

INQUIRY INTO LEGISLATION ON ALTRUISTIC SURROGACY IN NSW

Organisation: McGill Centre for Medicine, Ethics and Law
Name: Professor Margaret Somerville
Position: Founding Director
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SUBMISSION
to
Legislative Council
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INQUIRY INTO LEGISLATION ON ALTRUISTIC
SURROGACY IN NEW SOUTH WALES
by
Margaret Somerville

Thank you for your invitation to make a submission to your Inquiry. Surrogacy is an important topic, not only, in itself, but also, because how it is dealt with will set precedents and have impacts far beyond the issue of surrogacy.

You will see that I have taken the liberty of attaching some of my papers that I hope might be useful to the committee. I have researched and written on the ethics, law and societal impact of reproductive technologies, including surrogacy, since their introduction and these papers will give you access to my research, opinions and conclusions. In this submission, I outline the approach I believe, with respect, your committee needs to take in deciding what it should recommend in relation to altruistic surrogacy.

In analyzing the ethics of altruistic surrogacy, the first question – a question that is not listed in the Terms of Reference for this Inquiry – is whether surrogacy, itself, is inherently wrong. If it is, it should be prohibited: unethical means cannot be justified by seeking compassionate outcomes.

To decide whether surrogacy, including altruistic surrogacy, is inherently wrong, it must be assessed, first, from the point of view of the child, who would be born. Second, from the perspective of the women who would act as surrogates. Third, the impact that allowing it would have on our concept of a family and whether it would cause harm to the institution of the family, the fundamental unit on which society is based. And, fourth, the impact condoning it would have on important shared societal values.

If surrogacy is *not* inherently wrong, then to determine whether it is ethical we have to balance the benefits and harms and risks it presents, in general. It's at this level that the question of whether there is a difference in the ethical acceptability of altruistic surrogacy, as compared with commercial surrogacy, can be considered. If altruistic surrogacy is ethically acceptable in principle, the same analysis must then be undertaken in each individual case.

To be more specific as to what is required in assessing the ethics of altruistic surrogacy in general, an ethical analysis of its harms, risks and benefits must be undertaken:

- First, at the individual or micro level (e.g. its impact on children and women acting as surrogates, in particular, socio-economically destitute women and women in developing countries and, then, in relation to would-be parents).
- Second, at the institutional or meso level (e.g. its impact on the institution of the family and on the professions of law and medicine that would be involved).
- And third, at the societal or macro level (e.g. what does it mean to our individual and shared values to split the mother-child bond before birth? What impact would third parties', such as physicians, lawyers, social workers and so on, involvement in arranging or facilitating surrogacy, for instance, with IVF or sperm donation, have on values?).

My own view is that surrogacy is not ethically acceptable in principle, and that even if that were not the case its risks and harms, especially to children, to surrogate mothers, and to important societal values far outweigh any benefits or potential benefits, no matter how desperately people want to found a family and use a surrogate mother to do so, and how strong our compassion for them is.

Need to view surrogacy in a broader context...

Moreover, I propose that it is a mistake to view surrogacy in isolation. It is one element in the reproductive revolution that started with the oral contraceptive pill in the 1960's and, to understand what is involved in legitimating altruistic surrogacy and the consequences of that, it needs to be placed in a much larger context, in particular, in the context of reproductive and genetic technologies as a whole. Although it is now dated, I'm attaching, as Appendix A, a paper that I wrote in 1988, *Weaving Birth Technology into the "Value and Policy Web" of Medicine, Ethics and Law: Should Policies on "Conception" Be Consistent* to show the complex interlinking of values in this larger context. And, as Appendix B, another paper, *Reprogenetics: Unprecedented Challenges to Respect for Human Life* which tracks the evolution of the reproductive revolution up to 2003 (the date of publication of this paper).

Children's fundamental human rights...

