There is no doubt that Assisted Human Reproduction (AHR) is a ‘hot topic’ in Canadian Law. As AHR becomes increasingly commonplace across the country, case law is ever-expanding and select Canadian jurisdictions have made legislative changes to reflect the evolving reproductive landscape. However, there do remain jurisdictions that have not yet adapted legislatively and the result is something of a legal patchwork at the provincial level, ranging from the very-progressives to the moderately –outdated and everything in between, as will be discussed below. One point of uniformity across Canada is the Federal government’s Assisted Human Reproduction Act [AHRA][i]

Recently, the AHRA has been the subject of heated constitutional debate. In a deeply divided decision, the Supreme Court of Canada was asked to determine whether AHR as a legislative subject matter properly falls to federal jurisdiction as a valid exercise of its criminal law power, or to provincial jurisdiction as regulation of health care. While many questions remain, the Court was clear that commercial AHR practices, and activities like human cloning, are strictly prohibited throughout Canada.

[ii]

**Surrogacy**

Surrogacy *per se* is not illegal in Canada. However, the practice is restricted by federal law. Section 6 of the AHRA [iii] prohibits paying, offering to pay or advertising to pay consideration to a woman to be a surrogate mother. The section also prohibits intermediaries from arranging surrogacy for consideration. Counseling, inducing, or performing a medical procedure on a woman under 21 years of age with a view to having her act as a surrogate, regardless of whether consideration is paid, is prohibited.

Although paying consideration for surrogacy is prohibited by the AHRA, there is some indication that reimbursement of expenditures incurred by a surrogate mother is permitted.
Section 12(1)(c) of the AHRA provides that “[n]o person shall, except in accordance with regulations, …reimburse a surrogate mother for an expenditure incurred by her in relation to surrogacy.” The difficulty here is twofold: the first is that section 12 has never been proclaimed into force; and the second is that no regulations under this section have been promulgated. As such, there is much uncertainty as to what extent a surrogate may be reimbursed for the expenditures she incurs during pregnancy. Canadian practitioners report that, in the nine years they have waited for the section to be proclaimed, they have advised clients that a surrogate can be reimbursed for her out of pocket expenses, “provided that they are reasonable and related to the surrogacy.”

Parentage

An emerging area of Canadian law relating to AHR is determination of parentage. This issue arises where one or more parents of a child is either not the gestational or the biological parent (or neither) of the child, but seeks to be identified as the parent(s) of the child when the birth is registered, as opposed adopting the child from the gestational mother. Because many aspects of family law vary from province to province, the rules across the country with respect to parentage are not uniform. Thus far, three provinces have legislated in this area: Quebec, Alberta and British Columbia.

Quebec was the first of these jurisdictions to introduce legislation, in 2002. However, because that province is Canada’s only civil law jurisdiction, it tends to operate in relative isolation, and these “pioneering” reforms are little known outside of that province. The reforms added a third category to determinations of legal parenthood: in addition to “by blood” and “adoption”, it also included “born of assisted procreation”. The focus shifted away from genetics, toward the intentions of the participants in the “parental project”, including individuals, opposite sex couples and same sex couples.

In 2005, Alberta was the next province to introduce legislation providing a mechanism to determine parentage for children born as the result of AHR, but it contemplated only opposite-sex couples using AHR to conceive. Following a successful challenge by a same-sex couple that the parentage provisions violated their equality rights under the Canadian Charter of Rights and Freedoms, Alberta’s Family Law Act was amended in 2011 to reflect a gender-neutral, non-genetic, non-gestational intended parent. Under the
Alberta regime, an intended parent must bring an application in court seeking a declaration of parentage, with consent of the surrogate mother relinquishing her parental rights. Only two parents (same sex or opposite sex) will be recognized.[x]

Most recently, in 2013, British Columbia has also legislated in this area.[xi] More than two legal parents can be recognized for one child, either by pre-conception agreement, or by a court declaration of parentage. A further significant change to previous law is that intended parents in a surrogacy arrangement no longer need to seek a declaration of parentage from a court before appearing as parents on the birth certificate, so long as certain preconditions are met.[xii] The Act also grants the superior court of the province the power to make declarations of parentage (beyond simply invoking their parens patriae jurisdiction, as was previously the only option available to the court). Some commentators have remarked that this power may be used in situations where disputes as to parentage arise, but also for parties seeking further certainty of parentage when travelling to other jurisdictions.

