Court File No: 25678

IN THE SUPREME COURT OF FLAVELLE
(ON APPEAL FROM THE COURT OF APPEAL FOR FALCONER)

B E T W E E N:

SPENCER LEWISTON and KEVIN SOLEIL

Appellants

and

ATTORNEY GENERAL OF FLAVELLE

Respondent

FACTUM OF THE APPELLANTS

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PART I - OVERVIEW AND FACTS

OVERVIEW

1. Spencer Lewiston and Kevin Soleil are a married couple who have been trying to complete their family with a child since 2008. After nine years of anxiety, disappointment, and heartbreak, the couple has finally found a solution. Mrs. Petra Parker – an educated, married mother of two children – has offered to act as the couple's gestational surrogate. These parties wish to enter into a mutually beneficial gestational surrogacy agreement, whereby Mrs. Parker would be compensated $36,440.36 for carrying the couple's genetic child to term. Section 6(1) of the *Assisted Human Reproduction Act* ("*AHRA*") criminally prohibits such a transaction, punishable by up to ten years' imprisonment.

2. The total prohibition on compensated surrogacy in s. 6(1) of the *AHRA* restricts access to an already limited assisted human reproduction ("AHR") technology in a way that violates Mr. Lewiston and Mr. Soleil's rights under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*"Charter*"). The prohibition also infringes the equality rights of potential surrogates – the very women that the law purports to protect. None of these infringements can be justified under s. 1 of the *Charter*. As a result, s. 6(1) of the *AHRA* is unconstitutional and should be declared of no force or effect.

FACTS

The Appellants, Spencer Lewiston and Kevin Soleil

3. Spencer Lewiston and Kevin Soleil were married in 2005, shortly after the federal recognition of same-sex marriage. Eager to build their family, in 2008, the couple met with Falconer Fertility Services ("FFS") to investigate their options. From FFS, they learned that their only chance to have their own child was through surrogacy.[1]

4. Mr. Lewiston and Mr. Soleil decided to pursue surrogacy using Mr. Soleil's sperm and oocytes donated by Mr. Lewiston's sister, Julianne Lewiston, so that their child would be genetically related to both of them. Julianne also graciously volunteered to act as their surrogate. From 2010-2012, the couple and Julianne underwent several rounds of in vitro fertilization ("IVF"). Unfortunately, although a number of viable embryos were produced, every attempt at implantation was unsuccessful and she was unable to become pregnant.

5. In 2013, at ages 39 and 40 respectively, Mr. Lewiston and Mr. Soleil decided it would be best to try to find a gestational surrogate. They began by canvassing their friends and family, before ultimately turning to advertising. Throughout 2013, the couple posted numerous advertisements online, in the local paper, and on community bulletin boards. They received no viable responses.

6. Then, in 2014, the couple was contacted by Mrs. Petra Parker. Mrs. Parker introduced herself as a married mother of two children. She said that she had seen the couple's advertisement and that their story resonated with her. Her family had several LGBTQ friends and she had witnessed first-hand how difficult it was for them to have children. She wanted to help.

7. Having been through two pregnancies herself, Mrs. Parker was aware of the amount of work involved in carrying a child to term. As a result, she asked if the couple would be willing to compensate her for the surrogacy services. When they informed her that such a transaction was

[1] Surrogacy refers to the practice whereby, through prior arrangement, a woman carries and gives birth to a child that she does not intend to parent. Instead, parenting responsibilities are assumed by the intended parents. Surrogacy may be *traditional*, wherein a surrogate's own egg is fertilized by donor sperm, or *gestational*, in which the surrogate is implanted with an egg and sperm to which she has no genetic tie.

illegal under the *AHRA*, Mrs. Parker expressed her sympathies with the couple, but said she could not accept mere remuneration for her expenses.

8. Mr. Lewiston and Mr. Soleil continued their advertising for another year, but were unable to find anyone who was willing to act as their surrogate. It has been four years since Mrs. Parker first came forward and Mr. Lewiston and Mr. Soleil remain childless.

9. The parties seek to enter into a surrogacy agreement whereby Mrs. Parker would be paid $36,440.36 for her services, along with one-time payment of $1,000.00 immediately after the IVF embryonic transfer. The agreement also provides for reimbursement of "all reasonable expenses incurred by Mrs. Parker as a result of her pregnancy."[2]

10. The parties are barred from entering into this mutually beneficial arrangement by s. 6(1) of the *AHRA*. The potential sentence for contravening s. 6(1) is a fine of up to $500,000 or ten years' imprisonment.[3] Mr. Lewiston and Mr. Soleil have brought this application for a declaration that s. 6(1) of the *AHRA* unjustifiably violates ss. 7 and 15 of the *Charter* and should be declared of no force or effect.

Assisted Human Reproduction in Flavelle

11. Assisted human reproduction ("AHR") technology refers to the technology used to achieve pregnancy through procedures including fertility medication, in vitro fertilization, and surrogacy.

12. At trial, Dr. Amit Singh reported on the state of access to AHR services in Flavelle. In his expert opinion, while the demand for surrogacy is high in Flavelle, the number of women who are willing to carry a pregnancy for free is unsurprisingly low.[4] The demand is predominantly driven by LGBTQ and infertile individuals. Of Flavellians who attempted to have children using gestational surrogacy between 1998 and 2012, 23 percent were male couples and 43 percent were women who were physically incapable of carrying a child.[5]

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[2] Official Problem at para 18.
[3] *AHRA*, Appendix A to the Official Problem at section 60(a).
[4] Official Problem at para 23.
[5] Official Problem at para 25.

13. Dr. Singh also canvassed a number of peer-reviewed studies on surrogacy in comparable jurisdictions, namely the United States and the United Kingdom. These studies consistently found that women who agreed to become surrogates were motivated by considerations other than or in addition to financial gain, and made the initial decision to pursue surrogacy of their own accord. Most surrogates were educated, in their late twenties to early thirties, and had already-completed families. The majority also had moderate, rather than low household incomes.[6]

Judicial History

14. Justice Shin of the Superior Court of Falconer held that s. 6(1) of the *AHRA* did not infringe ss. 7 or 15 of the *Charter*. In *obiter*, he also noted that he had found ss. 7 and 15 to be infringed, he would have held the infringements to be justified under s. 1.[7]

15. A majority of the Falconer Court of Appeal upheld the decision of Justice Shin. Justice Pike acknowledged that while the s. 7 rights of the claimants were engaged, this engagement was in accordance with the principles of fundamental justice. He also held that s. 15 was not violated because the distinction drawn by the legislation was not discriminatory.[8] Justice Pike also endorsed the trial judge's reasons on the s. 1 analysis. Justice Puskas concurred with Justice Pike's reasoning on s. 7 and s. 1 of the *Charter*. However, with respect to s. 15 he found that s. 6(1) of the *AHRA* constitutes an ameliorative scheme and therefore fell under the protection of s. 15(2).[9]

16. Justice Noonan of the Court of Appeal wrote a lengthy dissent. She found that s. 6(1) of the *AHRA* violated both the Appellants' ss. 7 and 15 rights. Neither of these infringements could be justified under s. 1. Therefore, she would have granted the appeal and struck the law as unconstitutional.[10]

PART II - ISSUES

17. Mr. Lewiston and Mr. Soleil take the following positions with respect to the issues on appeal:

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[6] Official Problem at para 26.
[7] Official Problem at paras 36 and 42.
[8] Official Problem at paras 48, 50, and 51-53.
[9] Official Problem at paras 55-59.
[10] Official Problem at para 54.

a) Section 6(1) of the *AHRA* infringes s. 7 of the *Charter*;

b) Section 6(1) of the *AHRA* infringes s. 15 of the *Charter*; and,

c) Neither of these infringements are justified under s. 1 of the *Charter*.

