# Grand Moot 2017

# Assisted Human Reproduction and the *Charter*

*Lewiston and Soleil v Flavelle (Attorney General)*

*Official Problem*

# *LEWISTON AND SOLEIL v FLAVELLE (ATTORNEY GENERAL)*:
# ASSISTED HUMAN REPRODUCTION AND THE *CHARTER*

## Overview

[1] This appeal addresses whether the criminal prohibition on commercial surrogacy infringes individuals' *Charter* rights to equality and to life, liberty, and security of the person. It explores the ethical implications and societal values underlying the regulation of scientific and technological advances in assisted human reproduction ("AHR").

[2] Trudo is a city in the province of Falconer, a common law province in the country of Flavelle. Flavelle and Falconer have a Constitution, judicial system, Criminal Code, and systems of government and common law histories identical to those of Canada and Ontario, respectively.

[3] Flavelle's highest court is the Supreme Court of Flavelle. All Canadian legislation is binding on the Supreme Court of Flavelle, but the Court is not bound by Canadian jurisprudence. However, decisions of Canadian courts, particularly the Supreme Court of Canada, are considered highly persuasive.

[4] The Superior Court of Falconer and the Falconer Court of Appeal have jurisdiction over all issues raised in their respective decisions below.

[5] Mr. Spencer Lewiston and Mr. Kevin Soleil are a couple residing in Trudo who wish to become parents. Lewiston and Soleil attended law school together between 1994-1997. They both completed their articles at Sanderson Wilkins LLP, a prominent full-service law firm in Trudo. The pair grew very close during articling and began dating after they were called to the Bar of Falconer in 1998. In 2005, Lewiston and Soleil were married.

[6] Over the years, Lewiston and Soleil rose through the ranks at Sanderson Wilkins. Lewiston is presently a Partner and the Head of Securities Litigation, while Soleil is a Partner and the Co-Head of the Mergers & Acquisitions group.

[7] Since early in their relationship, Lewiston and Soleil were eager to build their family. After they both made partner in 2008, the couple began investigating their options for having children. At that time, Lewiston was 35 years old and Soleil was 36 years old.

**Legislative History of the Flavellian *Assisted Human Reproduction Act***

[8] In 2004, the Parliament of Flavelle passed the *Assisted Human Reproduction Act* (the "*AHRA*"), which was aimed at regulating AHR technologies and activities throughout the country. Prior to the enactment of the *AHRA*, the Royal Commission on New Reproductive Technologies (the "Milne Commission") was established in response to concerns about rapid scientific and technological advances in AHR, and the difficult ethical questions they raised. The Milne Commission issued its final report in 1993.

[9] Between 1993 and 1995, the federal government consulted with the provincial and territorial governments, experts in the fields of reproductive medicine and ethics, and individuals directly impacted by new reproductive technologies, including infertile persons. Following these consultations, Parliament enacted the *AHRA*.

[10] The provisions of the *AHRA* relevant to this appeal are reproduced in Appendix I. Section 2 declares, among other things, that "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." The *AHRA* prohibits several practices and procedures involving reproductive services and technologies. Section 6 criminalizes the payment of consideration to a woman in exchange for acting as a surrogate. However, ss. 12 and 65 provide for the promulgation of regulations respecting the *reimbursement* of a surrogate for pregnancy-related expenses.

[11] In October 2013, the Flavellian Minister of Health, Dr. Marsha Booth, issued the following statement:

> I have instructed the Department of Health to review the *Assisted Human Reproduction Act* and to develop the necessary regulations to bring into force provisions for reimbursement of surrogacy and other services. Our Government believes that this will improve access to assisted reproduction services for all Flavellians.

[12] In April 2014, the Department of Health introduced a single Regulation (excerpted in Appendix II) concerning the reimbursement of surrogates. Minister Booth noted that further regulations would be promulgated as part of a comprehensive scheme, but stated that the Government wished to bring the Regulation respecting reimbursement into force in the interim. She stated that this would ensure that the legal status of reimbursement, previously tolerated under

federal policy, was clear. The Regulation provides that "the commissioning parents may reimburse the surrogate mother for all reasonable expenses incurred by her as a result of her surrogacy."

