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Why the Government of Canada Won't Regulate Assisted Human Reproduction: A Modern Mystery

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WHY THE GOVERNMENT OF CANADA WON'T REGULATE ASSISTED HUMAN REPRODUCTION: A MODERN MYSTERY

*Dave Snow, Françoise Baylis & Jocelyn Downie**

The Canadian *Assisted Human Reproduction Act (AHR Act)*, passed in 2004, prohibits both paying consideration to a surrogate mother and purchasing sperm and ova from a donor (sections 6–7). Both prohibitions are subject to section 12, which was intended to permit reimbursement of expenditures incurred by surrogate mothers and gamete donors and reimbursement for loss

La *Loi sur la procréation assistée canadienne*, adoptée en 2004, interdit à la fois la rétribution d'une mère porteuse et l'achat de spermatozoïdes et ovules d'une donneuse (articles 6–7). Les deux interdictions sont soumises à l'article 12 qui visait à permettre le remboursement des frais encourus par les mères porteuses et les donneurs de gamètes ainsi que le remboursement des

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of work-related income for surrogate mothers. Remarkably, more than ten years after the *AHR Act* received Royal Assent, and in spite of repeated calls for greater legal clarity, Health Canada has not drafted regulations pursuant to section 12 of the *AHR Act*, which is not yet in force. In this paper, we speculate as to possible reasons why the Conservative government (2006–2015) did not draft regulations, and we explain in turn why each of the possible reasons for inaction is flawed. In light of our rejection of all of the reasons we could imagine, we argue that Health Canada should both explain and justify its failure to draft the regulations that would set the stage for Parliament to bring section 12 into force. It must do so if the federal government is to meet the *AHR Act*'s goal of protecting children, women, and men engaged in, or affected by, surrogacy and third-party egg production.

perles de revenus d'emploi pour les mères porteuses. Chose étonnante, plus de dix ans après que la *Loi sur la procréation assistée* a reçu la sanction royale, et en dépit des appels répétés pour une plus grande clarté juridique, Santé Canada n'a établi aucun règlement conformément à l'article 12 de la *Loi*, qui n'est toujours pas en vigueur. Dans cet article, nous nous interrogeons quant aux raisons possibles pour lesquelles le gouvernement conservateur (2006–2015) n'a établi aucun règlement et nous expliquons tour à tour pourquoi chacune des raisons possibles de cette inaction est peu convaincante. Compte tenu de notre rejet de toutes les raisons que nous puissions imaginer, nous demandons à Santé Canada d'expliquer et de justifier son refus d'établir les règlements nécessaires pour faire en sorte que l'article 12 entre en vigueur. Il doit ce faire, pour que le gouvernement fédéral puisse atteindre l'objectif de la *Loi sur la procréation assistée*, qui vise à protéger les enfants, les femmes et les hommes engagés dans, ou affectés par, la maternité de substitution et la production d'ovocytes pour autrui.

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INTRODUCTION

Policy options regarding payment for contract pregnancy and for human eggs vary around the globe. For example, in some countries, such as India and much of the United States, there are largely unregulated free markets in assisted human reproduction.¹ In other countries, such as the United Kingdom, there are legal limits on payments to gestating women and there is a flat fee for egg providers.² In still other countries, such as France, there is an outright ban on contract pregnancy, but reimbursement of expenses is permitted for egg donation.³ In Canada, the issue of legal reimbursement for contract pregnancy (designated “surrogacy” in the legislation) and human eggs is both complex and contested – unnecessarily so, we would argue.

While many believe that Canada prohibits payments but permits reimbursements for surrogacy and human eggs, what happens in practice is not quite so simple. There is a clear legal prohibition on payments, but next to no enforcement of this prohibition.⁴ To be specific on this point, there is considerable evidence of commercial transactions in Canada⁵ for both surro-

¹ Aaron D Levine, “Self-Regulation, Compensation, and the Ethical Recruitment of Oocyte Donors” (2010) 2:1 *Asian Bioethics Rev* 36; GKD Crozier & Dominique Martin, “How to Address the Ethics of Reproductive Travel to Developing Countries: A Comparison of National Self-Sufficiency and Regulated Market Approaches” (2012) 12:1 *Dev World Bioeth* 45.

