

Health Reform Observer - Observatoire des Réformes de Santé

VOLUME 7

| ISSUE 3 |

ARTICLE 1

Decriminalizing Payment of Gamete Donors and Surrogates in Canada: An Analysis of Factors Influencing the Public Debate in Light of Bill C-404

Anne-Isabelle CLOUTIER, *McGill University, Montréal, Québec, Canada*

4 September 2019

A Provincial/Territorial Health Reform Analysis

RECOMMENDED CITATION: Cloutier A-I. 2019. Decriminalizing Payment of Gamete Donors and Surrogates in Canada: An Analysis of Factors Influencing the Public Debate in Light of Bill C-404. *Health Reform Observer - Observatoire des Réformes de Santé* 7 (3): Article 1. DOI: <https://doi.org/10.13162/hro-ors.v7i3.3977>

Abstract

On 29 May 2018, the Liberal MP Anthony Housefather tabled Bill C-404 titled *An Act to amend the Assisted Human Reproduction Act* which seeks to decriminalize the payment of gamete donors and surrogates across Canada. Although Prime Minister Justin Trudeau indicated the importance of having a societal debate on the subject, the bill was read only once by the House of Commons before it died on the Order Paper. Bill C-404 aimed to increase the number of Canadian gamete donors and surrogates to fulfill Canada's domestic needs, which are purportedly not being met because of a lack of economic incentives on the supply side and the existence of a grey market that deters some Canadians in acting as donors or surrogates and causes intending parents to fear being criminally sanctioned if the reimbursement they pay is deemed unrelated or unreasonable. While Bill C-404 has not been adopted by Parliament, this paper seeks to analyze the policy tensions at the heart of the decriminalization of payment of donors and surrogates—tensions that may well resurface in the future. As long as the alleged shortage of donors and surrogates persists, stakeholders are likely to continue to advocate for legislative change.

Le 29 mai 2018, le député libéral Anthony Housefather a déposé le projet de loi C-404 intitulé Loi modifiant la Loi sur la procréation assistée, qui vise à décriminaliser le paiement des donneurs de gamètes et des mères porteuses au Canada. Bien que le premier ministre Justin Trudeau ait souligné l'importance d'avoir un débat de société sur le sujet, le projet de loi n'a été lu qu'une seule fois par la Chambre des communes avant de mourir au feuillement. Le projet de loi C-404 visait à augmenter le nombre de donneurs de gamètes et de mères porteuses pour répondre aux besoins intérieurs du Canada qui ne seraient pas satisfaits en raison du manque d'incitatifs économiques et de l'existence d'un marché gris qui dissuade certains Canadiens d'agir comme donneurs ou mères porteuses et qui fait en sorte que les parents craignent de possibles sanctions criminelles si le remboursement qu'ils offrent est jugé non-relié ou déraisonnable. Bien que le projet de loi C-404 n'ait pas été adopté par le Parlement, le présent document cherche à analyser les tensions politiques qui sont au cœur de la décriminalisation de la rémunération des donneurs et des mères porteuses—tensions qui pourraient bien réapparaître dans l'avenir, car la pénurie alléguée de donneurs et de mères porteuses est susceptible de persister et il est probable que les intervenants continueront à plaider pour un changement législatif.

Key Messages

- By allowing the commercialization of reproductive capacities and human tissues, Bill C-404 aimed to increase the number of Canadian gamete donors and surrogates to fulfill Canada's domestic needs. The latter are purportedly not being met because of a lack of economic incentives and the existence of a grey market that deters some Canadians in acting as donors or surrogates and causes intending parents to fear being criminally sanctioned if the reimbursement they pay is deemed unrelated or unreasonable.
- Even though Bill C-404 died on the Order Paper, it foregrounds an important debate on the ways in which the legal framework regulating assisted reproductive technologies can be improved to better serve Canadians experiencing fertility issues, as well as others who are willing to help them in building their family.
- Even though Bill C-404 died, it is unlikely that the debate will. As long as the alleged shortage of donors and surrogates persists, stakeholders are likely to continue to advocate for legislative change.

Messages-clés

- *En permettant la commercialisation des capacités reproductives et des tissus humains, le projet de loi C-404 visait à accroître le nombre de mères porteuses et de donneurs de gamètes canadiens pour répondre aux besoins intérieurs du Canada. Ces derniers ne seraient pas satisfaits en raison d'un manque d'incitatifs économiques et de l'existence d'un marché gris qui dissuade certains Canadiens d'agir comme donneurs ou mères porteuses et ferait en sorte que les parents craignent d'être sujets d'accusations criminelles si leur remboursement est jugé non-relié ou déraisonnable.*
- *Même si le projet de loi C-404 est mort au feuillet, il a néanmoins mis au premier plan l'important débat que la société canadienne doit avoir sur la façon par laquelle le cadre juridique canadien de réglementation des technologies de procréation assistée peut être amélioré afin de mieux servir les Canadiens qui vivent des problèmes de fertilité ainsi que ceux qui sont prêts à les aider à fonder leur famille.*

- *Même si le projet de loi C-404 est mort au feuilleton, le débat qu'il a suscité va vraisemblablement se poursuivre. Tant que la pénurie de donneurs et de gamètes persistera, les intervenants seront susceptibles de continuer à plaider pour un changement législatif.*

1 BRIEF DESCRIPTION OF BILL C-404

On 29 May 2018, the Liberal MP Anthony Housefather tabled *An Act to Amend the Assisted Human Reproduction Act* (Bill C-404, 2018). This bill seeks to decriminalize the payment of gamete donors and surrogates and stresses that it remains illegal to assist someone to provide gametes or act as a surrogate if they are underage, unable to consent, or coerced.

