THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 25, 2016

Via email: bgtd_ahr-dpbtg_pa@hc-sc.gc.ca

Cathy Parker
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Biologics and Genetic Therapies Directorate
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Dear Ms. Parker:

Re: Intent to develop regulations under *Assisted Human Reproduction Act*

On behalf of the Canadian Bar Association Family Law and Health Law Sections, and Sexual Orientation and Gender Identity Community Forum (the CBA), we are writing in response to Health Canada's notice of intent to bring into force sections 10, 12 and 45 to 58 of the *Assisted Human Reproduction Act* (AHRA) and supporting regulations.

In 2007, the CBA commented on related issues, through a consultation document on the treatment of expenditures under the AHRA. A copy of our response to that consultation is attached. The views expressed in it continue to reflect the CBA's position on the regulation of expenses under the AHRA.

The CBA has offered its views on the federal government's initiatives in the area of assisted human reproduction for almost 20 years, well before the enactment of the current AHRA. The CBA has questioned whether criminal prohibitions against any aspect of assisted human reproduction are appropriate, given the speed of scientific developments and constant evolution of public opinion on these issues. We remain concerned about overly harsh sanctions and use of the criminal law in this area, rather than using a regulatory approach. As noted in our 2007 submission, "the prohibition against compensating gamete donors and surrogates is likely to have an ongoing negative impact on the availability of assisted reproductive technologies for Canadian women and men who choose to use fertility services." Limited access to these technologies also has a disparate impact on LGBTQ families, who often require access to third party reproduction. The CBA urges the federal government to reconsider use of the criminal law in this important area for the health to Canadians.

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The CBA has also expressed concern about the lack of consistency across Canada in dealing with these issues and has urged provincial and territorial governments to attempt greater harmonization, with each other and with other federal legislative initiatives. Health Canada could play a leading role in developing harmonious legislation across Canada.

Given these overarching concerns, the CBA suggests that regulations under the AHRA be broad enough to ensure that the availability of surrogates or gamete donors is not further limited. Categories of expenditures in the regulations should not be exhaustive if other expenses are reasonable, and the cost of legal advice should be an acceptable expense. Loss of work-related income for ova donors should be considered given the time required for medical appointments, retrieval and recuperation. Our earlier submission also addresses appropriate categories of expenses.

Thank you for the opportunity to provide the CBA's views on this important topic. We are pleased to assist with, and comment on any regulatory proposals.

Yours truly,

(original signed by Gaylene Schellenberg for Wayne Barkauskas, Lisa Corrente, Brian Yuen and Francis Durnford)

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Enclosure

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Reimbursement of Expenditures under the *Assisted Human Reproduction Act*

CANADIAN BAR ASSOCIATION

September 2007

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Health Law and Family Law Sections and the Sexual Orientation and Gender Identity Conference of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

Reimbursement of Expenditures under the *Assisted Human Reproduction Act*

I. BACKGROUND

The Canadian Bar Association [CBA] welcomes the opportunity to comment upon the consultation document "Reimbursement of Expenditures Under the *Assisted Human Reproduction Act*" (consultation document). The *Assisted Human Reproduction Act* (AHRA) provides a regulatory and licensing framework for assisted reproductive technologies and establishes governing principles for its application.

As the first federal legislative effort to regulate this area, the AHRA is important to all Canadians. However, the approach of the legislation, to prohibit certain activities and criminalize non-compliance, may have adverse affects on some individuals. In particular, the prohibition against compensating gamete donors and surrogates is likely to have an ongoing negative impact on the availability of assisted reproductive technologies for Canadian women and men who choose to use fertility services. For those who want access to fertility agencies, traveling to the United States for these services involves significant additional cost and inconvenience. Prohibition may also inadvertently encourage informal arrangements made without the benefit of legal advice.

The CBA has contributed at various stages in the development of laws pertaining to assisted human reproduction.[1] In 2001, we noted the ongoing evolution of views in this area, and the likelihood that social attitudes, concerns and public perceptions of assisted reproductive

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[1] For example, Submission of the Canadian Bar Association to the Royal Commission on New Reproductive Technologies (Ottawa: CBA, 1990); Submission on Bill C-47, *Human Reproductive and Genetic Technologies Act* (Ottawa: CBA, 1997); Submission on Draft Legislation on Assisted Human Reproduction (Ottawa: CBA, 2001); Letter to the B. Brown, M.P., Chair – Commons Standing Committee on Health, Bill C-56, *Assisted Human Reproduction Act* (Ottawa: CBA, 2002).

technologies would continue to change over time. The CBA said that a regulatory body could best keep pace with the latest scientific, ethical, legal and social information, and educate and inform the public about emerging controversies that could impact regulatory policy.

The AHRA begins with a declaration of principles that gives priority to the health and well-being of children born through assisted reproductive technologies. It emphasizes that human reproductive capacities should not be exploited for commercial ends, and that women are more directly and significantly affected by these technologies than men. The declaration of principles also acknowledges the benefits of assisted human reproductive technologies for individuals, families and society in general.

