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 RESPONDENT

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PART I - OVERVIEW AND FACTS

1. In the 2010 *Reference re Assisted Human Reproduction Act,* the Supreme Court of Canada held that assisted human reproduction raises moral dilemmas that "do not fit neatly within the traditional legal frameworks that have developed in a world of natural conception." As such, "[t]he criminal law must be able to respond to new and emerging matters of public concern that go to the health and security of Canadians and the fundamental values that underpin Canadian society."[1]

2. The Appellants challenge restrictions on one type of assisted human reproduction: commercial surrogacy. Sections 6(1) and 12 of the *Assisted Human Reproduction Act* collectively permit individuals to enter into surrogacy arrangements but prohibit them from offering any payments beyond reasonable reimbursements in exchange for a surrogate's services.[2] These provisions are based on the idea that there are some things that money cannot and should not be able to buy.

3. Flavelle is sympathetic to the needs of couples like the claimants. But it also recognizes the potential for harm to the surrogates they depend on. Balancing these interests involves a difficult line-drawing exercise. The very fact that Parliament has chosen to draw the line here and not at the

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[1] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, Joint Book of Authorities Tab A44, at paras 4, 43.
[2] *Assisted Human Reproduction Act,* SC 2004, c 2, ss 6(1), 12 ["*AHRA*"].

Appellants' preferred position is not a sufficient reason to strike down prohibitions designed to safeguard the dignity and bodily integrity of all Flavellian women.

4. The Respondent accepts the factual findings of the lower courts.

PART II - ISSUES

5. This appeal raises the following issues:

(a) Does s. 6(1) of the *AHRA* violate s. 15 of the *Charter?*

(b) Does s. 6(1) of the *AHRA* violate s. 7 of the *Charter?*

(c) If s. 6(1) of the *AHRA* violates either s. 15 or s. 7 of the *Charter,* is it nevertheless justifiable in a free and democratic society under s. 1 of the *Charter?*

6. Flavelle submits that s. 6(1) violates neither s. 15 nor s. 7 of the *Charter.* However, in the event that it violates either section, the legislation is nevertheless justified under s. 1 of the *Charter.*

PART III - STATEMENT OF ARGUMENT

SECTION 15 (EQUALITY)

7. Individuals can have children through any number of means. These include natural childbirth, adoption, in vitro fertilization (IVF), and surrogacy arrangements. The *AHRA* does not foreclose all, or even many of these means. It simply regulates one type of conception by preventing individuals from offering payments to surrogates beyond the actual expenses arising out of the pregnancy.

8. In so doing, the *AHRA* does not infringe the equality rights of LGBTQ couples or of potential surrogates.

9. Section 6(1) is an ameliorative program within the meaning of s. 15(2) of the *Charter.* Parliament must be given leeway to protect women from dangers posed by innovative human reproduction techniques. Section 6(1) of the *AHRA* aims, *inter alia,* to protect financially vulnerable women from being exploited by commercial surrogacy arrangements. Prohibiting all

payment to surrogates, even those who are not vulnerable to exploitation, is necessary to accomplish this objective because it is difficult, if not impossible, to design alternative measures that can identify those women who are most at risk and prevent them from being exploited by commissioning parents.

10. Furthermore, s. 6(1) does not discriminate against either LGBTQ couples or women. In the case of LGBTQ couples, the Appellants have failed to demonstrate that the legislation draws a distinction on the basis of an enumerated or analogous ground. LGBTQ couples are not the only ones who cannot access commercial surrogacy. Infertile women and single men of any sexual orientation are also prevented from doing so. The true reason for the distinction lies in whether a given individual desires or needs a third party's assistance in producing a child. Further, this distinction is not discriminatory because the legislation takes into account their circumstances. It recognizes the need to consider the welfare of the surrogates involved.

11. In the case of potential surrogates, the legislation perpetuates neither prejudice nor stereotypes against women.

A. Section 6(1) does not violate section 15 of the *Charter* because it is an ameliorative program under section 15(2)

12. Legislation with a genuine purpose of ameliorating the conditions of disadvantaged groups is not open to challenge by those whom it adversely affects.[3]

13. Section 15(2) "seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups."[4] Once the legislature has enacted legislation that aims to protect marginalized groups in society, it is not for the courts to engage in the "unseemly" exercise of determining whether there is a more disadvantaged group that is more deserving of assistance.[5]

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[3] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab A2 at paras 44-45.
[4] *R v Kapp,* 2008 SCC 41, Joint Book of Authorities Tab A37 at para 33.
[5] *Lovelace v Ontario,* 2000 SCC 37, Joint Book of Authorities Tab Z at para A59; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab 26 at para 49.

Section 15(2) demands deference to the legislature's choice of which groups to benefit and through which means.[6]

14. Section 6(1) of the *AHRA* is an ameliorative scheme within the meaning of s. 15(2). It aims, *inter alia,* to prevent the risk that commissioning parents will exploit financially vulnerable women and induce them into participating in commercial surrogacy arrangements when they do not truly accept or understand the nature of the risks involved.[7] It meets both stages of the current test for an ameliorative program under s. 15(2), namely:

(a) The legislation targets a disadvantaged group identified by the enumerated or analogous grounds; and

(b) The legislation has an ameliorative or remedial purpose.[8]

15. The fact that the legislation incidentally restricts the "freedom" of the target group to contract into exploitive arrangements does not disqualify s. 6(1) as an ameliorative program.

(i) Section 6(1) targets a disadvantaged group

16. In *Kapp,* the Supreme Court held that "[n]ot all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination."[9]

17. Financially vulnerable women are a disadvantaged group in Flavelle. Women make up a disproportionate number of low-income individuals. Across the country, women remain underrepresented in the workforce and overrepresented in the ranks of the impoverished. These gender disparities increase for women with intersecting identities. For instance, 21.9% of women of colour in Flavelle live in low-income situations, as compared to 14.3% of all women and 12.2% of all men.[10] Similarly, 38.2% of people living in female-headed single parent households live in low-income situations after tax, compared to an overall low-income rate of 14.2%.[11]

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[6] *R v Kapp,* 2008 SCC 41, Joint Book of Authorities Tab A37 at paras 47-49; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab A2 at para 49.
[7] Official Problem, para 37.
[8] *R v Kapp,* 2008 SCC 41, Joint Book of Authorities Tab A37 at para 41.
[9] *R v Kapp*, 2008 SCC 41, Joint Book of Authorities Tab A37 at para 55.
[10] Official Problem, para 32.
[11] Official Problem, para 32.