**The Facts of *Lewiston and Soleil v Flavelle (Attorney General)***

[13] In November 2008, Lewiston and Soleil met with Ms. Charlotte Mullins, the CEO of Falconer Fertility Services ("FFS"), to discuss their options for family formation. FFS is a well-known company in Falconer that provides AHR services. Mullins explained that approximately 30% of the clients served by FFS were members of the LGBTQ community. She outlined the options available to LGBTQ individuals who could not conceive on their own, including in vitro fertilization ("IVF").

[14] Following their meeting with Mullins, Lewiston and Soleil decided to pursue IVF using Soleil's sperm and oocytes donated by Lewiston's sister, Julianne Lewiston, so that the child would be biologically related to both parents. Julianne also volunteered to act as their surrogate. Between 2010-2012, Julianne underwent several rounds of IVF without success. Although viable embryos were produced in each cycle, Julianne experienced recurrent implantation failure.

[15] In January 2013, Lewiston and Soleil decided to find a different gestational surrogate, though they still planned to use gametes donated by Julianne and Mr. Soleil. After Lewiston and Soleil were unable to find another female friend or family member willing to act as a surrogate, they decided to advertise for one. Throughout 2013, the couple posted numerous advertisements online, in the local paper, and on community bulletin boards, describing themselves and their situation. The couple was careful to specify that the surrogate would not be compensated.

[16] In January 2014, Mrs. Petra Parker, a woman residing in Stacey, a neighbouring city in Falconer, responded to Lewiston and Soleil's advertisement. Mrs. Parker introduced herself to the couple and informed them that she was a married mother of two. Her husband had a vasectomy in 2010 after the birth of their second child, when they decided that their family was complete. Mr. Parker is a tenured professor at the University of Stacey and earns approximately $200,000.00 per year. Until the birth of their first child, Mrs. Parker worked in marketing. For most of her adult life, Mrs. Parker aspired to be a full-time mother and homemaker.

[17] Mrs. Parker explained to the couple that their story resonated with her because her family has several queer friends, and they have witnessed how difficult the process of family formation can be for members of the LGBTQ community. However, having been through two pregnancies

herself, Parker stated that she was well aware of the amount of work involved in carrying a child to term. She asked whether the couple would be willing to provide compensation for her surrogacy services, in addition to reimbursement for her pregnancy-related expenses. She stated that she had done some research on compensation for surrogacy services in the United States and proposed that she should receive $36,440.36 for her services, paid in monthly instalments commencing the first month after fetal heartbeat. In addition, she requested a one-time payment of $1000.00 to be paid immediately after the IVF embryonic transfer.

[18] Lewiston and Soleil offered to draft a surrogacy agreement whereby Lewiston and Soleil would pay for "all reasonable expenses incurred by Mrs. Parker as a result of the pregnancy." These included, but were not limited to, expenses associated with complementary medicine that Parker, together with her physician, decided to pursue (such as massage therapy, acupuncture, and natural health products); counseling during pregnancy and for up to one year after birth; hiring a nanny to assist Parker with childcare and housekeeping while pregnant; pre-natal exercise classes; and maternity clothes.

[19] In February 2014, after reviewing the document, Mrs. Parker declined the agreement. She expressed her sympathies to the couple, but indicated that mere reimbursement would not be sufficient to motivate her to become a surrogate. Once again, she asked about the possibility of financial compensation in addition to reimbursement for her expenses. Lewiston and Soleil, aware of the criminal prohibition on commercial surrogacy in Flavelle, informed her that they could not compensate her for her surrogacy services.

[20] Lewiston and Soleil continued their advertising for another year, but were unable to find anyone willing to act as their surrogate. The couple resolved to seek a declaration that s. 6(1) of the *AHRA*, which prohibits commercial surrogacy in Flavelle, is unconstitutional.

**Judicial History**

[21] In March 2015, counsel for Lewiston and Soleil brought an application for a declaration that s. 6(1) was of no force and effect. They alleged that s. 6(1) of the *AHRA* infringed ss. 7 and 15(1) of the *Flavellian Charter of Rights and Freedoms*, and that it could not be saved under s. 1.

