



# Not Worth the Wait: Why the Long-Awaited Regulations Under the AHRA Don't Address Egg Donor Concerns

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## Abstract

The *Assisted Human Reproduction Act* seeks to protect egg donors' health and well-being and prevent trade in their reproductive capabilities. In order to fulfill these objectives, the Act prohibits the buying and selling of ova, and only allows for egg donors to be reimbursed for their expenses. However, no regulations setting out what expenses can be reimbursed were promulgated. Sixteen years later, these long-awaited regulations finally came into force in June 2020. In this study, I rely on data from interviews with sixteen egg donors in order to assess how the new regulations might help or hinder concerns that egg donors have with how egg transactions are regulated in Canada. I argue that the new regulations might hinder, more than help with, addressing current concerns related to egg transactions in Canada. The most likely result is that they will not change the current state of affairs.

**Keywords:** Egg donation, assisted human reproduction, Canada, reproductive technologies, public policy, law, qualitative research

## Résumé

La loi sur la procréation assistée vise à protéger la santé et le bien-être des donneuses d'ovules et à empêcher le commerce de leurs capacités reproductives. Afin d'atteindre ces objectifs, la loi interdit l'achat et la vente d'ovules et permet uniquement aux donneuses d'ovules de se faire rembourser leurs dépenses. Toutefois, aucune réglementation précisant les dépenses pouvant être remboursées n'avait été officiellement promulguée. Seize ans plus tard, ces réglementations tant attendues sont finalement entrées en vigueur en juin 2020. Dans cette étude, je m'appuie sur des données issues d'entretiens avec seize donneuses d'ovules afin d'évaluer comment la nouvelle réglementation pourrait aider ou entraver les préoccupations des

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donneuses d'ovules concernant la façon dont les transactions sont réglementées au Canada. Je soutiens que les nouvelles réglementations pourraient empêcher de répondre aux préoccupations actuelles liées aux transactions d'ovules au Canada, plutôt qu'aider à trouver une solution. Le résultat le plus probable de ces réglementations est qu'ils ne changeront pas l'état actuel des choses.

**Mots clés :** Don d'ovules, procréation assistée, Canada, technologies de reproduction, politique publique, droit, recherche qualitative

## Introduction

In 2004 the Parliament of Canada passed the *Assisted Human Reproduction Act* (AHRA).<sup>1</sup> The Act was meant to respond to a growing need to regulate the scientific and medical innovations of assisted reproductive technologies and related techniques and research.

One such technique is egg donation. Egg donation is a process whereby a woman provides ova to an individual or couple, “the intended parent(s),” in order to help them conceive.

The Act regulates egg donation through a number of sections. For instance, section 8<sup>2</sup> prohibits the use of human eggs without consent, and section 9<sup>3</sup> prohibits the donation of eggs by an individual under eighteen years of age. Most notably, the Act, under section 7(1), prohibits the purchase of ova.<sup>4</sup> Under section 60, a person who contravenes section 7 is guilty of an offence.<sup>5</sup> The justification for prohibiting payment is that doing so helps to fulfill the Act’s principles of protecting “the health and well-being of women”<sup>6</sup> and preventing trade in the “reproductive capabilities of women and men.”<sup>7</sup>

Per section 12, however, donors can be reimbursed for their expenses “in accordance with the regulations,” but for the fifteen years of the Act, the regulations under this section, outlining what could be reimbursed, had not been drafted.<sup>8</sup> Thus it has been unclear whether section 12 was in force, and whether donors could even be reimbursed. In the summer of 2019, these new regulations were finally published in the *Canada Gazette, Part I*.<sup>9</sup>

From May 2012 to April 2015, I conducted in-depth interviews with Canadian egg donors on their experiences with egg donation in Canada and their views of the AHRA. Since these eggs are not always “donated,” but are sometimes bought and sold, I use the term “egg transaction” to encompass the exchange that occurs between egg donors and intended parents.

I found that egg donors were concerned with the ban on payment and the lack of clarity with regard to the law—this lack of clarity being caused largely by the fact

<sup>1</sup> *Assisted Human Reproduction Act*, SC 2004, c 2. [AHRA]

<sup>2</sup> *Ibid.*, s 8.

<sup>3</sup> *Ibid.*, s 9.

<sup>4</sup> *Ibid.*, s 7(1).

<sup>5</sup> *Ibid.*, s 60.

<sup>6</sup> *Ibid.*, s 2(c).

<sup>7</sup> *Ibid.*, s 2(f).

<sup>8</sup> *Ibid.*, s 12.

<sup>9</sup> *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193.

that there were no section 12 regulations. They felt that the ban on payment and the fact that there were no section 12 regulations contributed to four major issues that resulted in the *AHRA* having the opposite effect of its intended principles to protect women and prevent commercialization. These four issues are that, first, the Act's ban on payment has contributed to an underground grey market for eggs. Second, donors who abide by the law will sometimes take a personal financial loss. Third, the ban on payment has created a dearth of egg donors, which puts pressure on the women who are donating. Fourth, the ban on payment is leading Canadian egg donors and intended parents to engage in egg transactions in countries where egg donors can be paid, but where egg donation is highly commercialized, and donors might receive insufficient medical care.

Given that the new section 12 regulations recently came into force, I take this opportunity to present my findings on egg donors' perspectives on the *AHRA*.<sup>10</sup> I assess the ways in which the new regulations help to address egg donors' concerns and hinder progress in this matter. I argue that the new regulations might hinder, more than help, with the current sphere of egg transactions in Canada. The most likely result is that they will not change the status quo.

I begin by outlining the *AHRA*'s progression. From the very start of its development, policy-makers have been preoccupied with preventing the commercialization of women's reproductive abilities and protecting women's health. I explain the new section 12 regulations and examine the existing body of scholarly work that assesses and criticizes the *AHRA*. I explain the methodology used to collect data from egg donors. I then discuss four major issues that have been caused by the Act and the ways these concerns contribute to the Act having the opposite effect of what it intends. I illustrate how the new regulations are likely to perpetuate or even exacerbate these four issues. Finally, I conclude by making recommendations about how to improve egg transactions in Canada, so that we can be more successful in meeting the principles of the *AHRA*.

## A History of the *AHRA* and Its Objectives

The birth of Louise Brown in 1987 sparked concerns by many about the "brave new world" shaped by the development and use of assisted reproductive technologies.<sup>11</sup> Dave Snow provides the first scholarly account of the assisted reproduction policy-making process in Canada at both national and provincial levels.<sup>12</sup> In his thorough account of the history of the *AHRA*, Snow observes that, in Canada, in that same year of 1987, feminist academics and women's health organizations created the

<sup>10</sup> For an analysis of the potential impact of the new section 12 regulations on surrogacy transactions, see Stefanie Carsley, "Regulating Reimbursements for Surrogate Mothers," *Alberta Law Review* 58, no. 4 (2021): 811-36.

<sup>11</sup> Author Aldous Huxley discussed the technique of IVF (in vitro fertilization) in his science fiction novel *Brave New World*. See Aldous Huxley, *Brave New World Revisited* (New York: Harper Collins, 2004).

<sup>12</sup> Dave Snow, *Assisted Reproduction Policy in Canada: Framing, Federalism, and Failure* (Toronto: University of Toronto Press, 2018), 6.