While the availability of fertility services impacts all segments of the population, limits to that availability are likely to systemically discriminate against single people, and the lesbian, gay, bisexual and transgendered communities, who more often rely on assisted reproductive technologies to have children. The governing principles of the AHRA also explicitly recognize that persons who undergo assisted reproduction procedures must not be discriminated against on the basis of sexual orientation or marital status.

Since the CBA's earlier submissions and the enactment of the AHRA, the demand for assisted reproductive technologies has indeed grown and use of those technologies become more common and widely accepted. Given the protections contained in the AHRA and its governing principles, we believe that regulations should impose additional obstacles on prospective parents only if required to respond to evidence of abuse or exploitation.

In light of these observations, we believe that regulations pertaining to controlled activities pursuant to section 12 of the AHRA should be broad enough to not further detrimentally impact the availability of surrogates or gamete donors.[2] This will help to ensure that the

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[2] However, we recognize that as the use of reproductive technologies becomes more prevalent, there may be unanticipated costs beyond those borne directly by prospective parents. For example, there may be demands for legal aid or for children's advocates if impecunious donors or surrogates wish to challenge an arrangement.

benefits of assisted reproduction procedures are available to all Canadians who seek reproductive assistance.

II. PROPOSALS FOR REGULATIONS AND LICENSING RELATING TO REIMBURSEMENT OF EXPENSES

The consultation document proposes certain categories of expenses that should be available for different controlled activities. Part A of the consultation document proposes categories of receipted expenditures eligible for reimbursement, and a formula for reimbursement of loss of income for surrogate mothers.

The consultation document appropriately does not suggest a defined cap on expenditures, as that would artificially impose the same or similar treatment on diverse situations. We agree that there should be a mechanism for approving expenditures not listed so as to ensure that any expenditure appropriately fits within the meaning of the AHRA. The CBA also supports the requirement that the expenses in the circumstances be reasonable. However, in every gamete donation and surrogacy situation, different circumstances arise requiring various different expenditures. For example, the prospective parent(s) may choose or be required to use a surrogate in a different province, making travel expenses greater than for a local surrogate.

We believe that the categories of expenditures should not be exhaustive. The proposed categories of expenditures should include, but not be limited to the categories set out in the consultation document. There will always be reasonable expenditures incurred in the process of gamete donation or surrogacy arrangements that cannot be anticipated in advance. Each particular situation is unique. Provided the regulations require expenses to be reasonable, they should not attempt to define all categories of reasonable expenses exhaustively. The regulations should not unduly restrict the categories but should only provide guidance as to what might be reasonable expenses in a typical surrogacy situation.

III. EXPENDITURES RELATED TO SPERM DONATION

In our view, independent legal services should be an additional category outlined in the non-exhaustive list of categories of expenses in Part A. There is no significant body of Canadian

common law establishing the rights and obligations of a donor, and it is reasonable and prudent for gamete donors to obtain independent legal advice with respect to those rights and obligations. In practice, donors regularly consult with lawyers in making arrangements and preparing contracts, particularly where the donors are identified.

The suggested category of "health care services" indicates in parenthesis that the services must be "provided and prescribed by health care providers". In our view, health care services should be specifically defined in the regulations to include both traditional and alternative health care providers. In addition, we believe that health care services should be eligible for reimbursement whether or not they are "prescribed". Otherwise, the requirement would unduly fetter the reasonable decision of intended parents and donors who wish to use health care services or alternative therapies that may increase fertility rates, whether or not those services can be "prescribed".

IV. EXPENDITURES RELATED TO OVA DONATION

The previous comments with respect to independent legal services and health care services should also apply to ova donation. It is common practice for clinics to require ova donors to have independent legal advice before donating. In addition, ova donors' health care services should be reimbursed whether they represent alternative therapies or are recommended by "prescribed health care providers".

Ova donation requires many medical appointments and at least one day of lost employment for retrieval. The legislation and proposal for regulations do not expressly allow for loss of work-related income for ova donors. While the AHRA allows for loss of work-related income for surrogate mothers, it is silent with respect to ova donation. Ova donors should be entitled to reimbursement for loss of work-related wages for medical appointments and attendances for retrieval.

V. EXPENDITURES RELATED TO SURROGACY

The categories set out in the consultation document for expenditures related to surrogacy are, in our view, far too narrow. Again, the list should not be exhaustive. In addition to the categories proposed in the consultation document, we suggest the following:

1. Personal Food Consumption: Surrogates are frequently asked to refrain from a diet high in processed foods, and to instead adopt one high in fiber and nutrients, often requiring organic foods. Such food is commonly more expensive than processed food.
2. Household help: A pregnant surrogate may need assistance in her last trimester, whether or not she faces health conditions related to the pregnancy. This is particularly true where multiple births are involved.
3. Childcare: This should be available whenever the surrogate needs relief, and not only when she needs to attend a scheduled appointment. Childcare should not be conditional upon medical advice.
4. Appliances for pregnancy: Some examples of appliances commonly used during pregnancy are pillows, foot rests or varicose vein hosiery.
5. Vitamins and supplements.
6. Yoga classes or gym membership.
7. Life insurance: In practice, almost all intended parents obtain life insurance in the event of a death of the surrogate to provide for the surrogate's next of kin.
8. Communication costs: land lines and cell phones. Intended parents should bear the cost of communication with the surrogate.