*The Expert Report of Dr. Amit Singh*

[22] Lewiston and Soleil advanced social science evidence about AHR technologies and services through their expert Dr. Amit Singh. Dr. Singh holds the Flavelle Research Chair in Bioethics and is a professor at the University of Stewart. Dr. Singh is an obstetrician-gynecologist whose research focuses on the ethics of AHR. He received his MD/PhD from the University of Weinrib in 1995 and has been a tenured professor at the University of Stewart since 2000.

[23] Dr. Singh's report began by noting the dearth of statistics on surrogacy in Flavelle. The report stated that academics generally agree that this lack of data is a result of the Flavellian government's regulatory strategy. While the *AHRA* established a national oversight body, the Flavellian Parliament, noting the reasons of the Supreme Court of Canada in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457, dismantled the agency in 2011. However, while data is lacking, Dr. Singh stated that demand for surrogacy services is high and supply is low.

[24] Dr. Singh's report included statistics on surrogacy in Flavelle, which were drawn primarily from a retrospective cohort study conducted by Dr. Singh and his colleagues. The study was published in a peer-reviewed journal in 2014. Dr. Singh's team found that IVF births accounted for 1.8% of the total births in Flavelle in 2012. In that same year, 2% of all IVF infants in Flavelle were born to gestational surrogates. Where intended parents used gestational surrogates, they typically found the surrogate through independent solicitation or through an agency. In 25% of cases, the surrogate was a family member or friend of the intended parent(s).

[25] Dr. Singh's team found that between 1998-2012, male couples accounted for approximately 23% of individuals who attempted to have children using gestational surrogacy. Women unable to carry a pregnancy due to damaged or absent uterus or other chronic conditions accounted for 43% of individuals who used gestational surrogacy. The remaining 34% had tried and failed to have children independently.

[26] Dr. Singh's report also included findings about commercial and altruistic surrogacy in the United States and the United Kingdom, which were drawn from other peer-reviewed studies. These studies consistently found that women who agree to be commercial surrogates are motivated by considerations other than monetary gain. Moreover, women who become surrogates typically make an independent decision to do so. Surrogates tend to be in their late twenties to early thirties, Caucasian, and Christian. Most surrogates have completed high school, many have completed an

undergraduate degree, and their household incomes tend to be moderate rather than low. Nearly all surrogates have completed their own families prior to becoming a surrogate. In sum, Dr. Singh reported that "[t]he profile of surrogate mothers emerging from the empirical research 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."

*The Testimony of Lewiston and Soleil*

[27] Lewiston and Soleil also testified about the impact of s. 6(1) on them, personally. Soleil testified that:

> For a long time, I didn't imagine having kids. As a gay man, I was encouraged to take that idea off the table. When I came out to my mother, what upset her the most was the thought that my sexual orientation meant that she would never have a grandchild.
>
> 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 as much as any straight parent.
>
> I also had to consider how to actually have a child. Could I ever have a child that was biologically related to me? Who would bear it? Would that person have a say in my child's life? Could I adopt?
>
> All of these things made me think that having a child was out of the question. But when I met Spencer, everything was put back on the table. Spencer has always wanted to be a father and he is so unwaveringly sure of his ability to be a good one. When I met him, for the first time in my life I thought: "I might actually be able to have a family." Once I realized it could be possible, I allowed myself to really think about what having a child meant to me.
>
> […]
>
> Spencer and I have considered adoption, but I believe that having a genetically-related child is a relationship with a unique dimension. I think of my relationship with my parents, and through them my grandparents, and I want my child to be 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 always imagined that, best-case scenario, we would have two children: one with Kevin's genes and one with mine. But thanks to Julianne's generosity, I know that one day, I will be able to look into our child's face and see both myself and the man I love reflected back.

Families are the defining architecture of most people's lives. I believe that being a father is one of the most important things I'll ever do. I think about having a child with my husband every day, and every day I wake up to a house that is quieter and emptier than it should be.