(ii) Section 6(1) has an ameliorative or remedial purpose

18. Legislation is ameliorative where the government's goal is "to improve the conditions of a group that is disadvantaged."[12]

19. Section 15(2) must permit governments to pro-actively address the potential for new and emerging forms of assisted reproduction to create and reinforce social disadvantage in Flavelle. This mirrors the current approach to s. 15(1), which protects individuals against discrimination that exacerbates historical disadvantage or threatens to generate future disadvantage. It is inconsistent with the purpose of s. 15(2) to fetter the ability of Parliament to protect vulnerable groups until they have already experienced harm.

20. The trial judge accepted that one of the purposes of prohibiting commercial surrogacy is to protect financially vulnerable women from potential exploitation.[13] The Appellants do not challenge this finding. Prohibiting all payments to surrogates contributes to this objective by preventing commissioning parents from using financial incentives to induce women to accept risks that they do not truly accept or understand.

21. Poor women are vulnerable to financial exploitation in uniquely gendered ways. The Supreme Court has recognized that poverty, combined with other intersecting grounds of disadvantage, leaves individuals in situations of "constrained choice."[14] The result is that in comparable industries like sex work, "[w]hether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, *[women] often have little choice but to sell their bodies for money.*"[15] Dr. Steiner's conclusions from her review of the experience of other countries confirm that commercial surrogacy arrangements tend to exploit financially vulnerable women in similar ways.[16]

22. Commissioning parents should not be able to take advantage of financially vulnerable women to serve their own ends. Contrary to the Appellants' assertions, acting as a commercial surrogate entails medical, psychological, and legal risks that go beyond those incurred by an

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[12] *R v Kapp*, 2008 SCC 41, Joint Book of Authorities Tab A37 at para 48.
[13] Official Problem, para 36.
[14] *Canada (Attorney General) v Bedford*, 2013 SCC 72, Joint Book of Authorities Tab A11 at paras 60, 86; *R v Hart,* 2014 SCC 52, Joint Book of Authorities Tab A35 at paras 224-226.
[15] *Canada (Attorney General) v Bedford*, 2013 SCC 72, Joint Book of Authorities Tab A11 at para 86.
[16] Official Problem, para 35.

ordinary pregnancy. Commercial surrogacy arrangements invariably contain binding terms that aim to safeguard the future child's well-being but do so by restricting or denying the surrogate's freedoms. These terms regulate mundane decisions like where the surrogate can travel and what activities she will engage in during the pregnancy, but also fundamental personal choices like what medical treatment she will receive, and when and in what circumstances she will have an abortion. They also subordinate the surrogate's liberty, health, and occasionally her life to the interests of the commissioning parents and the future child.

23. The implications of these terms, or of the surrogacy arrangement itself, are not always apparent at the outset and require independent professional advice to understand. The commissioning parents may refuse to perform their obligations for any number of reasons, including complications with the pregnancy, changing personal circumstances, or revelations about the surrogate's past that were not discussed at the outset. Similarly, the surrogate may feel that she should not perform her obligations because of the commissioning parents' circumstances or because she develops an unexpected attachment toward the child. In *Re Baby M*, for instance, a surrogate in a commercial arrangement became "disturbed, disconsolate, stricken with unbearable sadness" after being separated from the child.[17] She later fled with the child and launched a series of suits in order to secure custody rights.[18] Finally, despite the agreement being performed in accordance with the intentions of both parties, it may be impossible for the surrogate to contract out of their child support obligations.[19] And yet, impoverished women are least capable of paying for the independent advice that they require.[20]

24. In short, permitting commercial surrogacy in Flavelle against a backdrop of acute and gendered income inequality creates a real risk of exploitation. As Bastarache J. noted in *Thomson Newspapers Co v Canada (Attorney General)*, "our values encourage us to be solicitous of vulnerable groups and to err on the side of caution where their welfare is at stake."[21] "Positive proof" that a future harm will arise and that the prohibition is necessary to prevent the harm is not

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[17] *In the Matter of Baby M*, 109 NJ 396, 537 A2d 1227 (NJ 1988), Joint Book of Authorities Tab A20 at 1236 [*Re Baby M*].
[18] *In the Matter of Baby M*, 109 NJ 396, 537 A2d 1227 (NJ 1988), Joint Book of Authorities Tab A20 at 1237.
[19] *Jane Doe v Alberta*, 2007 ABCA 50, Joint Book of Authorities Tab A23.
[20] At paragraph 79, the Appellants admit that surrogacy agreements are generally arranged in consultation with a lawyer, who are paid for their services in helping negotiate the contract.
[21] *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877, Joint Book of Authorities Tab A51 at para 116.

the standard to be met.[22] Flavelle need only demonstrate that it was "rational for the state to conclude that the means chosen…would contribute to [the legislation's] purpose."[23] This standard is met here.

(iii) The fact that the legislation restricts the "freedom" of the target group does not disqualify it as an ameliorative scheme

25. The Appellants object that s. 6(1) of the *AHRA* does not qualify as an ameliorative scheme because it "punishes" the target group, relying on the Supreme Court's direction in *R v Kapp*.[24] This characterization misunderstands both the Supreme Court's comments in *R v Kapp* and the effect of the legislation itself.

26. In *R v Kapp*, the Supreme Court held that legislation that applies *direct* punishment against individuals in the target group does not qualify as an ameliorative scheme.[25] The Supreme Court expressed concerns about cases like *R v Music Explosion Ltd,* which held that bylaws punishing children from operating an amusement device without the consent of a guardian or a parent qualified as ameliorative schemes.[26] This concern is based on the understanding that applying fines or imprisonment against individuals seldom advances their well being. Such is not the case here. Section 6(1) does not criminalize the surrogate's act of accepting payments, but the commissioning parents' act of offering payment.

27. Ameliorative programs can legitimately restrict the choices open to individuals in the target group so long as these effects are minimally impairing. In *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, the Supreme Court confirmed that "distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program."[27]

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[22] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab A2 at para 60.
[23] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab A2 at para 60, citing *R v Kapp*, 2008 SCC 41, Joint Book of Authorities Tab A37 at para 49.
[24] Appellants Factum, paras 97-100; *R v Kapp*, 2008 SCC 41, Joint Book of Authorities Tab A37 at para 54,
[25] *R v Kapp,* 2008 SCC 41, Joint Book of Authorities Tab A37 at para 54.
[26] *R v Kapp,* 2008 SCC 41, Joint Book of Authorities Tab A37 at para 54.
[27] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab A2 at para 45 (emphasis added).