Canadian Coalition for a Royal Commission on New Reproductive Technologies.<sup>13</sup> The coalition lobbied the government to create a commission to investigate new reproductive technologies. In 1989, then Prime Minister Brian Mulroney commissioned the “Baird Commission.” The Commission was chaired by Patricia Baird, a genetic epidemiologist. Troubles on the Commission led to four of the seven commissioners being fired—two of these being the most vocal feminist commissioners.<sup>14</sup> This resulted in the loss of feminist control of the Commission, although Mariana Valverde and Lorna Weir argue that the resulting media scandal over the dismissals meant that Baird had to appease, or at least make it seem as though she was appeasing, feminist public opinion. As a result, the Commission needed to address the concerns expressed by women’s health activists.<sup>15</sup>

The Commission was mandated to study and report on the “current and potential medical and scientific developments related to new reproductive technologies, considering in particular their social, ethical, health, research, legal and economic implications and the public interest.”<sup>16</sup> Its mandate also included a focus on the protection of women’s health.<sup>17</sup>

The Commission investigated for four years, during which time it consulted over 15,000 Canadians. In 1993, the Commission issued its final report, *Proceed with Care*, which included 293 policy recommendations.<sup>18</sup> Snow observes that these recommendations fit into three categories—one of these is “prohibiting certain activities and technologies using the federal *Criminal Code*.”<sup>19</sup> Payment for egg donation was one such activity that the report recommended criminalizing.<sup>20</sup> As Alana Cattapan points out, there were two grounds for banning egg donation that were evident in the report and were later used by parliamentarians and committee witnesses to justify prohibiting payment for egg donation.<sup>21</sup> These were, first, that the commercialization and commodification of human

<sup>13</sup> Ibid., 20. See also Kathleen Hammond, “Assisted Human Reproduction Act (2004),” in *Embryo Project Encyclopedia*, July 30, 2015, <https://embryo.asu.edu/pages/assisted-human-reproduction-act-2004>.

<sup>14</sup> Mariana Valverde and Lorna Weir, “Regulating New Reproductive and Genetic Technologies: A Feminist View of Recent Canadian Government Initiatives,” *Feminist Studies* 23, no. 2 (1997): 419–23, <https://doi.org/10.2307/3178407>, 420.

<sup>15</sup> Ibid.

<sup>16</sup> Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993), 2.

<sup>17</sup> Ibid., 3; Alana Cattapan, “Rhetoric and Reality: ‘Protecting’ Women in Canadian Public Policy on Assisted Human Reproduction,” *Canadian Journal of Women and the Law* 25, no. 2 (2013): 202–20. <https://doi.org/10.3138/cjwl.25.2.202>; Alana Cattapan, “Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation,” *Canadian Journal of Law & Society / La Revue Canadienne Droit et Société* 29, no. 3 (2014): 361–79, <https://doi.org/10.1017/cls.2014.14>; Jocelyn Downie and Françoise Baylis, “Transnational Trade in Human Eggs: Law, Policy, and (In)Action in Canada,” *The Journal of Law, Medicine & Ethics* 41, no. 1 (April 1, 2013): 224–39, <https://doi.org/10.1111/jlme.12015>; Dave Snow, Françoise Baylis, and Jocelyn Downie, “Why the Government of Canada Won’t Regulate Assisted Human Reproduction: A Modern Mystery,” *McGill Journal of Law and Health* 9, no. 1 (July 9, 2017): 1–16.

<sup>18</sup> Royal Commission on New Reproductive Technologies, *Proceed with Care*.

<sup>19</sup> Snow, *Assisted Reproduction Policy in Canada*, 20.

<sup>20</sup> Cattapan, “Rhetoric and Reality,” 210.

<sup>21</sup> Ibid.

reproductive material were considered to be unethical<sup>22</sup> and, second, that egg donation was seen as problematic because it puts young, healthy women in the position of taking drugs and going through invasive and risky medical procedures.<sup>23</sup> These concerns are encompassed in the Act's objectives of preventing commercialization and protecting the well-being of women.<sup>24</sup>

Many of the Royal Commission's recommendations required action by the federal government, and it specifically suggested that the federal government develop comprehensive legislation.<sup>25</sup> There were three attempts to pass legislation before Bill C-6 was finally introduced and passed all three readings.<sup>26</sup> Not long after the Bill came into force, the Quebec government submitted a reference to the Quebec Court of Appeal challenging the Act on the basis that a number of sections of the Act infringed on the provincial government's jurisdiction in the area of health care.<sup>27</sup> The Quebec Court of Appeal held that the contested sections were unconstitutional.<sup>28</sup> The government of Canada appealed the decision to the Supreme Court of Canada (SCC), which held that some, but not all, of the contested sections were unconstitutional.<sup>29</sup> Two sections that dealt specifically with egg donation were repealed before coming into force. These were: section 14(2)(b),<sup>30</sup> which was to require mandatory counselling for gamete donors, and section 17,<sup>31</sup> which provided for a Personal Health Information registry of gamete donors and individuals using assisted reproductive technologies. The sad saga of the *AHRA* continued, and in 2012 the federal government also announced that as part of budget cuts, Assisted Human Reproduction Canada (AHRC)—the agency that had been created to oversee enforcement of the *AHRA* and the development of its regulations—was to be disbanded in 2013.<sup>32</sup> To date, charges have only been laid once for the contravention of section 7 of the Act. In 2013, among other charges, Leia Picard the director of Canadian Fertility Consultants, was charged with paying

<sup>22</sup> Cattapan, "Rhetoric and Reality," 210; Royal Commission on New Reproductive Technologies, *Proceed with Care*, 593-4.

<sup>23</sup> Cattapan, "Rhetoric and Reality," 210.

<sup>24</sup> *AHRA*, s 2(c) and s 2(f).

<sup>25</sup> Françoise Baylis and Jocelyn Downie, "The Tale of Assisted Human Reproduction Canada: A Tragedy in Five Acts," *Canadian Journal of Women and the Law*, January 15, 2014, <https://doi.org/10.3138/cjwl.25.2.183>; Royal Commission on New Reproductive Technologies, *Proceed with Care*, 19.

<sup>26</sup> Monique Hébert, Nancy Miller Chenier, and Sonya Norris, "Bill C-6 Assisted Human Reproduction Act," Legislative Summary (Ottawa: Library of Parliament, February 17, 2004), [https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/LegislativeSummaries/373LS466E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/373LS466E).

<sup>27</sup> *Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d'appel, LRQ, ch R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée*, LC 2004, ch 2 (*Dans l'affaire du*), 2008 QCCA 1167.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

<sup>30</sup> *AHRA* s 14(2)(b).

<sup>31</sup> *AHRA* s 17.

<sup>32</sup> Bill C-38, *Jobs, Growth and Long-Term Prosperity Act*, 1st Sess, 41st Parl, 2012 (assented to 29 June 2012). See also Alana Cattapan and Sara R. Cohen, "The Devil We Know: The Implications of Bill C-38 for Assisted Human Reproduction in Canada," *Journal of Obstetrics and Gynaecology Canada* 35, no. 7 (July 1, 2013): 654-56, [https://doi.org/10.1016/S1701-2163\(15\)30890-2](https://doi.org/10.1016/S1701-2163(15)30890-2).

egg donors and surrogates a flat fee rather than only reimbursing them for real expenses.<sup>33</sup>

Health Canada took over the responsibility of creating regulations for the *AHRA* after the AHRC was disbanded. Other than a 2004 workshop,<sup>34</sup> no efforts were made to draft regulations until 2015. In 2015, Health Canada contracted the Canadian Standards Association to develop standards on reimbursements for gamete donors and surrogates.<sup>35</sup> In October 2016, Health Canada announced its intention to update and strengthen the *AHRA*.<sup>36</sup> The Department published its intent to draft regulations in the *Canada Gazette*.<sup>37</sup> It invited feedback on the proposed initiative and consulted with stakeholders.<sup>38</sup> On July 7, 2017, it published a consultation document<sup>39</sup> that provided an overview of key policy proposals that would inform the development of section 12. The document gave Canadians an opportunity to review the policy proposals and to provide feedback before the Department finalized policy decisions and developed the regulations.<sup>40</sup> In the meantime, in May 2018, Member of Parliament Anthony Housefather put forward a private member's bill (Bill C-404) to decriminalize payment for sperm and egg donation, and surrogacy.<sup>41</sup> It would have also amended sections 6<sup>42</sup> and 7<sup>43</sup> of the *AHRA* to specify that sperm and egg donors must have the capacity to consent and must not be coerced into donating, and that the same applied to surrogates.<sup>44</sup> It did not, however, go beyond the first reading.

