



January 10, 2019

Via email: hc.lrm.consultations-mlr.sc@canada.ca

Mr. Bruno Rodrigue, Director
Office of Legislative and Regulatory Modernization
Health Products and Food Branch
Health Canada
11 Holland Avenue, Suite 14
Ottawa, ON K1A 0K9

Dear Mr. Rodrigue,

Re: Proposed Regulations under the *Assisted Human Reproduction Act*

The Canadian Bar Association Family Law, Sexual Orientation and Gender Identity Community and Health Law Sections (CBA Sections), appreciate the opportunity of commenting on proposed regulations under the *Assisted Human Reproduction Act* (AHRA or the Act). Over the past almost thirty years, the CBA Sections have contributed to the development of laws pertaining to assisted human reproduction.

The CBA Sections responded to the 2007 consultation *Reimbursement of Expenditures under the Assisted Human Reproduction Act*, with detailed comments about the regulation of expenses. We also wrote to the Office of Policy and International Collaboration in 2016, in response to Health Canada's notice of intent to bring into force sections 10, 12, and 45 to 58 of the AHRA and supporting regulations.

In the current consultation, Health Canada proposes three new regulations under the Act:

- establish a health and safety framework for third-party donor sperm and ova;
- identify the categories of expenditures that may be reimbursed to donors and surrogates;
- establish procedures regarding administration and enforcement of the Act.

Our comments pertain to the first two of these proposed regulations, with a primary focus on the second issue, *Reimbursement Related to Assisted Human Reproduction Regulations*. We note too what seems to be a drafting error in the *Regulations on the Administration and Enforcement of the Assisted Human Reproduction Act*, as the definition of “common law partner” refers to section 10(5) of the AHRA, which has been repealed.

Safety of Sperm and Ova Regulations

We support the proposed directed donation process for donor sperm and ova. We recognize that the proposed directed donation process is intended to make it easier and give more flexibility for Canadians who know their donors to proceed with building their families.

Reimbursement Related to Assisted Human Reproduction Regulations

In keeping with previous CBA Sections' submissions, we remain concerned about the use of criminal law to manage assisted reproductive technologies. We continue to believe that providing compensation to surrogates and donors should be decriminalized. In our 2016 submission, referenced above, we said:

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 of Canadians.

We realize that this issue is outside of the scope of the current proposed regulations.

Our earlier comments continue to reflect the CBA Section's position on the regulation of expenses under the AHRA. Regulations addressing reimbursement to surrogates and donors are necessary and long overdue. We emphasize our general support for the proposed regulations and offer specific suggestions that we believe would further improve them.

1. Non-Exhaustive List of Reimbursable Expenses

The proposed regulations do not suggest a defined cap for reimbursement of expenses, which we support. They do, however, define an exhaustive list of reimbursable expenses for ova and sperm donors in section 2, and for surrogates in section 4.

The CBA Sections do not believe the proposed regulations should attempt to define all categories for reimbursement. We suggest instead that reimbursement should be allowed for *reasonable* expenses, without unnecessarily restricting categories of reimbursable expenses. We recommend that the regulations outline principles and guidance as to what may be considered a reasonable expense in typical circumstances.

The proposed exhaustive list of categories could leave some surrogates and donors ineligible for reimbursement, even for reasonable out of pocket expenses. For surrogates, it is often impossible to predict every expense that will be reasonable, as every woman's pregnancy can be different. Additionally, each surrogacy has its own unique circumstances as a result of the combination of intended parents, surrogate and, in many cases, a surrogate's spouse and dependents.

A restrictive and exhaustive list of categories for reimbursement could dissuade healthy intended surrogates and donors from participating in the assisted reproduction process. Further, it could continue to negatively impact the availability of assisted reproductive technologies for the many Canadians who require or choose fertility services, including those who identify as LGBTQ+ or are infertile, the primary users of assisted reproduction. This negative impact on availability would directly contradict the purpose and intent of the Act.

2. Additions to the List of Reimbursable Expenditures in Surrogacy

While the list of reimbursable expenses related to surrogacy in section 4 of the proposed regulations should be non-exhaustive, we believe that any list should explicitly include:

i) Personal Food Consumption

Surrogates are frequently asked to avoid processed foods in their diet. They are also often asked to follow a healthy diet in accordance with the Canada Food Guide. Some are also asked to consume organic food or follow a special diet if there are unique circumstances in their pregnancy, such as gestational diabetes. Special types of food consumed for the health of the baby are often more expensive than what the surrogate might normally consume when not acting as a surrogate.

Additionally, surrogates often consume more food when they are pregnant, especially if they are carrying multiples. Surrogates should not be out of pocket for food-related expenses necessary for the health of the baby or babies.

ii) Household Help

During the pregnancy, a surrogate may need assistance, particularly in the final trimester, whether or not there are specific health conditions related to the pregnancy. This is particularly true with multiple births, or when the surrogate has young children of her own at home. Reasonable household help should be considered among any itemized expenses for reimbursement in section 4 of the proposed regulations.

iii) Communication Costs

In our 2007 submission, we said that additional itemized expenses should be included beyond those that would generally fall under the proposed section 4(f). We noted the possible exception of communication costs, which could be itemized separately for situations where communication with intended parents would be significant, for example where they live in another country or at a significant distance from the surrogate.