[28] Lewiston also testified about his experience:

We began the long struggle to start our family in 2008. It's hard to believe that it's been almost a decade. I always knew that the road to creating a family might be difficult, but I didn't anticipate how poorly reproductive services are tailored to the needs of gay couples.

I know many couples have trouble conceiving, but for us the barriers are also social, not just medical. It often seems like LGBTQ people were barely an afterthought in the system of assisted reproductive services, as if it were designed solely for infertile, straight couples. Once, the clinic that we go to gave us a copy of the Flavellian Fertility and Andrology Society's clinical practice guidelines for physicians and fertility-related service providers. The only LGBTQ people mentioned in the guide were lesbian couples, and they were only mentioned to remind service-providers that lesbians "do not differ from heterosexuals in their parenting skills." There was no mention of gay men or any other members of the community.

[…]

I suppose I could have accepted that it was our destiny to remain childless—after all, we've often heard that it is "unnatural" for gay couples to have children. But, I believe that we deserve to have a family, that we would be excellent parents, and that—where technology has made something possible—it is cruel to deny us that opportunity.

Of course we've considered adoption, but we've heard it's an expensive and arduous process with little guarantee of success. More importantly, why should we be denied the genetically-related child that most heterosexual couples are able to have thoughtlessly?

For most gay couples, surrogacy is the only option. We were never really perturbed by the commercial aspect of it. We've always

> thought that a woman who goes through the work associated with pregnancy and labour deserves to be compensated for it.
>
> […]
>
> It's a heartbreaking process, amplified by frustration after frustration. The barriers often feel insurmountable. But Kevin and I are used to fighting for this family. We had to fight to be together, we had to fight to get married, and we will keep fighting for the ability to have a child. Because even though we've built a beautiful life together, if it's not for family, what *is* it all for?

*The Expert Report of Dr. Jody Steiner*

[29] Flavelle proffered the report of Dr. Jody Steiner of the University of Stacey. Dr. Steiner holds the Flavelle Research Chair in Ethics and Law and has been a tenured professor since 1993. She earned her PhD in Philosophy from the University of Stacey in 1985 and her JD from the Chiao School of Law in 1988. Her research focuses on feminist legal theory and bioethics. The Flavellian government consulted Dr. Steiner extensively prior to the *AHRA*'s enactment.

[30] In her report, Dr. Steiner reviewed the history and objectives of the legislation. She stated that the *AHRA*'s criminal prohibitions were necessary to protect and promote the public health, safety, and values of Flavellians in the use of AHR technologies. Unlike other fields, AHR is especially concerning given its profound effect on the lives of women, children, and families.

[31] Dr. Steiner also identified several risks associated with such technologies. In particular, she noted that the practice of commercial surrogacy could create conflicts of interest on the part of health services providers, as well as lead to the commodification of human reproductive labour. Where a market for commercial surrogacy exists, she stated, women in certain economic conditions may be induced to participate in this practice, which could devalue their humanity. The criminal prohibition served to reduce the risk of commodification of women's bodies, and thus promote and protect their dignity.

[32] Steiner also noted that a disproportionate number of those living below the poverty line in Flavelle are women and that the disparity is even more pronounced for racialized women. For instance, 21.9% of women of colour live in low-income situations, compared to 14.3% of all women and 12.2% of all men. Additionally, 38.2% of people living in female-headed single-parent households lived in low-income situations, compared with an overall low-income rate of 14.2%.

[33] Regarding the values underlying the *AHRA*, Dr. Steiner drew a connection between the criminal prohibition on commercial surrogacy and a public consensus on Flavellian values. According to Dr. Steiner, s. 6 of the *AHRA* furthered the principles of equality, respect for human dignity, protection of the vulnerable, and the non-commodification of reproduction, which were explicit objectives adopted by Parliament. While she observed the difficulty of balancing collective and individual interests in the rapidly developing area of AHR, she stated that the principles set out by the Milne Commission were endorsed by a broad range of stakeholder groups.

[34] Included among those stakeholders were groups representing racialized women, who urged the Commission to adopt a blanket prohibition on commercial surrogacy. Groups like Immigrant and Visible Minority Women of Flavelle contended that "the costs in the increased potential for exploitation of women of colour outweigh any benefits that might accrue to affluent couples." The Flavellian Federation of Women United for Families also advocated for a blanket prohibition, calling the practice "degrading to [all] the women involved."

