participate, I will provide you with a copy of the draft interview guide that will be used in the study. You will have the opportunity to review this guide in advance of our conversation. During our interview, I will ask about your opinions regarding the draft interview guide. You are eligible to review the interview guide if you have acted as a surrogate in Canada; are age 18 or older; and, are sufficiently fluent in English to complete the interview. This audio-recorded interview would be conducted via Zoom. Our conversation would last approximately 20-30 minutes, depending on how much information you wish to share. If you decide to participate, a copy of this signed Informed Consent Form will be provided to you.

Confidentiality

None of your identifying or indirectly identifying information will be included in my thesis or any subsequent publications or presentations. Any data you provide will be kept confidential. No quotes will be included in the final thesis. Notes and audio recordings from the interview will be stored on secure systems that can only be accessed by members of the study team for five years after the conclusion of the study.

Potential Benefits

There is no direct benefit to you. However, your input would help shape important research that can be used to spur policy change in Canada. This research will also enrich public discourse on the involvement of surrogacy consultants in family building via surrogacy.

Potential Risks

There are very few risks associated with participating in this study. For some individuals, the subject matter may bring up negative feelings or memories. You do not have to answer any questions that you do not want to answer, and you may withdraw at any time. If you find that

you feel distressed or uncomfortable after the interview, please contact me or reach out to one of the resources listed on the Support Resources page, below.

Voluntary Participation and/or Withdrawal:

Your participation in this study is voluntary. You do not have to answer any questions that you do not want to answer and you may withdraw at any time.

Questions and Contact Information

If you have any questions regarding the study, you may contact me at [REDACTED] or [REDACTED]. This study has been reviewed and approved by University of Ottawa Research Ethics Board (REB). If you have any questions regarding the ethical conduct of this study, you may contact the Protocol Officer for Ethics in Research, University of Ottawa, at 613 562-5387 or ethics@uottawa.ca.

[If you agree to participate in this research, please sign the consent on the following page.]

[Participants should print a copy of the consent form to keep for their personal records.]

Consent to Participate in Research

I understand that I am being asked to review an interview guide that will be administered to surrogacy consultants in Canada. This study, and my role in it, has been explained to me by Alicia Czarnowski. I have read this Informed Consent Form (or have had this document read to me). All of my questions have been answered to my satisfaction. I voluntarily agree to participate in this study.

Participant's Signature

Participant's Name (Please Print)

Participant's Signature Date (DD/MM/YYYY)

Investigator Statement

I have carefully explained to the participant the nature of the research study and their role in it. To the best of my knowledge, the participant signing this consent form understands the nature, demands, risks, and benefits involved in participating in this study. I acknowledge my responsibility for the care and well-being of the above participant, to respect the rights and wishes of the participant, and to conduct the study according to applicable Good Clinical Practice guidelines and regulations.

Alicia Czarnowski

Support Resources

BetterHelp

<https://www.betterhelp.com/>

BetterHelp offers access to licensed, trained, experienced, and accredited psychologists (PhD / PsyD), marriage and family therapists (LMFT), clinical social workers (LCSW / LMSW), and board licensed professional counselors (LPC).

contact@betterhelp.com

Crisis Services Canada (CSC)

<https://www.crisisservicescanada.ca/en/>

CSC offers 24/7 support to anyone concerned about suicide.

1-833-456-4566

eMental Health

<https://www.ementalhealth.ca/>

eMental Health lists various mental health and social support services to help you find the help you need.

Hope for Wellness Help Line

<https://www.hopeforwellness.ca/>

The Hope for Wellness Help Line offers immediate mental health counselling and crisis intervention to all Indigenous peoples across Canada.

1-855-242-3310

Law Society Referral Service (Ontario) (LSRS)

<https://lsrs.lso.ca/lsrs/welcome>

LSRS uses an online platform to connect Ontarians looking for legal assistance with lawyers and paralegals. The referral process includes an initial consultation of up to 30 minutes for free. The consultation is meant to help you determine your rights and options.