Bill C-404 aims to increase the number of Canadian donors and surrogates to fulfill Canada's domestic needs that are, according to Mr. Housefather, currently unmet (*CBC* 2018; Housefather 2018). While some scholars oppose Mr. Housefather's bill on the grounds that empirical data to support the idea that there is a shortage of Canadian gamete donors and surrogates is lacking (Baylis *et al.* 2018), Canadian fertility professionals point to the fact that there is only one national sperm bank in Canada, to which a limited number of Canadian men are giving sperm (Dunne 2018; Housefather and Cohen 2018). Moreover, Alfonso Del Valle from Repro Med—The Toronto Institute for Reproductive Medicine—estimated, in 2015, the percentage of Canadian sperm used for ARTs in the country to be between 5% and 10% (*CBC* 2015). In 2017, a study stated that to meet Canadians' demand for sperm, there is no choice but to rely on importation. Around "250 mostly paid donors from outside" (O'Reilly *et al.* 2017, 5) the country are used "with the United States and Denmark being the two main national sources" (O'Reilly *et al.* 2017, 2). It has also been reported that—although the number of persons involved in such transactions remains unknown—"Canadians are going abroad to get human eggs, foreign nationals are coming to Canada to provide human eggs, and Canadians are importing human eggs from abroad (i.e., without going abroad themselves)" (Downie and Baylis 2015, 225; see also Motluk 2011).

The purported lack of donors and surrogates is attributed to the absence of economic incentives and the existence of a grey market that casts a shadow of legal uncertainty over the whole process. This "aura of illegality" (Cattapan 2013, 213) deters some Canadians from acting as donors or surrogates and causes intending parents to fear being criminally sanctioned if the reimbursement they pay is deemed unrelated or unreasonable. Decriminalization of payment of gamete donors and surrogates, it is argued, would solve both problems and thus increase the number of Canadian donors and surrogates (Canadian Fertility and Andrology Society 2018; *CBC* 2018; Cohen 2016; Housefather 2018; Panitch 2018).

Although Prime Minister Justin Trudeau has indicated the importance of having a societal debate on the subject (Dib 2018), the bill was read only once by the House of Commons before it died on the Order Paper (Parliament of Canada 2018). This is partly due to the restricted amount of time allocated in the House of Commons for consideration of private members' bills. While Bill C-404 has not been adopted by Parliament, this paper seeks to analyze the policy tensions at the heart of the decriminalization of payment of donors and surrogates—tensions that may well resurface in the future. Indeed, several stakeholders (e.g., members of the LGBTQ2+ community, Canadian Fertility and Andrology Society) are publicly demanding such a legislative change (Blackwell 2017; *Canada Gazette* 2018;

Canadian Fertility and Andrology Society 2018; Cohen 2016; Housefather 2018; UTorontoLaw 2018). It is thus likely that this issue will come up again in the Canadian political scene.

2 HISTORY AND CONTEXT

Bill C-404 seeks to amend the *Assisted Human Reproduction Act* (AHRA). In order to understand the factors influencing the public debate surrounding the decriminalization of payment, it is essential to first familiarize ourselves with the history of the AHRA and the context in which it evolved. This section offers a brief overview of the history of the AHRA (2.1) and of the scope of the Act from its enactment until today (2.2). It also addresses how, following the AHRA's enactment, the emergence of a grey market has had deleterious consequences which undermine its legitimacy and prompt calls for a change (2.3).

2.1 History of the AHRA's adoption

The AHRA received Royal Assent on 29 May 2004. The content of the Act was informed by numerous experts and public consultations that took place during a 15-year process that began with the establishment of the Royal Commission on New Reproductive Technologies (RCNRT) in 1989 (Hammond 2015; McLellan 2002). The RCNRT's mandate was to research the social, health, scientific, ethical, legal and economic implications of new reproductive technologies as well as the safeguards and policies that could be adopted to regulate them. After consulting around 40,000 Canadians, it published a report titled *Proceed with Care* (RCNRT 1993) which made 293 policy recommendations in favour, notably, of the prohibition of the sale of human body parts as well as payment of surrogates. Following the report, the federal government responded by launching a voluntary moratorium in 1995 on nine practices studied in it (e.g., buying and selling gametes and embryos). Bill C-47 was then introduced in 1996. Incorporating recommendations from the *Proceed with Care* report and insights from the moratorium, this bill constituted a first attempt to adopt national legislation on assisted human reproduction. However, it did not succeed before the dissolution of Parliament in 1997 (Hammond 2015). Years later, in May 2001, the House of Commons Standing Committee on Health was asked to review a draft of the AHRA and make recommendations as to its content. Among other things, the committee made recommendations to protect better the best interests of the child as well as informed choice. It also suggested creating a regulatory body to manage and oversee the operation of the Act. Many of the recommendations were incorporated in the legislation which became law in 2004 (Hammond 2015; Standing Committee on Health 2001).

Resulting from a vast expert and public consultation (Health Canada 2017), the AHRA was deemed grounded—at least by its creators—in a strong social consensus reflecting Canadians' concerns for preventing the commodification and commercialization of the human body as well as the associated risk of exploiting individuals for their reproductive

capacity (Baylis 2018; *CBC* 2018; McLellan 2002). It has been suggested that this so-called social consensus was, rather, a political one. Indeed, some scholars, like Dave Snow, have highlighted that only AHRA's creators and their supporters have claimed it enjoyed strong social legitimacy, while, in fact, evidence to prove such a claim is lacking as there was no polling data showing that Canadians felt this way at the time the bill was passed (Snow 2016).