Health Canada continued to move forward with the regulations, and on October 27, 2018, the Department invited the public to provide input on the proposed *AHRA* regulations, which were pre-published in the *Canada Gazette, Part I*.<sup>45</sup> In June 2019, there was a consultation on the draft Guidance document for

<sup>33</sup> Alison Motluk, "First Prosecution under Assisted Human Reproduction Act Ends in Conviction," *CMAJ: Canadian Medical Association Journal* 186, no. 2 (February 4, 2014): E75–76, <https://doi.org/10.1503/cmaj.109-4687>.

<sup>34</sup> Health Canada, "Workshop on the Reimbursement of Expenditures for Egg and Sperm Donors," report, July 26, 2004, <https://publications.gc.ca/site/eng/9.687332/publication.html>; Alison Motluk, "Reimbursement Discussions Exclude Surrogates, Donors," *CMAJ* 188, no. 1 (January 5, 2016): E7–8, <https://doi.org/10.1503/cmaj.109-5176>, E8.

<sup>35</sup> Novel Tech Ethics, "Breaking the Law," *Impact Ethics* (blog), August 2017, <https://www.dal.ca/sites/novelttechethics/projects/human-reproduction/breaking-the-law.html>.

<sup>36</sup> Health Canada, "Toward a Strengthened Assisted Human Reproduction Act: A Consultation with Canadians on Key Policy Proposals" (Government of Canada, July 12, 2017), <https://www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction/document.html>, 7.

<sup>37</sup> Government of Canada, "Government Notice — Assisted Human Reproduction Act: Notice to Interested Parties — Intent to Develop Regulations under the Assisted Human Reproduction Act," *Canada Gazette* 150, no. 40 (October 1, 2016), <http://www.gazette.gc.ca/rp-pr/p1/2016/2016-10-01/html/notice-avis-eng.html#ne1>.

<sup>38</sup> Snow, *Assisted Reproduction Policy in Canada*, 114; Health Canada, "Toward a Strengthened Assisted Human Reproduction Act," 8.

<sup>39</sup> Health Canada, "Toward a Strengthened Assisted Human Reproduction Act."

<sup>40</sup> *Ibid.*, 3.

<sup>41</sup> Bill C-404, *An Act to amend the Assisted Human Reproduction Act*, 1st session, 42nd Parl, 2018.

<sup>42</sup> *AHRA*, s 6.

<sup>43</sup> *AHRA*, s 7.

<sup>44</sup> *Ibid.*

<sup>45</sup> Government of Canada, "Proposed Regulatory Text—Reimbursement Related to Assisted Human Reproduction Regulations," *Canada Gazette, Part I*, Vol. 152, no. 43 (October 27, 2018), <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-10-27/html/reg3-eng.html>.

the reimbursement regulations. The final regulations were published in the *Canada Gazette, Part II*, on June 26, 2019.<sup>46</sup>

## The New Reimbursement Regulations

Section 2 of the *Reimbursement Regulations* sets out nine categories of expenditures that can be reimbursed.<sup>47</sup> The first of these is travel costs. This includes transportation, parking, meals, and accommodation.<sup>48</sup> Section 5 specifically sets out the amount that can be claimed if the mode of transportation is an automobile.<sup>49</sup> Other expenses that can be reimbursed are: the care of dependents or pets,<sup>50</sup> counselling services,<sup>51</sup> legal services and disbursements,<sup>52</sup> expenses for obtaining any “drug or device,”<sup>53</sup> products or services recommended by someone who practises medicine<sup>54</sup> and the cost of getting that recommendation,<sup>55</sup> health, disability, travel or life insurance,<sup>56</sup> and obtaining or confirming medical or other records.<sup>57</sup> Section 6 of the regulations outlines specific requirements for the reimbursement.<sup>58</sup> For instance, in order to be reimbursed, egg donors have to submit documents such as a declaration and a receipt for each expenditure.<sup>59</sup> The person who reimburses the expenditures has to keep a record of all documents obtained for the reimbursement for six years.<sup>60</sup>

A guidance document was published alongside the regulations, although this document is merely an interpretive aid. The guidance document makes it clear that if there is a discrepancy between the regulations and the guidance document text, the regulations take precedence.<sup>61</sup> The guidance document sets out that “there is no obligation to reimburse, meaning that only persons who wish to reimburse eligible expenditures will do so.”<sup>62</sup> This document also says that “reimbursements made in respect of matters not set out in section 12 of the *AHRA* are not automatically prohibited by section 6 or 7 of the Act.”<sup>63</sup> Some reimbursements can be reasonably justified like “reimbursing an ova donor for the loss of work-related income.”<sup>64</sup>

<sup>46</sup> Government of Canada, “Reimbursement Related to Assisted Human Reproduction Regulations,” *Canada Gazette Part II* 153, no. 13 (June 26, 2019), <http://www.canadagazette.gc.ca/rp-pr/p2/2019/2019-06-26/html/sor-dors193-eng.html>.

<sup>47</sup> *Reimbursement Related to Assisted Human Reproduction Regulations*.

<sup>48</sup> *Ibid.*, 2(a).

<sup>49</sup> *Ibid.*, s 5.

<sup>50</sup> *Ibid.*, s 2(b).

<sup>51</sup> *Ibid.*, s 2(c).

<sup>52</sup> *Ibid.*, s 2(d).

<sup>53</sup> *Ibid.*, s 2(e).

<sup>54</sup> *Ibid.*, s 2(f).

<sup>55</sup> *Ibid.*, s 2(g).

<sup>56</sup> *Ibid.*, s 2(h).

<sup>57</sup> *Ibid.*, s 2(i).

<sup>58</sup> *Ibid.*, s 6.

<sup>59</sup> *Ibid.*, s 6(a) and (d).

<sup>60</sup> *Ibid.*, s 11(1) and (2).

<sup>61</sup> Health Canada, “Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations” (Government of Canada, August 2019), <https://www.canada.ca/en/health-canada/programs/consultation-reimbursement-assisted-human-reproduction/document.html>, 6.

<sup>62</sup> *Ibid.*, 5.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

However, the guidance document notes that reimbursement must not involve monetary gain by involved parties, nor should it be a disguised form of payment or purchase.<sup>65</sup> The document even provides suggestions on how to show that reimbursement is not a disguised form of payment.<sup>66</sup>

### A Controversial Act: Existing Criticisms of the AHRA

Over the course of the AHRA's conception and in the years since it has been in place, the Act has received a large amount of commentary by scholars, practitioners and the media. Here, I focus specifically on criticisms that relate to how the AHRA deals with egg transactions.