Lawyer Referral Service (Alberta) (LRS)

<https://www.lawsociety.ab.ca/public/lawyer-referral/lawyer-referral-request/>

LRS (Alberta) helps Albertans find a suitable lawyer to help resolve their legal problem. The service includes a free 30-minute consultation.

1-800-661-1095

Lawyer Referral Service (BC) (LRS)

<https://www.accessprobono.ca/our-programs/lawyer-referral-service>

LRS (BC) helps British Columbians find a suitable lawyer to help resolve their legal problem. The service includes a free 30-minute consultation.

[1-800-663-1919](tel:1-800-663-1919)

The LifeLine Canada Foundation (TLC)

<https://thelifelinecanada.ca/>

TLC hosts a free Suicide Prevention and Awareness App, called the LifeLine App, which offers access and guidance to support for those suffering in crisis, as well as for those struggling with any degree of anxiety or depression.

TeleCBT

<https://telecbt.ca/>

TeleCBT.ca is a Canadian online counseling service that specializes in the use of cognitive behavior therapy (CBT).

416-777-9933

info@telecbt.ca

Togetherall

<https://togetherall.com/en-ca/>

Togetherall is an online, peer-to-peer support community that harnesses the protective and therapeutic effects of connectedness and healthy social networks.

APPENDIX C: Interview Guide (Surrogates)

Part 1: Consent Form Review

- Thank you for agreeing to participate in this interview. As I mentioned in my e-mail, I'm going to be interviewing surrogacy consultants with the goal of crafting recommendations for law reform. I am hoping to learn more about what services these consultants are providing; how they facilitate the relationship between surrogates and intended parents; how they're impacted by the law; and, how they're impacting surrogates.
- Given your experience with surrogacy, I am interested in hearing your thoughts and opinions about the draft interview guide.
- Did you have the opportunity to review the interview guide?
 - o If not, give the participant some time to review, or go through it together (whichever the participant prefers)
- Our interview should take about 20-30 minutes, depending on how much information you would like to share.
- Before we begin, I'll briefly review some of the information that was outlined in the consent form. Participation in this study is voluntary, and you don't have to answer a question if you don't feel comfortable doing so. You can also stop the interview at any time for any reason.
- Your identity will be kept confidential, and will not be identified in my dissertation or in any subsequent publications or presentations.
- Do you have any questions about any of this?
- I'm going to audio record the interview because I don't want to miss any of your comments. I will start the recording now.

Part 2: Interview Guide

- What do you think of the guide?
 - o Focused follow-up questions (if needed):
 - Is there anything you would add?
 - Is there anything you would remove?
 - Would you change any of the phrasing?

Part 3: Wrap-Up

- Is there anything else you want to add that we haven't discussed yet?
- If you think of anything else you want to share later, please feel free to send me an email or give me a call.
- Is there anyone else you think I should be speaking to?
- Would you like me to send you a copy of my dissertation once it is finished?
 - o Focused follow-up questions (if needed):
 - What e-mail address would you like me to send it to?

APPENDIX D: Recruitment E-mail (Consultants)

Dear _____,

My name is Alicia Czarnowski and I am a PhD candidate at the University of Ottawa, working under the supervision of Professor Vanessa Gruben. I am conducting a qualitative study of Canadian surrogacy consultants that will culminate in recommendations for law reform. This will be the first empirical project to interview surrogacy consultants in Canada, and the results will be published in a peer-reviewed journal.

I am writing to invite you, or a designated employee, to participate in an audio-recorded interview held via Zoom. I intend to ask about your experiences facilitating surrogacy arrangements at [Consultancy Name]. I will also ask about your views on the *Assisted Human Reproduction Act*, and your opinions on law reform. The interview would last approximately 90 minutes, depending on how much information you would like to share.

Your voice is vital to the success of this project. Through my research, I hope to better inform the public about the role that consultants play in family-building via surrogacy. I also hope to draw upon my interviews to advocate for future laws and policies that are evidence-informed, and that speak to the reality of how surrogacy consultants are operating in practice.

Data gathered from these interviews will be completely anonymized, so that neither you nor your affiliated business will be identifiable in the dissertation or any subsequent publications. I have attached a consent form for your review, which explains our strict privacy precautions in greater detail.