28. For this reason, in *Cunningham*, the Supreme Court held that provisions of the *Metis Settlement Act* that allow members of the settlement to be expelled if they registered as a status Indian qualified as an ameliorative program. This is because the *Act* as a whole aimed to "enhance Métis identity, culture and self-government" by establishing a Métis land base.[28] The Court was not deterred by the fact that the *Act,* in doing so, constrained the choices available to members of the target group. It held that excluding Métis members who also held status was necessary to the objective of preserving a distinct Métis identity.[29]

29. Similarly, in *A(C) v Manitoba (Director of Child & Family Services),* two members of the Supreme Court held that allowing a court to order medical treatment for a child under the age of 16 without their consent if it was in their best interests qualified as an ameliorative program. McLachlin C.J. and Rothstein J., concurring in result, arrived at this conclusion because the *Act* "aims at protecting the interests of minors as a vulnerable group."[30] This was despite the fact that, in the precipitating events, the *Act* permitted a court to order that a 14-year-old Jehovah's Witness receive a blood transfusion against her express wishes.

30. Section 6(1) of the *AHRA* is just one of many legislative provisions designed to protect individuals against the excesses of the marketplace. In *Re Baby M*, the New Jersey Supreme Court explained that:

> Putting aside the issue of how compelling [the surrogate's] need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy. In America, we decided long ago that merely because conduct purchased by money was "voluntary" did not mean that it was good or beyond regulation and prohibition. Employers can no longer buy labor at the lowest price they can bargain for, even though that labor is "voluntary," or buy women's labor for less money than paid to men for the same job, or purchase the agreement of children to perform oppressive labor, or purchase the agreement of workers to subject themselves to unsafe or unhealthful working conditions.[31]

31. A complete prohibition on commercial surrogacy goes no further than necessary to achieve its objective because it is difficult to design a regulatory scheme that can predict in advance which

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[28] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab A2 at para 60.
[29] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham,* 2011 SCC 37, Joint Book of Authorities Tab A2 at para 73.
[30] *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30, Joint Book of Authorities Tab A1 at para 152; *T(A) (Litigation Guardian of) v Ontario Health Insurance Plan,* 2010 ONSC 2398, Joint Book of Authorities Tab A50 at para 69.
[31] *In the Matter of Baby M*, 109 NJ 396, 537 A2d 1227 (NJ 1988), Joint Book of Authorities Tab A20 at 1249 (citations omitted).

women are at risk of exploitation and successfully prevent it from occurring.[32] Fertility clinic employees who stand in an irreconcilable conflict of interest with surrogates cannot be expected to adequately safeguard their well-being.[33] The reported cases are replete with examples of professionals failing to recognize signs of vulnerability, financial or otherwise, under the best of circumstances.[34] Even independent legal advice cannot prevent women from signing agreements out of financial distress that are subsequently found to be unconscionable.[35]

B. Section 6(1) does not violate section 15(1) of the *Charter*

32. If this Court finds s. 6(1) does not qualify as an ameliorative scheme, it nevertheless does not violate s. 15(1) by discriminating against LGBTQ couples or potential surrogates. The Appellants have failed to meet the test for discrimination for either group under s. 15(1), which is as follows:

(a) The legislation must create a distinction in its purpose or effect;

(b) The legislation must create a distinction based on the claimant's membership in an enumerated or analogous group; and

(c) The distinction must be discriminatory in the sense that it imposes an arbitrary disadvantage on the claimant group or perpetuates prejudice or stereotyping.[36]

(i) Section 6(1) does not discriminate against LGBTQ couples

Does section 6(1) create a distinction in purpose or effect?

33. Flavelle concedes that s. 6(1) of the *AHRA* has a disproportionate effect on some segments of the population. At the same time, it is important not to overstate the nature of the effects. Though s. 6(1) makes it somewhat more difficult for individuals like the claimants to have a child

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[32] *R v Malmo Levine,* 2003 SCC 74, Joint Book of Authorities Tab A39 at paras 3, 76-77, 135.
[33] Appellants Factum, para 112; *In the Matter of Baby M*, 109 NJ 396, 537 A2d 1227 (NJ 1988), Joint Book of Authorities Tab A20 at 1247.
[34] See, for instance, *Morrison v Coast Finance Ltd* (1965)*,* 55 DLR (2d) 710 (BCCA), Joint Book of Authorities Tab Z; *McKenzie v Bank of Montreal*, 55 DLR (3d) 641 (Ont HCJ), Joint Book of Authorities Tab Z; *Canadian Imperial Bank of Commerce v Ohlson* (1997), 154 DLR (4th) 33 Joint Book of Authorities Tab Z.
[35] See, for instance, *Mraovic v Mraovic,* 2003 MBQB 284, Joint Book of Authorities Tab A28 at paras 23, 34-35.
[36] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, Joint Book of Authorities Tab A24 at paras 19-20; *Quebec (AG) v A,* 2013 SCC 5, Joint Book of Authorities Tab 31 at para 327 (Abella J.).

through surrogacy, it by no means eliminates their ability to do so, nor does it close off other avenues like adoption.

Is the distinction based on the claimant's membership in an enumerated or analogous ground?

34. The Appellants have failed to prove that these effects distinguish between individuals on the basis of an enumerated or analogous ground. The record confirms that the legislation impacts a broader cross-section of society than just couples consisting of gay or bisexual men and transgender people. While statistics on traditional surrogacy arrangements are not available, just 23% of people who rely on gestational surrogacy are male couples. A full 43% are infertile women, while 34% are individuals like single men of any sexual orientation who otherwise cannot bear children independently.[37]

35. Consequently, s. 6(1) of the *AHRA* cannot be said to create distinctions based on sexual orientation, as the Appellants allege. Instead, it distinguishes between individuals based on whether they need or desire a third party's assistance in producing a child and have the means to pay for it.

36. It is not the case that any legislation that restricts, regulates, or delays access to assisted reproduction discriminates against LGBTQ individuals on the basis of their sexual orientation simply because they resort to assisted reproduction more frequently.[38] In *Susan Doe v Canada (Attorney General),* the Ontario Court of Appeal considered a similar challenge to assisted conception regulations imposing screening and testing requirements on semen from a donor who is not a spouse or sexual partner. It held that the legislation did not discriminate on the basis of sexual orientation simply because lesbian women by and large must use sperm from someone other than their partners. Instead, the Court accepted that the legislation distinguished on the basis of the different health risks involved with using a partner's sperm as opposed to a non-partner.[39] Its conclusion was bolstered by the fact that heterosexual women who used a non-partner's sperm were equally required to go through the screening process.[40]

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[37] Official Problem, para 24.
[38] Appellants Factum, paras 59, 61.
[39] *Susan Doe v Attorney General,* 2007 ONCA 11, Joint Book of Authorities Tab A49 at para 29.
[40] *Susan Doe v Attorney General,* 2007 ONCA 11, Joint Book of Authorities Tab A49 at para 29.

Does the distinction create arbitrary disadvantage?

37. Legislation creates an arbitrary disadvantage where it fails to respond to the actual capacities, needs, and circumstances of the members of the claimant group.[41] Section 6(1) of the *AHRA* does not fall victim to this flaw.