PART III - STATEMENT OF ARGUMENT

The Total Prohibition on Compensated Surrogacy Infringes Section 7 of the *Charter*

18. The criminalization of compensated surrogacy engages the s. 7 guarantee of the right to liberty and security of the person by limiting Mr. Lewiston and Mr. Soleil's ability to have their own child. These effects do not accord with the principles of fundamental justice. First, they are arbitrary and bear no rational connection to the law's objective of protecting vulnerable women from financial exploitation or coercion. Second, the law is overbroad and imposes *Charter* infringements in situations that have no nexus to the legislative objective.

A. Section 6(1) Engages the Appellants' Right to Liberty

19. Section 6(1) engages Mr. Lewiston and Mr. Soleil's liberty rights in two ways: (1) through the potential imposition of a lengthy period of imprisonment, and (2) by limiting Mr. Lewiston and Mr. Soleil's ability to have a child – particularly a genetically related child.

20. A violation of s. 6(1) of the *AHRA* carries a sentence of up to ten years' imprisonment. This threat of incarceration constitutes a direct limit on the s. 7 liberty rights of intended parents.[11]

21. Even absent imprisonment, the blanket prohibition on compensated surrogacy interferes with Mr. Lewiston and Mr. Soleil's liberty interest by restricting the exercise of their "fundamental personal choice" to have a child.[12] Like those choices recognized by the Supreme Court of Canada in *R v Morgentaler* and *Carter v Canada (Attorney General)*, the choice to have one's own child is

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[11] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 2, BOA, Tab 43; *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 90, BOA, Tab A30.

[12] *Carter v Canada,* 2015 SCC 5 at paras 64-69, BOA, Tab A12; *R v Morgentaler,* [1988] 3 SCR 463 at 166, BOA, Tab A41 *B(R) v Children's Aid Society of Metropolitan Toronto,* [1995] 3 SCR 463 at 334, BOA, Tab A5*; Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 54, BOA, Tab A6.

a "profoundly intimate and personal choice" that affects almost every aspect of an individual's life.[13]

22. Similarly, an intended parent's interest in their ability to have a child can be protected by s. 7's recognition of a "protected sphere of parental decision making."[14] The s. 7 liberty right includes an interest in "bringing up, nurturing, and caring for a child."[15] Just as parents have "a deep personal interest" in how they parent their children,[16] Mr. Lewiston and Mr. Soleil have a deep personal interest in their ability to have a child.

23. Both s. 7's protection of "profoundly intimate and personal" choices and the "sphere of parental decision making" extend to the couple's desire to have a genetically related child. Mr. Soleil attested to the couple's wish for a child of their own and its "unique dimension" as follows:

> I think of my relationship with my parents, and my grandparents, and I want my child to be a part of that. I want to be able to tell my child exactly where they come from. In a way, it's about legacy. In another way, it's about love. […] I know that one day, I will be able to look into our child's face and see both myself and the man that I love reflected back.[17]

24. The couple's desire to have their own child is a natural and understandable aspiration that is shared by many Flavellians. It should be encompassed in s. 7's protection of their liberty.

25. Section 6(1) infringes on these liberty interests by restricting Mr. Lewiston and Mr. Soleil's ability to have children, particularly genetically related children. Despite the high demand, access to reproductive alternatives in Flavelle is limited. The number of available surrogates who are willing to carry a pregnancy for free is unsurprisingly low.[18] Even if a couple is successful in locating a surrogate who is able to carry the pregnancy without compensation, difficulties may still

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[13] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 64, BOA, Tab A12; *R v Morgentaler,* [1988] 1 SCR 30 at 166, BOA, Tab A41; *Blencoe v British Columbia (Human Rights Commission)* 200 SCC 44, at para 83, BOA, Tab A6.
[14] *B(R) v Children's Aid Society of Metropolitan Toronto,* [1995] 3 SCR 463 at 369, 372, and 318, BOA, Tab A5.
[15] *B(R) v Children's Aid Society of Metropolitan Toronto,* [1995] 3 SCR 463 at 370, BOA, Tab A5.
[16] *B(R) v Children's Aid Society of Metropolitan Toronto,* [1995] 3 SCR 463 at 372, BOA, Tab A5.
[17] Official Problem at para 27.
[18] Official Problem at para 23.

arise with respect to implantation or carrying the pregnancy to term, as evidenced by Mr. Lewiston and Mr. Soleil's experience.[19]

26. As a result, very few births by surrogates occur each year. As noted by Dr. Singh, IVF births accounted for 1.8 percent of total births in Flavelle in 2012, and only 2 percent of those IVF infants were born to gestational surrogates. By criminalizing compensated surrogacy, s. 6(1) of the *AHRA* further restricts access to this rare reproductive technology.[20]

27. The Attorney General of Flavelle contends that s. 6(1) does not interfere with Mr. Lewiston and Mr. Soleil's fundamental personal choice because there is an alternative option for them to have a child: namely, adoption. Not only does this contention fail to recognize Mr. Lewiston and Mr. Soleil's fundamental personal interest in having a genetically related child, it also fails to acknowledge the difficulties, expenses, and risks associated with adoption – as well its limited availability to LGBTQ couples.[21]

28. Finally, it is important to note that the couple is not asserting a right to government assistance with reproduction.[22] They only ask that the state not criminally prohibit one of the few viable means by which they may exercise their fundamental choice to have a child. Section 6(1) of the *AHRA* therefore constitutes a state prohibition that violates Mr. Lewiston and Mr. Soleil's right to non-interference with an intensely personal and private choice.[23]

B. Section 6(1) Engages the Appellants' Right to Security of the Person

29. Section 6(1) of the *AHRA* also engages intended parents' rights to security of the person. First, like liberty, security of the person is engaged through the state's interference with the

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[19] Official Problem at para 14.
[20] Official Problem at para 24.
[21] See e.g. *International Association of Fire Fighters, Local 268 v Adekayode,* 2016 NSCA 6 at para 108, BOA, Tab A21. The Nova Scotia Court of Appeal accepted evidence that "the multitude of extraordinary pre and post adoption stressors and challenges that almost all adoptive parents face are not shared by the majority of birth parents." Furthermore, adoptive children are likely to "present unpredictable and profoundly perplexing problems that do not have easy solutions." With respect to international adoption, many countries prohibit adoption by LGBTQ couples, as noted by David C. Bell, *The Ironic Twist and International Adoption: Same-Sex Couples and International Adoption Challenges,* (2012) 12:1 Whittier Journal of Child and Family Advocacy, at 152, 156, 161-162, at 164-165, BOA, Tab B1.
[22] Unlike, e.g. *Cameron v Nova Scotia (Attorney General*) (1999), 177 DLR (4th) 611 (NS CA), BOA, Tab A10.
[23] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49, BOA, Tab A6.

intended parents' ability to have children. Second, security of the person is engaged because of the serious state-imposed psychological and emotional distress experienced by intended parents who are restricted in their ability to have children.

30. An individual's "status as a parent is often fundamental to personal identity," and is therefore recognized under s. 7's right to security of the person. [24] In *New Brunswick (Minister of Health and Community Services v G(J),* the Supreme Court of Canada held that the state's interference with parental status – through the apprehension of a child – violated the parents' right to security of the person.[25] The prohibition on compensated surrogacy similarly involves state interference with the fundamental right to parent, and therefore engages the couple's security of the person.