This study has been approved by the University of Ottawa Research Ethics Board. My supervisor and I also have substantial expertise conducting research in the area of assisted reproduction. I am a lawyer in good standing with the Law Society of Ontario. I graduated law school at the top of my class, and completed my LLM on using Canadian Blood Services as a governance model for assisted reproduction. I have also previously published my research in the *Canadian Journal of Family Law*. My supervisor, Vanessa Gruben, is an Associate Professor at the University of Ottawa and a member of the Centre for Health Law, Policy and Ethics. She has published extensively on the topic of assisted reproduction, and she is a co-editor of Canada's leading surrogacy textbook: *Surrogacy in Canada: Critical Perspectives in Law and Policy*.

If you are willing to participate in this study, or if you have any questions about the project, please feel free to contact me by replying to this email or by calling [REDACTED].

Thank you so much for your time and I look forward to hearing from you.

Sincerely,

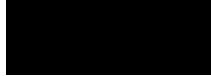
Alicia Czarnowski
PhD Candidate
University of Ottawa, Faculty of Law
[REDACTED]

APPENDIX E: Informed Consent Form (Consultants)

Principal Investigator: Alicia Czarnowski
PhD Candidate, Faculty of Law, University of Ottawa



Supervisor: Vanessa Gruben
Faculty of Law, University of Ottawa



Introduction

You are invited to participate in a qualitative study of Canadian surrogacy consultants that will culminate in recommendations for law reform. Please read this Informed Consent Form carefully, and contact me with any questions you may have prior to deciding whether to participate.

Study Purpose and Procedure

The purpose of this study is to gather data on Canadian surrogacy consultants in order to generate meaningful recommendations for law reform. You are eligible to participate if you work as a surrogacy consultant in Canada; are age 18 or older; and, are sufficiently fluent in English to complete the interview. These audio-recorded interviews will be conducted virtually via Zoom. Our conversation should last between 60-90 minutes, depending on how much information you wish to share. You will be asked a series of questions about yourself and your experiences acting as a surrogacy consultant. If you decide to participate, a copy of this signed Informed Consent Form will be provided to you.

Confidentiality

Your identity will be strictly protected subject to legal requirements. None of your identifying or indirectly identifying information will be included in the thesis or any subsequent publications or presentations. Any quotes and data that we use will be anonymized, so that it will not be possible to identify who provided this information. Transcripts will be de-identified (identifying information will be redacted), and audio-recordings of the interviews will be deleted once transcription is complete. Other data from the interviews will be stored on secure systems that can only be accessed by the research team for five years after the conclusion of the study.

Potential Benefits

There is no direct benefit to you. However, your input can help shape law reform in Canada. It can also help the public better understand the role that consultants play in family-building via surrogacy. Together, we can inspire future policies that are evidence-informed, and speak to the reality of how surrogacy consultants are operating in practice.

Potential Risks

There are few risks associated with participating in this study. Please note that **you do not have to answer any questions that you do not want to answer, and you may withdraw from the**

interview at any time. Subject to legal requirements, strict precautions will be made to protect your privacy, as described in the Confidentiality section. If you find that you feel distressed or uncomfortable after the interview, please contact one of the researchers listed above, or one of the resources listed on the Support Resources page, below.

Voluntary Participation and/or Withdrawal:

Your participation in this study is voluntary. You do not have to answer any questions that you do not want to answer and you may withdraw at any time.

Study Results

After completing the interview, you will have the option of requesting the final results of the study.

Questions and Contact Information

If you have any questions regarding the study, you may contact any of the researchers listed above. This study has been reviewed and approved by University of Ottawa Research Ethics Board (REB). If you have any questions regarding the ethical conduct of this study, you may contact the Protocol Officer for Ethics in Research, University of Ottawa, at 613 562-5387 or ethics@uottawa.ca.

[If you agree to participate in this research, please sign the consent on the following page.]