38. As the Supreme Court explained in *Withler,* "[e]quality is not about sameness and s. 15(1) does not protect a right to identical treatment."[42] At the end of the day, there is only one question: whether the challenged law violates the norm of substantive equality.[43] Substantive equality is advanced by legislation that is "sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences."[44] As McIntyre J. explained in *Andrews*:

> 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, while those based on an individual's merits and capacities will rarely be so classed.[45]

39. The Appellants ask to be treated the same as others when s. 15 only demands that they be treated equally in accordance with their circumstances. They demand the right to produce children with the ease that other parents can. But no direct comparison is possible because of their distinct needs and circumstances. The Appellants, unlike couples who capable of reproducing naturally, require significant assistance from a third party surrogate in order to do so.

40. Sections 6 and 12 of the *AHRA* take into account these circumstances by permitting individuals to access surrogacy but prohibiting them from offering payment in exchange. The reason for this lies in the need to balance the interests of individuals like the Appellants with the welfare of the surrogate and other women in society. As the Supreme Court held in *Kapp,* ameliorative purposes or effects militate against a finding of discrimination even under the new

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[41] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, Joint Book of Authorities Tab A24 at para 20.
[42] *Withler v Canada*, 2011 SCC 12, Joint Book of Authorities Tab A57 at para 31.
[43] *Withler v Canada*, 2011 SCC 12, Joint Book of Authorities Tab A57 at para 3.
[44] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, Joint Book of Authorities Tab A25 at paras 53, 70.
[45] *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143, Joint Book of Authorities Tab A4 at 174-175.

approach to s. 15(2).[46] The Appellants have conceded that, at the least, the legislation has ameliorative effects for financially vulnerable women.[47]

41. Legislation regularly treats assisted reproduction differently without falling afoul of s. 15(1) precisely because it engages different concerns from natural childbirth. In *Susan Doe v Canada (Attorney General)*, for instance, the Ontario Court of Appeal also held that different screening requirements on donor sperm would not have been discriminatory because they were based in health concerns that corresponded to the actual level of risk when using sperm from a sexual partner as opposed to a non-partner.[48]

42. Similarly, in *Tian v Canada (Minister of Citizen & Immigration),* an infertile woman made arrangements with gamete donors and a surrogate in China. She sponsored the child as a dependent child after his birth. The Immigration & Refugee Board denied her application because the relevant regulations defined a dependent child as either a biological or adopted child. She unsuccessfully argued before the Appeal Board that the regulations discriminated against children born through surrogacy. Requiring proof of parentage in surrogacy arrangements aims to "[avoid] complex and expensive jurisdictional conflicts over paternity should a child be admitted to Canada without finally resolving paternity" and "discourag[e] child trafficking by ensuring a sponsor is the legal parent of a child."[49] These regulations were not discriminatory because these concerns corresponded to the actual circumstances of surrogacy arrangements and are not present in natural childbirth or adoption.[50]

Does section 6(1) perpetrate stereotypes or prejudice?

43. The Appellants argue that prohibiting commercial surrogacy arrangements exacerbates the disadvantages faced by LGBTQ individuals in society. This effect is in some way connected to the

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[46] *R v Kapp,* 2008 SCC 41, Joint Book of Authorities Tab A37 at para 23.
[47] Appellants Factum, para 99.
[48] *Susan Doe v Attorney General,* 2007 ONCA 11, Joint Book of Authorities Tab A49 at paras 26, 29.
[49] *Tian v Canada (Minister of Citizenship & Immigration)*, [2011] IADD No 1065, Joint Book of Authorities Tab A52 at para 13.
[50] *Tian v Canada (Minister of Citizenship & Immigration)*, [2011] IADD No 1065, Joint Book of Authorities Tab A52 at para 13.

existence of stereotypes that LGBTQ couples are unfit parents or are illegitimate because they cannot have children naturally.[51]

44. Flavelle acknowledges that some groups like LGBTQ individuals face prejudice in society because some members of society draw an irrational inference that, due to their inability to reproduce naturally, LGBTQ couples are somehow less worthy of respect and consideration. But prohibiting specific types of assisted reproduction do not beget or even encourage views that they are less deserving. A person's reproductive capacities have no relation to their worth as a human being. Conversely, enabling specific types of assisted reproduction does nothing to overcome these prejudices. No technology currently in use can change the fact that some individuals do in fact require assistance in reproduction. Flavelle cannot be held responsible for the irrational and unrelated beliefs that are held by "third parties who are not in any sense acting as agents of the state."[52]

45. The legislation itself does not perpetuate independent prejudices about the legitimacy of LGBTQ families, contrary to the Appellants' suggestions at paragraph 76 of their factum. The law does not single out LGBTQ couples as the sole individuals capable of commodifying women's reproductive functions or of exploiting financially vulnerable women. Nor does it do so because of their sexual orientation. It restricts any individual who desires to have a biologically related child, requires assistance from a third party to do so, and must pay them in order to procure it.

(ii) Section 6(1) does not discriminate against women

46. The Attorney General accepts that s. 6(1) restricts the economic freedom of potential surrogates in a manner that is linked to their gender.

47. However, Flavellian women's own perceptions and experiences contradict the Appellants' assertion that s. 6(1) is in fact discriminatory against women.

Section 6(1) does not perpetuate stereotypes about women

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[51] Appellants Factum, paras 70-72.
[52] *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44, Joint Book of Authorities Tab A6 at para 59.

48. The Appellants contend that the legislation stereotypes women by implying that *all* potential surrogates are motivated by financial considerations, come from a lower socio-economic background, and are in need of protection against exploitation.[53] This account mischaracterizes one of the objectives underlying s. 6(1) of the *AHRA*. Section 6(1) addresses the risk that *some* surrogates will be motivated in part by financial considerations, and that, of these women, *some* will be coerced into arrangements with risks that they do not truly accept or understand.

49. This is a rational assessment that is based on evidence of exploitation in other industries like sex work, the experience of women in other countries that permit commercial surrogacy, and genuine fears expressed by representatives of women who are disproportionately represented among the ranks of the poor.[54] The Milne Commission heard from a number of groups representing racialized women that pressed the Commission to ban commercial surrogacy.[55] Groups like Immigrant and Visible Minority Women of Flavelle argued strenuously that "the costs in the increased potential for exploitation of women of colour by far outweigh any benefits that might accrue to affluent couples."[56]

Section 6(1) does not perpetuate prejudice against women

50. The Appellants contend that prohibiting individuals from offering compensation above the actual expenses involved in the pregnancy devalues women's labour by promoting the idea that it has no value at all.[57]

51. This argument relies on the assumption that offering money for in exchange for somebody's services always signifies or enhances its value. Attaching a price to a woman`s reproductive functions differs from pricing labour like caregiving or domestic labour. Our shared moral intuitions instruct that commodifying the human body and its functions is "undesirable" and diminishes the value of something that is intrinsically valuable by converting it into something that