31. This interference also imposes significant psychological and emotional distress on Flavellians who require AHR technology in order to have a child. The right to security of the person guards against state actions that cause serious psychological harm.[26] The level of harm caused need not "rise to the level of nervous shock or psychiatric illness," but must exceed "ordinary stress or anxiety."[27] As recognized by Justice Noonan in her dissent, "access to reproductive services has a profound impact on individuals' psychological well-being and autonomy," and criminal "restrictions on their procreative choice leads to serious psychological effects."[28]

32. After five years of trying and failing to have a child of their own, Mrs. Parker offered Mr. Soleil and Mr. Lewiston a solution. Section 6(1) of the *AHRA* remains the only barrier between the couple and their best chance at parenthood. For the past four years, Mr. Lewiston and Mr. Soleil

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[24] *New Brunswick (Minister of Health and Community Services) v G(J),* [1999] 3 SCR 46 at para 61, BOA, Tab A29.
[25] *New Brunswick (Minister of Health and Community Services) v G (J),* [1999] 3 SCR 46 at paras 56-67, BOA, Tab A29.
[26] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 64, BOA, Tab A12; *Blencoe v British Columbia (Human Rights Commission)* 200 SCC 44 at para 55, BOA, Tab A6; *R v Morgentaler,* [1988] 1 SCR 30 at 56 and 60, BOA, Tab A41.
[27] *New Brunswick (Minister of Health and Community Services) v G(J),* [1999] 3 SCR 46 at para 60, BOA, Tab A29.
[28] Official Problem at para 56; see also *Cameron v Nova Scotia (Attorney General*) (1999), 177 DLR (4th) 611 (NS CA) at paras 184 and 191, BOA, Tab A10 where the Nova Scotia Court of Appeal found that the inability to have children has been linked to severe psychological and social effects on those who suffer from it, including depression and social ostracism.

have wrestled with the fact that but for s. 6(1) of the *AHRA*, they could be pursuing a mutually beneficial, consensual, and ethical solution to their childlessness.[29] The emotional toll that they have endured as a result of the operation of s. 6(1) is sufficient to engage their right to security of the person.

C. The Deprivations Do Not Accord with the Principles of Fundamental Justice

33. The deprivation of Mr. Lewiston and Mr. Soleil's rights to liberty and security of the person do not accord with the principles of fundamental justice. Section 6(1) of the *AHRA* is not a rational means of achieving the law's objective to protect vulnerable women from financial exploitation. An arbitrary or overbroad impact on one person is sufficient to establish a breach of s. 7. [30] Insofar as it applies to non-exploitative, mutually beneficial compensated surrogacy arrangements, s. 6(1)'s effects are arbitrary and overbroad.

(i) The Purpose of the Impugned Provision

34. The object of the impugned legislation must be defined precisely for the purposes of constitutional review. The purpose should be "confined to measures directly targeted by the law."[31] Courts must resist framing the object of a law "too broadly," "lest the resulting objective immunize the law from challenge under the *Charter*."[32]

35. The purpose of s. 6(1) of the *AHRA* is to protect vulnerable women from financial coercion and exploitation. This purpose can be deduced from the statement of principles in the *AHRA*, which include claims that "the health and well-being of women must be protected" in AHR and "trade in the reproductive capabilities of women and men and the exploitation of children, women, and men for commercial ends raise health and ethical concerns that justify their prohibition." [33]

36. The objective of s. 6(1) cannot properly be defined as preventing "the commodification" of women, children, or human reproduction. By accepting "preventing commodification" as the

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[29] Official Problem at paras 14 and 16-19.
[30] *Carter v Canada (Attorney General),* [2015] SCC 5 at para 78, BOA, Tab A12.
[31] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 132, BOA, Tab A11; *Carter v Canada (Attorney General),* 2015 SCC 5 at para 78, BOA, Tab A12.
[32] *RJR- MacDonald Inc. v Canada (Attorney General)*, 1995 3 SCR 199 at para 144, BOA, Tab A45; *Carter v Canada (Attorney General),* [2015] SCC 5 at para 77, BOA, Tab A12.
[33] *AHRA* at s 2(c) and (f), Appendix I, Official Problem.

law's purpose, the courts below defined the objective too broadly and effectively "immunized" s. 6(1) from judicial review.[34]

37. First, the objective of "preventing commodification" is too abstract and difficult to define to provide an effective measure for legislative success or failure. Like the purported objective of protecting "the preservation of life" in *Rodriguez v British Columbia (Attorney General)* and *Carter v Canada (Attorney General)*, "preventing commodification" is best understood as a reference to an animating social value, rather than as a description of the specific object of the prohibition.[35] Sweeping, generic objectives short-circuit the Court's ability to conduct *Charter* analysis with transparency, objectivity, and predictability.[36]

38. Second, the objective of "preventing commodification" is more properly framed as a reaction to the concern that commodification may lead to exploitation. This concern is captured in the more tailored definition of the legislative objective. Commodification in and of itself is not a social evil. Individuals sell their skills, time, and labour in the workforce every day as part of the economy's natural ordering. Even where these jobs affect one's bodily integrity, there is nothing inherently degrading or dehumanizing about accepting compensation for one's work. Further, courts frequently assign monetary value to human life and bodily integrity through the assessment of damages in tort. Courts have compensated individuals for loss of fertility[37] and the cost of private surrogacy services in the United States.[38] This practice does not "commodify" human life, but recognizes its value.

39. Therefore, preventing "the commodification of women's bodies" is not a legitimate legislative objective for the purposes of constitutional review. "Protecting vulnerable women from financial coercion and exploitation" is the appropriate characterization of s. 6(1)'s objective.

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[34] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 144, BOA, Tab A45; *Carter v Canada (Attorney General),* 2015SCC 5 at para 77, BOA, Tab A12.
[35] *Carter v Canada (Attorney General),* 2015 SCC 5, at paras 75 and 76, BOA, Tab A12.
[36] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 77, BOA, Tab A12, citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 144, BOA, Tab A45.
[37] See e.g. *Bowlby v Oosterhuis*, 2003 63 O.R. (3d) 748 at para 36 (awarding $75,000 for loss of fertility), BOA, Tab A7.
[38] *Wilhelmson v Dumma,* 2017 BCSC 616 at para 366-379, BOA, Tab A55.

(ii) Section 6(1) is Arbitrary

40. A law is arbitrary where its effect on the individual is rationally inconsistent with the objective of the legislation.[39] Section 6(1) is arbitrary because the object of protecting vulnerable women from exploitation bears no real connection on the facts to the effects of banning compensated surrogacy in Flavelle.[40]

41. In *Chaoulli v Québec (Attorney General),* the purpose of the impugned provision, which prohibited private health insurance for certain services, was to protect the public health care system. Based on international evidence, a majority of the Supreme Court of Canada found that private health insurance and a public health system could co-exist. As a result, three of the four judge majority found that the prohibition was "arbitrary" because there was "no real connection on the facts" between the effect and the objective of the law.[41] This holding was unanimously upheld by the Supreme Court of Canada in *Canada (Attorney General) v Bedford*.[42]

42. Similarly, in this case, international comparison demonstrates that there is no real connection on the facts between the government's objective of protecting vulnerable women from exploitation and the reality of surrogacy arrangements. Dr. Singh's evidence at trial demonstrated that the profile of surrogate mothers in the United States and Britain "does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement."[43] Dr. Singh consistently found that women who agreed to be commercial surrogates were motivated by considerations other than financial gain, and that rather than being coerced into these arrangements, most surrogates typically made the initial decision to pursue surrogacy themselves.[44]

43. Mrs. Parker's choice to enter a compensated surrogacy arrangement with Mr. Lewiston and Mr. Soleil is rational and informed. She seeks to exercise control over her own reproductive capacities in an arrangement that resonates with her personal convictions and her sympathy for the

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[39] *Canada (Attorney General) v Bedford,* [2013] SCC 72 at paras 99, 112, and 119, BOA, Tab A11.
[40] As recognized by Noonan J in her dissent, at para 53 of the Official Problem.
[41] *Chaoulli v Québec (Attorney General)*, 2005 SCC 35 at para 134 and 153, BOA, Tab A13.
[41] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 99, BOA, Tab A11.
[42] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 99, BOA, Tab A11.
[43] Official Problem at para 26.
[44] Official Problem at para 26.

difficulty LGBTQ individuals face in creating families. Her desire to be financially recognized for her work is not a result of her exploitation, but her agency. Dr. Singh's evidence demonstrates that Mrs. Parker – far from being an exception to the norm – is representative of surrogates in other industrialized countries.[45] The law's effects on these women bear no rational connection to the purpose of protecting vulnerable women. It follows that in circumstances where a potential surrogate is autonomous, capable, and informed, there is no good reason for the deprivation of the intended parents' rights to liberty and security of the person.

