

## **The Legality of Transnational Paid Surrogacy Arrangements in Canada**

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### **I. Overview**

A group of fertility industry professionals retained Addario Law Group LLP to provide a legal opinion interpreting the legality of certain transnational surrogacy arrangements.

This opinion addresses whether the offences related to paying surrogates under the *Assisted Human Reproduction Act* (“*AHRA*”) apply to intended parents<sup>1</sup> who do not live in Canada, but choose to pay their Canadian surrogates<sup>2</sup>.

The *AHRA* creates several offences criminalizing paid surrogacy arrangements. In general, the *AHRA* targets the payors and intermediaries of such arrangements, and not the surrogates themselves.

In our opinion, the *AHRA* prohibits paying women in Canada for their surrogacy services, regardless of the country where the payment comes from and regardless of where the intended parents live.

If the arrangement involves a Canadian surrogate, we believe Canadian authorities will have jurisdiction to charge individuals or entities outside of Canada with a crime and Canadian courts can hear the prosecution.

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<sup>1</sup> In this legal opinion, we use the term “international intended parent(s)” to mean individual(s) outside of Canada who wish to engage a Canadian surrogate who will carry their baby on their behalf.

<sup>2</sup> In this legal opinion, we use the term “Canadian surrogates” to mean any surrogate who lives in Canada regardless of their citizenship status. We are not referring to surrogates who live outside of Canada but have Canadian citizenship.

We address the following questions and provide the following conclusions:

**1. Are there criminal liability risks for international intended parents who pay or offer to pay Canadian surrogates from outside of Canada?**

**Yes.** The *AHRA* makes it a criminal offence to pay, offer to pay, or arrange payment for a surrogate. Our opinion is that Canada will have jurisdiction to prosecute international intended parents for paying or offering to pay Canadian surrogates, regardless of whether the offer and/or payment is made inside or outside of Canada.

Payments cannot be “cleansed” of criminality simply because they are made by an intermediary entity such as an agency outside of Canada. The test for jurisdiction requires a “real and substantial” link between the offence and Canada. While the test is fact-specific, if the surrogate lives in Canada, we believe the test for jurisdiction to charge and prosecute will be met.

**2. Are there risks for Canadian lawyers or agencies who participate in activities which facilitate transnational agreements for intended parents who wish to pay Canadian surrogates?**

**Yes.** Lawyers or agencies who participate in activities that facilitate commercial surrogacy agreements face potential criminal liability as parties to the offence of compensating a surrogate, for counselling an offence, and/or directly for accepting compensation to arrange the services of a surrogate mother.

Additionally, lawyers could face disciplinary proceedings from their regulator for facilitating an unlawful agreement.

**3. Are there liability risks to Canadian fertility clinics which participate in transnational paid surrogacy arrangements?**

**Yes.** The risk of a fertility clinic being criminally liable for participating in paid surrogacy arrangements will depend on the clinic’s level of knowledge and participation in the paid arrangement. The broad language of the *AHRA* poses some risk that a fertility clinic could be prosecuted as a party to an offence under the *AHRA*.<sup>3</sup>

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<sup>3</sup> An organization may be found to be a party to an offence. See: [Criminal Code](#), R.S.C., 1985, c. C-46, s. 22.2 [*Criminal Code*].

Additionally, the fertility clinic and its staff could face professional discipline from their respective regulators for their involvement in a transnational paid surrogacy arrangement.

**4. Could the conspiracy offences in the *Criminal Code* apply to transnational commercial surrogacy arrangements in Canada?**

**Yes.** The conspiracy provisions in the *Criminal Code* apply to unlawful surrogacy arrangements under the *AHRA*. The *Criminal Code* deems a conspiracy as having occurred in Canada if there is a common intention to commit an offence in Canada, even if intended parents or other entities involved are located outside of Canada and even if the payment originates outside of Canada.

**5. Is there a risk that Canada will exercise jurisdiction to criminally charge international intended parents and entities which pay or offer to pay Canadian surrogates?**

**Yes.** In our opinion Canada will be able to establish jurisdiction to prosecute international intended parents, or entities which assist them, for offences under the *AHRA* where payment is received by a Canadian surrogate. This would include situations where the intended parents are paying Canadian surrogates contrary to the rules under the *AHRA*.