² Françoise Shenfield et al, “Cross Border Reproductive Care in Six European Countries” (2010) 25:6 *Hum Reprod* 1361 at 1367; Guido Pennings et al, “Socio-Demographic and Fertility-Related Characteristics and Motivations of Oocyte Donors in Eleven European Countries” (2014) 29:5 *Hum Reprod* 1076 at 1085.

³ Pennings et al, *supra* note 2 at 1081, 1087–88.

⁴ Françoise Baylis & Jocelyn Downie, “Wishing Doesn’t Make It So” (17 December 2013), *Impact Ethics* (blog), online: <impactethics.ca/2013/12/17/wishing-doesnt-make-it-so>.

⁵ Alison Motluk, “The Human Egg Trade”, *The Walrus* (April 2010), online: <thewalrus.ca/the-human-egg-trade>; Tom Blackwell, “Canadian Fertility Consultant Received \$31K for Unwittingly Referring Parents to U.S. ‘Baby-Selling’ Ring”, *National Post* (15 December 2013), online: <news.nationalpost.com/2013/12/15/canadian-fertility-consultant-received-about-30000-for-unwittingly-referring-parents-to-u-s-baby-selling-ring>. The evidence here consists in media reports and not peer-reviewed literature. On this we offer two comments. First, there are no peer-reviewed articles reporting on empirical

gacy and human eggs,⁶ and yet our research reveals that there has only been one conviction in the last ten years.⁷ Moreover, while Parliament intended to permit reimbursement of receipted expenditures and, for surrogate mothers, reimbursement for loss of work-related income incurred during pregnancy, the regulations required to give effect to this intent have never been drafted.⁸

The Canadian *Assisted Human Reproduction Act (AHR Act)*,⁹ passed in 2004, prohibits paying consideration to a surrogate mother or someone acting on her behalf, as well as purchasing sperm or ova from a donor or someone acting on behalf of a donor.¹⁰ Both of these prohibitions are subject

research in this area, not least because such research would require research participants to admit to legally questionable activities. Second, Motluk is a highly regarded investigative journalist. Her article on the human egg trade in Canada (which includes evidence of cancelled cheques) won a silver 2011 National Magazine Award for investigative journalism.

⁶ There is also evidence of Canadians' involvement in transnational surrogacy and egg selling. While a discussion of the extraterritorial application of the *Assisted Human Reproduction Act* is beyond the scope of this article, two of the authors have addressed this issue in previous work. See Jocelyn Downie & Françoise Baylis, "Transnational Trade in Human Eggs: Law, Policy, and (In)Action in Canada" (2013) 41:1 *JL Med & Ethics* 224. For an alternative perspective, see Susan G Drummond & Sara R Cohen, "Eloquent (In)Action: Enforcement and Prosecutorial Restraint in the Transnational Trade in Human Eggs as Deep Ambivalence about the Law" (2014) 26:2 *CJWL* 206.

⁷ In December 2013, in an unreported decision, Leia Picard, the director of Canadian Fertility Consulting Ltd., received a fine of \$60,000 after admitting to violating sections 6 and 7 of the *Assisted Human Reproduction Act*, SC 2004, c 2 [*AHR Act*]. See Public Prosecution Service of Canada, *Annual Report 2013–2014* (Ottawa: Office of the Director of Public Prosecutions, 2014) at 15, online: <www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2013_2014/ar14-ra14.pdf>; see also *R v Picard and Canadian Fertility Consulting Ltd* (2013), Agreed Statement of Facts, online: Novel Tech Ethics <www.dal.ca/content/dam/dalhousie/pdf/sites/novelttechethics/AHRA_Facts.pdf> [*R v Picard*, Agreed Statement of Facts].

⁸ Downie & Baylis, *supra* note 6 at 229; Françoise Baylis, Jocelyn Downie & Dave Snow, "Fake It Till You Make It: Policymaking and Assisted Human Reproduction in Canada" (2014) 36:6 *J Obstet Gynaecol Can* 510.