(iii) Section 6(1) is Overbroad

44. Even if s. 6(1) is not found to be completely arbitrary, it is arbitrary in its application to individuals like Mr. Lewiston, Mr. Soleil, and Mrs. Parker. A total prohibition on compensated surrogacy is overbroad because it captures and criminalizes arrangements that are ethical, non-exploitative, and mutually beneficial. Section 6(1) therefore denies Mr. Lewiston and Mr. Soleil their rights to liberty and security of the person unnecessarily.[46]

45. A law will be struck as overbroad when it "goes too far by denying the rights of some individuals in a way that bears no relation to the object."[47] An overbroad effect on one person is sufficient to infringe s. 7 of the *Charter*.[48] Section 6(1) uses means which are broader than necessary to accomplish its objective and is not reasonably tailored to effect that objective.[49]

46. In *R v Heywood,* the Supreme Court of Canada held that a law which barred individuals convicted of certain offences from loitering near public playgrounds or parks was overbroad.[50] The provision's purpose was to protect children from becoming victims of sexual offences, but it applied to individuals without regard for whether they actually constituted a threat to children, and therefore was overbroad. Similarly, in this case, s. 6(1) applies to surrogacy relationships where

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[45] Official Problem at para 26.
[46] *R v Heywood,* [1994] 3 SCR 761 at 792-793, BOA, Tab A36; *Carter v Canada (Attorney General),* 2015 SCC 5 at para 101, BOA, Tab A12; *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 118, BOA, Tab A11.
[47] *R v Michaud,* 2015 ONCA 585 at para 79, BOA, Tab A40; *Carter v Canada (Attorney General),* 2015 SCC 5 at para 85, BOA, Tab A12 citing *Canada (Attorney General) v Bedford,* 2013 SCC 72 at paras 101 and 102-103 BOA, Tab A11; *R v Appullonappa,* 2015 SCC 754 at para 26.
[48] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 78, BOA, Tab A12; *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 123, BOA, Tab A11.
[49] *R v Heywood,* [1994] 3 SCR 791 at 794, BOA, Tab A36.
[50] *R v Heywood,* [1994] 3 SCR 791at 775 and 794, BOA, Tab A36.

the women are not vulnerable or subject to financial exploitation, without regard for whether the agreement is actually exploitative.[51]

47. Mrs. Parker is not financially or otherwise vulnerable. When she agreed to act as a surrogate for Mr. Lewiston and Mr. Soleil, Mrs. Parker was secure in her finances, her parenting capabilities, and her marriage. She was clear in her motivations for becoming a surrogate and, as an educated mother of two, she understood the risks and rewards of pregnancy.

48. Section 6(1) therefore targets conduct that bears no relation to its purpose. As held in *Bedford* and *Carter*, where the law is drawn broadly in order to make enforcement more practical, there still may be no connection between its purpose and effect on the *specific individual*.[52] Under s. 7, "the focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammeled."[53] The practicalities of enforcing s. 6(1) are inappropriate considerations under the s. 7 analysis, and should be left to the s. 1 analysis.

49. The total ban on compensation captures intended parents who enter agreements with surrogates mutually based on free and informed consent, where reproductive labour is being fairly compensated, and where the surrogates are not vulnerable and not exploited. As stated in *Carter,* it follows that the limitation on Mr. Lewiston and Mr. Soleil's rights "is in at least some cases not connected to the objective of protecting *vulnerable* persons." The blanket prohibition "sweeps conduct into its ambit that is unrelated to the law's objective" and is overbroad.[54]

The Total Prohibition on Compensated Surrogacy Infringes Section 15 of the *Charter*

50. The *AHRA*'s total prohibition on commercial surrogacy violates the equality rights of LGBTQ intended parents and potential surrogates. Both directly and through its adverse effects, the law creates distinctions that perpetuate the arbitrary disadvantages of these groups. Section 6(1) therefore infringes s. 15's guarantee of substantive equality.

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[51] *R v Heywood,* [1994] 3 SCR 791at 796 and 798-799, BOA, Tab A36.
[52] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 113, BOA, Tab A11; *Carter v Canada (Attorney General),* [2015] 1 SCR 331 at para 85, BOA, Tab A12.
[53] *Carter v Canada (Attorney General),* [2015] 1 SCR 331 at para 85, BOA, Tab A12.
[54] [emphasis in original] *Carter v Canada (Attorney General),* [2015] 1 SCR 331 at para 86, BOA, Tab A12.

51. Section 15 of the *Charter* is infringed where (1) a law creates a distinction based on an enumerated or analogous ground; and (2) that distinction is discriminatory, in the sense that it perpetuates arbitrary disadvantage.[55]

52. A distinction under s. 15 of the *Charter* exists when the claimant is "treated differently than others" because they are either denied a benefit that others are granted or made to carry a burden that others are not.[56] A distinction is said to be discriminatory where it is "arbitrary" because it fails to respond to the actual capacities and needs of a group and instead reinforces, perpetuates, and exacerbates the group's disadvantage.[57]

53. Section 6(1) of the *AHRA* creates a distinction based on the intersecting grounds of sexual orientation and sex by restricting access to a reproductive technology that is crucial for certain LGBTQ couples who cannot reproduce on their own. In doing so, the law imposes a burden on LGBTQ couples that is not imposed on heterosexual couples who are able to reproduce without the assistance of AHR technology. This distinction perpetuates arbitrary disadvantages faced by LGBTQ people by failing to respond to their actual need for AHR services and limiting their ability to have a child. Additionally, the law's communicative effect perpetuates misconceptions that intended parents in commercial surrogacy arrangements are likely to exploit women and commodify or devalue human life, when in reality, they value it immensely.

54. Section 6(1) also creates a distinction on the basis of sex by prohibiting the payment of consideration to women for their surrogacy services. This distinction is discriminatory in that it perpetuates stereotypes about women's ability to control their own reproductive choices. It also exacerbates the historical disadvantage faced by women by restricting them from receiving compensation for their reproductive labour.

55. Finally, s. 6(1) cannot be saved under s. 15(2) because it is not an ameliorative program and it discriminates against the population that it is designed to protect.

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[55] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20, BOA, Tab A24; *R v Kapp*, 2008 SCC 41 at para 17, BOA, Tab A37.
[56] *Withler v Canada*, 2011 SCC 12 at para 62, BOA, Tab A57; *R v Kapp*, 2008 SCC 41 at para 17, [2008] 2 SCR 483, BOA, Tab A37.
[57] *Quebec v A*, 2014 SCC 5 at paras 342 and 333, BOA, Tab A31; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 20, BOA, Tab A24.

56. The purpose of s. 15 is to protect substantive equality, recognizing that "persistent systemic disadvantages have operated to limit the opportunities available to certain groups in society."[58] By criminalizing commercial surrogacy, s. 6(1) of the *AHRA* exacerbates these systemic disadvantages and accordingly infringes s. 15's guarantee of substantive equality.

A. Section 6(1) of the *AHRA* Infringes the Equality Rights of LBGTQ Intended Parents

(i) Section 6(1) Creates a Distinction Based on Sexual Orientation and Sex

57. Section 6(1) of the *AHRA* disproportionately impacts gay men, as well as some bisexual men and transgender people who wish to become parents (collectively "LGBTQ intended parents"[59]) by making surrogacy, a crucial AHR technology, more difficult to access.

58. While s. 6(1) does not directly target LGBTQ intended parents, the legislation has adverse discriminatory effects on them. Section 15(1) has long been held to protect against the unintended discriminatory adverse effects of legislation.[60]

59. LGBTQ intended parents must disproportionately rely on AHR technologies in order to start their families. For couples like Mr. Lewiston and Mr. Soleil who wish to have genetically related children, surrogacy is the only option.

60. LGBTQ intended parents therefore constitute a significant portion of those who seek assisted reproductive services across Flavelle. Falconer Fertility Services reports that approximately 30 percent of the clinic's service users are members of the LGBTQ community.[61] With respect to surrogacy in particular, male couples accounted for approximately 23% of individuals who attempted to have children using gestational surrogacy between 1998 and 2012.[62]

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[58] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 16-18, BOA, Tab A24; *R v Kapp*, 2008 SCC 41 at paras 14-15, BOA, Tab A37; *Andrews v The Law Society of British Columbia,* [1989] 1 SCR 143 at 171, BOA, Tab A4.