[53] Appellants Factum, paras 89-90.
[54] *Canada (Attorney General) v Bedford,* 2013 SCC 72, Joint Book of Authorities Tab A11 at para 86; Official Problem, para 32.
[55] Official Problem, para 34.
[56] Official Problem, para 34.
[57] Appellants Factum, paras 93-94.

is only instrumentally valuable.[58] For this reason, Flavellian women perceive that attaching a price to surrogacy is "degrading to the women involved," rather than affirming.[59]

SECTION 7 (LIFE, LIBERTY, AND SECURITY OF THE PERSON)

52. The prohibition on commercial surrogacy does not engage commissioning parents' liberty interest to a fundamental personal choice, nor does it engage their security of the person. The impugned provision only engages their liberty interests through the possibility of imprisonment. This engagement is in accordance with the principles of fundamental justice. First, the provision is rationally connected to protecting financially vulnerable women from exploitation and preventing the commodification of women's reproductive functions. Second, the law is appropriately tailored to achieving those objectives.

A. Section 7 Engagement

(i) Parents' section 7 liberty rights are only partially engaged

53. Flavelle agrees that the possibility of imprisonment for an offense triggers s. 7 liberty interests.[60] However, Flavelle disputes the Appellants' claim that their s. 7 interests are engaged by denying them a fundamental personal choice.

54. The Appellants claim that prohibiting commercial surrogacy denies them the chance to have a child. However, the impugned provision only restricts one means of having children. Surrogacy and adoption are still available and viable options for commissioning parents. As accepted by the Falconer Court of Appeal, "s. 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."[61]

55. In reality, the Appellants' true *Charter* claim is that section 7 protects the right to have a biologically related child.[62] Their rationale for rejecting adoption as a viable option relies on the assumption that adoption is not any less expensive, arduous, or uncertain than pursuing a

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[58] *Harvard College v Canada (Commissioner of Patents),* 2002 SCC 76, Joint Book of Authorities Tab A19 at para 176.
[59] Official Problem, para 34.
[60] *R v Malmo Levine,* 2003 SCC 74, Joint Book of Authorities Tab A39 at para 84 and 89, *Reference re s. 94(1) of the Motor Vehicle Act (British Columba)*, 1985 2 SCR 486, Joint Book of Authorities Tab X at 515.
[61] Official Problem, para 50.
[62] Appellants Factum, para 27.

surrogacy arrangement, let alone commercial surrogacy. Their own experience with a previous surrogacy proves otherwise. The Appellants do not appear to have even explored adoption, either domestic or international, nor did they place any evidence in the record as to its difficulty or expense.

56. While the general decision of whether or not to have children is a fundamental personal life choice, the preferred means of having a child is not, and should not be covered by s.7. For instance, Canadian courts have held that the right to have a child does not encompass a right to assisted conception using gametes not screened for infectious diseases; a preference in the way a child is conceived.[63] Being denied the choice of *how* one has children, as distinct from the choice of whether or not to have children, does not qualify as a "basic choice going to the core of what it means to enjoy individual dignity and independence."[64] The Appellants in this case are asking for a similar preference to be granted s. 7 protection. The justification that this passes on their "legacy" is not enough to ground a s. 7 claim.

57. Not every restriction on a general liberty interest impinges on a fundamental personal life choice protected by the *Charter*. As La Forest J. explained in *B(R)*:

> …liberty does not mean unconstrained freedom; see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (per Wilson J., at p. 524); *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713 (per Dickson C.J., at pp. 785-86). Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. [65]

(ii) Parents' section 7 security of the person interest is not engaged

58. The Appellants' right to security of the person is only engaged if a state action "has a serious and profound effect on a person's psychological integrity" that goes beyond "ordinary stress or anxiety." [66] This is a high threshold for any claimant to meet and has not been proven in this case.

59. The simple fact that commissioning couples experience distress because of their inability to conceive naturally does not engage security of the person under section 7. In *Blencoe*, the

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[63] *Susan Doe v Canada (Attorney General)*, 2007 ONCA 11, Joint Book of Authorities Tab A49 at para 33.
[64] *Godbout v Longeuil (City)*, 1997 SCR 844, Joint Book of Authorities Tab A18 at para 66.
[65] *B(R) v Children's Aid Society of Metropolitan Toronto,* 1 SCR 315, Joint Book of Authorities Tab A5 at para 80.
[66] *New Brunswick (Minister of Health and Community Services v G(J),* 1999 3 SCR 46, Joint Book of Authorities Tab A29 at para 60.

Supreme Court emphasized that the harm that engages the right to security of the person must not only be serious, it must also *result* from state action.[67] The state is not responsible for the initial distress of being unable to have children because it did not cause their infertility. Nor is the state responsible for the inherent and ordinary anxieties that individuals experience as they attempt to overcome their infertility through IVF, adoption, or other means.

60. To engage s. 7, the legislation must cause *additional* psychological stress, beyond that experienced due to infertility, rising to the level of severe psychological distress. This threshold is not met here. The impugned provision only restricts one avenue of assisted reproduction while leaving open other alternatives. The stress the claimants refer to are inherent and ordinary anxieties that come as a result of the challenges of infertility, not a serious harm that is unique to the inability to access commercial surrogacy. Further, the psychological harm, described by claimants' own testimony, is not from their inability to have children, but their inability to have biologically-related children, as they were unwilling to try adoption. However, the desire for "legacy" is not so strong as to amount to the psychological distress needed for security of the person to be engaged.

61. The Appellants' reliance on child apprehension cases as an analogous psychological distress is misleading.[68] The harm of taking away a living child that the parents already knew and loved is fundamentally different and more serious than restricting a person's ability to have a future hypothetical child. As such, the psychological distress caused by prohibiting commercial surrogacy is not comparable to that of having a living child taken away.

B. The deprivation is in accordance with the principles of fundamental justice

(i) Section 6(1) has two compelling objectives

62. In *Carter*, the Supreme Court directed litigants to define the object of the law precisely, and to confine the objectives of the law "to measures directly targeted by the law."[69] Prohibiting commercial surrogacy aims to prevent harms associated with 1) the exploitation of financially

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[67] *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44, Joint Book of Authorities Tab A6 at para 57.
[68] Appellant Factum at para 30.
[69] *Carter v Canada (Attorney General)*, 2015 SCC 5, Joint Book of Authorities Tab A12 at para 78; *Canada (Attorney General) v Bedford,* 2013 SCC 72, Joint Book of Authorities Tab A11 at para 132; *R v A(B),* 2015 ONCA 803, Joint Book of Authorities Tab A32 at para 49.

vulnerable women; and 2) the commodification of women's reproductive functions. These objectives find support in the legislation's history,[70] purpose statement,[71] and previous findings by the Supreme Court of Canada.[72] With respect to these values, Dr. Steiner's expert testimony connected the criminal prohibition on commercial surrogacy with a public consensus on Flavellian social values.[73]

Section 6(1) protects financially vulnerable women from exploitation

63. As explained above in the Respondent's arguments on s. 15(2), this objective aims to protect women in dire financial circumstances from being coerced into entering surrogacy contracts and accepting risks that they do not truly accept or understand.