⁹ *AHR Act*, *supra* note 7.

¹⁰ *Ibid*, ss 6–7. Because of existing regulations for the processing and distribution of sperm, there is an established pattern for sperm in contrast to the uncer-

to section 12 of the *AHR Act*, which, once in force, is expected to permit reimbursement of expenditures incurred by surrogate mothers and gamete donors and, for surrogate mothers, reimbursement for loss of work-related income incurred during pregnancy. Until 2012, when the *AHR Act* was amended by Parliament,¹¹ such reimbursement was to be permitted provided (i) there were receipts for the expenditures or a certificate from a qualified medical practitioner and (ii) the reimbursement was made “in accordance with the regulations and a licence.”¹² In 2012, the requirement for a licence was eliminated.¹³

As such, in Canada, once section 12 comes into force, reimbursement for women who provide gestational services or eggs for third-party reproduction should be permissible, provided they have receipts for the expenditures or, in the case of surrogate mothers, a properly executed certificate from a qualified medical practitioner, and also provided the reimbursement is made in accordance with the regulations. But herein lies the rub: section 12 cannot be brought into force in any meaningful way¹⁴ because there are

tainty for eggs and surrogacy. See *Processing and Distribution of Semen for Assisted Conception Regulations*, SOR/96-254. While we recognize that the introduction of regulations under section 12 of the *AHR Act* could confirm or change existing practices regarding the distribution of sperm, a discussion of this matter is beyond the scope of this paper.

¹¹ *Jobs, Growth and Long-Term Prosperity Act*, SC 2012, c 19, ss 713–53 [*Prosperity Act*].

¹² Sections 12(1) and 12(3)(b) of the original *Assisted Human Reproduction Act*, SC 2004, c 2 [*AHR Act* (2004)], prior to amendment by the *Prosperity Act*, *supra* note 11. For the text of the *Act* as it appeared from 1 December 2007 to 15 March 2012, see online: <laws-lois.justice.gc.ca/eng/acts/A-13.4/20071201/P1TT3xt3.html> (amendments prior to 2012 did not concern section 12).

¹³ *AHR Act*, *supra* note 7, s 12. Prior to 2012, section 12 was under the “Controlled Activities” category of the *AHR Act*, which listed activities that would be permitted only in accordance with regulations and a licence. In 2012, the legislature removed the “Controlled Activities” category and moved section 12 into the “Prohibited Activities” category. In addition, the legislature eliminated the requirement for a licence, but maintained the requirement for regulations. As well as setting out rules for reimbursement of expenditures for sperm, ova, and surrogacy, this section prohibits (except in accordance with regulations) reimbursement for the maintenance or transport of an *in vitro* embryo. *AHR Act*, *supra* note 7, s 12(1)(b).

¹⁴ Technically, section 12 prohibits the reimbursement of expenditures for sperm,

no regulations and because Health Canada, the federal agency responsible for creating them,¹⁵ has yet to draft such regulations.

Remarkably, more than ten years after the *AHR Act* received Royal Assent, and in spite of repeated calls for greater legal clarity,¹⁶ Health Canada has not drafted regulations pursuant to section 12 of the *Act*. This is surprising for at least two reasons. First, there is evidence of an established intent to draft such regulations. In a 2005 report on a workshop with stakeholders regarding reimbursement of expenditures for egg and sperm donors, Health Canada indicated that its “next steps” would include the development of