[35] In addition to the commodification of women's bodies, Dr. Steiner warned that vulnerable women could potentially be exploited. She pointed to several studies on commercial surrogacy in India, where the vast majority of commercial surrogates reported that they had pursued surrogacy due to poverty. The studies also identified concerns about external pressure on women to become surrogates—for example, from brokers or husbands—since a woman earn many times her husband's salary for a single surrogacy. The authors of one study concluded that "in reality, the surrogacy contract would not exist if the parties were equal," and that commercial surrogates were susceptible to financial inducement and therefore vulnerable to exploitation because of their financial status. In another study, the authors stated that the Indian experience of commercial surrogacy was "rife with problems and inequalities." Dr. Steiner also noted that there had been similar findings in studies conducted on several other countries that permit commercial surrogacy.

*The Decision of the Superior Court of Falconer (Shin J)*

[36] The application judge, Shin J, held that s. 6(1) of the *AHRA* did not infringe ss. 7 or 15 of the *Charter*.

[37] Shin J considered the legislative history of the *AHRA*, and relying on *Reference re Assisted Human Reproduction Act*, found that the intention of Parliament was "to protect vulnerable women from exploitation, to safeguard Flavellians' values with respect to the usage of reproductive

technologies, and to prevent the commodification of human reproduction." With respect to s. 6(1) of the *AHRA*, Shin J held that the object of the impugned provisions was "in furtherance of the statutory objective of opposing the commodification of reproductive services."

[38] Shin J admitted Dr. Singh's report and Dr. Steiner's report as expert evidence, and accepted the conclusions drawn in each. He also stated in his reasons that he found Lewiston and Soleil's testimony to be compelling and uncontested.

[39] Shin J held that s. 6(1) of the *AHRA* engaged the liberty interests of intended parents, because of the possibility of a sentence of imprisonment, and because he considered that the provision affected a "fundamental personal choice," namely the choice to have children. Shin J rejected the applicants' argument that the impugned provisions engaged their security of the person interests, finding that any state-imposed stress was not sufficiently serious to trigger s. 7.

[40] However, Shin J concluded that the impugned provision was not arbitrary, grossly disproportionate, or overbroad:

> Preventing the exploitation of women and the commodification of human reproduction is a legitimate state interest. On the evidence before me, there exists a rational connection between the criminal prohibition on commercial surrogacy and this statutory objective. Thus, s. 6(1) of the *AHRA* is not arbitrary.
>
> Nor is the provision overbroad. The evidence shows that some surrogates who accept compensation are not economically disadvantaged. However, I do not agree that this renders the provision impermissibly overbroad. Overbreadth requires the denial of "the rights of some individuals in a way that bears no relation to the object": *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 85, [2015] 1 SCR 331 (emphasis added). Here, the blanket prohibition on commercial surrogacy is necessary to achieve the objects of the *AHRA*, namely to prevent the commodification of human reproduction and to uphold Flavellian values.
>
> Finally, the provision is not grossly disproportionate. Unlike in *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, and *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, the prohibition at issue does not force individuals to expose themselves to the risk of bodily harm by limiting access to harm-reduction measures. Instead, the provision is aimed at ensuring that the tangible and intangible harms associated with commercial surrogacy never materialize in Flavelle.

[41] Next, Shin J considered Lewiston and Soleil's argument that the *AHRA* violated their s. 15(1) equality rights because it disadvantaged them relative to heterosexual couples. Referring to the Canadian jurisprudence, he held that the applicants' s. 15(1) rights were not infringed because the legislation did not draw a distinction based on an enumerated or analogous ground.

[42] Shin J went on to reason that even if ss. 7 or 15(1) were infringed, any such infringements would be justified under s. 1 of the *Charter*.

[43] Regarding the application of s. 1 to infringements of s. 7, Shin J expressed substantial agreement with the reasoning of the Ontario Court of Appeal in *R v Michaud*, 2015 ONCA 585, 127 OR (3d) 81. He stated that "*Michaud* highlights the circumstances under which infringements of s. 7 may be saved under s. 1 and calls into question *obiter dicta* from the Supreme Court of Canada that such breaches will rarely, if ever, be justified in a free and democratic society."