2.2 AHRA's scope from its enactment until today

The AHRA's first sections identify a list of principles aimed at protecting women and children's well-being (e.g., prevent exploitation, promote health, safety, dignity, rights and protect free and informed consent as well as human individuality and diversity) and legally define several terms (e.g., donor, embryo, fetus, surrogate mother) (AHRA 2004).

The AHRA details prohibited activities (e.g., commercialization of surrogacy and gamete donations), activities allowed only if licensed, administration of assisted reproduction technologies (ARTs), as well as sanctions for transgressing the Act. It also created a personal health information registry and a regulatory agency—Assisted Human Reproduction Canada (AHRC). Created in 2006, the AHRC was mandated to promote compliance with and to enforce the AHRA. More specifically, the AHRA endowed the AHRC with the responsibility of issuing and reviewing licences, collecting, analyzing and managing health reporting information as well as creating the regulations essential to the proper functioning of the law (e.g., regulation outlining the allowed reimbursable expenses for gamete donors and surrogates) (AHRA 2004).

The efficiency of numerous sections of the AHRA depended on the drafting and publication of regulations. However, in 2008, before any substantial regulatory work could be done (Health Canada 2017), the Quebec Court of Appeal ruled that numerous provisions of the AHRA were unconstitutional because they infringed on provincial power to regulate medical practice and research (*Re AHRA Qc* 2008). In 2010, the Supreme Court of Canada partially confirmed this decision, finding that sections 10, 11, 13, 14 through 18, 40(2), 40(3), 40(3.1), 40(4), 40(5), 44(2) and 44(3) were unconstitutional. Notably, these provisions were related to health reporting, the creation of a personal health information registry, and licensing (*Re AHRA* 2010).

In response to the Supreme Court of Canada's decision and to the 2012 Canadian federal budget which stated the government's intention to dismantle the AHRC (Flaherty 2012; Hammond 2015), the government tabled Bill C-38 to amend the AHRA which became law in 2012 (*Consolidated Federal Laws of Canada, Jobs, Growth and Long-term Prosperity Act*, 2012). It repealed the sections that were deemed unconstitutional and the ones related to the AHRC. Health Canada became responsible for the enforcement of the remaining provisions of the Act (e.g., compliance and enforcement of the AHRA) and, as "a result of the legal environment surrounding the AHR Act, the drafting of regulations for the remaining sections of the Act was put on hold" until October 2016. At that time, Health

Canada announced its intention to conduct a public consultation and to create the needed supporting regulations for the proper functioning of the AHRA (Health Canada 2017). A draft regulation to clarify what is considered eligible expenses for reimbursement was presented in October 2018, adopted in June 2019 and will come into force in June 2020 (*Canada Gazette* 2018; Health Canada 2017; Health Canada 2019)

2.3 Rise of a grey market

The government's omission, up until 2016, to draft a regulation stating clearly allowed reimbursable expenses for donors and surrogates has had deleterious consequences. The absence of such regulations left donors and surrogates uncertain in terms of their legal rights and obligations, and intending parents fearing criminal sanctions. This has been a deeply frustrating and stressful situation for all Canadians seeking ARTs to build families and others who want to help them (Baylis 2018; Baylis *et al.* 2018; *CBC* 2018; Nelson 2016). Some scholars argue that the lack of regulation is responsible for the emergence of a grey market whereas others argue that the grey market emerged as a result of the criminal prohibitions themselves (Canadian Fertility and Andrology Society 2018; *CBC* 2018; Housefather 2018).

3 INFLUENTIAL FACTORS: IDEAS, INTERESTS AND INSTITUTIONS

3.1 Ideas

3.1.1 Protection against exploitation

Some argue that the commercialization of reproductive capacities entails a risk of exploitation of socio-economically vulnerable individuals who will donate or act as a surrogate because they find themselves in difficult financial circumstances (Baylis 2018; *CBC* 2018; Guichon as quoted in Blackwell 2017). Decriminalization would allow for “economically secure people to buy procreative labour and custodial rights of vulnerable women” (Snow 2016 citing Shanley 2007 and Wilkinson 2003) which is, from Bill C-404's opponents' point of view, a problematic situation which threatens women's dignity and well-being (Baylis *et al.* 2018). In return, though they agree on the importance of protecting women's dignity and well-being, proponents of decriminalization highlight that altruistic surrogacy is not an efficient way to guarantee exploitation-free agreements. Indeed, women may be coerced in donating their eggs or acting as surrogates for reasons other than financial ones. For example, a woman can be coerced by her family or friends to provide eggs or a child to close ones experiencing fertility issues. In such circumstances social reasons are the source of the coercion and not money. Thus, the dichotomy between altruistic and commercial surrogacy and the depiction of the first one as respectful of women's well-being and the second one as

necessarily exploitative is over-simplistic (Snow 2016 citing Campbell 2013). Proponents of decriminalization also point to the fact that current arrangements are exploitative in the sense that fertility professionals involved in ARTs make substantial amounts of money, leaving only gamete donors and surrogates—the ones on which the whole process relies—without remuneration (Snow as quoted in Moss 2018; Panitch 2018).