**6. Can the *AHRA* apply to international entities which do any of the following:**

- a. pay or offer to pay Canadian surrogates;**
- b. arrange for international intended parents to pay Canadian surrogates; or**
- c. manage payments for Canadian surrogates?**

**Yes.** The *AHRA* makes it an offence to pay or offer to pay a surrogate. It is also an offence to offer or accept consideration to “arrange services of a surrogate mother in Canada”.

Case law demonstrates it will be easy for Canada to establish jurisdiction to prosecute a non-Canadian person or entity where the aim of the prosecution targets harm suffered in Canada. Additionally, such persons or entities could face criminal liability for counselling an offence or conspiracy, depending on the individual or entity’s level of knowledge and participation.

## II. The *AHRA* and Paid Surrogacy in Canada

In Canada, surrogacy is governed by the *Assisted Human Reproduction Act* (the “*AHRA*”).<sup>4</sup> Surrogacy is legal in Canada, provided that the surrogate is not paid. Sections 5 to 7, 9 and 60 of the *AHRA* create the following surrogacy-related offences:

- (1) Paying or offering to pay “a female person to be a surrogate mother”;
- (2) Accepting consideration for:
  - a. arranging the services of a surrogate mother;
  - b. offering to make such an arrangement for consideration; or
  - c. advertising the arranging of such services.
- (3) Paying, offering to pay, or advertising to pay consideration to another person<sup>5</sup> for arranging the services of a surrogate mother.<sup>6</sup>

The offences may be prosecuted by way of summary conviction or indictment. On summary conviction, the offence carries a potential penalty of up to a \$250,000 fine, or term of imprisonment up to four years, or both.<sup>7</sup> By indictment, the offence carries a potential penalty of up to \$500,000, or a term of imprisonment of up to 10 years, or both.<sup>8</sup>

### ***Reimbursements Only***

The only payments individuals may pay to a surrogate for providing surrogacy services in Canada are *reimbursements* for surrogacy-related expenditures in accordance with the Act’s *Regulations*.<sup>9</sup>

Reimbursements must fall into one of the categories established by Regulation.<sup>10</sup> The Regulation imposes specific documentation and record-keeping obligations to ensure that payments are for legitimately reimbursable expenditures.<sup>11</sup>

After a thorough review, we have not located any instances where authorities laid charges against international intended parents under the *AHRA*. However, Canada’s approach to jurisdiction for

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<sup>4</sup> [Assisted Human Reproduction Act, S.C. 2004, c. 2](#), [“*AHRA*”].

<sup>5</sup> The definition of “person” in the *AHRA* and *Criminal Code* includes corporations. See: [Interpretation Act, R.S.C., 1985, c. 1-21](#), s. 33(1).

<sup>6</sup> [AHRA](#), ss. 6 and 60.

<sup>7</sup> [AHRA](#), s. 60(b).

<sup>8</sup> [AHRA](#), s. 60(a).

<sup>9</sup> [AHRA](#), s. 12(1).

<sup>10</sup> [Reimbursement Related to Assisted Human Reproduction Regulations, SOR/2019-193](#), ss. 2-8.

<sup>11</sup> [Reimbursement Related to Assisted Human Reproduction Regulations, SOR/2019-193](#), s. 11-12.

criminal offences means that international intended parents (or entities assisting those intended parents) face the risk of prosecution if they participate in paying Canadian surrogates, rather than reimbursing them for expenses in accordance with the *AHRA*.

### III. Jurisdictional Reach of the *AHRA*

Transnational surrogacy arrangements in which international intended parents pay Canadian surrogates raise questions about the territorial reach of the *AHRA*.