ova, and surrogacy, as well as the maintenance and transport of embryos unless made “in accordance with the regulations.” However, the clear intent of this section was to permit reimbursement for expenditures through the drafting of subsequent regulations. While Parliament could conceivably bring this section into force *without* any corresponding regulations, the effect of doing so would be largely to duplicate sections 6 and 7, which already prohibit “consideration” for these activities. See *AHR Act*, *supra* note 7, ss 6–7, 12; Health Canada, “Prohibitions Related to Purchasing Reproductive Material and Purchasing or Selling *In Vitro* Embryos” (18 July 2013), online: <www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/purchasing-achat-eng.php> [Health Canada, “*In Vitro* Embryos”]; Health Canada, “Prohibitions Related to Surrogacy” (18 July 2013), online: <www.hc-sc.gc.ca/dhp-mps/brgtherap/legislation/reprod/surrogacy-substitution-eng.php> [Health Canada, “Surrogacy”]. In practice, regulations are frequently drafted by the relevant administrative agency or department before the coming into force of a provision, so that the adoption of regulations and the coming into force of the provision occur on the same day. As Bédard notes, the federal *Interpretation Act*, RSC 1985, c I-21, “authorizes that actions be taken or regulations be made pursuant to an Act that is not yet in force in order to make the Act in question effective on its commencement.” This happened with the appointment of the first Conflict of Interest and Ethics Commissioner, “an example of preliminary actions accomplished pursuant to, but before the commencement of, an Act.” Library of Parliament, Legal and Legislative Affairs Division, “Coming into Force of Legislation”, by Michael Bédard, Publication No. 2009-03-E (revised version 30 May 2012) at 1, online: <www.parl.gc.ca/Content/LOP/ResearchPublications/2009-03-e.pdf>.

¹⁵ Section 65 of the *AHR Act*, *supra* note 7, grants authority to the Governor in Council to create regulations, and section 20(1) of the *Act* grants the Minister of Health responsibility “for the policy of the Government of Canada respecting assisted human reproduction and any other matter that, in the opinion of the Minister, relates to the subject-matter of this Act”; collectively, these two provisions give Health Canada the power to draft regulations.

¹⁶ Downie & Baylis, *supra* note 6; Baylis, Downie & Snow, *supra* note 8.

“policy options for the regulations,” and that “the normal regulatory process will unfold ... with the aim of having the entire regulatory framework in place by 2007 or 2008.”¹⁷ In 2007, Health Canada also issued a public consultation document in which it stated that “when section 12 comes into force, it will provide for the reimbursement of receipted expenditures in accordance with the regulations and a licence.”¹⁸ A letter to stakeholders accompanying the document noted that regulations for section 12 were “currently being developed, and consultation with Canadians is a key element of this process.”¹⁹

Second, Health Canada is clearly capable of drafting regulations under the *AHR Act*. In 2007, it created the *Assisted Human Reproduction (Section 8 Consent) Regulations*.²⁰ Given that Health Canada signalled its intent to draft regulations on reimbursement back in 2005 and in 2007, and given that it knows how to go about the business of creating regulations pursuant to the *AHR Act*, it is not obvious why there are still no regulations on reimbursement in 2015.

In this paper, we speculate²¹ as to possible reasons why Health Canada has not drafted regulations, and we explain in turn why each of the possible reasons for inaction is flawed. Given our rejection of all of the reasons

¹⁷ Health Canada, Workshop on the Reimbursement of Expenditures for Egg and Sperm Donors – Meeting Report, November 5–6, 2004, prepared by the Intersol Group for Health Canada (final report: 30 March 2005) at 11, online: Government of Canada <publications.gc.ca/collections/Collection/H21-239-2005E.pdf>.

¹⁸ Health Canada, “Reimbursement of Expenditures under the Assisted Human Reproduction Act: Public Consultation Document” (n.d. [August 2007]) at 4 [on file with authors].

¹⁹ Letter from Health Canada’s Assisted Human Reproduction Implementation Office (9 August 2007), accompanying the Public Consultation Document, *ibid*.

²⁰ *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137.

²¹ Our speculation is based on an analysis of all available evidence and scholarship on this subject, including direct inquiries to Health Canada and Health Canada’s public statements on the issue. Our goal is not to impute intent; rather, it is to explore possible reasons for not drafting regulations, precisely because Health Canada has not made its motivations clear. If Health Canada were to offer an explanation, such speculation might not be necessary.

we could imagine,²² we argue that Health Canada should both explain and justify its failure to introduce the regulations that would set the stage for Parliament to bring section 12 into force. Health Canada must do so if the federal government is to meet the *AHR Act*'s goal of protecting children, women, and men engaged in, or affected by, surrogacy and third-party egg production.

WHY IS HEALTH CANADA NOT REGULATING LEGALLY PERMISSIBLE REIMBURSEMENTS?