3. Restrictive Nature of Sections 2(f) and 4(f)

In the 2007 submission, the CBA Sections expressed concern about the requirement for “health care services” to prescribe services etc. that would be reimbursable. The wording proposed in sections 2(f) and 4(f) now is broader, so the requirement is for “health care services” to be *recommended in writing*, rather than prescribed. However, for donor expenses, the recommendation must be from a person authorized to practice medicine, and for surrogates from a person authorized to assess, monitor and provide health care to a woman during her pregnancy, delivery or post-partum period. This wording is likely broad enough to cover non-traditional health practitioners for surrogates, but consideration should be given to similar wording for donors.

4. Reimbursement to Surrogates for Loss of Work-Related Income after Birth

Surrogates should not have to accept a reduction in income as a result of their altruism. Full income recovery should be available, and EI parental benefits would form part of that income recovery for surrogates with access to them.

Section 8 of the proposed regulations appears not to permit reimbursement for a surrogate's lost wages during the post-partum recovery period. This is problematic for many reasons. Canadian laws seek to promote and support altruistic aspects of surrogacy, but the proposed regulations would actually penalize women for a reasonable period of post-partum recovery if they are unable to work.

The failure to reasonably reimburse surrogates for lost net wages during the period of delivery and post-partum recovery could seriously and significantly compromise the health and safety of the surrogate. This omission would create the risk that surrogates will be compelled to return to work before being medically cleared to do so, placing their long-term health and safety in jeopardy. It also suggests that surrogates are expected to subsidize their own post-partum recovery period.

Our continued position is that intended parents should be permitted to reimburse net lost wages for surrogates for the delivery and reasonable post-partum recovery period. To allow these expenses would demonstrate an intent to protect the health and safety of surrogates and more consistently align with the spirit of the Act.

i) Requirement for Medical Practitioner Authorization

We are concerned about the requirement that a *qualified medical practitioner* must state a reason for the surrogate not working for her to claim reimbursement for net loss wages. This is an improvement over prior wording that required a medical practitioner to “certify in writing that there is a risk to the surrogate’s health or to the health of the embryo or fetus” to claim net loss wages, which the CBA Sections raised as a concern in our 2007 submission. Rather than a “qualified medical practitioner”, the proposed regulations should use the same definition as that in section 4(k): “a person who is authorized under the laws of a province to assess, monitor and provide health care to a woman during her pregnancy, delivery or the post-partum period”. Many post-partum women continue to use midwives and other health professionals, and that should be recognized.

5. Reimbursement for Loss of Work-Related Income to Ova and Sperm Donors

Section 2 of the proposed regulations does not permit ova and sperm donors to claim reimbursement for loss of work-related income. This omission could result in donors failing to access proper medical, psychological and legal advice, potentially compromising the safety of intended parents and donors. Further, failure to provide reasonable reimbursement for loss of work-related income may dissuade healthy intended donors from participating in the assisted reproduction process.

The 2007 consultation document, *Reimbursement of Expenditures under the AHRA* discussed the necessity for reimbursement for loss of work-related income for ova donors. Ova donors should be entitled to reimbursement for loss of work-related wages for medical appointments and attendances for retrieval.

The process of donating ova requires many donors to take time away from employment or studies to access medical, psychological and legal services, all necessary to protect the donor. For example, ova donors may need to travel significant distances to a fertility clinic and can require, in many instances, up to 14 days off work for ova retrieval, including travel and recovery time. Under the proposed regulations, an ovum donor’s reasonable net lost wages for time off work for medical, psychological and legal appointments cannot be reimbursed.

For sperm donors, there is only one clinic in Canada, ReproMed in Toronto, where donors can make sperm donations. Many intended sperm donors must take time off work to travel to Toronto. Under the proposed regulations, a sperm donor's reasonable net lost wages for taking that time to donate their sperm cannot be reimbursed and that should be remedied.

6. Maintenance of Records and Process for Reimbursement

The CBA Sections are concerned that requiring maintenance of records and procedure for reimbursement of expenses may be overly burdensome for those who use fertility services.

Sections 7 and 9 of the proposed regulations refer to a person reimbursing a surrogate or donor needing to declare and affirm information. If this infers a requirement for a formal affirmation with a notary public or lawyer, we suggest that is inappropriate. The services of a notary public or lawyer would unnecessarily increase costs for intended parents, who have already incurred significant legal, medical and other fees. Further, it could delay reimbursement to a surrogate or donor, as intended parents, particularly those in rural areas, may have limited access to a notary public or lawyer. Again, this seems to contradict the intent and spirit of the Act.

The proposed regulations require donors and surrogates to keep their records for a period of six years, which seems in line with standards under the *Income Tax Act*.

Conclusion

The CBA Sections appreciate the opportunity to offer our views on this important topic. We hope our comments are helpful in improving the proposed regulations to benefit those Canadians who are involved in assisted reproduction.

Yours truly,

(original letter signed by Gaylene Schellenberg for Melanie Del Rizzo, Dorianne Mullin and Salimah Walji-Shivji)

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