[44] Applying the *Oakes* test, Shin J considered that preventing the exploitation of women and the commodification of human reproduction was a pressing and substantial objective. In his view, the ban on commercial surrogacy was rationally connected to the statutory objective.

[45] He also held that the impugned provision was minimally impairing, since it did not criminalize altruistic surrogacy or criminalize the actions of commercial surrogates. He added that even if the legislative objective were narrowly construed as preventing the exploitation of *vulnerable* women, a more targeted prohibition would not be as effective, since it would suffer from enforcement difficulties and fail to adequately protect *all* vulnerable women. He relied on the conclusions of the Milne Commission, which expressed skepticism "that any regulatory scheme could ensure that all parties were able to make free and informed choices." Shin J also acknowledged the Milne Commission's additional concerns that "even if a regulatory system could be designed to overcome these obstacles, the most serious harms of preconception arrangements would remain. No regulatory system could remedy the basic affront to human dignity occasioned by the commodification of human reproduction."

[46] Finally, Shin J concluded that the salutary effects of the provision outweighed any deleterious effects.

[47] Lewiston and Soleil appealed the decision to the Falconer Court of Appeal.

*The Decision of the Falconer Court of Appeal (Pike JA for the majority, with whom Puskas JA concurred in the result; Noonan JA dissenting)*

[48] The majority of the Falconer Court of Appeal, Noonan JA dissenting, dismissed the appeal.

[49] Pike JA upheld the impugned provision, holding that it did not infringe either ss. 7 or 15(1) of the *Charter*. In the alternative, he would have held that any infringements were justified under s. 1. At the outset of his judgment, Pike JA considered the underlying objective of the *AHRA*:

> In *R v Wholesale Travel Group*, [1991] 3 SCR 154, 84 DLR (4th) 161, Cory J observed that the *Charter* is not meant to be used "to roll back legislative protections enacted on behalf of the vulnerable." Such protections are at issue here; a core objective of s. 6(1) is to prevent the exploitation of women and the commodification of human reproduction. As McLachlin CJC stated in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 61, [2010] 3 SCR 457, the *AHRA* "seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants."

[50] Pike JA disagreed with the application judge's holding that the impugned provisions affected a "fundamental personal choice" of Lewiston and Soleil:

> Section 6(1) of the *AHRA* does not affect individuals' freedom to seek or act as surrogate mothers; it merely prohibits the payment of consideration for such services. The liberty interest under s. 7 includes the exercise of procreative choice, such as the decision to conceive a child. However, Canadian courts have held that it does not encompass a right to assisted conception using gametes not screened for infectious diseases, since it is properly regulated to protect the health of a mother and her child: *Doe v Canada (Attorney General)*, 2007 ONCA 11, 84 OR (3d) 81. Similarly, s. 6(1) of the *AHRA* protects not only the health and psychological well-being of surrogates, but also the societal values associated with human reproduction. Thus, I conclude that the right to liberty cannot encompass a right to access commercial surrogacy.

Pike JA agreed with the application judge that any state-induced stress was not sufficiently serious to engage the security of the person interests of intended parents. He acknowledged that the s. 7 rights of intended parents were engaged by the possibility of imprisonment, but agreed with Shin J that this deprivation was consistent with the principles of fundamental justice.

[51] Next, Pike JA held that the impugned provision did not violate s. 15(1), since it did not discriminate against gay men or individuals experiencing infertility. He accepted that the impugned provision created a distinction based on the enumerated and analogous grounds of sexual orientation and disability, due to the adverse effects it has on members of these groups. Adopting the position of the Nova Scotia Court of Appeal in *Cameron v Nova Scotia (Attorney General)*, 1999 NSCA 14, 204 NSR (2d) 1, Pike JA stated that medical infertility was a disability for the purposes of s. 15(1). However, he reasoned that the distinction drawn by the impugned provision did not result in discrimination:

> Under the second prong of the s. 15(1) test, the court must determine whether the distinction drawn by the law creates a disadvantage by perpetuating prejudice or stereotyping. I conclude that s. 6(1) of the *AHRA* does not, since it does not promote the view that gay men or individuals experiencing infertility are less worthy of recognition or value as a human beings, or as members of Flavellian society, equally deserving of concern, respect, and consideration. While the provision has adverse effects on gay men and individuals experiencing infertility, those effects are not rooted in prejudice or stereotyping, nor do they worsen existing prejudices or stereotypes.