The *AHRA* is silent on this point. Generally, the *Criminal Code* prevents individuals from being convicted of offences which occur outside of Canada.<sup>12</sup> However, Canadian courts will find jurisdiction to prosecute an offence and potentially convict when:

- (1) there is a “real and substantial link” between the offence and Canada; and
- (2) assuming jurisdiction does not offend the principles of international comity.<sup>13</sup>

#### *The “Real and Substantial Link” Test*

The test for a real and substantial link between an offence and Canada requires that a significant portion of the activities constituting the offence occur in Canada.<sup>14</sup> The assessment is not limited to the facts that strictly form the elements of the offence.<sup>15</sup> In *Libman v. The Queen* the defendant operated a telephone scam from Ontario which induced U.S. residents to purchase virtually worthless shares of a corporation and to transfer money to Panama.<sup>16</sup> The Court rejected the argument that Canada had no jurisdiction because the essential element of fraud—deprivation—occurred outside of Canada.

The Court held that accepting such an argument would render the law ineffective because it could be avoided by the artifice of leaving the country to obtain the fruits of a scheme hatched in Canada.<sup>17</sup> In other words, the link between Canada and the offence was not “accidental”, but rather an integral part of the scheme.<sup>18</sup>

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<sup>12</sup> *Criminal Code*, R.S.C., 1985, c. C-46, s. 6(2) [*Criminal Code*].

<sup>13</sup> *Libman v. The Queen*, 1985 CanLII 51 (SCC), [1985] 2 SCR 178, at paras 67, 74 [“*Libman*”]; *R. v. Barra*, 2021 ONCA 568, at para 46 [“*Barra*”]; *R. v. Coban*, 2022 BCSC 1441, at para 9 [“*Coban*”].

<sup>14</sup> *Libman*, at para 74.

<sup>15</sup> *Barra*, at para 46.

<sup>16</sup> *Libman*, at paras 2-5.

<sup>17</sup> *Libman*, at para 71; *Barra*, at para 46.

<sup>18</sup> *Libman*, at para 71.

### *Applying the Test to Transnational Paid Surrogacy*

While the real and substantial connection test is fact-specific, Canadian courts would likely find jurisdiction to prosecute offences under the *AHRA* even if the intended parents or intermediaries are not in Canada.

#### Real and substantial link:

The real and substantial link test will likely be met in transnational paid surrogacy agreements concerning Canadian surrogates if the payment is received by a Canadian surrogate or the nature of the arrangement seeks out Canadian surrogates.

*Libman* held that Canadian courts still have jurisdiction even when the “gravamen” (or essence) of an offence occurred outside of Canada, so long as the offence has a real and substantial link to Canada.<sup>19</sup> In transnational paid surrogacy arrangements concerning Canadian surrogates, the essence of the offence does occur in Canada when a surrogate is paid in Canada. But even when a Canadian surrogate is paid outside of Canada, the real and substantial connection test would still likely be met.

Jurisprudence since *Libman* suggests that Canada will have jurisdiction to prosecute an international individual or entity under the *AHRA* where the harm of the offence is suffered in Canada or the benefit of an offence is obtained in Canada.

In *R. v. Coban*, Canada had jurisdiction to prosecute a Dutch citizen living in the Netherlands. The Crown alleged that the defendant communicated with a teenaged complainant over a two-year period in which he used her intimate images to harass, extort, and threaten her. The defendant was charged with possession of child pornography. The devices containing child pornography were never in Canada. The Court found jurisdiction because the complainant lived in Canada, the evidence was linked to Canada because the Crown intended to prove that the defendant sent messages from aliases posing as Canadians, and the impact of the offence was felt in Canada.<sup>20</sup> *Coban* demonstrates that the harm of an offence being suffered in Canada is a significant factor weighing in favour of Canada’s jurisdiction over a prosecution. Where a paid surrogate is in Canada, a prosecution will be seen as protecting against a harm suffered in Canada, even if the

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<sup>19</sup> *Libman*, at paras 70-71.

<sup>20</sup> *Coban*, at para 24.

payor or intermediary is outside the country. If the payor is an international intended parent who enters Canada at the time of birth, the link is even stronger.