Even before Bill C-6 became the AHRA, scholars criticized the Royal Commission's final report as well as the government's proposed response to regulating assisted reproductive technologies through federal criminal law. Alison Harvison Young and Angela Wasunna, in 1998, for instance, criticized the assumption that was being made that Canadians had a collective opinion regarding assisted reproductive technologies, and in particular egg donation and surrogacy.<sup>67</sup> They argued that it was not clear how the Commission could have pulled together a collective opinion of Canadians based on the diverse and often contradictory responses that were collected by the Commission about assisted reproductive technologies.<sup>68</sup> They also pointed out that in the few years since *Proceed with Care* had come out, it was likely that some of these views would already be outdated, given how quickly assisted reproductive technologies develop and how fast society's views about these technologies shift.<sup>69</sup>

Their second major criticism was of the government's proposal to use the criminal law to regulate assisted reproductive technologies and techniques like egg and sperm donation and surrogacy. They argued that criminal law was inapt to deal with complex and controversial issues of this kind as it would impose norms that would not reflect the actual diversity of people's opinions on assisted reproductive technologies.<sup>70</sup> They cited examples of laws criminalizing abortion, and the prohibition of alcohol, to illustrate the fact that, in areas where people have strong emotional responses, laws that just make commands do not necessarily stop the practice, but just force it underground.<sup>71</sup>

Harvison Young and Wasunna's argument that the so-called collective Canadian opinion might not have truly reflected Canadians' diverse views at the time that *Proceed with Care* was published is all the more important given the fact that the AHRA did not come into force until eleven years later. The AHRA was based on outdated research by the time it came out. Dave Snow suggests that, as a result, it is

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Alison Harvison Young and Angela Wasunna, "Wrestling with the Limits of Law: Regulating New Reproductive Technologies," *Health Law Journal* 6 Spec No (1998): 239–77.

<sup>68</sup> Ibid., 247.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid., 243.

<sup>71</sup> Ibid., 244.

now “nearly thirty years outdated.”<sup>72</sup> Additionally, the Royal Commission, when putting together its report, seems to have done a poor job of actually consulting egg donors and doing research on egg donors to back up their findings. Although *Proceed with Care* repeatedly discusses the potential exploitation of surrogates and egg donors, the only Canadian-based source to support this assertion is a 1988 report by Margrit Eichler and Phebe Poole, on surrogates, for the Law Reform Commission.<sup>73</sup> This problem with not adequately consulting egg donors persisted through the development of the new regulations. At the phase that Health Canada hired the Canadian Standards Association to develop the policy that would underlie development of the new regulations, Health Canada was criticized for not better publicizing the process, and for not being sufficiently inclusive.<sup>74</sup> Not a single surrogate or egg donor, or anyone with firsthand experience for that matter, was invited to sit on the committee.<sup>75</sup>

Third, despite the fact that egg donors themselves have rarely been consulted, the *AHRA*'s prohibitions on payment have been justified largely on the basis that the financial incentive and commercialized nature of paid egg donation must mean that it is exploitative.<sup>76</sup> The *AHRA* draws a distinction between compensating donors and reimbursing donors. The Nuffield Council on Bioethics report helpfully distinguishes between these two types of recompense. Whereas *reimbursement* of donors is usually for direct expenses or financial loss, *compensation* is generally for non-financial losses like “inconvenience, discomfort and time” and is considered to be a financial incentive.<sup>77</sup> The *AHRA* allows reimbursement of donors but not compensation. In its purpose section, the *AHRA* refers to preventing the exploitation of women for commercial means.<sup>78</sup> Commercialization refers to taking eggs out of the intimate and personal sphere and putting them into the market in order to make profit.<sup>79</sup> This is not to be confused with commodification—another preoccupation of the Baird Commission and scholars of reproductive technologies. Commodification allows eggs, or the egg donor herself, to be treated as a form of property that is reduced to its economic worth.<sup>80</sup>

<sup>72</sup> Dave Snow quoted in Alison Motluk, “Long-Awaited Regulations Bring Clarity to Assisted Reproduction Act,” *CMAJ News* (blog), July 25, 2019, <https://cmajnews.com/2019/07/25/long-awaited-regulations-bring-clarity-to-assisted-reproduction-act/>.

<sup>73</sup> Cattapan, “Risky Business”; Royal Commission on New Reproductive Technologies, *Proceed with Care*, 670; Margrit Eichler and Phebe Poole, “The Incidence of Preconception Contracts for the Production of Children Among Canadians: A Report Prepared for the Law Reform Commission of Canada,” 1988.

<sup>74</sup> Motluk, “Reimbursement Discussions Exclude Surrogates, Donors,” E7.

<sup>75</sup> *Ibid.*

<sup>76</sup> Cattapan, “Risky Business,” 364; Royal Commission on New Reproductive Technologies, *Proceed with Care*, 592.

<sup>77</sup> Nuffield Council on Bioethics, “Human bodies: Donation for medicine and research” October 11, 2011, <https://www.nuffieldbioethics.org/publications/human-bodies-donation-for-medicine-and-research>, 70.

<sup>78</sup> *AHRA*, s 2(f).

<sup>79</sup> Radhika Rao, “Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research,” *Berkeley Technology Law Journal* 21, no. 3 (Summer 2006): 1055–66, 1061. See also, Maneesha Deckha, “Holding onto Humanity: Animals, Dignity, and Anxiety in Canada’s Assisted Human Reproduction Act,” *Unbound: Harvard Journal of the Legal Left* 5, no. 21 (2009): 21–54, 22.

<sup>80</sup> Rao, “Coercion, Commercialization, and Commodification,” 1058.

Scholars like Alana Cattapan, have expressed concerns with this assumption that egg donation is necessarily exploitative when it is paid.<sup>81</sup> Angela Campbell, and Rakhi Ruparelia have voiced similar concerns in the related area of paid surrogacy.<sup>82</sup> First, it assumes that egg donors cannot genuinely consent when money is involved.<sup>83</sup> As Cattapan points out, multiyear research by investigative journalist Alison Motluk<sup>84</sup> reveals that there are bigger health risks than egg donors anticipate, which can have exploitative implications for women's bodies.<sup>85</sup> However, this does not mean that payment makes egg transactions exploitative. Second, it assumes that exploitation "is more likely to occur if payment is involved."<sup>86</sup> It does not consider the fact that there is possible exploitation when there is no pay involved, such as in family relationships.<sup>87</sup> Samantha Yee and colleagues' research on known altruistic egg donation in Canada, for instance, reveals that a personal relationship with a recipient plays an influential role in egg donors' decision to donate.<sup>88</sup>

A fourth criticism of the *AHRA* has to do with the missing regulations for section 12. In her 2006 article, legal academic Erin Nelson noted that Health Canada had, in 2004, announced that it was starting to develop the "regulatory components" of the Act.<sup>89</sup> It was anticipated that this would take only three years.<sup>90</sup> In the fifteen years that it actually took for these regulations to be promulgated, Health Canada was heavily criticized for taking so long to draft them.<sup>91</sup> The lack of regulations also created confusion over whether section 12 was even in force without the regulations. Many authors seem to agree that section 12 requires the regulations in order to come into force.<sup>92</sup> Other sources, including Health Canada

<sup>81</sup> Cattapan, "Risky Business."

<sup>82</sup> Angela Campbell, "Law's Supposition about Surrogacy against the Backdrop of Social Science," *Ottawa Law Review* 43, no. 29 (2012); Rakhi Ruparelia, "Giving Away the 'Gift of Life': Surrogacy and the Canadian Assisted Human Reproduction Act," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2007), <https://papers.ssrn.com/abstract=2380805>.

<sup>83</sup> Cattapan, "Risky Business," 375.

<sup>84</sup> Alison Motluk, "The Human Egg Trade: How Canada's Fertility Laws Are Failing Donors, Doctors, and Parents," *The Walrus*, April 2010; Alison Motluk, "Wanted: Egg Donor in Good Health," *CBC: The Current*, February 19, 2012; Alison Motluk and Canada, "I Thought I Just Had to Sleep It Off: Egg Donor Sues Toronto Fertility Doctor after Suffering Stroke," *National Post*, March 28, 2013, <https://nationalpost.com/news/canada/kylee-gilman-sues-toronto-fertility-doctor>.

<sup>85</sup> Cattapan, "Risky Business."