I'm also attaching, as Appendix C, a paper I presented at the 2007 International IVF Congress, *Brave New Babies: Children's Human Rights with respect to Their Biological Origins and Family Structure*, in which I explain some of the major issues that need to be considered in relation to children's human rights in the context of reproductive technologies. Although it does not deal with surrogacy explicitly, it deals with closely related issues that are relevant in considering surrogacy, in particular, what

are the fundamental human rights of children with respect to their genetic origins, conception, gestation, and family structure. Some of the questions raised by the committee in its Terms of Reference, such as whether children have a right to know the identity of their progenitors (I believe they do) are addressed in this paper.

In short, surrogacy raises the issue of the child's biological origins, the child's right to knowledge of those, and the child's links to their immediate biological parents and wider biological families. It is not clear in the terms of reference whether, what is called, "full surrogacy" is being considered (that is, both the sperm and ovum are donated and the surrogate mother is only the gestational mother) or also "partial surrogacy" (that is, the sperm of a man is used to inseminate the surrogate mother who is the biological, as well as the gestational, mother of the child who will be given up to the commissioning parents) or both kinds of surrogacy.

A problem peculiar to altruistic surrogacy, which is probably the strongest reason for refusing to endorse it, is that the most likely person who will act as an altruistic surrogate is a close relative of the woman or man who wants to use a surrogate mother, let's say a sister or a sister-in-law. That means in a partial surrogacy that the child could be the biological child of its biological "aunt" and the aunt's brother-in-law. If the surrogate were the sister of the commissioning father and the sister-in-law of the commissioning mother, in a partial surrogacy the child would be the child of a brother and sister. This relationship is, of course, genetically dangerous and constitutes a relationship that the crime of incest is meant to guard against. However, in most criminal codes, incest requires sexual intercourse, therefore, such a combination would not fall within the definition of incest and prohibited as such, especially when one takes into account the rule in criminal law that offences must be strictly construed against imposing criminal liability. In a full surrogacy, this genetic problem would be avoided, but there are still the problems of the child's identity formation within close family relationships, when these relationships are no longer straightforward and clear because of the use of surrogacy. Moreover, these problems are much harder to avoid when commercial surrogacy is not available as an alternative, which could be used as an argument that commercial surrogacy should be allowed if altruistic surrogacy is permitted – that is, we should allow all surrogacy or prohibit all of it.

As well, I am attaching as Appendix D a more general paper I've just published in the Journal of Family Studies, *Unlinking Child-Parent Biological Bonds: The Link Between Same-Sex Marriage, Adoption And New Reproductive Technologies*. In this I discuss the much broader impacts, than at first expected, that have resulted in Canada from legalizing same-sex marriage, especially from the combination of same-sex marriage and new reproductive technologies. As you will see, one such impact is that same-sex spouses have successfully argued in the Quebec Court of Appeal (the case is being appealed to the Supreme Court of Canada) that it is unconstitutional to prohibit commercial surrogacy, as Canadian law presently does, because to do so infringes on their right to found a family, a right conferred by marriage and is wrongful discrimination on the basis of sexual orientation. Many other broader outcomes need to be considered in relation to allowing surrogacy.

This paper also contains a discussion of the general ethical principles and concepts that might be applicable and useful in deciding on the ethical acceptability of the use of reproductive technologies, but which are equally applicable to surrogacy.

Commercial surrogacy...

The committee will also see that I explain in the paper mentioned above, that although commercial surrogacy is a serious criminal offence in Canada (under the *Assisted Human Reproduction Act* 2004, up to five years imprisonment and a \$250,000 fine) the law is not enforced. One question that raises for your Inquiry is whether if only altruistic surrogacy were allowed laws and safeguards would be effective in preventing commercial surrogacy. The legitimating of altruistic surrogacy affirms that surrogacy, itself, is ethically acceptable, which makes commercial surrogacy more likely to occur and easier to ethically justify.