[59] While lesbians, some bisexual women, and some transgender persons do not suffer the adverse effects of s. 6(1), the use of the inclusive term "LGBTQ" is intended to reflect the wider community of which Mr. Lewiston and Mr. Soleil are a part.

[60] *Vriend v Alberta*, [1998] 1 SCR 493 at paras 75-76, BOA, Tab A54; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 77, BOA, Tab A16; *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at paras 47-49, BOA, Tab A8.

[61] Official Problem at para 11.

[62] Official Problem at para 24.

61. As discussed in the s. 7 analysis above, access to reproductive alternatives in Flavelle is limited. The number of available surrogates in Flavelle who are willing to carry a pregnancy for free is unsurprisingly low. Mrs. Parker's experience demonstrates that more women would be able to come forward as surrogates if – given the amount of work involved in carrying a child to term – they were afforded the appropriate compensation. By criminalizing compensated surrogacy, s. 6(1) of the *AHRA* imposes a barrier between autonomous, capable, and informed women like Mrs. Parker and the LGBTQ couples who seek their assistance. The law therefore imposes a burden by making it more difficult for LGBTQ couples to access the AHR services that they require.

62. This distinction is based on the intersecting grounds of sexual orientation – a well-established analogous ground of discrimination[63] – and sex. Section 6(1)'s restriction of key AHR services is not borne by most heterosexual couples, who can reproduce without the use of AHR technologies.

63. To say that this law simply distinguishes between "those who require AHR services to conceive" and "those who do not" does not accord with s. 15's guarantee of substantive equality. Justice Shin of the Superior Court therefore erred in finding that s. 6(1) did not create a distinction on the basis of an enumerated or analogous ground.[64] Framing the distinction in this manner reverts to the overly formalistic comparator group analysis that was rejected by the Supreme Court of Canada in *Withler v Canada (Attorney General)*.[65] It fails to account for the unique experiences of discrimination that may be faced by different groups who experience the adverse effects of this law.[66]

64. Claimants must be entitled to frame their claims "in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group."[67] In this case, the disproportionately burdensome effects of the impugned law are directly tied to Mr. Lewiston and Mr. Soleil's identities as gay men. LGBTQ

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[63] *Vriend v Alberta* [1998] 1 SCR 493 at para 90; *M v H*, [1999] 2 SCR 3 at para 64, BOA, Tab A54.
[64] Official Problem at para 41.
[65] *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 2 and 55-60, BOA, Tab A57.
[66] For instance, in *Cameron v Nova Scotia (Attorney General)* (1999), 177 DLR (4th) 611 (NS CA), the Nova Scotia Court of Appeal recognized the distinct discriminatory impacts suffered by infertile people under laws that limited their access to an emerging AHR technology at paras 207 and 208, BOA, Tab A10.
[67] *Khakewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 19, citing *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at para 37, BOA, Tab A24.

couples who wish to become parents are faced with an impossible choice: either rely on AHR services, or change a part of their identity that has been regarded as "changeable only at an unacceptable personal cost."[68] By further limiting the already restricted ways that LGBTQ couples may have children, the law imposes a "heavy and disabling burden" on these couples based on their sexual orientation.[69]

(ii) The Availability of Alternative Reproductive Methods does not Diminish this Burden

65. The availability of adoption, international surrogacy, or uncompensated surrogacy does not diminish s. 6(1)'s burden. As noted by Justice Abella in *Quebec v A*, "substantive equality looks not only at the choices that are available to individuals, but at "the social and economic environments" in which these choices play out.[70] The social and economic environment in this case demonstrates how seriously limited the availability of AHR technologies are for potential parents who cannot conceive on their own.

66. Furthermore, the Attorney General's assertion that Mr. Lewiston and Mr. Soleil could simply adopt a child does not alter the reality that s. 6(1) denies some LGBTQ couples the ability to have a genetically related child – a burden that is not imposed on heterosexual couples.

(iii) The Distinction is Discriminatory Towards LGBTQ Intended Parents

a. Section 6(1) Fails to Correspond to the Actual Needs & Capacities of LGBTQ Couples

67. Section 6(1) of the *AHRA* fails to respond to the needs of LGBTQ couples who are unable to start families without the assistance of AHR technologies – particularly those who long to have genetically related children. There is no suggestion that LGBTQ couples are less fit to be parents than heterosexual couples, or that the law's restriction on their ability to become parents is in any way tied to their actual capacities. Section 6(1)'s effect on LGBTQ couples is therefore entirely arbitrary. By criminally prohibiting compensated surrogacy, s. 6(1) erects a barrier to a necessary technology and exacerbates the difficulties faced by LGBTQ couples who wish to become parents.

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[68] *Egan v Canada*, [1995] 2 SCR 513 at 528, BOA, Tab A17.
[69] *Vriend v Alberta*, [1998] 1 SCR 493 at para 98, BOA, Tab A54.
[70] *Québec (Attorney General) v A,* 2012 SCC 5 at para 342, BOA, Tab A31.

b. Section 6(1) Exacerbates Disadvantages Faced by LGBTQ Intended Parents

68. Section 6(1) perpetuates the disadvantage suffered by LGBTQ intended parents who are unable to have children without AHR services by imposing a restrictive barrier on one of those services. As noted by the Supreme Court of Canada in *Quebec v A*, "[i]f the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[71] By criminally prohibiting compensated surrogacy, s. 6(1) widens the gap between LGBTQ couples and the rest of the society.

69. This barrier aggravates the pre-existing historical disadvantage of LGBTQ people in Flavelle. Pre-existing or historical disadvantage is "probably the most compelling factor" suggesting *Charter*-infringing discrimination because "[t]he root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed."[72]

70. The historical disadvantage of members of the LGBTQ community is well established. They "form an identifiable minority who have suffered and continue to suffer serious social, political, and economic disadvantage."[74] Much of this historic disadvantage has been intimately tied to stereotypical views of LGBTQ couples' parenting capacity. As Mr. Soleil attested:

> Growing up, I often heard people say that gay couples were unfit to raise children—that we are mentally ill, unnatural, or that our children will grow up wanting because they don't have opposite-gender parents. It was difficult not to internalize these views, even though I knew that I would love and care for my child just as much as any straight parent.[75]

71. Furthermore, the inability of LGBTQ couples to have children on their own has historically been used to deny them access to equal rights in other contexts. For instance, in the Supreme Court's 1995 decision in *Egan v Canada*, the majority held that a law that omitted same-sex

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[71] *Quebec (AG) v A*, 2013 SCC 5 at para 332, [2013] 1 SCR 61, BOA, Tab A31.
[72] *Quebec (AG) v A*, 2013 SCC 5 at para 332, [2013] 1 SCR 61, BOA, Tab A31.
[74] *Egan v Canada,* [1995] 2 SCR 213 at para 175 (per Cory J) and para 89 (per L'Heureux-Dubé J), BOA, Tab A17.
[75] Official Problem at para 29.

couples from spousal allowance provisions under the *Old Age Security Act* did not violate s. 15 of the *Charter*, in part because:

> Viewed in the larger context, then, there is nothing arbitrary about the distinction supportive of heterosexual family units […] It is the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs. […] [Homosexual couples] may, it is true, occasionally adopt or bring up children, but this is exceptional and in no way affects the general picture.[76]

72. This historical context is essential to understanding the impact of s. 6(1) on LGBTQ individuals' feelings of dignity and self-worth. As Justice L'Heureux-Dubé noted in *Egan*, "groups that are more socially vulnerable will experience the adverse effects of legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable."[77] For LGBTQ intended parents who have been subject to historical disadvantage, the barrier imposed by Parliament therefore has effects that are unique and distinct from the disadvantage of other adversely affected groups.

73. These effects include the harmful psychological consequences outlined above in the s. 7 analysis. Despite their desperate desire to have biological children, their confidence in their ability to create healthy and loving families, and their knowledge that they could arrange surrogacy agreements that are ethical, non-exploitative, and beneficial for all parties, LGBTQ intended parents must wrestle with the fact that they have been denied this viable solution to their childlessness.