VI. EXPENDITURES FOR MAINTENANCE OF *IN VITRO* AND TRANSPORTATION OF *IN VITRO* EMBRYOS

Independent legal services should also be available for parties incurring expenditures relating to maintenance, transportation and donation of embryos. In addition, cryopreservation and storage fees should be reimbursable for the entire time that the embryo is cryopreserved. Any regulation should not unduly limit reimbursement for these expenses.

VII. REIMBURSEMENT OF LOSS OF WORK-RELATED INCOME FOR SURROGATES

The proposal in the consultation document would allow reimbursement for loss of work-related income for surrogates only where a qualified medical practitioner certifies in writing that there is a risk to the surrogate's health or to the health of the embryo fetus. We believe that the loss of work-related income for surrogates should be defined in a manner that would capture legitimate "sick days" or time taken off work due to the pregnancy, even though there may not be a direct "risk" to the surrogate's health or that of the embryo fetus. For example, extreme morning sickness may not be a health risk, but may be such that the

surrogate is unable to work. That absence would be a direct consequence of her surrogacy, and she would lose work-related income.

In addition, a pregnant woman can start to collect Employment Insurance maternity benefits as early as eight weeks before her anticipated due date, without a certificate from a doctor. This suggests that the federal government recognizes that pregnant women may well have health-related needs in the last two months of pregnancy. In our view, intended parents should be able to supplement a surrogate's income during the EI maternity benefit period.

The definition should be sufficiently broad to allow reimbursement for loss of work-related income for any absence directly connected to the pregnancy. Otherwise, the surrogate would be subsidizing the costs of the surrogacy. While the legislation formally seeks to promote and support the altruistic aspects of surrogacy, this would actually penalize women for offering to embark on a gestational carrier arrangement.

With respect to the particular proposal for reimbursement of loss of work-related income, the CBA notes that the model proposed in the regulations presumes that the surrogate is employed when she offers to become a surrogate. However, many surrogates have children of their own and may have been on parental leave prior to commencing a surrogacy. Others may have been unemployed or choose not to return to work to become a surrogate for a friend or family member. Also, it is an unfortunate reality that women may still not be hired on the basis of their pregnancy. The model for reimbursement of loss of work-related income should be broad enough to address special circumstances that warrant payment for loss of work-related income as a reasonable expense, while ensuring that the expense is not simply compensation for surrogacy. The formula set out in the regulations should be sufficiently flexible to capture special circumstances.

VIII. LICENSING RELATING TO REIMBURSEMENT OF EXPENSES

The consultation document proposes that those who may reimburse a surrogate for expenses are limited to the child's intended parents. However, in our view, there may be many other parties, including partnerships, health care teams, associations, family health care teams or surrogacy consultants who should be able to obtain a license to reimburse the surrogate.

Prior to the AHRA, third parties were frequently used to reimburse surrogates for expenditures, and to determine the reasonableness of expenditures in accordance with contracts between the parties. When the AHRA was proposed, the CBA noted the breadth of its prohibition against third party intermediaries, and recommended that certainly doctors, lawyers and psychologists should be available to assist in surrogacy arrangements.[3]

The current proposal appears to suggest a significant policy change by prohibiting anyone other than the intended parents to administer the reimbursement of surrogate mothers and to assess what are reasonable expenses in accordance with legislative requirements. Given the realities and the demand for third parties to assist prospective parents with surrogacy arrangements, we believe that this restriction is too narrow.

In practice, surrogates frequently enter into contracts that provide for a maximum of eligible expenses to be paid. Third party surrogate consultants or agencies are often engaged to process these expenses much like an accountant would assess the reasonableness of an expense for tax purposes. These services determine the reasonableness of an expense in accordance with the legislation and the contracts between the parties, and reimburse the expense in a timely manner from an amount held in trust. Receipts are required and monthly transactional costs are negotiated. Negotiations directly between a surrogate and intended parents on the minutiae of expenses would be inefficient, cumbersome, and potentially even lead to conflicts. Accordingly, the CBA suggests it is unreasonable for the regulations to propose that licenses to reimburse the surrogate would be limited only to intended parents.

IX. QUALIFICATIONS OF CORPORATE APPLICANTS

Many entities other than corporations may want to apply for a license. Health care teams, family clinics, partnerships, and other entities may be appropriately licensed. The CBA recommends that the qualifications of "corporate applicants" be defined more broadly so that they may include other entities properly constituted or practicing in Canada.

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[3] *Supra*, note 1, 2002 at 2.

X. CONCLUSION

The CBA appreciates the opportunity to comment on the consultation document, and trusts that our comments will be helpful in improving the regulations.