<sup>86</sup> *Ibid.*, 374.

<sup>87</sup> Cattapan, "Risky Business"; Campbell, "Law's Supposition about Surrogacy against the Backdrop of Social Science"; Ruparelia, "Giving Away the 'Gift of Life.'"

<sup>88</sup> Samantha Yee, Eric Blyth, and A Ka Tat Tsang, "Oocyte Donors' Experiences of Altruistic Known Donation: A Qualitative Study," *Journal of Reproductive and Infant Psychology* 29, no. 4 (2011a): 404–15.

<sup>89</sup> Erin L. Nelson, "Legal and Ethical Issues in ART Outcomes Research," *Health Law Journal*, 2005, 165–86.

<sup>90</sup> *Ibid.*, 185.

<sup>91</sup> Snow, Baylis, and Downie, "Why the Government of Canada Won't Regulate Assisted Human Reproduction"; Françoise Baylis, Jocelyn Downie, and Dave Snow, "Fake It till You Make It: Policymaking and Assisted Human Reproduction in Canada," *Journal of Obstetrics and Gynaecology Canada: JOGC = Journal d'obstétrique et Gynécologie du Canada: JOGC* 36, no. 6 (June 2014): 510–12.

<sup>92</sup> Baylis, Downie, and Snow, "Fake It till You Make It," 511; Maneesha Deckha, "Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalization and Public Funding," *McGill Law Journal* 61, no. 1 (September 1, 2015): 31, 41 footnote 43.

and AHRC, stated that even though section 12 was not yet in force, reimbursement was permitted in Canada.<sup>93</sup> In any case, the lack of regulations created uncertainty, for those using assisted reproduction in Canada, as to what was and was not allowed.<sup>94</sup>

Fifth, despite threatening harsh penalties, the Act has only been enforced once—in the case of Leia Picard.<sup>95</sup> The result of the Act not being enforced is that it is not taken seriously.<sup>96</sup> Even in the case where the Act was enforced, Jocelyn Downie and Françoise Baylis argue that the fines imposed on Picard in this case were so low that agencies engaging in similar activities might just see this as the “cost of doing business.”<sup>97</sup>

Finally, critiques have centred around the fact that egg donors are being paid on an underground market for eggs in Canada,<sup>98</sup> that large numbers of Canadians are travelling abroad for paid egg donation; that foreign nationals are being paid to come to Canada to provide eggs; and that Canadians are importing eggs from jurisdictions where egg donors are paid.<sup>99</sup> Alana Cattapan argues that the government’s failure to develop regulations and enforce criminal provisions has pushed paid egg donors underground and abroad.<sup>100</sup> Jocelyn Downie and Françoise Baylis criticize Canadian authorities for failing to respond to this international trade in eggs, for not completing the regulations, for not enforcing the law, and for not promoting national self-sufficiency.<sup>101</sup>

## Research Methods

These criticisms highlight the importance of consulting with egg donors—the community of women that the *AHRA* seeks to protect—in order to assess the Act. This is the first academic study to explore egg transactions in the grey market in Canada. It is part of a larger study that involved interviews with egg donors, as well as twenty intended parents and twenty fertility specialists. In this article, I focus on the data collected through in-depth interviews with sixteen Canadian egg donors. Each of these participants has been given a pseudonym.

Fifteen egg donors self-identified as Caucasian, one self-identified as “Native and African Canadian.” Four egg donors were students. The others had a wide range of occupations including secretary, manager of a non-profit organization,

<sup>93</sup> See Downie and Baylis, “Transnational Trade in Human Eggs,” footnotes 45 and 46. Baylis and Downie cite a Health Canada public consultation document as well as the old AHRC website. They also cite a CBC article and a fertility clinic website.

<sup>94</sup> Baylis, Downie, and Snow, “Fake It till You Make It,” 511.

<sup>95</sup> Cattapan, “Rhetoric and Reality,” 217.

<sup>96</sup> *Ibid.*, 219.

<sup>97</sup> Françoise Baylis and Jocelyn Downie, “Wishing Doesn’t Make It So,” *Impact Ethics* (blog), December 17, 2013, <https://impactethics.ca/2013/12/17/wishing-doesnt-make-it-so/>.

<sup>98</sup> Motluk, “The Human Egg Trade.”

<sup>99</sup> Downie and Baylis, “Transnational Trade in Human Eggs,” 225; Eric Blyth, “Fertility Patients’ Experiences of Cross-Border Reproductive Care,” *Fertility and Sterility* 94, no. 1 (2010): 11–15; Edward Hughes and Deirdre DeJean, “Cross-Border Fertility Services in North America: A Survey of Canadian and American Providers,” *Fertility and Sterility* 94, no. 1 (2010): e16–19.

<sup>100</sup> Cattapan, “Rhetoric and Reality,” 206.

<sup>101</sup> Baylis, Downie, and Snow, “Fake It till You Make It”; Downie and Baylis, “Transnational Trade in Human Eggs,” 225.

legal assistant, small business owner, and homemaker. Ten donors had engaged in egg transactions once, three donors had engaged in egg transactions twice, one donor had engaged in egg transactions four times, and one donor, Tiffany, had taken part in egg transactions “fifteen or sixteen times.” One donor was just about to participate in an egg transaction for the first time. Of the donors who had already engaged in egg transactions, eleven egg donors had engaged in egg transactions anonymously and so had had little or no contact with the intended parents. Three egg donors were identified donors, meaning that they met the intended parents through the egg transaction and stayed in contact with them afterwards. Tiffany had done both anonymous and identified transactions. Ellen, the donor who had not yet engaged in an egg transaction, planned to have an anonymous transaction.

Six egg donors had only been reimbursed for expenses that would be allowable under the new regulations. Eight donors were reimbursed in such a way that, depending on one’s interpretation of the *AHRA*, would likely be construed as compensation. In the view of the egg donors, however, it was reimbursement. Two donors (Tiffany and Chantelle) went to the United States and one other donor (Katherine) was planning to go to the United States for a subsequent transaction. Tiffany and Chantelle had been paid in the United States, and Katherine hoped to be paid.

In Canada, infertility forums and advertising websites have become a popular way for egg donors and intended parents to connect. I recruited egg donors through seven of these advertisement and infertility forums. These were: kijiji, craigslist, Toronto Super Ads, [opts.com](http://opts.com), [IVF.ca](http://IVF.ca), [ivf-infertilty.com](http://ivf-infertilty.com), and [co-parent-search.com](http://co-parent-search.com). I posted information about this study on all seven forums inviting egg donors who had posted in these forums to participate. A Canadian infertility support group and an online egg donor community (We Are Egg Donors) also kindly circulated information about this study.

I conducted phone and Skype interviews. Phone and Skype were preferred because the egg donors lived in many different parts of Canada and because they afforded participants a greater sense of anonymity. This was important given the private nature of egg transactions. I asked egg donors open-ended questions about their decision to engage in egg transactions, logistical details about how they connected with intended parents, their feelings towards intended parents, and finally, their perspectives on the laws in Canada surrounding egg transactions. Twelve egg donors were interviewed once, and four egg donors were interviewed before and after their egg transactions. Egg donor interviews ranged in length from twenty minutes to just under two hours with an average of fifty-five minutes. I transcribed and coded all interviews according to conventions outlined by Foss and Waters<sup>102</sup> and Ryan and Bernard.<sup>103</sup>

<sup>102</sup> Sonja K. Foss and William Waters, “Coding Qualitative Data,” (2011), *Qualitative Data*, <http://www.abdsurvivalguide.com/News/020603.htm>.

<sup>103</sup> Gery W. Ryan and H. Russell Bernard, “Data management and analysis methods,” in *Handbook of Qualitative Research* (Thousand Oaks, CA: SAGE Publications, 2000).

