

From tolerance to reimbursement of expenditures*

Section 6 of the AHR act allows a person to resort to a surrogate mother as long as she (nor any intermediary) is paid and is at least 21 years old. Until now, the absence of regulations on the reimbursement of surrogate mothers for their expenditures has somehow shielded us from the development of a child market in Canada, even if it has not made it possible to avoid commercial practices by Canadian surrogates, or deterred procreative tourism on the part of Canadian citizens or the exploitation of women living in low income countries.

The adoption and implementation of regulations to permit reimbursement of surrogate mothers for expenditures might put an end to even this limited protection. Although these regulations do not, strictly speaking, allow a woman to be paid or to make a profit, they will foster the financial evaluation of pregnancy and, in so doing, of a child¹. In following this path that legitimizes surrogacy, Health Canada ignores lessons learned elsewhere. Indeed, many countries, previously opened to surrogacy, now forbid it or refuse its access to foreign couples. Contexts in these countries are different from ours, but their bad experiences nonetheless underline how surrogacy is problematic and violates women's and children's dignity.

Health Canada's proposition objective

The following text focuses essentially on section 12 of point 4.2 of the document entitled *Toward a Strengthened Assisted Human Reproduction Act: A Consultation with Canadians on Key Policy Proposals* which deals with the reimbursement of surrogate mothers and donors. It focuses on the issue of surrogacy.

The proposition's objective is stated at point 4.2.1. : "*Parliament recognized that in order to promote an altruistic system...*". Thereby already promotes a specific form of contract pregnancy, one considered adequate and described as altruistic. However, this objective may be questioned and, consequently, the propositions that follow. Moreover, even if it is authorized in the AHR Act, the legitimacy of using surrogates does not reach consensus in Canada.

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¹ Excerpts from : *Commentaires sur le projet de règlement en vertu de la Loi sur la procréation assistée*, Maria De Koninck et Abby Lippman, 21 novembre 2016

In addition, the concept of a « system », used in reference to social rules aiming to support the transmission of life, is problematic: such a designation is utterly dehumanizing. Nor is the use of the word « altruistic » neutral. Rather, it seeks to draw sympathy by introducing a moral value to the design of a contract binding a surrogate mother, a contract whose object is a human being to be born.

Three dimensions at stake in Health Canada's proposition also demand comment: Canadian values which are scorned by the proposed orientation; "pathologization" of the desire to have children; and the evolution of social practices.

Canadian values

Canada boasts about being a great place to live, a country where values of human dignity and of equity are respected and where respect of human individual and collective rights is advocated. What values are upheld when it comes to surrogacy? We suggest that surrogacy poses a threat to human dignity and rights of women and children.

Dignity and women's rights

The struggles taken up by Canadian women to become emancipated, improve their status, have access to education, to all occupations and professions and to places of power etc., rested on the need for them to be recognized as persons in their own right, having as many assets and as much potential as their fellow men. These struggles lasted decades and Canadian women are finally now legally recognized as men's equals. They are no longer confined to their reproductive functions and to being mothers. This status is different from what still exists in some societies where women are married when very young, often against their will, and where their social status depends on their capacity to give birth.

By adopting the proposed regulations, Canada would institutionalize a practice that brings women back to their definition as reproducers, since surrogacy means that women are made available to sponsors for whom they will bear a child and to whom they are expected to relinquish the child at birth. Women are not children producers and should never be reduced to this function to satisfy others' desire for a child. It is no longer socially acceptable in Canada for a man to appropriate a woman to make sure he has descendants. Canadian women have completely rejected this social situation and any threat to backtracking must be decried. The use of a surrogate mother is but a « modern » version of this appropriation. No

matter that this is a temporary situation, and not one that is lifelong as it was in the past, and irrespective that it is unlike what still exists in some societies where women have little power, the meaning of the relationship established between a surrogate mother and the child's sponsor (s) remains that of the appropriation of a woman's reproductive potential.

Women have also fought for the humanization of childbirth, arguing correctly that pregnancy and childbirth are first and foremost a human experience which cannot be cut in pieces nor reduced to a medical and technical intervention. Resorting to surrogate mothers complies with a logic that divides in pieces and anonymizes a unique human experience whose physical and psychosocial consequences for the mother and the child are significant. These effects are trivialized and the complexity of human experience ignored whenever surrogacy practices are justified.

Many discourses attempt to hide this reality to mislead us into believing that bearing a child is an activity comparable to others, such as taking care or maintaining a household. This is not the case. A woman who bears a child is involved psychologically, physically and socially throughout pregnancy to bring him or her into this world. Pregnancy and childbirth is an experience which cannot ever be deemed equivalent to a work activity.

There is abundant evidence adding to our knowledge about how these unique experiences, during which sharing and mother/child exchanges occur, leave both with marks that cannot be erased. And we continue to learn more and more about these exchanges². To minimize the intensity of such a human experience and consider it a production process is degrading for women and retrogressive for society.