A. Perhaps Health Canada believes the regulations would be superfluous

Perhaps Health Canada has not drafted the regulations for section 12 because it believes that these regulations would be superfluous insofar as the only effect of bringing section 12 into force would be to restrict reimbursements to those for receipted expenditures and properly certified loss of work-related income during pregnancy. Perhaps Health Canada believes it can achieve this goal by fiat, simply by stipulating that such reimbursement is Health Canada's "policy."²³ On this view, the will of Parliament can be respected without undertaking the onerous task of developing and implementing regulations.

However, this reasoning would be seriously flawed.

²² Other than two recent articles (Downie & Baylis, *supra* note 6; Baylis, Downie, and Snow, *supra* note 8), the scholarly community has been surprisingly absent from discussions on the failure to create regulations for section 12 of the *AHR Act*. Letters to Health Canada from two of us (Françoise Baylis and Jocelyn Downie) seeking clarity on section 12 have similarly failed to elicit an adequate explanation. See "Reproductive Tissues", *NTE Impact Ethics*, online: <www.dal.ca/sites/noveltechethics/projects/selling-the-body/reproductive-tissues.html> ["Reproductive Tissues", *NTE Impact Ethics*] (including sources therein).

²³ See *R v Picard*, Agreed Statement of Facts, *supra* note 7 ("Health Canada policy permits reimbursement to donors and surrogates of expenses and disbursements related to donation or surrogacy. This cannot involve paying consideration to donors or surrogates for their services or accepting payment for arranging surrogate services or similar financial gain" at para 3); see also Baylis, Downie & Snow, *supra* note 8.

First, the source of the requirement for receipts comes directly from subsections (1) and (2) of section 12. If section 12(1)–(2) did not exist, there would be no legislated requirement for receipts in order for expenditures to be reimbursable. Without section 12(1)–(2), Health Canada would have no legal basis for its stated “policy” limiting reimbursements to expenses or expenditures for which there are receipts. Because regulations are necessary for section 12 to have any meaning that would differentiate that section from the prohibitions on “consideration” contained in sections 6 and 7,²⁴ the regulations are necessary for Health Canada’s “policy” to have any foundation in law.

Second, section 12(1)–(2) was deliberately created to limit the scope of permissible payments so as not to include any and all possible expenses, but only receipted “expenditures.”²⁵ During the legislative committee hearings leading up to the creation of the *AHR Act*, in testimony regarding an earlier draft of the bill that did not yet include section 12(3), Glenn Rivard on behalf of the Department of Justice noted that an expenditure is “a narrower concept than an expense” (such as forgoing a high salary) insofar as “money must actually have been paid out by the individual.”²⁶ Notably, Health Canada itself has used both the language of “expenses”²⁷ and “expenditures”²⁸ when offering its interpretation of the *AHR Act* on its websites.

Third, the rule of statutory interpretation known as the “rule against surplusage” or “presumption against tautology” militates against such reasoning. This rule is the principle that every word in a piece of legislation has been included for a reason. As noted by Ruth Sullivan in her leading

²⁴ See *supra* note 14 and sources cited therein.

²⁵ *AHR Act*, *supra* note 7, s 12.

²⁶ Rivard’s comment was in response to a question from MP Yolande Thibeault, who was concerned that section 12 as then conceived could permit reimbursement for loss of work-related income for someone whose “usual salary is \$75,000 a year”; Rivard confirmed that work-related income would not qualify as an expenditure. House of Commons, Standing Committee on Health, *Committee Evidence*, 37th Parl, 1st Sess, No 85 (30 May 2002) at 1155, online: <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=606622&Language=E&Mode=1&Parl=37&Ses=1>.

²⁷ Health Canada, “*In Vitro* Embryos”, *supra* note 14; Health Canada, “Surrogacy”, *supra* note 14.

²⁸ Health Canada, “*In Vitro* Embryos”, *supra* note 14.

text on statutory interpretation, “[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.”²⁹ The Supreme Court has cited Sullivan approvingly in this regard.³⁰ Clearly, the drafters of the *AHR Act* believed that section 12 – and subsequent regulations that would add specificity to section 12 – was necessary to the proper functioning of the *Act*. Thus, the rule against surplusage further counters any potential claim that section 12 is superfluous.