Commercial surrogacy commodifies, objectifies and reifies the transmission of human life from one generation to the next and fails to uphold respect for the passing on of life. As well, it involves the horrible harms of "surrogate mother factories" in developing countries that exploit very poor and desperate women, who have no other means of support. To exploit their situation is a further ethical wrong.

I suggest that with respect to commercial surrogacy an analogy can be made to the sale of organs. I'm attaching as Appendix E a recent article of mine, *At heart, it's slavery by another name: All of us are dehumanized if we treat body parts as merchandise*, that was published in the Globe and Mail, one of Canada's two national newspapers. The interesting question is whether altruistic surrogacy is similar to altruistic organ donation.

One could argue that it is, when it's truly altruistic. But the similarity is highly debatable because, in contrast to altruistic organ donation, a third party, a child, is involved and the "best interests" of the child must be paramount. That paramountcy requires that the child's human rights and claims as to the conditions of their "coming into being" must take priority over any other person's claims or wishes. One response to this stance is that, without the surrogacy, the child would not exist, so they have no basis for an argument that the surrogacy was a wrong to them. But, as one young Australian woman conceived by anonymous sperm donation, which she considers a serious wrong to her, said when faced with this argument, "If I had come into existence as a result of rape, it doesn't mean I have to see rape as acceptable and can't argue it is wrong".

Second, the vast majority of surrogacies are not altruistic and, as in commercial organ transplants, poor, desperate people are exploited. To allow altruistic surrogacy is to acknowledge that surrogacy is ethically acceptable, in principle. As explained previously, the argument that commercialization, properly regulated, does not make it ethically unacceptable, would then have much greater weight than would otherwise be the case. This argument has been used in support of the sale of organs for transplant.

The wise old legal axiom, "hard cases make bad law", needs to be heeded in relation to surrogacy. Our hearts rightly go out to people who desperately want to have a baby and start a family and can't do so. Looking at the individual adults in that situation it's easy to think we should be compassionate and not put obstacles in their way. As one woman who wanted to hire a surrogate mother and came to my office to discuss the law prohibiting her from doing so, said to me, "I can't believe they could be so cruel." That's a valid perception from her point of view.

But, from a larger perspective, all surrogacy is a bad idea ethically. It breaks what is arguably the most intimate of all bonds, that of mother and child. That bond is important to each of us, as individuals, and to society, itself. It is no answer to say we allow adoption. Adoption is a regrettable necessity in unplanned circumstances and, as such, does not damage the societal value of the bonding of parents – in particular, mothers – to their children. The opposite is true of officially approved surrogacy – no matter how well-intentioned. Before the child is even conceived, the plan is for the woman who carries it to give it away.

Conclusion...

Finally, I would respectfully urge the committee to explore the question: What's wrong ethically and philosophically with surrogacy? In my opinion, to summarize, surrogate motherhood is inherently wrong from the point of view of:

- the child who will be born;
- the women who serve as surrogate mothers;
- harm to the institutions of law and medicine, which will necessarily be involved in facilitating surrogacy; and
- harm to societal values, in particular, respect for:
 - the transmission of the human life;
 - children's human rights relating to their biological origins and family structure;
 - the dignity of women, in general, because of harm to the dignity of the women who act as surrogate mothers; and
 - the unconditional nature of parental love and parent-child bonding.

If, however, the committee were to decide that surrogacy is not, itself, inherently wrong, then, even from a utilitarian ethical perspective, I would argue, for the reasons explained in this submission, that surrogacy, including altruistic surrogacy, should not be legitimized.

If you have any questions please do not hesitate to contact me.

Respectfully submitted.

A handwritten signature in cursive script, reading "Margaret Somerville". The signature is written in dark ink and is positioned above the typed name.