Dignity and children's rights

Also scorned by the legitimization of surrogacy are the values of children's human dignity and rights. Canada does not accept the notion that a human can be considered as merchandise and rejects turning one into a transaction object. Why should we weaken these values by accepting that the birth of a child can be planned in a contractual context between one or more sponsors and a woman

² Hoekzema, Eline et al, Pregnancy leads to long-lasting changes in human brain structure, *Nature Neuroscience*, 20, 287–296, (2017), doi:10.1038/nn.4458; MacKinnon N. et al., The Association Between Prenatal Stress And Externalizing Symptoms In Childhood: Evidence From The Avon Longitudinal Study Of Parents And Children, *Biological Psychiatry*, 2017, doi: 10.1016/j.biopsych.2017.07.010

who will have to carry that child during nine months? Ordering a child, even if it does not involve an income or a profit, remains a commodification activity; the child is the object of an exchange even if there is no remuneration. Moreover, the great progress we have made in Canada to protect our children, to make sure they are treated as persons in their own right, deserving respect from their earliest age (e.g., prohibitions on physical punishment), would be reversed by a practice such as surrogacy that turns children into goods someone wants, orders, takes delivery of, and may erase her/his maternal origins. Such a child is an orphan (deprived of her/his mother, a condition that has been planned), even if the plan is to subsequently attribute the status of mother or of second parent to a sponsor. Planning in advance to make a child motherless to fulfill someone's need, offends our consciences as members of a society that claims to place human beings above all reification.

Of course, children can be, for different reasons and in different circumstances, entrusted to other adults than their natural parents, with these other adults becoming his parents. But, to plan a birth so that the child will be relinquished essentially alters his experience.

We recognize that pressures from different interest groups are strong and that accepting surrogacy might be perceived as a gesture of open-mindedness. But this is not the case. Rather, were the Canadian government, in 2017, to adopt regulations that go further than the tolerance inscribed so far in the law, to "*promote an altruistic system*", would reflect a commitment to definitely accept a social setback for women and children.

No doubt: the representations used by different messages and reports in the media are often positive and idealistic and sympathetically promote the alleged happiness of those given the "gift" of a child. But what about the child himself? So much is said and written about the future parents, with so little about the children. Arrangements are preferred that attempt to make sure a parent has a biological link to the child to be born, with little if any attention to the child and his links to his maternal origins? Sadly, media handling of the issues too often reflects only the image of an individualistic society which tries to fulfill all desires whatever the consequences.

The desire to have a child, the desire to be a parent: social responses

The desire to have a child is worthy but it is not a right. There is no such thing as a right to a child. One must understand that the desire to have a child is socially supported and is socially constructed. The *pathologisation* of hypofertility

exemplifies a medical and social drift that creates suffering, distress and can favour the search for solutions at any price. The history of medicine includes many examples of solutions offered to socially constructed problems. To oppose surrogacy it in no way to minimise the suffering felt by people who realise they cannot have children. Rather, it is to question the deployment of means that, by defining as pathological situations that can be socially addressed, only maintain or increase this suffering while infringing on values or creating setbacks on acquired social rights.

To enable social progress in our society and to identify what kinds of support should be offered to couples who wish to have a family, our efforts must be framed in ways that advance human dignity and human rights. Thus, to recognize the right of homosexual couples to adopt children is a legitimate sign of social progress. Such a measure puts an end to discrimination while enabling children who need a home to find one.

But to recognize the right for someone to reach an agreement with a woman so that she will bear a child and hand him over after his birth is a social setback. This practice is degrading for women and does not respect the rights of children to be born, as human beings rather than as products that have been ordered, and to be so without emotional risk (planned separation from the mother).

When nature makes it impossible to realize the desire to have a child – and medicine cannot help without putting into question human dignity and rights --, society can offer opportunities to satisfy the wish to take care, to educate and to pass on, by making it easier to adopt children in need of parents, or to make it easier to exercise different forms of parenting. This is the direction in which Canada's policies should go.

The normalisation of a practice and its definition in market terms

Beyond these considerations, which put into question the practice of using surrogates as a solution, we must draw attention to the impact of adopting regulations for which Health Canada is seeking social approval by asserting that it will favour « altruism».

On the one hand, the fact that a woman voluntarily accepts to be a surrogate mother does nothing to alter the harmful meaning of this practice for the status of women and, on the other hand, even if regulations do not permit remuneration, estimating some price that would be an allowable reimbursement, opens a wide door for market distorting practices.

Social science knowledge, developed in Canada in particular, has taught us that, in a social, economic and political context as ours, a social practice is considered legitimate when regulated, and then can be redefined in market terms. In other words, by giving its approval to a practice, as is happening now in an effort to adopt guidelines (which had not been done previously), there is automatic acceptance of the increased legitimacy and use of the practice. Then, the conditions for its normalization are put in place. Using a surrogate mother becomes legally sanctioned under certain conditions, and it is entirely predictable that progressively other conditions will become allowable. It will then probably not be long before human reproduction becomes a commercial activity emptied of its most profound meaning.

Are we, in Canada, afraid to assert that women cannot be reduced to reproducers – and that calling a practice altruistic doesn't alter the situation? Don't we want to protect the status of our children who, under no circumstances, should result from contractual arrangements? Don't we wish our laws and regulations prevent someone from planning (meaning voluntarily) for a child to be donated to another by the woman who gave him birth, the child perhaps never knowing her and unable to trace his origins?

It would be unrealistic to think that by regulating the practice, we will avoid the distorting commercial practices of using surrogate mothers observed around the world, practices that have led several countries to prohibit it or to shut the door to reproductive tourism.

Whether it is free, compensated, paid or profitable, the use of a surrogate mother goes against Canadian values that were hard-won. We need to respect these and support, not threaten, the progress we have made in terms of the status of both women and children and in the humanization of childbirth. Pregnancy is not a phase in the production of a human being. It is so much more than that and cannot and should not be the subject of a contract.

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