74. Finally, s. 6(1) perpetuates arbitrary disadvantage because it has a communicative effect similar to perpetuating prejudice or stereotypes. This harm was recognized by the Supreme Court in *Trociuk v British Columbia (Attorney General)*, where the Court found that a law that permitted mothers to "unacknowledge" biological fathers on a child's birth certificate discriminated against men.[78] Under the impugned provision, some fathers could be "unacknowledged" for no reason, while others were excluded for valid reasons like sexual assault or incest. The Court held that "[a]

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[76] [emphasis in original] *Egan v Canada,* [1995] 2 SCR 513 at paras 537-538, BOA, Tab A17.
[77] *Egan v Canada*, [1995] 2 SCR 513 at 520, BOA, Tab A17.
[78] *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, at paras 22-25, BOA, Tab A53.

father who belongs to the first category would reasonably perceive that the legislature considers his relationship with his children to be similar to the relationships of fathers in the other categories." This association was said to be "pejorative" and "demeaning to one's dignity."[79]

75. Similarly, in this case, the communicative effect of s. 6(1) implies that intended parents will potentially exploit women or contribute to the commodification and dehumanization of human life. This effect is particularly devastating for Mr. Soleil and Mr. Lewiston, given that Mrs. Parker is not vulnerable, but rather is fully autonomous, informed, and eager to help them begin their family. As was the case in *Trociuk*, the knowledge that one's exclusion is not necessary to achieving an allegedly ameliorative goal would lead any reasonable claimant to perceive that "his significant interest" was "superfluously sacrificed in the pursuit of that objective."[80]

76. The criminal prohibition on compensated surrogacy therefore "has dire and demeaning consequences for those affected."[81] It perpetuates the idea that LGBTQ families are not worthy of equal respect, consideration, and protection, and violates s. 15's guarantee of substantive equality.

B. Section 6(1) of the *AHRA* Infringes the Equality Rights of Potential Surrogates

(i) Section 6(1) Creates a Distinction Based on the Enumerated Ground of Sex

77. On its face, s. 6(1) explicitly makes a distinction on the enumerated ground of sex by prohibiting payment to potential surrogates for their reproductive labour. In doing so, Parliament imposes a unique burden on women who wish to be compensated for surrogacy that it does not impose on others who are legally permitted to profit from women's reproductive labour.

78. The *AHRA* permits payment to third parties who assist in the arrangement of "altruistic" surrogacies. For instance, surrogacy agreements are generally arranged in consultation with a lawyer, who may be paid for their services in helping negotiate the contract. While no one can directly accept payment for the "arrangement" of the services of a surrogate (i.e. "matching" a surrogate with intended parents),[82] other third parties who may receive compensation include

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[79] *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34 at para 23, BOA, Tab A53.
[80] *Trociuk v British Columbia (Attorney General)*, 2003 SCC 34 at para 29, BOA, Tab A53.
[81] *Vriend v Alberta*, [1998] 1 SCR 493 at para 97, BOA, Tab A54.
[82] *AHRA*, Appendix I, Official Problem at s. 6(3).

"fertility physicians, gamete banks, and pharmaceutical companies."[83] As noted by one group of commentators,

> This selective approach to compensated support and professional advice is paternalistic, and privileges an educated class of practitioners – doctors, lawyers, and pharmaceutical firms – over the actual surrogates being commissioned.[84]

79. This scheme therefore results in a perverse situation whereby a surrogate's lawyer may financially benefit from an "altruistic" surrogacy arrangement, while the surrogate herself cannot. It creates a distinction between those who can benefit from a surrogacy agreement, including the intended parents in altruistic arrangements, and the women who are prohibited from benefitting.

80. This distinction is based on sex. The *AHRA* defines a surrogate mother as,

> [A] female person who – with the intention of surrendering the child at birth to a donor or another person – carries an embryo or foetus that was conceived by means of an assisted reproduction procedure and derived from the genes of a donor or donors."[85]

81. In *Brookes v Canada Safeway Ltd.*, the Supreme Court of Canada held that discrimination based on pregnancy is discrimination based on sex because of the "basic biological fact that only women have the capacity to become pregnant." The Court found it "difficult to conceive" that "restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women."[86] Similarly, surrogacy is unique to women. Restricting a woman's ability to receive compensation for her surrogacy, particularly where so many others may profit from the transaction, constitutes a distinct burden that is imposed on her based on her sex.

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[83] Stu Marvel, Lesley A Tarasoff, Rachel Epstein, Datejie Green, Leah S Steele, and Lori E Ross, "Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Material, Services, and Facilities" in *Regulating Creation: The Law, Ethics, and Policy of Assisted Human* Reproduction, eds Trudo Lemmens, Andrew Flavelle Martin, Cheryl Milne, and Ian B Lee (Toronto: University of Toronto Press, 2017) at 337, BOA, Tab B3.

[84] [emphasis added] Stu Marvel, Lesley A Tarasoff, Rachel Epstein, Datejie Green, Leah S Steele, and Lori E Ross, "Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Material, Services, and Facilities" in *Regulating Creation: The Law, Ethics, and Policy of Assisted Human* Reproduction, eds Trudo Lemmens, Andrew Flavelle Martin, Cheryl Milne, and Ian B Lee (Toronto: University of Toronto Press, 2017) at 337, BOA, Tab B3.

[85] *AHRA*, Appendix I to the Official Problem at s. 2.

[86] *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 at 1243-44, BOA, Tab A9.

(ii) The Distinction is Discriminatory Towards Potential Surrogates

a. Section 6(1) Fails to Correspond to the Actual Needs & Capacities of Potential Surrogates

82. Section 6(1) does not correspond to the actual needs and circumstances of independent, autonomous, and informed women who seek to be compensated for their surrogacy services.

83. Unlike distinctions based on an individual's merits and capacities, distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination.[87]

84. Mrs. Parker is not vulnerable and has not been subjected to coercion or exploitation. She autonomously wishes to enter into a mutually beneficial surrogacy agreement with Mr. Soleil and Mr. Lewiston – but only if she is appropriately compensated for the demanding effort involved in carrying a pregnancy to term. Section 6(1) is therefore not tailored to Mrs. Parker's merits and capacities, but instead prohibits her from receiving compensation for surrogacy based on her association with vulnerable women.

85. Additionally, insofar as Parliament's concern is that socioeconomically disadvantaged women in general are likely to be coerced into surrogacy, evidence from other comparable jurisdictions does not support the concern that women who become surrogates are exploited by the arrangements, that they cannot give meaningful consent to participating, or that the arrangements commodify women or children.[89] Therefore, on the evidence, s. 6(1) is not appropriately tailored to the needs and circumstances of potential surrogates in general.

86. Legislative schemes that impose burdens or withhold benefits from a group for its "own protection" have been upheld under s. 15 of the *Charter*, but only where their effects align with a person's actual needs and capacities.[90] For example, in *Eaton v Brant Country Board of Education*, the Supreme Court of Canada found that a Tribunal's decision to assign a child with cerebral palsy to a special education class was not discriminatory. Key to this outcome was the fact that the Tribunal conducted an individualized assessment of the child, taking into account her

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[87] *Andrews v The Law Society of British Columbia,* [1989] 1 SCR 143 at 174-75, BOA, Tab A4.
[89] Official Problem at para 26.
[90] See e.g. *Winko v British Columbia (Forensic Psychiatric Institute),* [1999] 2 SCR 625 at paras 88-90, 94, BOA, Tab A56; *A(C) v Manitoba,* 2009 SCC 30 at para 104, BOA, Tab A1.

special needs, in order to properly balance her best interests.[91] Individualized assessment ensures that the effects of a state-made distinction are properly tailored to an individual's actual needs and capacities. Any type of individualized or even narrowed assessment is entirely precluded under s. 6(1)'s blanket prohibition.

b. Section 6(1) Perpetuates Prejudice and Stereotypes

87. Instead of being appropriately tailored to their needs and capacities, s. 6(1) perpetuates prejudice and stereotypes about potential surrogates, poor women, and women in general. Proof of stereotyping is not a necessary element of the s. 15(1) *Charter* analysis. However, where a law perpetuates stereotypes, it "reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within Canadian society." One of the main goals of section 15(1) of the *Charter* is to overcome these prejudicial stereotypes in our society.[92]

88. First, s. 6(1) of the *AHRA* perpetuates stereotypes about economically disadvantaged women. By prohibiting only commercial surrogacy, it implies that only poor women may be coerced or exploited, while women with more economic resources can consent freely to become surrogates simply by virtue of their wealth. It indicates that economically disadvantaged women would not have the autonomy or agency to decline to act as a surrogate.