Margaret Somerville AM, FRSC, DCL
Samuel Gale Professor of Law,
Professor Faculty of Medicine,
Founding Director Centre for Medicine, Ethics and Law,
McGill University

Montreal, Quebec, Canada
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Margaret Somerville

Margaret Somerville holds professorships in both the Faculty of Law and the Faculty of Medicine at McGill University, Montreal. She is Samuel Gale Professor of Law (the first woman in Canada to hold a named Chair in Law) and the Founding Director of the McGill Centre for Medicine, Ethics and Law. She plays an active role in the world-wide development of applied ethics, in particular, the study of the wider ethical and legal aspects of medicine and science.

Professor Somerville has a background in both science and law. She graduated, with distinction, in Pharmacy from the University of Adelaide (1963); in Law, with First Class Honours and the University Medal, from the University of Sydney (1973); and was awarded a Doctorate in Civil Law by McGill University (1978). She has received honorary doctorates in Law from the University of Windsor, Ontario (1992); Macquarie University, Sydney, Australia (1993); St. Francis Xavier University, Antigonish, Nova Scotia (1996); the University of Waterloo, Waterloo, Ontario (2004); and an honorary doctorate in science from Ryerson University, Toronto, Ontario (2006). She was elected a Fellow of the Royal Society of Canada in 1991. She is the recipient of many honours and awards, including the Distinguished Service Award of the American Society of Law and Medicine (1985); the *Pax Orbis ex Jure* Gold Medal of the World Jurist Association for support and dedication to the cause of world peace through law (1985); the Order of Australia (1990) in recognition of her international contribution to law and bioethics; the Arthur Kroeger College Award for Ethics (2002); and, was chosen by an international jury as the first recipient of the UNESCO Avicenna Prize for Ethics in Science (2003).

Professor Somerville has an extensive national and international publishing and speaking record. She has wide experience in communicating with large audiences, especially through television and radio, on topics that raise complex legal and ethical problems for society and is frequently involved in such work in Canada and abroad. She is deeply committed to the public's right to be involved in the decision making shaping our society. To this end, she authored *The Ethical Canary: Science, Society and the Human Spirit* and *Death Talk: the Case against Euthanasia and Physician-Assisted Suicide*. She has edited *Do We Care? Renewing Canada's Commitment to Health*, Proceedings of the first Directions for Canadian Health Care conference; and co-edited *Transdisciplinarity: reCreating Integrated Knowledge*. Most recently she delivered the 2006 CBC Massey Lectures, *The Ethical Imagination: Journeys of the Human Spirit*, published as a book by House of Anansi Press.

Professor Somerville has been a consultant on a broad range of topics to governments and non-governmental bodies, including the Global Programme on AIDS of the World Health Organization, UNAIDS, the United Nations Human Rights Commission in Geneva, and law reform commissions in Canada and Australia. She has been a keynote speaker at UNESCO conferences in Paris, Barcelona and Tehran and has been Vice President of the Canadian Commission for UNESCO's *Sectoral Commission on Natural and Social Sciences*. In 2005, she undertook a lecture tour of Iranian universities and was a chairperson at the World Jurist Congress in China. She was the founding Chairperson of the National Research Council of Canada Ethics Committee and has served on many clinical and research ethics committees, and many editorial boards, advisory boards and boards of directors, including the Canadian Centre for Ethics in Sport, WADA (World Anti-Doping Authority) ethics committee, NWMO (Nuclear Waste Management Organization) ethics committee, and the American Society of Law, Medicine and Ethics. She is a director of the Beaverbrook (Canadian) Foundation and the Molinari Foundation.

Her work has included research, speaking engagements and consultation on issues related to euthanasia; pain relief; genetics; reproductive technologies; biotechnology; ecosystem health; aging populations; mental health and mental disability; human rights in health care, including in a global context; the pharmaceutical industry; public health; health care systems; medical malpractice; human medical research; animal research; AIDS; abortion; the allocation of medical resources; and the role that scientific and medical research and technology play in formation of societal values and the societal paradigm.