In *R. v. Barra* the defendant was not Canadian, but was the controlling mind of a Canadian company which bribed an Air India official contrary to the *Corruption of Foreign Public Officials Act*. The discussion in which the bribe was offered occurred outside of Canada and no payments related to the bribe originated in Canada. The Court nonetheless found a real and substantial link because the benefit of the bribe—a contract between Air India and a Canadian company—would be obtained in Canada.<sup>21</sup>

In sum, in the scenario of international intended parents paying Canadian surrogates, even if a payment for surrogacy comes from outside Canada, or is kept outside of Canada, the benefit of the offence—an individual's agreement to act as a paid surrogate—is obtained in Canada. *Barra* suggests this factor will weigh heavily in favour of Canada's jurisdiction to prosecute an offence under the *AHRA* if the paid surrogate is in Canada.

An important feature of *Libman* is the Court's analysis of whether a law would be ineffective if Canada did not take jurisdiction. The stated principles of the *AHRA* and the Parliamentary debates make clear that the purpose of the *AHRA* is to prevent for-profit models of surrogacy in Canada and to protect vulnerable women from being induced into paid surrogacy relationships.<sup>22</sup> Courts are likely to find that the *AHRA* would be rendered ineffective if an individual could avoid its consequences by leaving Canada or making payments from outside of Canada, while still taking the benefits of a paid surrogacy arrangement involving a Canadian surrogate.

#### Principles of international comity:

It is unlikely that a court would find prosecuting an offence under s. 6 of the *AHRA* offends principles of international comity.

Prosecutions do not offend international comity if the prosecuting country has a legitimate interest in protecting its people from activities abroad that have unlawful consequences in the prosecuting

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<sup>21</sup> *Barra*, at para 27. Note that the *Corruption of Foreign Public Officials Act* now defines its territoriality and explicitly states that it applies outside of Canada. However, the offences at issue in *Barra* were committed before these provisions came into force. The Court held the provisions did not apply and instead analyzed the conduct under the real and substantial link test. This demonstrates that courts defer to the real and substantial link test even where the territoriality of an Act is not explicit.

<sup>22</sup> *AHRA*, s. 2 (c), (d), (f); [Canada, House of Common, Hansard, 37<sup>th</sup> Parliament, 1<sup>st</sup> Session, No. 188 \(21 May 2002\)](#), at p. 1015.

country.<sup>23</sup> The harm targeted by the *AHRA* is for-profit surrogacy models and vulnerable individuals being induced into commercial surrogacy arrangements. If that harm occurs in Canada, it will not offend international comity for Canada to assert jurisdiction.<sup>24</sup>

#### IV. Applicability of the Crime of Conspiracy to Transnational Paid Surrogacy

Intended parents and intermediaries who compensate Canadian surrogates could be prosecuted for a conspiracy to contravene the *AHRA*. Conspiracy is a *Criminal Code* offence which requires a shared intention to do something unlawful, an agreement to do something unlawful, and a common unlawful design.<sup>25</sup> The offence applies to contravening any Act of Parliament, which includes the *AHRA*.<sup>26</sup>

Canadian fertility clinics which participate in embryo transfers to a paid surrogate may risk criminal liability for conspiracy. An evaluation of those risks is outside the scope of this opinion.

If the Attorney General proceeds with conspiracy charges, as opposed to charges under the *AHRA*, the Attorney General will likely avoid a legal challenge to Canada's jurisdiction. Section 465(4) of the *Criminal Code* deems a conspiracy as having occurred in Canada where a person outside of Canada conspires with anyone to commit an offence in Canada.<sup>27</sup> Section 465(4) could apply to individuals or entities outside of Canada (e.g.: agencies) which pay, offer to pay, advertise, or arrange the services of a Canadian surrogate.

A conviction for conspiracy carries the same punishment as the core offence itself. In the case of the *AHRA*, the maximum fines and prison terms are set out in s. 60.

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<sup>23</sup> [Libman](#) at para 67; [R. v. Oler, 2018 BCCA 323](#), at para 44.

<sup>24</sup> The legality of Canadian intended parents paying individuals who live abroad for surrogacy services is outside the scope of this opinion.

<sup>25</sup> [R. v. Root, 2008 ONCA 869](#), at para 66.