[Participants should print a copy of the consent form to keep for their personal records]

Consent to Participate in Research

I understand that I am being asked to participate in a research study about surrogacy consultants in Canada. I have read this Informed Consent Form (or have had this document read to me). All of my questions have been answered to my satisfaction. If I decide at a later stage in the study that I would like to withdraw my consent, I may do so at any time before the study is closed. I voluntarily agree to participate in this study.

Participant's Signature

Participant's Name (Please Print)

Participant's Signature Date (DD/MM/YYYY)

Investigator Statement

I have carefully explained to the research participant the nature of the above research study. To the best of my knowledge, the research participant signing this consent form understands the nature, demands, risks, and benefits involved in participating in this study. I acknowledge my responsibility for the care and well-being of the above research participant, to respect the rights and wishes of the research participant, and to conduct the study according to applicable Good Clinical Practice guidelines and regulations.

Researcher Signature

Researcher Name

Support Resources

BetterHelp

<https://www.betterhelp.com/>

BetterHelp offers access to licensed, trained, experienced, and accredited psychologists (PhD / PsyD), marriage and family therapists (LMFT), clinical social workers (LCSW / LMSW), and board licensed professional counselors (LPC).

contact@betterhelp.com

Crisis Services Canada (CSC)

<https://www.crisisservicescanada.ca/en/>

CSC offers 24/7 support to anyone concerned about suicide.

1-833-456-4566

eMental Health

<https://www.ementalhealth.ca/>

eMental Health lists various mental health and social support services to help you find the help you need.

Hope for Wellness Help Line

<https://www.hopeforwellness.ca/>

The Hope for Wellness Help Line offers immediate mental health counselling and crisis intervention to all Indigenous peoples across Canada.

1-855-242-3310

Law Society Referral Service (Ontario) (LSRS)

<https://lsrs.lso.ca/lsrs/welcome>

LSRS uses an online platform to connect Ontarians looking for legal assistance with lawyers and paralegals. The referral process includes an initial consultation of up to 30 minutes for free. The consultation is meant to help you determine your rights and options.

Lawyer Referral Service (Alberta) (LRS)

<https://www.lawsociety.ab.ca/public/lawyer-referral/lawyer-referral-request/>

LRS (Alberta) helps Albertans find a suitable lawyer to help resolve their legal problem.

The service includes a free 30-minute consultation.

1-800-661-1095

Lawyer Referral Service (BC) (LRS)

<https://www.accessprobono.ca/our-programs/lawyer-referral-service>

LRS (BC) helps British Columbians find a suitable lawyer to help resolve their legal problem. The service includes a free 30-minute consultation.

[1-800-663-1919](tel:1-800-663-1919)

The LifeLine Canada Foundation (TLC)

<https://thelifelinecanada.ca/>

TLC hosts a free Suicide Prevention and Awareness App, called the LifeLine App, which offers access and guidance to support for those suffering in crisis, as well as for those struggling with any degree of anxiety or depression.

TeleCBT

<https://telecbt.ca/>

TeleCBT.ca is a Canadian online counseling service that specializes in the use of cognitive behavior therapy (CBT).

416-777-9933

info@telecbt.ca

Togetherall

<https://togetherall.com/en-ca/>

Togetherall is an online, peer-to-peer support community that harnesses the protective and therapeutic effects of connectedness and healthy social networks.

APPENDIX F: Interview Guide (Consultants)

Part 1: Consent Form Review

- Thank you for agreeing to participate in this interview. As I mentioned in my e-mail, I'm interested in learning more about what surrogacy consultants do, how they structure relationships between surrogates and intended parents, and how they're affected by the law. I'm eager to learn more about the services you offer, and to hear about your perspectives on surrogacy in Canada.
- The interview should take about an hour to an hour and a half, depending on how much information you would like to share. I know you probably have a very busy schedule, so I won't keep you any longer than 90 minutes unless you would like to continue sharing.
- Before we begin, I'll briefly review some of the information that was outlined in the consent form. Participation in this study is voluntary, and you don't have to answer a question if you don't feel comfortable doing so. You can also stop the interview at any time for any reason.
- Your identity will be kept confidential. This means that you and [Consultancy name] won't be identified in my thesis, or any subsequent publications or presentations.
- Throughout the interview, I'll be referring to [Consultancy name] as "your consultancy".
- Do you have any questions about any of this?
- I am going to audio record the interview because I don't want to miss any of your comments.
- Zoom automatically records both audio and video. I will delete the video recording immediately. However, if you would be more comfortable turning your camera off, please feel free to do so.
- I will start the recording now and we can get started!