## Egg Donors' Concerns with the AHRA and Why the New Regulations Will Not Remedy Them

The egg donors whom I interviewed identified four issues that they felt were caused by the AHRA—specifically by its ban on payment and the missing section 12 regulations. In the opinion of egg donors, these issues result in the Act having the opposite effect of what is intended by its principles. I examine each of these four issues in turn and illustrate that while having the regulations is a step in the right direction, the regulations will not deal with issues raised by the AHRA that cause it to have the opposite effect of its objectives.

### 1. Canada Has a Grey Market for Egg Transactions

The first way that the Act has the opposite effect of what is intended by its objectives is that it has contributed to the development of a grey market for eggs in Canada. Eight egg donors had participated in a grey market for eggs in Canada. They did so because they were motivated, at least in part, by compensation. Brooke said:

You know, I live in 2014 with a child. My son's three years old, he's extremely expensive, and with the fall of the economy I've run into some financial struggle myself a bit. And I just heard the money factor, I know I can get pregnant, and it just sounded like something I could do.

Fifteen of the sixteen egg donors disagreed with the AHRA's ban on compensation and thought that egg donors should be compensated. Marissa's egg transactions, for instance, had not fallen into that murky area that could be construed as compensation, but she felt that other donors should be compensated. She said:

I think that's absurd to feel like out-of-pocket expenses are enough of a compensation. It's a lot of time and, you know, a big chunk of your life that you have to just give to a stranger. We wouldn't expect that in any other thing. We compensate people for everything here. Why wouldn't we compensate them at least for their time and their stress and the inconvenience, and the potential risk for their health?

The ban on payment has pushed this market underground. Egg donors and intended parents have taken advantage of the lack of clarity with regard to permissible expenses. They have been receiving amounts of money or gifts, that likely cross the line into payment. However, since this line is not entirely clear, they accept the money, because they rationalize that it is a reimbursement. Since the Act is not being enforced, it is less of a concern. Egg donor Lesley, for instance, received a car from the intended parents she worked with. She says, "the car was a way to get to my clinic appointments instead of them [the intended parents] paying for my bus, or car rental or whatever, so it's a reimbursement." The Act may reduce the number of egg donors being paid. It may also be reducing the aggressive commercialization of egg transactions that we see in countries like the United States, where egg donor advertisements can be found all over college campuses, on buses, as

pop-ups on social media websites, and so on.<sup>104</sup> However, women's reproductive abilities are still being commercialized on the online forums and advertising websites in Canada, where egg donors and intended parents connect. As Lesley explains, "egg donors post about themselves, like height, education and stuff and people [intended parents] message them with their best offer." Since this occurs in a grey market, it is more discreet than in countries like the United States, where payment is allowed, but it is still commercialization. There is also no oversight of this underground market, and egg donors are not protected if things go wrong, leaving them vulnerable.

It is possible that the regulations will curtail the grey market because the regulations mostly clarify the line between legitimate expenses and payment by listing what can and cannot be reimbursed.<sup>105</sup> The Guidance Document makes it explicit that "reimbursement must not involve monetary gain," or be a "disguised form of payment."<sup>106</sup> It seems unlikely, however, that this will actually stop the grey market completely. Egg donors were being paid before the *AHRA* came into force,<sup>107</sup> and during the sixteen years it took for the regulations to come into force and clarify what can and cannot be reimbursed. Payment, to some degree, has become a social norm in Canada. Even if the regulations were to curtail the grey market, it might be contrary to protecting egg donors' health and well-being to not allow payment. Egg donors in this study felt they deserved to be paid, and that they are making this decision based on their own sense of what is good for them. Additionally, we presume that allowing egg donors to be paid commodifies their reproductive abilities, because the payment is solely for the production of the eggs. This is certainly true, at least in part, since this ability is unique to females. However, it is important to note how Marissa, like other donors, perceived the money to also be for their "time," "stress," and "inconvenience," meaning that the money was not solely for their reproductive abilities.

## 2. Egg Donors Take a Personal Financial Loss

Second, the *AHRA*'s ban on payment contributed to some egg donors, who abided by section 7, taking a personal financial loss. Some egg donors were not appropriately reimbursed for expenses that the new section 12 regulations make clear would have been permissible to reimburse. The expenses of engaging in egg transactions can be high and add up quickly. For instance, egg donor Brooke is a single parent

<sup>104</sup> See, for example, Bernadine P. Healy, "Editorial Egg Donors for Hire: A Medical Dilemma In Search of Solutions, Not College Students," *Journal of Women's Health* 4, no. 2 (April 1, 1995): 107–9, <https://doi.org/10.1089/jwh.1995.4.107>; Mark V. Sauer, "Egg Donor Solicitation: Problems Exist, But Do Abuses?," *The American Journal of Bioethics* 1, no. 4 (December 1, 2001): 1–2, <https://doi.org/10.1162/152651601317139199>.

<sup>105</sup> There is the possibility for some confusion because of the Guidance Document saying that some reimbursements that are not set out in the regulations are not automatically prohibited and could still be justified. See Health Canada, "Guidance Document," 5.

<sup>106</sup> Ibid.

<sup>107</sup> For instance, an intended parent who I interviewed, Evelyn, who underwent egg donation in 2003, said "at that time payment was still allowed...it was \$5000 and I just added that to the other costs I owed to the fertility clinic."

who lives in Southern Ontario. She was working with intended parents at a fertility clinic in Markham, Ontario. She explains:

I was staying in York. It's about an hour away plus, with traffic. So, you know, it's expensive. Toronto's an expensive city. I was staying for free with my friend, but I was spending hundreds of dollars a week on gas, just on gas, driving to and from, having to pay for parking for my car, you know, having to eat every day. So money goes really quickly when you're driving constantly.

As Heather, an egg donor, described to me, “things just add up fast, and it's easy to forget to ask to be reimbursed for things that you don't realize were expenses you incurred from donating and wouldn't have otherwise.”

More often, donors described taking a financial loss because they had to miss time from work, and they were not reimbursed for this loss of work-related income. Brooke, for example, was originally only supposed to be in York for two weeks to attend her appointments. However, she said, “since I was at a lower hormone dose for a longer time, I actually had to extend my stay by another week. And, like, it didn't click in [the intended parents'] head to say, oh, well do you need help for that extra week because I missed out on another week of work.”

Compensation can help provide a buffer in case donors are not reimbursed for all their expenses. It also helps to offset loss of work-related income. When donors take a personal financial loss, especially when they have limited means, this can harm their well-being by causing financial stress. The new regulations are likely to both help and hinder the problem of egg donors taking a personal loss. They help in that the Guidance Document says that egg donors should not be out of pocket for expenses they incur from the donation.<sup>108</sup> This kind of statement helps to promote adequate reimbursement. The clear list of expenses that can be reimbursed gives direction on what egg donors should be reimbursed for and can almost act like a checklist so that expenses are not overlooked. Since it is now clear that legal services are reimbursable, if a contract is created, these expenses could be listed in the contract.<sup>109</sup> This serves as an additional way for egg donors to ensure they are reimbursed.

However, there are also some ways that the new regulations might perpetuate the existing problem. First, in its “Policy statements” section, the Guidance Document says that there is “no obligation to reimburse, meaning that only persons who wish to reimburse eligible expenditures will do so.”<sup>110</sup> As an overarching policy principle, this carries more weight than the statement that egg donors should not be out of pocket. Second, the regulations do not include egg donors' loss of work-related income as a reimbursable expense.<sup>111</sup> The new regulations might increase the frequency with which donors take a personal loss in this area. Now that there is a list of reimbursable expenses that excludes loss of work-related income, intended parents might be less likely to cover work-related income, or to give larger

<sup>108</sup> Health Canada, “Guidance Document,” 6.