B. Perhaps Health Canada wants to avoid responsibility for the enforcement of limits on the exchange of money in connection with assisted human reproduction

Perhaps Health Canada does not want to write the regulations for section 12 and thereby provide clarity regarding the rules for reimbursement of expenditures and reimbursement for loss of work-related income for surrogate mothers because it hopes that, without the regulations, Canadians who want the services of a surrogate or an egg provider will pursue their reproductive objectives outside of Canada. This would effectively reduce Health Canada’s responsibilities for enforcement of the prohibitions on payment. Indeed, the recent report *Avis détaillé sur les activités de procréation assistée au Québec* specifically identifies the prohibition on remuneration as one of the reasons for increased reproductive travel, particularly for eggs.³¹

By not writing the section 12 regulations, Health Canada creates an incentive for Canadians who want to reimburse women for out-of-pocket expenditures (and, in the case of surrogacy, loss of work-related income) to access reproductive goods and services outside Canada in a jurisdiction where the law with respect to reimbursement is clear. Health Canada has specifically said that it “interprets the prohibitions under the *AHR Act* as

²⁹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at 210.

³⁰ See e.g. *British Columbia (Forests) v Teal Cedar Products Ltd*, 2013 SCC 51 at para 28, [2013] 3 SCR 301, 363 DLR (4th) 1.

³¹ Québec, Commissaire à la santé et au bien-être, *Avis détaillé sur les activités de procréation assistée au Québec* (Québec: Gouvernement du Québec, 2014) at 248, online: <www.csbe.gouv.qc.ca/fileadmin/www/2014/Procreation_assistee/CSBE_PA_detaille_2014.pdf>.

applying to activities that take place *in Canada*.³² Therefore, any exporting of commercialized reproduction reduces Health Canada's self-perceived enforcement obligations.

If this is the reason for not drafting the regulations, it would of course fly in the face of the commitments implied by the *Act*'s own declaration of its principles, which include protecting "the health and well-being of children born through the application of assisted human reproductive technologies,"³³ protecting "the health and well-being of women" affected by these technologies,³⁴ and preventing the "trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends."³⁵ It is indefensible for the government to incentivize Canadians to take conduct that has been deemed harmful out of the country – thus arguably encouraging the exploitation of citizens of destination countries for commercial ends³⁶ – simply so as to avoid having to enforce the law designed to prevent the harmful conduct in the first place.

C. Perhaps Health Canada wants the legal regime to be more permissive than it would be with section 12 in force

Perhaps Health Canada under the Conservative government (2006–2015) preferred a more permissive regime than was initially intended by both those in Health Canada responsible for drafting the legislation between 1996 and 2004 and the parliamentarians who passed the *AHR Act* in 2004.³⁷

³² Letter from Lynn Mainland, Director, Assisted Human Reproduction, Health Canada to Drs. [Jocelyn] Downie & [Françoise] Baylis (24 September 2013), online: Novel Tech Ethics <www.dal.ca/content/dam/dalhousie/pdf/sites/noveltechethics/HCRresponse2013_09.pdf> [emphasis added].

³³ *AHR Act*, *supra* note 7, s 2(a).

³⁴ *Ibid*, s 2(c).

³⁵ *Ibid*, s 2(f).

³⁶ Jennifer A Parks, "Care Ethics and the Global Practice of Commercial Surrogacy" (2010) 24:7 *Bioethics* 333 at 336; GKD Crozier & Françoise Baylis, "The Ethical Physician Encounters International Medical Travel" (2012) 36:5 *J Med Ethics* 297 at 300; Vida Panitch, "Surrogate Tourism and Reproductive Rights" (2013) 28:2 *Hypatia* 274.