Regarding exploitation and threat to women’s dignity and well-being, it is important to highlight that the presumed harm currently driving the criminal ban on payment does not reflect the lived experiences of all donors and surrogates. For example, Professor Angela Campbell’s review of social science literature on surrogate mothers’ experiences shows how research on surrogacy counters—to some extent—these concerns. First, although “intending parents will often have higher educational qualifications and socioeconomic statuses than their surrogates, this disparity does not necessarily translate into an uneven playing field.” This is due to the fact that intending parents often see the surrogate as their very last chance to have a child and that, in some jurisdictions, the surrogate may legally refuse to transfer the child after having given birth. Second, the majority of surrogates “assert that their decision to engage in surrogacy was rooted in an informed choice, and was not induced by mistake or through manipulative or coercive behaviour on the part of the intending parents.” However, some surrogates may nonetheless feel economically vulnerable as they rely “on promises regarding payment and post-delivery contact” (Campbell 2012, 43).

3.1.2 Prevention of the commodification of the human body

Some people hold that the commercialization of reproductive capacities results in a reprehensible commodification of the human body. For example, some critics state that surrogacy not only reduces women to mere “objects of use” and babies to “objects to be purchased and sold,” but also trivializes the unique pregnancy-specific mother-child bond (Snow 2016, 3).

Professor Françoise Baylis, a renowned philosopher and bioethicist who is one of the leading voices opposing Mr. Housefather’s bill, argues that commercialization of reproductive capacities could lead to the commodification of other body parts, such as organs. Even though she remains unclear as to how such a thing would concretely unfold, in her opinion, the government or the tribunals would have a hard time justifying that someone can pay for bodily tissues to have a child, but another person cannot pay for a kidney to save his life (Baylis 2018; *CBC* 2018).

3.1.3 Promotion of reproductive autonomy

Individuals in favour of decriminalization often submit arguments in favour of the protection and promotion of Canadians’ reproductive autonomy. Decriminalizing payment increases the number of ways in which a person can autonomously use their body to earn money. They hold that it is not up to the state to limit these opportunities and to dictate to

individuals, for their own good and dignity, what they can and cannot do with their bodies to earn money (Campbell 2013; Snow 2016). In their view, the intrusion of the state in such matters is paternalistic and in disharmony with the diversity of values inherent to a pluralistic society (*CBC* 2018; Housefather 2018; Housefather and Cohen 2018).

3.1.4 Recognition of reproductive labour

Some proponents of Mr. Housefather’s bill argue that it would be a gender equalizer. The current ban on payment of egg donors and surrogates “reinforce[s] the idea that women’s role in reproduction must be altruistic, and thereby expose[s] them to unfair advantage taking by others” (Panitch 2018). Thus, by valuing and monetizing women’s reproductive capacities, decriminalization could challenge the traditional role played by women in society, that is understood as being about altruistically providing reproductive labour in the domestic sphere. Moreover, decriminalization could empower some women with “otherwise-limited economic opportunities” by giving them a new source of income. (Snow 2016, 3).

3.1.5 Eradication of the grey market

Proponents of Bill C-404 argue that the criminalization of payment created a grey market, while its opponents argue that lack of appropriate regulation is to blame for its emergence and, thus, question the relevance of the bill. Even though they recognize some of the problems associated with the current functioning of the AHRA (i.e., the deeply stressful and frustrating state of uncertainty in which intending parents, surrogates and donors are kept), they consider the upcoming regulation by Health Canada a solution. According to opponents of decriminalization, “[t]hese regulations will provide Canadians with a clear legal path to follow in building their families without fear of criminal sanction” (Baylis *et al.* 2018) while preserving Canadians from the risks associated with the commercialization of reproductive capacities and human tissues (Baylis 2018; Baylis *et al.* 2018; *CBC* 2018).

In return, proponents of the decriminalization of payment argue that an altruistic model, even if well regulated, will continue to be inefficient in meeting Canadians’ needs for donors and surrogates. This is due to the fact that Canadians will still have no monetary incentives to help other citizens found a family. They thus do not believe that Health Canada’s regulation will eradicate the current grey market (*CBC* 2018; Cohen 2016; Housefather 2018; Panitch 2018). On this point, studies indicate that money does significantly influence one’s willingness to donate eggs and sperm—particularly among younger donors (Gezinski *et al.* 2016; O’Reilly *et al.* 2017). It is also interesting to note that a 2017 study assessing the feasibility of a self-sufficient altruistic sperm donation program in Canada suggests that, while the current “demand for donor insemination exceeds the potential supply available from eligible and willing Canadian men” (O’ Reilly *et al.* 2017, 5), an “altruistic sperm donation program could be achieved under optimal conditions in Canada.” Increasing the number of Canadian sperm donors (e.g., induce change in societal behaviour toward sperm

donation) would, however, require “considerable effort” (O’Reilly *et al.* 2017, 6).

Moreover, proponents of the decriminalization of payment have argued that a regulation detailing a list of reimbursable expenses is not sufficiently flexible to consider the individual circumstances of each donation or the situation of each surrogate mother. Gamete donors, surrogates, and intending parents are thus likely to continue to operate in a shady zone full of uncertainties if the prohibition on payment is maintained (*Canada Gazette* 2018; *CBC* 2018; Housefather 2018).