89. Second, despite Parliament's objective of protecting only financially vulnerable women, s. 6(1) enacts a total prohibition on compensated surrogacy for all women. In doing so, it assumes that even the most independent-minded, clearest-thinking, financially secure woman may need protection from the coercive influence of intended parents. As was argued in *Carter*, the implicit idea behind the total prohibition is that all women are *potentially* vulnerable and in need of protection.[93] Section 6(1) therefore portrays all women as vulnerable, weak-willed, and subject to exploitation, rather than empowered and autonomous in their reproductive choices.

90. Finally, by permitting only "altruistic" or uncompensated surrogacy arrangements, the law reinforces traditional gender stereotypes whereby birth mothers are expected to perform their

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[91] *Eaton v Brant Country Board of Education,* [1997] 1 SCR 241 at paras 72-80, BOA, Tab A15.
[92] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 64, BOA, Tab A25.
[93] *Carter v Canada (Attorney General),* 2015 SCC 5, at paras 87-88, BOA, Tab A12.

social roles as child-bearers for free. By denying women the opportunity to obtain compensation for reproductive labour, s. 6(1) perpetuates the under-valuation of such labour and the women who perform it in society.

91. Section 6(1)'s conceptual framework therefore refuses to acknowledge the reality of surrogacy arrangements. Under this framework, women are placed into one of two categories: the "good mother" who performs her traditional role by bearing children for free, or the vulnerable woman in need of state protection from her own economic choices. There is no room under this framework for the needs and capacities of Mrs. Parker or other autonomous and informed women like her.

c. Section 6(1) Exacerbates the Disadvantages Faced by Women

92. By criminalizing the payment of compensation to a surrogate for her labour, this provision exacerbates the material disadvantages faced by women in a society that is invested in the idea that "women's work" – such as caregiving, reproductive labour, and domestic labour – should be performed for free.

93. The refusal to permit compensation for surrogacy reflects society's general refusal to accept that it benefits from the surplus value of the free labour of childbearing women. The expectation that women will perform reproductive labour or other "women's work," such as child rearing and domestic labour, without compensation is intimately linked to women's historical disadvantage in Flavellian society.

94. In *Brooks*, Chief Justice Dickson noted that "those who bear children and society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious." In his words, "it is unfair to impose all of the costs of pregnancy upon one half of the population."[94] Yet by refusing to permit women to receive compensation for their labour, this law contributes to the material disadvantages faced by women who disproportionately bear the unique costs of reproduction.

95. This paradox whereby society can materially benefit from women's reproductive labour, while the women themselves cannot, is reflected in the very provisions of the *AHRA* itself. Given

[94] *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219 at 1243, BOA, Tab A9.

that third-party intermediaries can profit from a surrogacy arrangement, this law imposes a distinct burden on women that results in discriminatory effects.

C. Section 6(1) of the *AHRA* Cannot be Saved Under Subsection 15(2) of the *Charter*

96. Section 6(1) of the *AHRA* is not an ameliorative program within the meaning of subsection 15(2) of the *Charter*. Subsection 15(2) protects government programs that aim to ameliorate "conditions of disadvantaged individuals or groups" in order to improve "the conditions of [that] specific and identifiable disadvantaged group."[95] The purpose of subsection 15(2) is to save these ameliorative programs from charges of "reverse discrimination."[96] Ameliorative programs therefore function by "targeting specific disadvantaged groups for benefits, while excluding others."[97]

97. Section 6(1) of the *AHRA* does not target a specific disadvantaged group for a benefit, but instead imposes burdens on that group, purportedly for the group's "own protection." It is designed to restrict women who would enter into compensated surrogacy agreements, and punish those who would pay consideration for said services. Laws of this sort were directly excluded from the ambit of subsection 15(2) in *R v Kapp*:

> These precedents suggest that the meaning of "amelioration" deserves careful attention in evaluating programs under s. 15(2). We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. Nor, as already discussed, should the focus be on the effect of the law. This said, the fact that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts.[98]

98. Justice Puskas of the Court of Appeal failed to appreciate the difference between an ameliorative program within the meaning of s. 15(2) of the *Charter*, and a law with potential ameliorative effects. While it is possible that s. 6(1) has positive effects for some financially vulnerable women, it is not an affirmative action program meant to ameliorate the historical

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[95] *R v Kapp*, 2008 SCC 41 at para 55, BOA, Tab A37.
[96] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* at para 41, BOA, Tab A2.
[97] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* at para 41, BOA, Tab A2.
[98] [emphasis added] *R v Kapp*, 2008 SCC 41 at paras 53-54, citing *R v Music Explosion Ltd* (1990), 68 Man R (2d) 203 at para 18, BOA, Tab A37.

disadvantage faced by women. Mr. Soleil and Mr. Lewiston are not making a claim of "reverse discrimination." The *AHRA* is not a targeted program challenged by a relatively advantaged group, but rather legislation of general application that is being challenged by predominantly disadvantaged groups who are disproportionately burdened by it. Therefore, s. 6(1) cannot be "saved" under s. 15(2) of the *Charter*.

99. Overall, s. 6(1) perpetuates the arbitrary disadvantages suffered by women by denying surrogates the ability to seek compensation for their reproductive labour. This total prohibition is not tailored to the needs and circumstances of most surrogates, and instead perpetuates prejudices and stereotypes. Potential surrogates do not require "perfect correspondence" between the law and its effects, but in this case, there is a total lack of correspondence between the needs and circumstances of informed, independent, autonomous women who seek compensation for surrogacy services and the objective of protecting the vulnerable from financial coercion.

Section 6(1) of the *AHRA* is not Justified under Section 1 of the *Charter*

100. The Attorney General has not discharged its burden of showing that s. 6(1) is demonstrably justified under s. 1. First, the provision is not rationally connected to the goal of protecting vulnerable women from exploitation. Second, a total prohibition on compensated surrogacy does not minimally impair the ss. 7 and 15 rights at issue. Finally, the concrete deleterious effects of the law far outweigh any speculative salutary effects.[99]

101. Under the s. 1 analysis, "care must be taken not to extend the notion of deference too far."[100] In particular, deference is unwarranted where Parliament has demonstrated a persistent unwillingness to engage with or develop problematic legislation. The *AHRA* was enacted in 2004 based on a Royal Commission that concluded in 1994. Even with the benefit of 13 years of enactment, Parliament has failed to pass an effective regulatory scheme that would lend guidance to the operation of the *AHRA* with respect to surrogate reimbursement.[101] As noted by the Supreme Court in *RJR-MacDonald Inc. v Canada (Attorney General)*:

> To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution

[99] *R v Oakes*, [1986] 1 SCR 103 at 138-139, BOA, Tab A42.
[100] *RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199 at para 136, BOA, Tab A45.
[101] Official Problem at para 12.

> difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.[102]

102. A separate s. 1 justification must be carried out with respect to each independent *Charter* violation.[103] Notably, the nature and significance of the s. 7 rights to life, liberty, and security of the person make it unlikely that a law which violates s. 7 can be justified under s. 1.[104]

(i) Rational Connection

103. The Attorney General has not demonstrated a rational connection between the effects of a total prohibition on compensated surrogacy and the objective of protecting vulnerable women.[105]

104. Commentators rightfully question whether a law that has been found arbitrary under s. 7 can ever be upheld as rationally connected to its objective under s. 1.[106] As discussed in the arbitrariness analysis above, the effects of s. 6(1) on Mr. Lewiston and Mr. Soleil's rights bear no connection to the objective of protecting vulnerable women from financial coercion or exploitation. Not only is Mrs. Parker not vulnerable, the evidence of Dr. Singh that was accepted at trial indicates that in permissive jurisdictions, research does not support the concern that compensated surrogates are vulnerable or exploited.[107] The result is that under this law, Mr. Lewiston and Mr. Soleil's rights are violated for "no good reason."[108]

105. With respect to s. 15, the law's effect on potential surrogates similarly is not rationally connected to the goal of the absolute prohibition on compensated surrogacy. A law that discriminates against women and perpetuates their economic disadvantage cannot rationally be said to support the objective of protecting them.[109]

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[102] *RJR- MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199 at para 136, BOA, Tab A45.
[103] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 158, BOA, Tab A46.
[104] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at paras 129, 161-63, BOA, Tab A11; *Re BC Motor Vehicle Act,* [1985] 2 SCR 486 at 518, BOA, Tab A43.
[105] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 126, BOA, Tab A11.
[106] See e.g. Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* Toronto: Irwin Law, 2012 at 155, BOA, Tab B7.
[107] Official Problem at paras 24 and 26.
[108] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 99, BOA, Tab A12.
[109] *Vriend v Alberta,* [1998] 1 SCR 493 at para 119, BOA, Tab A54.

(ii) Minimal Impairment

106. Section 6(1)'s total prohibition on compensated surrogacy is not minimally impairing of the claimants' ss. 7 and 15 rights. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal."[110] The analysis is meant to ensure that any deprivation of *Charter* rights "is confined to what is reasonably necessary to achieve the state's object." Importantly, the burden of establishing minimal impairment rests on the government.[112]

107. Far from being the "least drastic means" of achieving the legislative objective, the absolute prohibition on compensated surrogacy, with its heavy impact on the claimants' ss. 7 and 15 rights, goes significantly further than is necessary to achieve the legislative objective.

108. The Attorney General has failed to show why a permissive regime with properly designed and administered safeguards would not be capable of protecting vulnerable people from abuse and error, while minimally impairing claimants' rights to liberty, security of the person, and equality.[113] It also has failed to show why such a regime is undesirable, given its ability to appropriately respond to the actual needs and capacities of surrogate women, thereby minimally impairing their s. 15 right to equality.

109. In *Carter*, the Supreme Court of Canada held that an absolute prohibition on medically assisted dying was not minimally impairing because the Attorney General could not show that physicians were unable to reliably assess competence, voluntariness, or non-ambivalence in patients; that physicians would fail to apply informed consent requirements for medical treatment; or that evidence from permissive jurisdictions showed that a more permissive regime would lead to a slippery slope.[114] On the evidence, the trial judge had expressly rejected these possibilities.

110. Similarly, in this case, the Attorney General has not demonstrated that an absolute prohibition on compensated surrogacy is necessary to protect vulnerable women. There is no evidence that physicians or other professionals involved in AHR arrangements would be unable to screen for signs of coercion or vulnerability in compensated surrogacy agreements. In comparable jurisdictions where compensated surrogacy is permitted, there is no evidence of exploitation or

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[110] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 at para 53, BOA, Tab A3.
[112] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 102 and 118, BOA, Tab A12.
[113] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 105, BOA, Tab A12.
[114] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 104, BOA, Tab A12.

coercion. In fact, evidence from these jurisdictions suggests the opposite. As noted in *Carter*, "[a] theoretical or speculative fear cannot justify an absolute prohibition."[115]

111. Furthermore, concerns about decisional capacity and vulnerability do not arise solely due to the presence of consideration. These concerns may also arise in the altruistic surrogacy context, as pressure from family or friends may have even greater potential to overwhelm informed consent than compensation.[116] Many of the risks that the Attorney General describes are already part and parcel of AHR technology. As the evidence from other permissive jurisdictions shows, these risks can effectively be "limited through a carefully designed and monitored system of safeguards."[117]

112. Finally, the Attorney General argues that a total prohibition on compensated surrogacy is necessary for enforcement purposes. This assertion should be treated with skepticism given that only one person has ever been charged under s. 6(1) of the *AHRA* since its enactment 13 years ago.

113. In effect, the Attorney General argues that a blanket prohibition on compensated surrogacy should be upheld unless Mr. Lewiston and Mr. Soleil can demonstrate an alternative approach that eliminates all risk. Such an approach "effectively reverses the onus under section 1, requiring the claimant whose rights are infringed to prove less invasive ways of achieving the prohibition's object."[118] The s. 1 justification analysis "is a process of demonstration, not intuition or automatic deference to the government's assertion of risk."[119] In this case, the Attorney General has not proven that the absolute prohibition on compensated surrogacy minimally impairs the claimants' ss. 7 and 15 rights.

(iii) Effects Balancing

114. Finally, any salutary benefits of this scheme cannot be outweighed by the law's concrete detrimental effects on the claimants' ss. 7 and 15 rights.

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[115] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 119, BOA, Tab A12.
[116] Maneesha Deckha, "Situating Canada's Compensated Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding" (2015) 61:1 McGill LJ 31 at 64-66, BOA, Tab B2.
[117] Official Problem at para 26; *Carter v Canada (Attorney General),* 2015 SCC 5 at para 117, BOA, Tab A12.
[118] *Carter v Canada (Attorney General),* 2015 SCC 5 at para 118, BOA, Tab A12.
[119] *Carter v Canada (Attorney General),* [2015] SCC 5 at para 119, BOA, Tab A12, citing *RJR-MacDonald* at para 128, BOA, Tab A45.

115. The deleterious effects of s. 6(1) of the *AHRA* are severe. The claimants have experienced "insurmountable barriers" in their fight to have a child. The total prohibition on compensated surrogacy exacerbates these barriers in a manner that discriminates against the claimants, as well as the women the law purports to protect. The prohibition engages the essential *Charter* rights of liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. This infringement is not trivial. For contravening s. 6(1), even in the context of an ethical surrogacy agreement arranged with a willing, independent, and well-informed potential surrogate, Mr. Lewiston and Mr. Soleil are potentially subject to a sentence of ten years of imprisonment.

116. With respect to the potential salutary effects, the Attorney General has failed to demonstrate that s. 6(1) protects vulnerable women from exploitation, or that Flavellian women require protection from exploitation in the context of compensated surrogacy agreements. The demonstrated deleterious effects of this law on the claimants' rights far outweigh the alleged salutary effects of the law. Therefore, s. 6(1) of the *AHRA* is not saved by s.1 of the *Charter.*

PART IV - ORDER REQUESTED

117. The Appellants respectfully request that this appeal be allowed and that this Court issue a declaration that s. 6(1) of the *AHRA* violates ss. 7 and 15 of the *Charter* and is accordingly of no force or effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September, 2017.

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Jessica Kras / Madeline Lisus

PART V - TABLE OF AUTHORITIES

JURISPRUDENCE

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	Source	***Paragraph(s)***
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	Source	***Paragraph(s)***
	David C. Bell, *The Ironic Twist and International Adoption: Same-Sex Couples and International Adoption Challenges,* (2012) 12:1 Whittier Journal of Child and Family Advocacy, at 152, 156, 161-162, at 164-165	27
	Maneesha Deckha, "Situating Canada's Compensated Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding" (2015) 61:1 McGill LJ.	113
	Stu Marvel et al., "Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Material, Services, and Facilities" in *Regulating Creation: The Law, Ethics, and Policy of Assisted Human* Reproduction, eds Trudo Lemmens et al. (Toronto: University of Toronto Press, 2017)	79
	Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012)	105

Court File No: 25678

IN THE SUPREME COURT OF FLAVELLE

(ON APPEAL FROM THE COURT OF APPEAL FOR FALCONER)

B E T W E E N:

SPENCER LEWISTON and KEVIN SOLIEL
Appellants

- and -

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Respondent

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