³⁷ Françoise Baylis & Matthew Herder, "Policy Design for Human Embryo Re-

This could explain why Health Canada currently appears to interpret section 12(1)–(2) of the *AHR Act* as permitting reimbursement of “expenses” as long as they are receipted.³⁸ In contrast, on their face, these provisions of the *AHR Act* limit reimbursement to the narrower category of receipted “expenditures” and require that such reimbursements be “made in accordance with the regulations,”³⁹ not in accordance with a Health Canada policy stipulated on a website.⁴⁰

To say the least, it would be deeply problematic if the above hypothesis were Health Canada’s reason for not drafting regulations for section 12. It is for elected members of Parliament, not civil servants, to make law establishing the nature and size of expenditures eligible for reimbursement. Indeed, under the *AHR Act*, draft regulations must be put before Parliament.⁴¹ Health Canada’s role, consistent with established democratic processes, is not to undermine but rather to advance the will of Parliament – in this case, by drafting the required regulations. Regulations under section 12(1)–(2) would, at the very least, likely need to limit reimbursement to “expenditures” as opposed to the broader category of “expenses” (to be consistent with the enabling legislation). Also, given the principles declared in the *AHR Act*, these regulations would likely need to spell out some limits as to the nature and size of expenditures that would be reimbursable.⁴²

search in Canada: An Analysis (Part 2 of 2)” (2009) 6:3 *J Bioeth Inq* 351 at 357–59.

³⁸ Health Canada, “*In Vitro* Embryos”, *supra* note 14; Health Canada, “Surrogacy”, *supra* note 14.

³⁹ *AHR Act*, *supra* note 7, ss 12(1)–(2). Although section 12(3) permits reimbursement of a surrogate for the loss of work-related income incurred during her pregnancy in instances where 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,” that section does not include the word “expenditure”; consequently, our comment on the distinction between expenses and expenditures pertains only to subsections (1) and (2) of section 12.

⁴⁰ Health Canada, “*In Vitro* Embryos”, *supra* note 14; Health Canada, “Surrogacy”, *supra* note 14.

⁴¹ *Ibid*, s 66(1).

⁴² Health Canada, “*In Vitro* Embryos”, *supra* note 14; Health Canada, “Surrogacy”, *supra* note 14.

D. Perhaps Health Canada wants to set the parameters for permissible reimbursement of expenditures without oversight by Parliament

Perhaps Health Canada wants to set the parameters for permissible reimbursements of expenditures without oversight by Parliament. As noted above, draft regulations must be put before Parliament under the *AHR Act*. In contrast, statements made by Health Canada do not require parliamentary review and approval. By publishing an online interpretation of the *AHR Act* and directing fertility clinics, patients, and others to its website for direction on reimbursement,⁴³ Health Canada is at least trying *de facto* to set the parameters for permissible reimbursement in the absence of parliamentary oversight.

Of course, this too would be deeply problematic as a reason for Health Canada's inaction. To reiterate, section 66 of the *AHR Act* specifically stipulates that regulations pursuant to the *Act* must be placed before the House of Commons and the Senate. Of note, this legislated requirement goes above and beyond the common regulatory requirements for ordinary legislation,⁴⁴ suggesting that parliamentary oversight was clearly and forcefully desired by Parliament. Seeking to avoid such oversight would be a remarkable violation of our system of government.

E. Perhaps Health Canada was and continues to be acting on instructions from the previous federal government to keep the issue of human reproduction out of Parliament

It is possible that the previous government wanted to keep the issue of human reproduction out of Parliament and instructed Health Canada not to advance the file. Most of the *AHR Act* came into force in 2004 (when the Liberal Party was in power). In 2006, the Conservative Party came to power and thereafter consistently showed little interest in assisted human

⁴³ "Reproductive Tissues", *NTE Impact Ethics*, *supra* note 22; Health Canada, "In Vitro Embryos", *supra* note 14; Health Canada, "Surrogacy", *supra* note 14.

⁴⁴ Canada, Privy Council Office, "Guide to Making Federal Acts and Regulations: Part 3 – Making Regulations" (2 December 2009), online: <www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/part3-eng.htm>.

reproduction policy. Below are a few examples of inaction by the federal Conservative government on matters concerning human reproduction.