3.1.6 Increased accessibility of ARTs

If the decriminalization of payment does lead to an increase in Canadian donors and surrogates, it would also reduce the need for reproductive tourism in which individuals travel to other jurisdictions to obtain fertility treatments because those services are not available or accessible to them in a form that suits their needs in their home jurisdiction. This form of tourism is very cost-prohibitive for intending parents (e.g., cost of the trip and stay in another city for several weeks). Hence, decriminalization may increase accessibility to ARTs for Canadians experiencing fertility issues, LGBTQ2+ community members and single women who wish to build a family (Dunne 2018).

However, accessibility has many dimensions. As Cattapan (2018) observes, low price caps would have to be set for gamete donations and surrogacy services. Otherwise, it is possible that the accessibility of ARTs will decrease: the legalization of payment, involving the additional burden of paying someone, may make ARTs even more cost-prohibitive than they are at present for a number of Canadians (Cattapan 2018).

Ultimately, one should keep in mind that an important way to increase access to ARTs is publicly funding fertility treatments and surrogacy. For example, in vitro fertilization (IVF)—a technique used in gestational surrogacy to ensure that the baby is not genetically linked to the surrogate—is very cost-prohibitive. One IVF cycle can cost between \$10,000 and \$20,000. Ontario is the only province providing limited coverage under its health insurance plan. Québec, New Brunswick and Manitoba help families offset the costs of fertility treatment by offering tax credits. In the rest of Canada, citizens must assume entirely the costs of IVF. Even if payment is decriminalized, as long as fertility treatments are not publicly funded, wealth will continue to determine who has access to ARTs and surrogacy. Poorer Canadians who cannot pay the fees charged by private clinics will continue to have limited access to the latter (Scala 2019).

3.2 Interests

3.2.1 Egg donors and surrogates

Decriminalization is perceived as being in the health interest of egg donors and surrogates. It has been reported that the uncertainties related to the grey market and the fact that some women feel like they are being “paid under the table make [...] them feel guilty” (Ravitsky

as quoted in Blackwell 2017), and discourage them “from returning to the clinics where they donated when complications arise or [leads them to be] unwilling to speak out if and when any mistreatment occurs” (Cattapan 2013, 213; see also Motluk 2010; Motluk 2017). At the same time, decriminalization of payment could have the adverse effect of influencing some women to consent to riskier interventions if the remuneration is high (Cattapan 2018).

Finally, it is worth mentioning that, in a 2019 qualitative analysis of Canadian gestational surrogates’ experiences, participants were divided on the issue of decriminalizing payment. However, “many voiced concerns about the loopholes of the AHR Act in which it created a black market of commercial surrogacy” and about the “lack of clarity with regards to the reimbursement of expenses [that] can leave room for potential financial exploitation of surrogates by the system” (Yee, Hemalal, Librach 2019, 9).

3.2.2 Canadians seeking ARTs

Canadians seeking ARTs to build a family report having an interest in proceeding within a system where criminal sanctions are not attached to the very method used to create their family (Housefather 2018). Decriminalization would remove the negative stigma with gamete donorship and surrogacy. It would also allow intending parents to stop fearing being criminally sanctioned for giving a gift to their surrogate or gamete donor to thank them for their generosity (Housefather 2018; Intended Parents as quoted in Lindell 2018).

3.2.3 Donor-conceived Canadians

Some organizations of donor-conceived Canadians, like the Donor Conceived Alliance of Canada, state that their members have an interest in maintaining the ban on payment of gamete donors. They argue that for someone to learn that payments were involved in their creation can be very dehumanizing (Donor Conceived Alliance of Canada 2018).

At the same time, Bill C-404’s proponents highlight that gametes used by Canadians are often imported from countries where donors are paid (*CBC* 2018; Panitch 2018) and argue that decriminalization and the expected correlated increase in Canadian gamete donors could be in the best interest of donor-conceived children. In fact, reducing Canada’s need to buy gametes outside of Canada would significantly diminish Canada’s reliance on foreign systems, over which it exercises no meaningful control or influence, in order to verify the veracity of the information given by the donors (*CBC* 2018; Housefather 2018; Housefather and Cohen 2018; Panitch 2018). Indeed, even though imported sperm needs to comply with rigorous safety standards, “[s]ignificant concerns have been raised about the safety of sperm and eggs used in Canada” (Cattapan, Gruben, Cameron 2019). While there are no regulations to ensure the safety of eggs, sperm is checked for infections (e.g., HIV) (*Canada Gazette* 2018). Other information, including donors’ medical history, is accepted on the basis of an “honour system” (Leader as quoted in Carlucci 2016). *The Safety of Sperm and Ova Regulations* (SSOR 2019) that will come into force in 2020 are unlikely to remedy

the situation. Indeed, while “Canada’s new regulations aim to address these concerns at the source, to ensure that the safety of sperm and eggs will be addressed prior to arriving in fertility clinics,” the new safety measures will be very difficult to apply. Among other things, since the AHRA does not include extraterritorial application, “it is unlikely that inspections of international sperm and egg banks or processors can or will occur” and Canadian importers’ ability to influence foreign processors in effectively complying with Canadian regulations will remain limited (Cattapan, Gruben, Cameron 2019). In short, the situation leaves Canadian donor-conceived children uncertain in terms of the information they are given about their biological parents.

Although validating and updating donors’ health information would remain a challenge with Canadian donations, provincial and federal governments have more authority to enforce mechanisms to verify the veracity of the information disclosed within Canada’s territory than outside of it.