[52] Pike J.A. also rejected the applicants' argument that s. 6(1) of the *AHRA* discriminated against prospective surrogates on the basis of sex. He reasoned that, far from imposing arbitrary disadvantage, the impugned provision reflected the high value that society places on women.

[53] Mindful of an appeal of his judgment, Pike JA reasoned that even if the provision violated ss. 7 and/or 15, it would be saved under s. 1, in accordance with the reasons given by Shin J.

[54] Puskas JA concurred with Pike JA in the result. Although Puskas JA agreed with Pike JA's reasoning on s. 7 of the *Charter*, and his reasoning on s. 1, he concluded that the impugned provision fell under s. 15(2) of the *Charter* because it has the ameliorative purpose of bettering the conditions of women in society. Thus, in his view, s. 6(1) of the *AHRA* did not violate s. 15.

[55] Noonan JA wrote a lengthy dissent. She began by stating:

> By prohibiting the purchase and sale of gametes and the purchase of surrogacy services, the *AHRA* imposes barriers in the path of non-traditional family formation. The impugned provision represents an attempt to protect women from exploitation, but the US experience indicates that such concerns are unfounded.
>
> In recent years, the Supreme Court of Canada has struck down criminal prohibitions on assisted dying and prostitution-related

> activities. These cases demonstrate how the blunt instrument of the criminal law is often ill-suited to regulate complex human experiences, or the behaviour of marginalized groups.

[56] Addressing the applicants' s. 7 arguments, Noonan JA reasoned that the impugned provision deprived intended parents of their rights to liberty and security of the person in a manner that was not in accordance with the principles of fundamental justice. Noonan JA noted that the impugned provision engaged the liberty interests of intended parents because of the potential for imprisonment and because of its impact on a fundamental personal choice. Then, she reasoned that the applicants' security of the person interests were also engaged:

> State action that denies access to vital medical services results in physical and psychological suffering, which engages s. 7: *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 123, [2005] 1 SCR 791. While surrogacy is not, strictly speaking, a form of medical treatment implicating individuals' physical well-being, access to reproductive services has a profound impact on individuals' psychological and social well-being. By prohibiting individuals from accessing commercial surrogacy, Flavelle forces them to accept restrictions on their procreative choice, leading to serious psychological effects.
>
> These deprivations of liberty and security of the person are both arbitrary and overbroad. The provision is arbitrary because it undermines its objective (*i.e*. preventing the exploitation of women), by prohibiting mutually beneficially commercial transactions while ignoring exploitative altruistic arrangements. Moreover, the provision is itself exploitative, since it prevents women from earning fair compensation for their labour. Far from respecting women's human dignity, the provision denigrates their dignity by perpetuating the notion that they are insufficiently autonomous to determine how they should use (or not use) their reproductive capacities. The provision is also overbroad, since it is capable of capturing—as here—consensual, non-exploitative transactions.

[57] Noonan JA also disagreed with Pike JA's s. 15(1) analysis. She would have held that s. 6(1) of the *AHRA* perpetuated the disadvantage faced by same-sex couples and those experiencing infertility in building their families. Additionally, she stated that by restricting the means available to LGBTQ persons in building their families, "s. 6(1) of the *AHRA* fuels the insidious stereotype that these families are 'unnatural' and less-deserving of concern, respect, and consideration."

[58] Noonan JA also reasoned that the impugned provision did not engage s. 15(2), since Parliament's objective in enacting the legislation was not to ameliorate the existing conditions of women, but to protect them from future harm. She considered that Puskas JA erred by conducting what was properly a s. 1 analysis under s. 15(2), noting that the justifiability of protective schemes should be—and has always been—evaluated using the *Oakes* test.