Part 2: Warm-Up Questions

- How did you become involved in surrogacy?
 - Focused follow-up questions (if needed):
 - Do you have a personal connection to surrogacy?
 - If so, tell me about it.
- How long have you been working at your consultancy?
- Can you tell me about your position here?
- Tell me a bit about your consultancy.

Part 3: Role prior to conception

- Let's start at the very beginning of the process. How does your consultancy attract new clients?
- Walk me through what you do for your clients, before conception occurs.
 - Focused follow-up questions (if needed):
 - What information do you provide?
 - What advice do you provide?
 - What services do you coordinate?

- Can you tell me about any screening of surrogates?
- Can you tell me about any screening of intended parents?
- How do surrogates and intended parents get matched?
- What role do you play in negotiating the surrogacy agreement, if any?

Part 4: Role during pregnancy

- What do you do for your clients during the pregnancy?
 - Focused follow-up questions (if needed):
 - What support mechanisms do you offer to surrogates, if any?
 - What support mechanisms do you offer to intended parents, if any?
 - What kind of conflicts can arise between surrogates and intended parents?
 - What happens if a conflict arises between the intended parents and the surrogate?
 - Do you provide any advice about how to navigate the surrogate-IP relationship?
 - If so, what kind of advice do you give?
 - Who do you give this advice to?
- What role do you play in facilitating the surrogates' reimbursement?
 - Focused follow-up questions (if needed):
 - What role does the IP take on with respect to reimbursement?
 - Do any third parties play a role in reimbursement?
(For example, lawyers or clinics)

Part 5: Role during birth and post-partum

- What role do you play during the birth, if any?
- What role do you play post-partum, if any?
 - Focused follow-up questions (if needed):
 - Do you ask surrogates if they would like to participate in future surrogacies?
 - If so, what does this conversation look like and when does it happen?
 - How soon can a surrogate mother work with you again?
 - How often can a surrogate work with you?
- Do you provide any advice about how to navigate the surrogate-intended parent relationship after the baby is born?
 - If so, what kind of advice do you give?
 - Who do you give this advice to?

Part 6: Payment

- How much do you charge intended parents for your services?
 - Focused follow-up questions (if needed):
 - Does payment cover all the services we have discussed today?

- Does anything cost extra?
- Is any service offered for free?
- When is payment made?

Part 7: Benefits & Challenges

- What do you see as the greatest benefit of your services for surrogates?
- What do you see as the greatest benefit of your services for intended parents?
- What challenges, if any, have you faced in offering these services?
- How is your role similar or different to the roles that other third parties play in the surrogacy process (for example, lawyers, social workers, or counsellors)?

Part 8: Law

- TRANSITIONAL PRELUDE: So far, I've been asking a lot of questions about what your consultancy does for intended parents and surrogates. I would now like to shift the conversation and ask you about your views on Canadian surrogacy law.
- Can you tell me a bit about the law and how it impacts your work?
 - Focused follow-up questions (if needed):
 - Is the current law creating any barriers? If so, tell me about them.
 - How have the new reimbursement regulations affected your practice, if at all?
- If you could change the law, what changes would you make?
- Some people suggest that what consultancies are doing is inconsistent with the AHRA - what would you respond to them?

Part 9: Wrap Up

- Is there anything else you want to add that we haven't discussed yet?
- If you think of anything else you want to share later, please feel free to send me an e-mail or give me a call.
- Is there anyone else at your consultancy who you think that I should speak to?
 - Focused follow-up questions (if needed):
 - Can you provide me with their contact information?
- Would you like me to send you a copy of my dissertation once it is finished?
 - Focused follow-up questions (if needed):
 - What e-mail address would you like me to send it to?