3.2.4 Fertility professionals

With the exception of persons living in Ontario who meet the eligibility criteria for provincial government-funded programs, Canadians must pay out-of-pocket, in whole or part, to access ARTs. Not publicly funding ARTs has had the effect of transforming “into a private commodity” what can be considered a medical service. Although the Supreme Court declared unconstitutional AHRA’s provisions for licensing and monitoring IVF clinics because they encroach on the jurisdiction of the provinces, provincial governments, with the exception of Québec, did not step in to oversee IVF clinics’ activities. As a result, Canadian IVF clinics are largely left on their own with few governmental restrictions to regulate their practice (Scala 2019).

In this context, decriminalization of payment would benefit fertility doctors and lawyers who will likely see, with the expansion of the number of Canadian donors and surrogates, an increase in their business (Baylis 2018; Blackwell 2017; *CBC* 2018). On this point, organizations like the Canadian Fertility and Andrology Society—the largest body representing fertility specialists within Canada’s legal and medical professions—have been criticized for vigorously supporting Bill C-404. Rightly or not, it is said that its interventions in the debate are tainted primarily by its members’ financial interests and not Canadians’ best interests (Baylis 2018; Guichon as quoted in Blackwell 2017; *CBC* 2018).

3.3 Institutions

Decriminalization of payment would harmonize law with practice and prevent the Canadian government from continuing to enforce a legal framework where Canadians have to import gametes from countries where donors are generally paid or travel to more lenient judicial frameworks to find surrogates who will also be generally paid, while payment is prohibited in Canada (Baylis *et al.* 2018; Baylis and Downie 2013; Deonandan 2015; O’Reilly *et al.*

2017; Panitch 2018).

Decriminalization of payment would put the responsibility for regulating the terms of payments on the shoulders of the provincial governments. If they do not act in a concerted way, this could lead to a regulatory patchwork that may be difficult to navigate and, for some actors, harmful if they are not adequately protected by their province’s laws (Baylis 2018; *CBC* 2018).

4 STRENGTHS, WEAKNESSES, OPPORTUNITIES AND THREATS

Table 1 summarizes the strengths, weaknesses, opportunities and threats of Bill C-404—or of any other similar future bill that would decriminalize payment of gamete donors and surrogate mothers—from the perspectives of different stakeholders (identified in parentheses).

Table 1: Summary of the potential strengths, weaknesses, opportunities, and threats of decriminalization of payment for gamete donation and surrogacy

STRENGTHS	WEAKNESSES
<ul style="list-style-type: none"> ● No fear of criminal sanctions (<i>intending parents, donors, surrogates, fertility professionals</i>) ● Eradicate the current grey market (<i>gamete donors, surrogates, intending parents</i>) ● Prevent suffering from avoidable harm (<i>egg donors, surrogates</i>) ● Increased access to ARTs in Canada, reducing the need for reproductive tourism outside the country for Canadians (<i>public</i>) ● Avoid having to manage the inflexibility of a regulation listing reimbursable expenses (<i>intending parents, donors, surrogates</i>) ● Likely to significantly diminish Canada’s reliance on systems over which it exercises no meaningful control or influence to verify the veracity of the information given by the donors (<i>donor-conceived children, intending parents</i>) 	<ul style="list-style-type: none"> ● Relevance of the decriminalization: Health Canada’s recently adopted regulation may—according to a group of scholars—solve some of the problems resulting from the grey market (<i>government</i>) ● If no cap is fixed for remuneration may be cost-prohibitive, diminishing access to ARTs (<i>public</i>) and may influence some women in consenting to riskier health interventions (<i>egg donors, surrogates</i>) ● May lead to a regulatory patchwork from one province to another that is difficult to navigate (<i>government, public, gamete donors, surrogates</i>)

STRENGTHS (CONT'D)	WEAKNESSES (CONT'D)
<ul style="list-style-type: none"> • Depart from an over-simplistic dichotomy between “non-exploitative” altruistic surrogacy and “exploitative” commercial surrogacy (<i>government</i>) 	
OPPORTUNITIES	THREATS
<ul style="list-style-type: none"> • Harmonize law with practice (<i>government</i>) • Profit-making opportunity (<i>fertility professionals</i>) • Increase the number of ways in which a person can autonomously use their body to earn money (<i>potential donors, surrogates</i>) • Gender equalizer (<i>surrogates, egg donors</i>) • Remove the negative stigma often associated with gamete donorship and surrogacy (<i>intending parents, gamete donors, surrogates</i>) 	<ul style="list-style-type: none"> • Potential exploitation of socio-economically vulnerable groups (<i>government, members of these groups</i>) • Risk of leading Canada toward the commodification of women and donor conceived babies as well as other body parts (<i>government, public, donor-conceived children, surrogates</i>)

5 CONCLUSION

Bill C-404’s main objective is to improve the possibilities for family formation for Canadians experiencing fertility issues by remedying the current shortage of Canadian donors and surrogates due to the lack of economic incentives and the grey market. Even though Bill C-404 died on the Order Paper, it has sown an important seed in the Canadian political arena. It foregrounded the important debate Canadian society needs to have with respect to the ways in which Canada’s legal framework regulating ARTs can be improved to better serve Canadians needing those technologies to build a family as well as others who are willing to help them.

It is plausible that the shortage of donors and surrogates will persist despite the pending regulation of reimbursable expenses by Health Canada, and that individuals will continue to advocate for the decriminalization of payment. Eventually the Canadian government will need to decide on whether to promote the legislative status quo while making the current altruistic system more efficient (e.g., multiply governmental interventions to show social recognition and gratitude toward donors and surrogates, to remove barriers and disincentives to donation or surrogacy) or to amend the law and officially allow for the

human body to be put in the market place. Should the second option prevail, such an important public policy decision should be grounded in a social and political consensus rigorously reached through expert and public consultations.