[59] Turning to s. 1, Noonan JA acknowledged that preventing the commodification and exploitation of women was a pressing and substantial objective. Further, although she acknowledged arguments by some commentators that an arbitrary law cannot meet the rational connection requirement of the *Oakes* test, she nonetheless concluded that s. 6(1) of the *AHRA* was rationally connected to its objective, since there was a "reasonable prospect" that the prohibition on commercial surrogacy would protect vulnerable women from exploitation. However, she reasoned that the provision was neither minimally impairing nor proportional in effects. She stated that, like in *Carter*, a carefully constructed regulatory regime would ensure that Parliament's objectives were met without causing these serious infringements of individuals *Charter* rights.

**Issues on Appeal**

[60] Lewiston and Soleil have been granted leave to appeal the Falconer Court of Appeal's decision to the Supreme Court of Flavelle.

The Court is being asked to decide the following issues:

1. Does s. 6(1) of the *Assisted Human Reproduction Act* infringe s. 7 of the *Charter*?
2. Does s. 6(1) of the *AHRA* infringe s. 15 of the *Charter*?
3. If s. 6(1) of the *AHRA* infringes either s. 7 or s. 15, is it justified under s. 1 of the *Charter*?

## APPENDIX I: RELEVANT PROVISIONS OF THE *ASSISTED HUMAN REPRODUCTION ACT*

**Declaration**

**2** The Parliament of Flavelle recognizes and declares that

> **(a)** the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;
>
> **(b)** the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;
>
> **(c)** while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;
>
> **(d)** the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;
>
> **(e)** persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;
>
> **(f)** 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; and
>
> **(g)** human individuality and diversity, and the integrity of the human genome, must be preserved and protected.

[…]

**Payment for Surrogacy**

**6 (1)** No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.

[…]

**Reimbursement of expenditures**

**12 (1)** No person shall, except in accordance with the regulations,

> **(a)** reimburse a donor for an expenditure incurred in the course of donating sperm or an ovum;
>
> **(b)** reimburse any person for an expenditure incurred in the maintenance or transport of an *in vitro* embryo; or

**(c)** reimburse a surrogate mother for an expenditure incurred by her in relation to her surrogacy.

**Receipts**

**(2)** No person shall reimburse an expenditure referred to in subsection (1) unless a receipt is provided to that person for the expenditure.

**No reimbursement**

**(3)** No person shall reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy, unless

**(a)** 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; and

**(b)** the reimbursement is made in accordance with the regulations.

[…]

**Offence and punishment**

**60** A person who contravenes any of sections 5 to 7 and 9 is guilty of an offence and

**(a)** is liable, on conviction on indictment, to a fine not exceeding $500,000 or to imprisonment for a term not exceeding ten years, or to both; or

**(b)** is liable, on summary conviction, to a fine not exceeding $250,000 or to imprisonment for a term not exceeding four years, or to both.

[…]

**Regulations of Governor in Council**

**65 (1)** The Governor in Council may make regulations for carrying into effect the purposes and provisions of this Act and, in particular, may make regulations […]

**(e)** respecting the reimbursement of expenditures for the purposes of subsection 12(1), including providing for the expenditures that may be reimbursed;

**(e.1)** for the purposes of subsection 12(3), respecting the reimbursement of a loss of income;

## APPENDIX II: HEALTH FLAVELLE REGULATION

### Assisted Human Reproduction (Interim Section 12 Reimbursement) Regulations

### Flv. Reg. 2014-001

### ASSISTED HUMAN REPRODUCTION ACT

**Interpretation**

**1(1)** The following definitions apply in these Regulations.

*Act* means the *Assisted Human Reproduction Act*.

*commissioning parent* means a person who enters into a surrogate motherhood agreement with a surrogate mother.

*surrogate mother* means 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.

**Reimbursement of Surrogate Mother Under Section 12 of the Act**

**2** The commissioning parents may reimburse the surrogate mother for all reasonable expenses incurred by her as a result of the pregnancy.

**Coming into Force**

**3** These Regulations come into force on April 1, 2014.