Section 6(1) prevents the commodification of women's reproductive functions

64. Commodification involves the attachment of monetary value to a thing. Permitting commissioning parents to purchase control over a woman's reproductive functions for a price commodifies those reproductive functions.

65. This objective is distinct from the harms of financial exploitation. In enacting the *AHRA*, Parliament declared that the "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."[74] It is apparent on the face of the statute that the commodification of the reproductive functions is a separate evil from the exploitation of women in particular surrogacy arrangements.

66. Legislation has consistently treated selling human bodies and its functions as invoking concerns distinct from selling human ideas, skills, and labour. The *Criminal Code* prohibits abducting and selling a person into slavery.[75] The *Patent Act* prohibits patenting human life.[76]

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[70] Official Problem, paras 30, 33.
[71] *AHRA,* s 2.
[72] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, Joint Book of Authorities Tab A44 at paras 100, 111.
[73] Official Problem, para 33.
[74] *AHRA*, s 2(f).
[75] *Criminal Code,* RSC 1985, c C-46, ss 279(1), 279.01(1).
[76] *Patent Act*, RSC 1985, c P-4 , s 2; *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76, Joint Book of Authorities Tab A19 at para 187.

Various provincial statutes prohibit selling or trading in human organs.[77] The *Assisted Human Reproduction Act* prohibits buying and selling reproductive tissues.[78]

67. Parliament has enacted this legislation because commodifying the human body and its functions is believed to be "intrinsically undesirable."[79] Commodification treats a person as an object; it denies their inherent worth, their agency and autonomy, and the importance of their experiences, feelings, needs, and desires.[80] As the Supreme Court explained in *Harvard College*, objectification is problematic because it promotes the view that "a moral agent with autonomy and dignity…can be used as an instrument for the needs or desires of others without giving rise to ethical objections."[81]

68. Reproductive decisions are not properly subject to private law duties or judicial oversight because they unacceptably intrude on a woman's privacy, autonomy, and bodily integrity.[82] Wilson J. in *Morgentaler* objected to the idea that women could be passive recipients of a decision made by others as to whether her body was to be used to nurture a new life. This denies her human dignity and self-respect.[83] It is no more acceptable for commissioning parents to make this decision for women than it is for the state.

69. Objectification can also pose concrete harms to women. In *R v Butler*, the Supreme Court accepted that avoiding harm to society through exposure to obscene material was a valid legislative objective.[84] The Supreme Court cited approvingly to decisions that held that "materials

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[77] *Human Tissue Gift Act*, RSBC 1996, c 211, ss 10-11; *Human Tissue and Organ Donation Act*, SA 2006, c H-14.5, s 3(2); *Human Tissue Gift Act*, RSS 1978, c H-15, at s 11; *Human Tissue Gift Act*, CCSM c H180, at s 15; *Trillium Gift of Life Network Act*, RSO 1990, c H.20, at s 10; *Human Tissue Gift Act*, SNB 2004, c H-12.5, at s 10(1); *Human Organ and Tissue Donation Act*, SNS 2010, c 36, at s 21; *Human Tissue Donation Act*, RSPEI 1988, c H-12.1, at s 15; *Human Tissue Act*, RSNL 1990, c H-15, at s 18; *Human Tissue Gift Act*, RSY 2002, c 117, at s 10.
[78] *AHRA*, s 7(1).
[79] *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76, Joint Book of Authorities Tab A19 at para 176.
[80] Martha Nussbaum, "Objectification" (1995) 4:4 *Philosophy and Public Affairs*, Joint Book of Authorities Tab B4 at 257.
[81] *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76, Joint Book of Authorities Tab A19 at para 176.
[82] *Dobson (Litigation Guardian of) v Dobson,* [1999] 2 SCR 753, Joint Book of Authorities Tab A14 at paras 27, 31.
[83] *R v Morgentaler*, [1988] 1 SCR 30, Joint Book of Authorities Tab A41 at 173 (Wilson J).
[84] *R v Butler,* [1992] 1 SCR 452, Joint Book of Authorities Tab A33 at 491-499.

portraying women as a class as objects for sexual exploitation and abuse have a negative impact on 'the individual's sense of self-worth and acceptance.'"[85]

70. The harms of commodification in the context of commercial surrogacy, while not susceptible to exact proof, are not so abstract as to be incapable of being measured and weighed against other values. One harm of commodification in the context of commercial surrogacy contracts lies in the nature of the terms of the contracts. Any surrogacy arrangement must regulate decisions of fundamental importance like the medical treatment that the surrogate can receive or the circumstances in which she may or must obtain an abortion. But once consideration is provided, no matter in what form or amount, the contract becomes legally binding. Therefore, contracts, unlike voluntary agreements, confer real power upon commissioning parents to subjugate the freedom, health, and sometimes even the life of the surrogate mother to those of their child.

71. The harm also lies in the messages it sends to third parties to the transaction. As the philosopher Michael Sandel explains, markets are not agnostic forums that simply distribute goods in society. They also express and promote certain attitudes about the goods being exchanged.[86] Commercial surrogacy lends credence to a societal perception that, in at least some sense, a woman's value lies in her reproductive capacity, which can be bought, sold, or traded.[87]

(ii) Section 6(1) is not arbitrary

72. Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose.[88] A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily interferes with those interests.[89]

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[85] *R v Butler,* [1992] 1 SCR 452, Joint Book of Authorities Tab A33 at 497, citing *R v Red Hot Video Ltd* (1985), 45 CR (3d) 36 (BCCA).
[86] Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Strauss and Giroux, 2012), Joint Book of Authorities Tab B6.
[87] Royal Commission on New Reproductive Technologies, *Proceed with Care,* vol 2, ch 23, Joint Book of Authorities Tab B5 at 678-79.
[88] *Canada (Attorney General) v Bedford,* 2013 SCC 72, Joint Book of Authorities Tab A11 at para 111.
[89] *Canada (Attorney General) v Bedford,* 2013 SCC 72, Joint Book of Authorities Tab A11 at para 111.

73. In this case, the question is whether the purpose of the law—to protect financially vulnerable women and prevent the commodification of women's reproductive functions—is directly connected to denying commissioning parents the choice of having a child in this way.