6 REFERENCES

- Assisted Human Reproduction Act* (SC 2004, c 2). <https://laws-lois.justice.gc.ca/eng/acts/a-13.4/> [AHRA].
- Baylis F. 2018. Paying for egg donations enters dicey territory. *National Post*, 5 June. <https://nationalpost.com/opinion/our-fertility-laws-can-criminalize-people-trying-to-start-a-family-its-time-for-an-overhaul>
- Baylis F, Cameron A, Cattapan A, Guichon J, Lemmens T, Lepine E, McTeer M. 2018. Fact sheet: proposed changes to the Assisted Human Reproduction Act May 29, 2018. <https://cdn.dal.ca/content/dam/dalhousie/pdf/sites/noveltechethics/n-te-AHRA%20Fact%20Sheet.pdf>
- Bill C-404: An Act to Amend the Assisted Human Reproduction Act*. 2018. 1st Reading May 29, 2018, 42nd Parliament, 1st session. <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-404/first-reading>
- Blackwell T. 2017. Doctors urge Canada to make it legal to pay for sperm, eggs—even if people ‘line up’ to make a quick buck. *National Post*, 12 May.
- Campbell A. 2012. Law’s suppositions about surrogacy against the backdrop of social science. *Ottawa Law Review* 43(1): 29-57.
- Campbell A. 2013. *Sister wives, surrogates and sex workers: outlaws by choice?* Farnham: Ashgate Publishing.
- Canada Gazette*. 2018. Safety of Sperm and Ova Regulations. Part I, 2018, vol. 152, 43.
- Canadian Fertility & Andrology Society. 2018. Position statements. <https://cfas.ca/position-statements.html>
- Carlucci M. 2016. U.S. sperm bank lawsuit prompts Ottawa fertility doctor’s call for new donor standards. *CBC News*, 3 September. <https://www.cbc.ca/news/canada/ottawa/ottawa-fertility-doctor-wants-new-standards-1.3744949>
- Cattapan A. 2013. Rhetoric and reality: "protecting" women in Canadian public policy on assisted human reproduction. *Canadian Journal of Women and the Law* 25: 202-220. <https://doi.org/10.3138/cjwl.25.2.202>
- Cattapan A. 2018. Changing the law to allow payment for surrogacy is fraught with complications. *CBC*, 22 May. <https://www.cbc.ca/news/opinion/surrogacy-payments-1.4672280>

- Cattapan A, Gruben V, Cameron A. 2019. New reproductive technology regulations don't go far enough. *Policy Options*, 15 April. <https://policyoptions.irpp.org/magazines/april-2019/new-reproductive-technology-regulations-dont-go-far-enough/>
- CBC. 2015. Why the majority of sperm donations in Canada are from the U.S. [Radio] 25 September. <https://www.cbc.ca/radio/the180/refugee-cessation-canadian-sperm-supply-the-case-against-national-polls-1.3242699/why-the-majority-of-sperm-donations-in-canada-are-from-the-u-s-1.3242843>
- CBC. 2018. Phone-in on paying surrogate mothers [Audio podcast]. 26 April. <https://www.cbc.ca/listen/shows/maritime-noon/episode/15540294>
- Cohen S. 2016. How the Assisted Human Reproduction Act hurts Canadians and in particular donor-conceived children in Canada. <http://www.fertilitylawcanada.com/fertility-law-canada-blog>
- Consolidated Federal Laws of Canada, Jobs, Growth and Long-term Prosperity Act* (SC 2012, c 19). <https://laws-lois.justice.gc.ca/eng/acts/J-0.8/page-1.html>
- Deonandan R. 2015. Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy. *Risk Management and Healthcare Policy* 8: 111-119. <https://doi.org/10.2147/RMHP.S63862>
- Dib L. 2018. Mères porteuses payées: la réflexion est nécessaire, selon Justin Trudeau. *La Presse*, 4 April. <https://www.lapresse.ca/actualites/politique/politique-canadienne/201804/04/01-5159857-meres-porteuses-payees-la-reflexion-est-necessaire-selon-justin-trudeau.php>
- Donor Conceived Alliance of Canada. 2018. Our goals. <http://www.donorconceivedalliance.ca/advocacy/>
- Downie J, Baylis F. 2013. Transnational trade in human eggs: law, policy, and (in)action in Canada. *Journal of Law, Medicine & Ethics* 41(1): 224-239. <https://doi.org/10.1111/jlme.12015>
- Dunne C. 2018. Paying sperm and egg donors will help LGBTQ couples build families. *Huffington Post*, 5 May. https://www.huffingtonpost.ca/dr-caitlin-dunne/paying-sperm-and-egg-donors-will-help-lgbtq-couples-build-families_a_23474261/
- Flaherty J. 2012. Jobs Growth and Long-Term Prosperity: Economic Action Plan 2012. Public Works and Government Services Canada
- Gezinski LB, Karandikar S, Carter J, White M. 2016. Exploring motivations, awareness of side effects, and attitudes among potential egg donors. *Health and Social Work* 41(2): 75-83. <https://doi.org/10.1093/hsw/hlw005>