<sup>26</sup> *Criminal Code*, s. 126(2).

<sup>27</sup> *Criminal Code*, s. 465(4).

## V. Common Questions

Below are our answers to some common questions that surrogates, intended parents, surrogacy agencies, and the legal and medical professionals involved in surrogacy in Canada may have.

### **1. Will Canada be able to assert jurisdiction to prosecute an international intended parent under the *AHRA* if the payment(s) for the surrogate in Canada do not flow through Canada?**

In our opinion, payments to a surrogate in Canada being sent from, or kept, outside of Canada will not act as a barrier to Canada asserting jurisdiction to prosecute an offence. *Libman* says that the conduct occurring in Canada does not have to constitute an essential element of an offence.<sup>28</sup>

The precise action barred by the *AHRA*—compensating a Canadian surrogate—does not need to occur in Canada for Canada to have jurisdiction. Further, a court may draw a comparison to *Barra* and find that even if payments to a surrogate were made to a non-Canadian trust account, for example, the benefit of the payments—an individual’s agreement to provide surrogacy services in exchange for compensation—is significantly linked to Canada.

### **2. Are there criminal liability risks to entities which advertise paid surrogacy arrangements involving Canadian surrogates?**

**Yes.** It is an offence under s. 6(1) of the *AHRA* to advertise to pay a woman for her surrogacy services.

An individual who advertises commercial surrogacy services in Canada may also face charges for counselling an offence under s. 22 of the *Criminal Code*. Counselling requires the Crown to prove that an individual or entity deliberately encouraged the commission of an offence and intended or consciously disregarded the unjustified risk that the offence was likely to be committed as a result.<sup>29</sup>

Either mode of liability will require the Crown to establish Canada’s jurisdiction over the offence by showing a real and substantial link to Canada. If the advertisement is targeted or otherwise directed at Canadian surrogates, the test will likely be met.

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<sup>28</sup> *Libman* at paras [70-71](#).

<sup>29</sup> *Briscoe*, at para [15](#).

### **3. Are there risks to surrogates in Canada who accept compensation?**

The *AHRA* targets the person or organization paying a surrogate, not the surrogate for accepting that payment. No offence in the *AHRA* criminalizes accepting payment for surrogacy services. Theoretically, a surrogate could be prosecuted as a party to an offence under the *AHRA* for aiding or abetting the offence. However, in our opinion, it is highly unlikely that the Attorney General would prosecute a surrogate, since the intent of the *AHRA* was to protect vulnerable women from entering commercial relationships which commodify their ability to have children.

### **4. Are there risks for Canadian lawyers who facilitate agreements for international intended parent clients who wish to pay Canadian surrogates?**

There is no exception under the *AHRA* for lawyers. A lawyer who receives consideration for drafting a legal agreement for paid surrogacy services between international intended parent and Canadian surrogate, for example, may face criminal liability under the *AHRA* or for counselling an offence.

In addition to criminal liability, lawyers facilitating transnational commercial surrogacy agreements face potential professional regulatory risks.

For example, Rule 3.2-7 of the Law Society of Ontario's *Rules of Professional Conduct* states that lawyers shall not knowingly assist or encourage illegal conduct or advise a client on violating the law to avoid punishment.<sup>30</sup> A provincial regulator may take disciplinary action against lawyers who facilitate agreements that they know are contrary to the *AHRA*, or who advise clients on methods to violate the *AHRA* while avoiding punishment.

### **5. Do the risks for lawyers apply to lawyers representing a paid surrogate?**

The offences in the *AHRA* do not distinguish between lawyers acting on a surrogate's behalf or intended parent's behalf. A lawyer acting for a paid surrogate may still face criminal liability under the *AHRA* or for counselling an offence. The lawyer may also face professional discipline consequences.

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<sup>30</sup> Law Society of Ontario, [Rules of Professional Conduct](#), R. 3.2-7.