Section 6(1) is rationally related to the protection of financially vulnerable women

74. Prohibiting commercial surrogacy is rationally related to the objective of protecting financially vulnerable women because it removes the power of prospective parents to coerce women into entering surrogacy contracts using financial incentives. As the Supreme Court held in *Carter*, "where an activity poses certain risks, the prohibition of the activity in question is a rational method of curtailing risks."[90]

75. Dr. Steiner's accepted evidence at trial illustrated the reality of exploitation and coercion in commercial surrogacy contracts. Dr. Steiner cited studies where the vast majority of commercial surrogates reported that they had pursued surrogacy due to poverty. These studies concluded that "the surrogacy contract would not exist if the parties were equal," and that commercial surrogates were financially vulnerable to exploitation because of their financial status.[91] The Appellants' reliance on evidence regarding the situation in the United Kingdom is misleading because its regime, like Flavelle's, only permits reasonable reimbursements.[92]

Section 6(1) is rationally related to preventing the commodification of women's reproductive functions

76. Shin J. at the Superior Court of Falconer correctly concluded that there was a rational connection between prohibiting commercial surrogacy and preventing the commodification of women's reproductive functions.[93]Any payment beyond reasonable reimbursements commodifies woman's reproductive functions by attaching a price to them. The prohibition of this practice is necessary to prevent the commodification of women's bodies.

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[90] *Carter v Canada (Attorney General)*, 2015 SCC 5, Joint Book of Authorities Tab A12 at para 100.
[91] Official Problem, para 35
[92] Appellants Factum, para 42.
[93] Official Problem, para 40

(iii) Section 6(1) is not overbroad

77. The impugned provision is not overbroad because the prohibition achieves its purpose of preventing the commodification of women's reproductive functions despite capturing some surrogates who are not exploited.

78. As previously discussed, consideration commodifies women's reproductive functions by attaching a price to them. Consideration is inherent to a commercial surrogacy contract and therefore, prohibiting commercial surrogacy can never be overbroad in achieving this objective.

79. The *Bedford* and *Carter* formulation of the test for overbreadth holds that legislation is overbroad where it captures a single person for whom the effects of the law are unrelated to its objectives.[94] This formulation should not be applied to legislation with multiple objectives. Legislation with multiple objectives by nature target different harms or different populations. Requiring that each objective be perfectly tailored to all populations is an impossible standard to meet. A law that attempts to achieve multiple objectives should not be made more likely to fail constitutional scrutiny because of its multiple benefits. So long as one objective satisfies all principles of fundamental justice, the law should be found constitutional.

80. Post-*Carter*, bright-line rules have withstood *Charter* scrutiny if they meet the *Bedford* and *Carter* standards for at least one of their multiple objectives. In *R v A(B)*, for instance, Feldman J.A. considered whether the close-in-age exception to the prohibition on sexual relations with minors failed on the principle of overbreadth. The claimant argued the law was overbroad because it criminalized conduct—non-exploitative, consensual sex between a child aged 16 or younger and an adult more than 5 years older—that had no connection with its purposes.[95] Feldman J.A. held that the legislation had two purposes: 1) to prevent sexual exploitation of children, and 2) to protect them from sexual contact with adults because of the power imbalance and the consequences that flow from that. Because the legislation was not overbroad with respect to the second objective, Feldman J.A. held that it could not be said that the legislation's effects had "no connection to the mischief contemplated by the legislature."[96] Similarly, in this case, because the

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[94] *Canada (Attorney General) v Bedford,* 2013 SCC 72, Joint Book of Authorities Tab A11 at para 112; *Carter v Canada (Attorney General)*, 2015 SCC 5, Joint Book of Authorities Tab A11 at para 85
[95] *R v AB*, 2015 ONCA 803, Joint Book of Authorities Tab A32 at para 29.
[96] *R v AB*, 2015 ONCA 803, Joint Book of Authorities Tab A32 at para 29.

law achieves the objective of preventing the commodification of women's reproductive functions, it should not be said to be overbroad.

SECTION 1 (JUSTIFICATION)

81. In the event that this Court finds that s. 6(1) of the *AHRA* violates either s. 7 or s. 15 of the *Charter,* this Court should nevertheless uphold the legislation under s. 1.

82. Section 6(1) of the *AHRA* fulfills all four criteria in the *Oakes* test, namely:

(a) The law has pressing and substantial objectives;

(b) The provision of the law which limits the *Charter* right is rationally connected to its objectives;

(c) The provision is minimally impairing of the *Charter* right; and

(d) The salutary effects of the provision outweigh its deleterious effects.[97]

83. Although the Court has indicated that a s. 1 analysis must be conducted for each *Charter* breach, given that the justification is substantively similar for a s. 15 or s. 7 breach, there will be a single analysis.

A. Section 6(1) advances a pressing and substantial objective

84. Parliament is entitled to "legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society."[98] Assisted reproduction is one of those issues that engages deep questions of morality:

> The creation of human life and the processes by which it is altered and extinguished, as well as the impact this may have on affected parties, lie at the heart of morality. Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on persons like donors and mothers. Taken as a whole, the Act seeks to avert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants.[99]

[97] *R v Oakes,* [1986] 1 SCR 103, Joint Book of Authorities Tab A42 at 138-139.
[98] *R v Butler,* [1992] 1 SCR 452*,* Joint Book of Authorities Tab A33 at 493.
[99] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, Joint Book of Authorities Tab A44 at para 5.

85. As explained above, s. 6(1) of the *AHRA* aims to prevent two specific consequences of commercial surrogacy: 1) the commodification of women's bodies, and 2) the exploitation of vulnerable women in particular.

86. These objectives advance the twin values of respect for the inherent dignity of the human person and a commitment to equality, both of which are core values in a "free and democratic society" within the meaning of s. 1.[100] "The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations on those rights."[101]

87. The acceptance of these objectives was explained Dr. Steiner in her expert testimony connected the criminal prohibition on commercial surrogacy with a public consensus on Flavellian social values.[102]

B. Section 6(1) is rationally connected to its purpose of preventing the commodification of women's bodies and preventing the exploitation of vulnerable women

88. To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic."[103] The onus on the government is to show that it is "reasonable to suppose that the limit may further the goal, not that it will do so."[104]

89. "Where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks."[105] Prohibiting the commercialization of surrogacy is rationally connected to preventing the commodification of women's bodies. Allowing commissioning parents to attach a price to a surrogacy contract commodifies women by promoting a view that they can be bought, sold, and transferred at whim to others. Parliament has sought to prevent the commodification of women's reproductive bodies by criminalizing the exchange of money for the use of her body.

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[100] *R v Oakes,* [1986] 1 SCR 103, Joint Book of Authorities Tab A42 at 136.
[101] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, Joint Book of Authorities Tab A48 at 1056.
[102] Official Problem, para 33.
[103] *RJR- MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, Joint Book of Authorities Tab A45 at para 153.
[104] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, Joint Book of Authorities Tab A3 at para 48.
[105] *Carter v Canada (Attorney General)*, 2015 SCC 5, Joint Book of Authorities Tab A12 at para 100.