<sup>109</sup> *Reimbursement Related to Assisted Human Reproduction Regulations*, s 2(d).

<sup>110</sup> Health Canada, “Guidance Document,” 5.

<sup>111</sup> *Reimbursement Related to Assisted Human Reproduction Regulations*, s 2.

amounts of money that would help to offset this loss. However, the Guidance Document suggests that reimbursements for things that are not set out in the new regulations “are not automatically prohibited.”<sup>112</sup> The Guidance Document suggests that some things, like loss of work-related income for an egg donor, might still be justified.<sup>113</sup> This perhaps leaves the possibility that loss of work-related income can be reimbursed. Since it is clear that the regulations prevail when there is a conflict between the regulations and the Guidance Document, what is more likely is that this will just create confusion about what can and cannot be reimbursed, particularly for those who only read the Guidance Document.<sup>114</sup>

Finally, the regulations provide a process through which reimbursement is meant to occur.<sup>115</sup> However, the Guidance Document explains that Health Canada leaves the frequency with which reimbursements are made up to the parties.<sup>116</sup> It suggests that it might be most practical for reimbursement to occur “at the time of each donation,” which seems to mean the time at which the eggs have been extracted and intended parents receive them.<sup>117</sup> This system might perpetuate the problem of egg donors taking a personal loss in two ways. First, egg donors can accumulate many expenses over the course of donating. They might not have the means to pay for these expenses up front and might rack up credit card interest if they are not reimbursed in a timely fashion. They are unlikely to be reimbursed for this interest. This proposition that reimbursement occur at the end of the transaction also adds to a power imbalance between intended parents and egg donors because it puts egg donors, like Brooke, in the position of having to request that each expense be reimbursed as they accumulate, rather than that being the default. Second, it does not seem as though Health Canada will be providing much oversight on the reimbursement of expenses, and there is a continued possibility that egg donors will have nowhere to turn if they are not adequately reimbursed.

### 3. *The Dearth of Canadian Egg Donors Puts Pressure on Existing Donors*

The third issue caused by the AHRA is that the ban on payment seems to have resulted in a shortage of egg donors in Canada.<sup>118</sup> This problem does not exist in countries like the United States, where egg donors are paid. Some of the egg donors I interviewed, knowing how few donors there are, felt compelled to donate more. As Marissa put it, “when you see so much need out there and you know that you’re one of the few people willing to do it, you feel a lot more pressure to do it.” Another donor, Tiffany, spoke of a similar pressure. The doctor at the fertility clinic where she had donated kept calling and asking if she would donate again and again. She

<sup>112</sup> Health Canada, “Guidance Document,” 5.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*, 2.

<sup>115</sup> *Reimbursement Related to Assisted Human Reproduction Regulations*, s 6.

<sup>116</sup> Health Canada, “Guidance Document,” 12.

<sup>117</sup> *Ibid.*

<sup>118</sup> Kathleen Hammond, “The Role of Normative Ideologies of Motherhood in Intended Mothers’ Experiences of Egg Donation in Canada,” *Anthropology & Medicine* 25, no. 3 (2018): 265–79, 267; Downie and Baylis, “Transnational Trade in Human Eggs,” 224; Blyth, “Fertility Patients’ Experiences of Cross-Border Reproductive Care”; Hughes and Dejean, “Cross-Border Fertility Services in North America,” e17.

ended up donating “fifteen or sixteen times.” She said, “after the first one it just kept going. I would have felt bad saying no.”

Another donor, Alex, had donated twice. In both cycles they had retrieved over thirty eggs from her: “they retrieved thirty-seven eggs from my first cycle, and then thirty-something in my next one.” It was so many eggs that they ended up giving them to two families. Alex speculated about whether she had been overstimulated to produce more eggs because this way her eggs would be able to go to more intended parents. She said, “I know there’s not a lot of donors, so it’s great that I was able to do that, but I worry sometimes about whether that was safe for me, to get that much of the hormone, and, if there were more donors, whether they wouldn’t have stimulated me to have such a big yield.”

In line with the American Society for Reproductive Medicine (ASRM), the Canadian Fertility and Andrology Society (CFAS), in its Third Party Guidelines, recommends that donors should not undergo more than six ovarian stimulations for egg transactions.<sup>119</sup> The CFAS suggests that there is little evidence to suggest that engaging in egg transactions repetitively affects ovarian reserve.<sup>120</sup> That being said, they acknowledge that there is no long-term data on how ovarian stimulation might affect ovarian reserve, or the risks of ovarian stimulation for health generally.<sup>121</sup> It may take decades to properly understand the health risks of egg transactions.<sup>122</sup> There is some concern that ovarian stimulation might increase the long-term risk of ovarian cancer<sup>123</sup> and uterine cancer.<sup>124</sup> More recently, Jennifer Schneider and colleagues describe five women in the United States who were egg donors and later developed breast cancer, despite having negative genetic testing results.<sup>125</sup> Each of these women had also gone through more rounds of treatment than usual (up to ten) and had a large number of eggs retrieved (twenty-eight to thirty-three eggs).

<sup>119</sup> Practice Committee of the American Society for Reproductive Medicine, “Repetitive Oocyte Donation: A Committee Opinion,” *Fertility and Sterility* 102, no. 4 (October 2014): 964–66, <https://doi.org/10.1016/j.fertnstert.2014.06.035>; Jon Havelock et al., “Clinical Practice Guidelines for Third Party Reproduction,” Canadian Fertility and Andrology Society Clinical Practice Guidelines (Canadian Fertility and Andrology Society, 2016), [https://cfas.ca/\\_Library/clinical\\_practice\\_guidelines/Third-Party-Procreation-AMENDED-.pdf](https://cfas.ca/_Library/clinical_practice_guidelines/Third-Party-Procreation-AMENDED-.pdf).

<sup>120</sup> Havelock et al., “Clinical Practice Guidelines for Third Party Reproduction,” 15.

<sup>121</sup> *Ibid.*

<sup>122</sup> Helen Pearson, “Health Effects of Egg Donation May Take Decades to Emerge,” *Nature* 442, no. 7103 (August 1, 2006): 607–8, <https://doi.org/10.1038/442607a>.

<sup>123</sup> Alice S. Whittemore, Robin Harris, and Jacqueline Itnyre, “Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 US Case-Control Studies. II. Invasive Epithelial Ovarian Cancers in White Women. Collaborative Ovarian Cancer Group,” *American Journal of Epidemiology* 136, no. 10 (November 15, 1992): 1184–1203, <https://doi.org/10.1093/oxfordjournals.aje.a116427>. See also Mary Anne Rossing et al., “Ovarian Tumors in a Cohort of Infertile Women,” *The New England Journal of Medicine* 331, no. 12 (September 22, 1994): 771–76, <https://doi.org/10.1056/NEJM199409223311204>.

<sup>124</sup> Michelle Althuis et al., “Uterine Cancer after Use of Clomiphene Citrate to Induce Ovulation,” *American Journal of Epidemiology* 161, no. 7 (April 1, 2005): 607–15, <https://doi.org/10.1093/aje/kwi084>.

<sup>125</sup> Jennifer Schneider, Jennifer Lahl, and Wendy Kramer, “Long-Term Breast Cancer Risk Following Ovarian Stimulation in Young Egg Donors: A Call for Follow-up, Research and Informed Consent,” *Reproductive Biomedicine Online* 34, no. 5 (May 2017): 480–85, <https://doi.org/10.1016/j.rbmo.2017.02.003>.