**6. Are there risks for individuals or entities outside of Canada who participate in facilitating a paid Canadian surrogate on behalf of international intended parents?**

Individuals or entities which facilitate a paid surrogacy arrangement with a Canadian surrogate may face criminal liability under s. 6(2) of the *AHRA* for “arranging” the services of a surrogate mother, and/or under s. 6(1) for paying a surrogate.

The *AHRA* does not contain a definition of “arranging” surrogacy services under section 6(2) of the *AHRA*. Whether conduct amounts to “arranging” surrogacy services will be a case-specific assessment.

In our opinion, one example of “arranging” would be to assist in moving funds between international intended parents to the paid Canadian surrogate, either directly or through a third party. Providing escrow or accounting services in order to facilitate payment to surrogates could also attract criminal liability depending on knowledge of what the funds are for.

**7. Are there liability risks to Canadian fertility clinics which participate in transnational paid surrogacy arrangements?**

The liability risk for fertility clinics which participate in paid surrogacy arrangements will vary depending on the clinic’s level of participation and knowledge of the paid nature of the surrogacy arrangement, as well as the clinic’s intent. Where the fertility clinic creating the embryo or facilitating the embryo transfer is aware that the surrogate is being paid by international intended parents, the fertility clinic may face liability for aiding or abetting an offence under the *AHRA*.

The broad language of the offences in the *AHRA* does create a risk that the Crown could pursue a charge for a fertility clinic as a party to an offence.

Fertility clinics and their staff may also face disciplinary proceedings brought by their regulator for their participation in an unlawful paid surrogacy arrangement. For instance, Ontario’s *College of Physicians and Surgeons* classifies contravening a federal law which has a purpose of protecting public health as professional misconduct.<sup>31</sup>

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<sup>31</sup> See: [Ontario Regulation 856/93, Professional Misconduct](#), ss. 28(i), 34.

Additionally, physicians who face criminal charges may also face disciplinary proceedings by their regulatory authority for conduct unbecoming of a physician.

**8. If an individual or entity reached out to Health Canada to make Health Canada aware of a transnational paid surrogacy arrangement concerning a Canadian surrogate, and received no response, does that mean Health Canada takes no issue with transnational paid surrogacy?**

**No.** Health Canada cannot be assumed to approve of or tacitly consent to transnational commercial surrogacy arrangements merely because they do not respond to an inquiry advising them of such an arrangement. Nor does Health Canada's non-response shield an individual or entity from criminal consequences.

The only defence available to argue that a government official led an individual or entity to erroneously believe their illegal conduct was actually lawful is officially induced error.<sup>32</sup>

To establish the defence of officially induced error, a defendant must satisfy a court that:

1. they considered the legal consequences of their actions;
2. they obtained advice from an appropriate official responsible for the administration or enforcement of the particular law;
3. the advice received was reasonable in the circumstances;
4. the advice received was erroneous; and
5. the defendant relied on the erroneous advice.<sup>33</sup>

With no response from Health Canada, there is no "erroneous" advice to rely on.

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<sup>32</sup> [Lévis \(City\) v. Tétreault; Lévis \(City\) v. 2629-4470 Québec inc., 2006 SCC 12 \(CanLII\), \[2006\] 1 SCR 420 \[Tétreault\]](#).

<sup>33</sup> [Tétreault](#), at para 26.

## VI. Conclusion

International intended parents risk criminal liability for paying Canadian surrogates. This risk extends to intermediaries or other entities facilitating payments to Canadian surrogates from either inside or outside of Canada.

There are several modes of criminal liability which Canadian authorities could use to prosecute such individuals and entities. These include prosecutions under the *AHRA*, as a party to an offence under the *AHRA*, or prosecutions for conspiracy and/or counselling an offence under the *Criminal Code*.

Whether a non-Canadian individual or entity is convicted of a surrogacy-related offence may depend on Canada's ability to satisfy a Canadian court that it has jurisdiction over an offence. In our opinion, there is a real and substantial link between an offence and Canada where a paid surrogacy arrangement involves a surrogate living in Canada.

Additionally, depending on their level of knowledge and participation, legal and medical professionals who facilitate or assist paid surrogacy arrangements in Canada bear criminal and professional regulatory risks.



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