90. Prohibiting commercial surrogacy is also rationally connected to protecting financially vulnerable women from exploitation. No woman can be coerced into entering a surrogacy contract through the use of financial incentives if no payment is possible.

91. The Appellants have set too exacting of a standard of proof in demanding a social and scientific consensus on the relevant harms before Parliament may act. As the Supreme Court explained in *Sauvé v Canada (Chief Electoral Officer)*:

> Legislative justification does not require empirical proof in a scientific sense. While some matters can be proved with empirical or mathematical precision, others, involving philosophical, political and social considerations, cannot. In this case, it is enough that the justification be convincing in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relelvant considerations, that the state is justified in infringing the right at stake to the degree it has. What is required is "rational, reasoned defensibility." Common sense and inferential reasoning may supplement the evidence.[106]

92. Accordingly, the Court has applied a threshold of "reasoned apprehension of harm" in cases like *R v Keegstra* and *R v Butler,* which were premised on the prevention of broad-based social harms that were not amenable to exact proof.[107] Once this threshold has been met, deference is owed. It is sufficient for Parliament to rely on logic and common sense to demonstrate that there are risks of harm that it must prevent.

C. Section 6(1) is minimally impairing

93. This stage of the *Oakes* test asks "whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner."[108] Deference is owed to the government's chosen means of achieving its objective in cases involving complex social issues where the legislature is best placed to balance the competing interests of different groups.[109]

94. Parliament "did not act precipitously" in enacting the *AHRA*.[110] It enacted the *AHRA* in the wake of extensive consultations with the provinces, territories, and a broad range of stakeholder groups and was ultimately impelled to act based on the recommendations of the Milne

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[106] *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, Joint Book of Authorities Tab A47 at para 18 (citations omitted).
[107] *R v Butler,* [1992] 1 SCR 452, Joint Book of Authorities Tab A33 at 504; *R v Keegstra,* [1990] 3 SCR 697, Joint Book of Authorities Tab A38 at 768-771.
[108] *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, Joint Book of Authorities Tab A3 at para 55.
[109] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, Joint Book of Authorities Tab A22 at paras 993-994.
[110] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, Joint Book of Authorities Tab A44 at para 5.

Commission.[111] A broad range of stakeholder groups, including women's groups, have endorsed the principles in the Milne Report.[112]

95. The Milne Commission studied whether it was possible to regulate commercial surrogacy and was sceptical "that any regulatory scheme could ensure that all parties were able to make free and informed choices."[113] As explained above under s. 15(2), it is difficult, if not impossible, to design a regulatory scheme that can identify in advance which women are vulnerable to exploitation and prevent it from occurring. The Milne Commission also emphasized that regulations would fail in preventing the overall harm to the participants in the transaction through commodification:

> Even if a regulatory system could be designed to overcome these obstacles, the deepest and 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.[114]

96. Parliament struck a reasonable balance between the competing interests of different groups in society, including women, children, and LGBTQ couples. The *AHRA* permits individuals to seek assistance from a surrogate mother and even permits them to reimburse her for her expenses. But drawing the line at the commercialization of surrogacy arrangements is necessary because of its effects on the women involved in the process. Even though pro-active bright line rules are "usually over-inclusive and errs on the side of safety…[they] are legitimate and reasonable uses of governmental authority."[115]

97. Admittedly, this scheme accepts a residual level of risk to the surrogate by permitting altruistic surrogacy. This is the price of providing individuals like the claimants with a reasonable opportunity to conceive a biologically related child. However, the Appellants' invitation to strike down the legislation because it attempts to balance interests rather than favour one side unilaterally produces a strange result for constitutional interpretation. Nowhere in the jurisprudence is it suggested that legislation can become more constitutionally compliant by being more restrictive of *Charter* rights.

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[111] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, Joint Book of Authorities Tab A44 at paras 5-6, 29.
[112] Official Problem, para 33.
[113] Official Problem, para 45.
[114] Official Problem, para 33.
[115] *R v Michaud*, 2015 ONCA 585, Joint Book of Authorities Tab A40 at para 148.

D. The salutary effects of section 6(1) outweigh its deleterious effects

98. "At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively."[116]

99. In many cases, "if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups."[117]

100. Where this is true, the legislature's policy choices are also entitled to deference when it comes to calculating and weighing the nature and extent of the burdens involved. "Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do."[118] This is especially the case where Parliament crafts legislation to protect vulnerable groups. Courts must wary of allowing the *Charter* to "become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."[119]

101. The harms that commercial surrogacy entails for women, and in particular, vulnerable women, outweigh the benefits to the individuals in the claimant group.

102. Commercial surrogacy at best offers a marginal benefit to individuals in the claimant group. Individuals who cannot have a child by themselves already have numerous options to start their family. The Appellants have led no evidence as to how many additional women would be willing to act as surrogates if they could be paid, and what the cost would be. Regardless, only individuals in the claimant group who are sufficiently wealthy would ever be in a position to pay the upfront cost of a traditional surrogacy, let alone the additional costs of a gestational surrogacy.

103. At worst, it will be detrimental to the majority of individuals in the group. Commercialization has the potential to undermine an altruistic market or even render it

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[116] *Canada (Attorney General) v Bedford,* 2013 SCC 72, Joint Book of Authorities Tab A11 at para 126.
[117] *R v Edwards Books and Art Ltd,* [1986] 2 SCR 713, Joint Book of Authorities Tab A34 at 795 (La Forest J.)
[118] *R v Malmo Levine,* 2003 SCC 74, Joint Book of Authorities Tab A39 at para 133.
[119] *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, Joint Book of Authorities Tab A34 at 779.

impossible. Once it becomes possible to profit from surrogacy arrangement, women may be less inclined to see surrogacy as an altruistic activity. Individuals in the claimant group who are less wealthy and who would otherwise benefit from a surrogacy arrangement may be precluded from doing so once surrogates come to expect payment in exchange for their services.

PART IV - ORDER REQUESTED

104. The Respondent asks this Court to dismiss the appeal with costs in this Court and throughout.

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

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ATTORNEY GENERAL OF FLAVELLE

PART V - TABLE OF AUTHORITIES

JURISPRUDENCE

	Case Authority	***Paragraph(s)***
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LEGISLATION

	Source	***Paragraph(s)***
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	Human Tissue Gift Act, RSBC 1996, c 211	66
	Human Tissue and Organ Donation Act, SA 2006, c H-14.5	66
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	Human Tissue Gift Act, SNB 2004, c H-12.5	66
	Human Organ and Tissue Donation Act, SNS 2010, c 36	66
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	Human Tissue Act, RSNL 1990, c H-15	66
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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 -

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