- Hammond K. 2015. Assisted Human Reproduction Act (2004). The Embryo Project Encyclopedia. <https://embryo.asu.edu/pages/assisted-human-reproduction-act-2004>
- Health Canada. 2017. Toward a strengthened Assisted Human Reproduction Act. A consultation with Canadians on key policy proposals. <https://www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction/document.html>
- Health Canada. 2019. Draft guidance document: reimbursement related to Assisted Human Reproduction Regulations. <https://www.canada.ca/en/health-canada/programs/consultation-reimbursement-assisted-human-reproduction/document.html>
- Housefather A. 2018. Press conference. *Facebook*, 27 March. <https://www.facebook.com/anthonyhousefather/videos/1877831872257893/>
- Housefather A, Cohen S. 2018. Our fertility laws can criminalize people trying to start a family. It's time for an overhaul. *National Post*, 9 April. <https://nationalpost.com/opinion/our-fertility-laws-can-criminalize-people-trying-to-start-a-family-its-time-for-an-overhaul>
- Lindell R. 2018. Canadian parents want to do more for the surrogates carrying their babies. *Global News*, 3 June. <https://globalnews.ca/news/4243343/surrogacy-canada-legal-controversy/>
- McLellan A. 2002. Assisted Human Reproduction Act. Canada. Parliament. House of Commons. Edited Hansard 137 (188). 37th Parliament, 1st session. <http://www.ourcommons.ca/DocumentViewer/en/37-1/house/sitting-188/hansard>
- Moss N. 2018. Inequality in system no reason to criminalize paying for fertility services, says Grit MP Housefather. *The Hill Times*, 14 November. <https://www.hilltimes.com/2018/11/14/privatization-working-titles/176051>
- Motluk A. 2010. The human egg trade. *The Walrus*, 26 June. <https://thewalrus.ca/the-human-egg-trade/>
- Motluk A. 2011. Canadian court bans anonymous sperm and egg donation. *Nature*, 27 May. <http://www.nature.com/articles/news.2011.329>
- Motluk A. 2017. Anatomy of a surrogacy. *Hazlitt*, 6 November. <https://hazlitt.net/longreads/anatomy-surrogacy>
- Nelson E. 2016. Gestational surrogacy in Canada. In *Handbook of gestational surrogacy*, ed. S. Sills, 123-130. Cambridge University Press.
- O'Reilly D, Bowen J, Perampaladas K, Qureshi R, Xie F, Hughes E. 2017. Feasibility of an altruistic sperm donation program in Canada: results from a population-based model. *Reproductive Health* 14(8): 1-8. <https://doi.org/10.1186/s12978-016-0275-0>

- Panitch V. 2018. Time to decriminalize payment for sperm, ova and surrogacy. *Ottawa Citizen*, 10 May. <https://ottawacitizen.com/opinion/columnists/panitch-time-to-decriminalize-payment-for-sperm-ova-and-surrogacy>
- Parliament of Canada. 2018. Private Member's Bill C-404 (42-1). <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9863117>
- RCNRT (Royal Commission on New Reproductive Technologies). 1993. Proceed with care: final report of the Royal Commission on New Reproductive Technologies. Ottawa: Canadian Government Publishing.
- Re AHRA 2010. Reference re Assisted Human Reproduction Act, 61 Supreme Court of Canada. (2010). <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7905/index.do>
- Re AHRA Qc 2008. In the matter of a Reference by the Government of Quebec pursuant to the Court of Appeal Reference Act, R.S.Q., c. R-23, concerning the constitutional validity of sections 8 to 19, 40 to 53, 60, 61 and 68 of the Assisted Human Reproduction Act, S.C. 2004, c. 2., 2008 QCCA 1167.
- Safety of Sperm and Ova Regulations* (SOR/2019-192). <https://laws.justice.gc.ca/eng/regulations/SOR-2019-192/FullText.html>
- Scala F. 2019. Should we publicly fund IVF in Canada? *Policy Options*. <https://policyoptions.irpp.org/magazines/april-2019/publicly-fund-ivf-canada/>
- Shanley ML. 2007. *Making babies, making families: what matters most in an age of reproductive technologies, surrogacy, adoption and same-sex and unwed parents?* Boston: Beacon Press.
- Snow D. 2016. Criminalising commercial surrogacy in Canada and Australia: The political construction of 'national consensus'. *Australian Journal of Political Science* 51(1): 1-16. <https://doi.org/10.1080/10361146.2015.1108388>
- Standing Committee on Health. 2001. Assisted human reproduction: building families. Government of Canada. <https://www.ourcommons.ca/Content/Committee/371/HEAL/Reports/RP1032041/healrp02/healrp02-e.pdf>
- UTorontoLaw. 2018. Be it resolved: the prohibition on payment for surrogacy & gametes in Canada should be repealed. *YouTube*, 23 November. <https://www.youtube.com/watch?v=t2tdh9khQ3k&t=2330s>
- Wilkinson S. 2003. The exploitation argument against commercial surrogacy. *Bioethics* 17(2): 169-187. <https://doi.org/10.1111/1467-8519.00331>
- Yee S, Hemalal S, Librach CL. 2019. "Not my child to give away": A qualitative analysis of gestational surrogates' experiences. *Women and Birth: Journal of the Australian College of Midwives*. <https://doi.org/10.1016/j.wombi.2019.02.003>

7 FOR MORE DETAIL

Institute for Research on Public Policy. 2019. Special issue: addressing the gaps in Canada's assisted reproduction policy. *Policy Options*, 15 April. <https://policyoptions.irpp.org/magazines/april-2019/addressing-the-gaps-in-canadas-assisted-reproduction-policy/>