Other provinces and territories of Canada have yet to introduce legislation with respect to parentage. An ever-growing line of case law suggests that, where intentions of the parties are abundantly apparent, courts will find a way to declare intended parents as first legal parents, even without clear legislative authority to do so.[xiii] Some jurisdictions, however, are left with aging precedents standing for the proposition that intended parents cannot be declared first legal parents, even where the parties’ intentions could not be more obvious.[xiv] Although rules of this kind seem increasingly out of touch with modern reality, in the face of a legislative void, families, lawyers and even courts are left with little guidance and much uncertainty.

**Ova, Sperm and Embryo Donation**

The AHRA prohibits the purchase of human sperm and ova (gametes, collectively) from a donor or from a person acting on behalf of a donor. It also prohibits the purchase or sale of *in vitro* human embryos. Human reproductive material (gametes and embryos) can only be used for procreation where there is written consent from the donor of the material given in accordance with the regulations.[xv] Some commentators have noted or predicted problems arising from the prohibition of the commercialization of ova and sperm donation. A Canadian sperm shortage was reported as early as 2006, only two years after the prohibition
took effect.\[xvi\] It is also expected that more Canadians will turn to imported, anonymously donated ova, especially in light of improving preservation technology and the “shockingly severe” penal sanctions of the AHRA.\[xvii\]

A recent issue relating to anonymous gamete donation in Canada arose in the Pratten \[xviii\] case. The adult offspring of an anonymous sperm donor challenged provincial law granting adult adopted children access to certain information about their biological parents, but not providing the same right to adult children born as the result of anonymous gamete donation. Although the lower court granted Pratten a suspended declaration of invalidity for the existing law, giving the legislature time to amend the provisions to extend the right to donor children, the Court of Appeal overturned the decision and determined that there was no breach. The Supreme Court did not grant Pratten leave to appeal. To date, anonymous gamete donation remains a valid practice in Canada.

**Written Agreements**

AHR practices in Canada are often subject to a written agreement. Despite the fact, as discussed above, that anonymous gamete donation is legal in Canada, many intended parents prefer to use the genetic material of a person whose identity they know. Having a written agreement in place between the donor and the intended parents is common practice. The same is true of surrogacy arrangements: there is usually a written agreement in place between the gestational mother and the intended parents. This is particularly common practice for those using medically-facilitated AHR; indeed, most fertility clinics in Canada require that the parties enter into a written agreement before the procedure takes place.\[xix\] Many such agreements are drafted by the intended parents’ legal counsel with input from all involved, but the surrogate or donor is strongly encouraged to seek independent legal advice before signing.\[xx\] However, for a variety of reasons (including cost and a desire for discretion), it is not uncommon for AHR to take place outside of the medical sphere, particularly where known-donor sperm donation is concerned. In circumstances such as those, the participants must be self-motivated to seek legal assistance or to draft an agreement of their own devising. One practitioner warns of the perils of relying upon boiler-plate AHR contracts found on-line, and emphasizes the importance of setting out the specific intentions and needs of the particular parties in each case.\[xxi\] Finally, it should be noted that the Quebec Civil Code expressly states that surrogacy agreements are null and unenforceable at law.\[xxii\]
[i] SC 2004, c 2 [AHRA].


[iii] AHRA, supra note 1.


[v] Note that the term used in Quebec’s Civil Code is “filiation”, not “parentage”. The terms connote similar meanings, but it should be noted that filiation is a more all-encompassing legal concept than is parentage.


[vii] Ibid.

[viii] Fraess v Alberta (Minister of Justice and Attorney General), 2005 ABQB 889. In that case, the government of Alberta took no position and made no submissions regarding the constitutional validity of the impugned provisions of the FLA. See: DWH v DJR, 2011 ABQB 119 at paras 15-17.

[ix] SA 2003, c F-4.5.


[xiii] See, e.g., from New Brunswick: JAW v JEW, 2010 NBQB 414, and from Ontario: AA v BB, 2007 ONCA 2, in which a declaration for a third parent (and second female parent) was successfully sought.

AHRA, supra note 1, ss 7(1), 7(2), 8(1) and 8(3). The regulations are: Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137.

“Sperm donor shortage hits Canadian infertility clinics”, CBC News (19 December 2006).

Sara R Cohen, “What Have we Done? AHRA as ‘Not in My Backyard’ Legislation (which I expect will result in increased use of commercialized, anonymously provided donor ova from U.S. egg banks)”, Fertility Law Canada™ at D2Law LLP – Sara R Cohen, LLB (20 June 2013).

Pratten v Attorney General (BC), 2012 BCCA 480, reversing 2011 BCSC 656. Leave to appeal to Supreme Court of Canada denied.

Sherry Levitan, supra note 3.


Art 541 CCQ.