According to section 70 of the *AHR Act*, a parliamentary committee was to undertake a comprehensive review of the legislation by 2009, and to submit a report on its review a year thereafter.⁴⁵ The Conservative federal government ignored the review requirement.

When Assisted Human Reproduction Canada (the oversight agency created by the *AHR Act*) faced questions about its budget after three of its board members resigned, the federal Conservative government did not respond.⁴⁶ When the federal government closed down Assisted Human Reproduction Canada, it did so through provisions in a 425-page omnibus budget-implementation bill, legislation that affected 69 pieces of federal legislation with severely constrained time for debate.⁴⁷ Through that same bill, the federal government unceremoniously repealed section 70 of the *AHR Act*, which mandated parliamentary review.⁴⁸

Beyond assisted human reproduction, the Conservative government also sought to keep debates regarding access to abortion and the status of the fetus out of Parliament.⁴⁹ Indeed, the government under the Conservatives sought to avoid any debate on policy issues that touched on human

⁴⁵ Although the legislation was passed in 2004, the three-year review provision was contingent on the coming into force of section 21, which occurred on 12 January 2006. *AHR Act* (2004), *supra* note 12, s 70.

⁴⁶ Gloria Galloway, “Human Reproduction Agency Has Little to Show for \$30-million”, *Globe and Mail* (31 May 2012), online: <www.theglobeandmail.com/news/politics/human-reproduction-agency-has-little-to-show-for-30-million/article4224870/>.

⁴⁷ *Prosperity Act*, *supra* note 11; see also Gloria Galloway & Daniel Leblanc, “The Tale of 2012’s Omnibus Budget Bill”, *Globe and Mail* (12 June 2012), online: <www.theglobeandmail.com/news/politics/the-tale-of-2012s-omnibus-budget-bill/article4249856/>.

⁴⁸ *Prosperity Act*, *supra* note 11, s 738; see also *AHR Act*, *supra* note 7, s 70 (indicating that the section has been repealed pursuant to the *Prosperity Act*).

⁴⁹ “Harper Says He Won’t Reopen Abortion Debate”, *CBC News* (21 April 2011), online: <www.cbc.ca/news/politics/harper-says-he-won-t-reopen-abortion-debate-1.1010714>; see also Paul Saurette & Kelly Gordon, “Arguing Abortion: The New Anti-Abortion Discourse in Canada” (2013) 46:1 *Can J Political Science* 157 at 167.

reproduction, assisted or otherwise. As noted above, under the *AHR Act*, any regulations under section 12 would need to be brought before Parliament. Instructions from that government not to produce regulations would have served the goal of keeping reproduction issues out of Parliament. Perhaps Health Canada's inaction is reflective of compliance with instructions from the government, whether given explicitly or implicitly.

The political desire of the former Conservative government to avoid the issue of human reproduction being raised in Parliament was understandable. However, a desire on the part of the federal government to avoid political consequences at the ballot box is neither an excuse for Health Canada to depart from the will of Parliament (as expressed through the *AHR Act* introduced under a previous Liberal government), nor to avoid its own democratic responsibility for its decision (by being transparent and accountable for choosing not to advance the regulations). Health Canada should not allow itself to be used by any federal government as a cloak for political decision making nor as a shield from accountability for its political decisions. It remains to be seen whether the 2015 federal election of the Liberal Party will lead to any change in this regard.

CONCLUSION

The *AHR Act* creates a legal regime that clearly prohibits paying consideration to a surrogate mother or someone acting on her behalf, as well as purchasing sperm or ova from a donor or someone acting on behalf of a donor. However, the legal status of reimbursements for expenditures is complicated and confusing, as is the legal status of reimbursement for loss of work-related income for surrogate mothers. This is because the federal government that passed the *AHR Act* intended to allow reimbursement for out-of-pocket receipted expenditures and loss of work-related income during pregnancy, and such reimbursements were to be governed by regulations. However, these regulations have yet to see the light of day. We have been unable to find or fathom defensible reasons for Health Canada not having drafted the regulations. We therefore argue Health Canada should either persuasively defend its failure to draft regulations or get on with the task of drafting. A decade and counting is too long to wait.