In addition to the risks related to ovarian stimulation, the ASRM outlined the possibility of risk associated with aspects of the egg retrieval process, such as the use of anesthesia and follicular aspirations.<sup>126</sup> The ASRM also acknowledged the psychological risks involved with egg transactions, and the fact that egg donors might need fertility therapy themselves in future.<sup>127</sup>

Thus, the research illustrates sound reasons for limiting the number of times egg donors engage in these transactions and for being wary of donors being aggressively stimulated.<sup>128</sup> However, contrary to the *AHRA*'s objectives of protecting egg donors' well-being, the experiences of these egg donors suggest that the dearth of donors is contributing to some Canadian donors donating more times and being more aggressively stimulated than might be healthy.

The regulations are likely to make the shortage worse since they make it clear that donors cannot make money from donating their eggs.<sup>129</sup> Donors who might have otherwise participated in the grey market may no longer donate. This could reduce the number of egg donors. There is a chance that there are some egg donors who would not engage in egg transactions in Canada before the regulations were completed (I discuss two such donors below) because they were concerned about the lack of clarity regarding what they could or could not be reimbursed for. Now that there is some clarity, it is possible that these individuals would choose to donate in Canada. However, it is unlikely that this group of donors will offset the number of donors who will be deterred by the regulations, since compensation is such a powerful motivator.<sup>130</sup>

#### ***4. Egg Donors and Intended Parents Are Engaging in Transnational Egg Transactions***

The final issue that the Act contributes to is that it leads intended parents and egg donors to engage in transnational egg transactions, particularly in the United States. A thriving collaboration between many Canadian and American fertility clinics and agencies has developed to make it easier for Canadian intended parents to use eggs from paid American donors. Canadian intended parents will receive some of their care at their Canadian clinic, and the donor egg component is dealt

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<sup>126</sup> Practice Committee of the American Society for Reproductive Medicine, "Repetitive Oocyte Donation."

<sup>127</sup> *Ibid.*

<sup>128</sup> See, for example, Schneider, Lahl, and Kramer, "Long-Term Breast Cancer Risk Following Ovarian Stimulation in Young Egg Donors"; Rossing et al., "Ovarian Tumors in a Cohort of Infertile Women."

<sup>129</sup> Health Canada, "Guidance Document," 5.

<sup>130</sup> See, for example, Lindsay B. Gezinski et al., "Exploring Motivations, Awareness of Side Effects, and Attitudes among Potential Egg Donors," *Health and Social Work* 41, no. 2 (May 2016): 75–83, <https://doi.org/10.1093/hsw/hlw005>; Satvinder Purewal and Olga B. A. van den Akker, "Systematic Review of Oocyte Donation: Investigating Attitudes, Motivations and Experiences," *Human Reproduction Update* 15, no. 5 (September 1, 2009): 499–515, <https://doi.org/10.1093/humupd/dmp018>.

with through the American partner clinic or agency. Now, improvements in the oocyte vitrification process have made it such that Canadian intended parents can pay American clinics and agencies to simply ship them frozen eggs from across the border.<sup>131</sup> This means that Canadian intended parents no longer even have to travel to the United States for donor eggs. Canadian egg donors are also working with American fertility clinics and agencies. Sometimes they have to travel to the United States for the donation. Other times, their American clinic or agency pairs them with Canadian intended mothers and the donation occurs at a Canadian clinic that is partnered with the American clinic or agency. The egg donors' payment comes from the American clinic or agency.

Two donors in the present study had donated in the United States in order to be paid. Another donor was planning to go to the United States for a subsequent donation in order to be paid. There are concerns that the health care that egg donors might receive in other countries will be of a lower standard than the care they would receive in Canada. Research on patients travelling abroad for fertility treatments suggests that because people only travel to another country for a short amount of time, there may be less time devoted to explaining the procedure and receiving consent or seeking out second opinions.<sup>132</sup> For those egg donors travelling to the United States, they participate in a highly commercial egg industry with an aggressive pursuit of donors that has been criticized for not prioritizing egg donors' well-being.<sup>133</sup>

Additionally, twelve of the twenty intended parents in this study had travelled abroad to seek out egg transactions in countries where egg donors are paid. The Act might be limiting the egg donor market in Canada, but it is causing Canadian intended parents to participate in markets abroad, where egg donors' health and well-being might be at risk and their reproductive capabilities might be more aggressively commercialized than in Canada.

The new regulations, by making it more explicit that there should be no monetary gain from egg transactions, are likely to lead to more egg donors and intended parents travelling abroad. One egg donor and three intended parents chose to travel abroad, in part, because of the lack of clarity with regard to what constitutes a permissible reimbursable expense in Canada—they did not want to unintentionally break the law. It is therefore possible that the clarity provided by the

<sup>131</sup> Downie and Baylis, "Transnational Trade in Human Eggs." See also Vincent Couture *et al.*, "Reproductive Outsourcing: An Empirical Ethics Account of Cross-Border Reproductive Care in Canada," *Journal of Medical Ethics* 45, no. 1 (January 1, 2019): 41–47, <https://doi.org/10.1136/medethics-2017-104515>.

<sup>132</sup> See Anna Pia Ferraretti *et al.*, "Cross-Border Reproductive Care: A Phenomenon Expressing the Controversial Aspects of Reproductive Technologies," (2010) *Reproductive Biomedicine Online* 20, no. 2, 261; Kamal K. Ahuja, "Patient Pressure: Is the Tide of Cross-Border Reproductive Care Beginning to Turn?" *Reproductive Biomedicine Online* 30, no. 5 (2015), 447; Hanis Wahed, "Ethical and Legal Issues in Medical Tourism" *IIUM Law Journal* 23, no. 2 (2015), 1, <https://journals.iium.edu.my/iiumlj/index.php/iiumlj/article/view/130>.

<sup>133</sup> Caroline Bass and Joseph Gregorio, "Conflicts of Interest for Physicians Treating Egg Donors," *AMA Journal of Ethics* 16, no. 10 (October 1, 2014): 822–26, <https://doi.org/10.1001/virtualmentor.2014.16.10.pfor2-1410>; A. D. Gurmankin, "Risk Information Provided to Prospective Oocyte Donors in a Preliminary Phone Call," *The American Journal of Bioethics: AJOB* 1, no. 4 (2001): 3–13, <https://doi.org/10.1162/152651601317139207>.

regulations, in terms of what can be reimbursed and how this should be done, will result in some egg donors and intended parents who might have otherwise left Canada deciding to pursue egg transactions in Canada. However, this would only apply to intended parents who are content to give, and egg donors who are content to receive, reimbursement only for the expenses that are allowable under the new regulations.

## Conclusion and Recommendations

What an examination of these four issues shows is that, while the promulgation of regulations after the very long wait was certainly welcome, it remains doubtful whether the regulations we now have will make a positive difference in addressing egg donors' concerns. In fact, they may exacerbate them.

In regard to egg donors' concerns over taking a personal loss, the regulations could have helped to address donors' concerns by, for instance, allowing presumptive expenses, such as a per diem claim, and suggesting that reimbursement occur as expenses accumulate rather than at the end of the donation. However, they completely missed the mark. In regard to egg donors' concerns over the grey market, the culture of this grey market was likely strengthened by the lack of clarity around permissible reimbursement in the sixteen years before the regulations came into effect. However, the primary reason for egg donors' concerns about the grey market, the dearth of egg donors, and transnational egg transactions is the Act's ban on payment. Since the regulations had to align with the Act, they were never going to be able to deal with these three concerns.

Even though the regulations are unlikely to address egg donors' concerns, what this research brings to light are some steps that we can take that could improve egg donors' experiences with egg transactions. In the long term, we can continue to explore decriminalizing egg transactions, and encourage the provinces to regulate. If the provinces were to do so, they might explore the possibility of having donors receive a small lump-sum payment, as is the case in the United Kingdom, to help alleviate personal financial loss, such as loss of work-related income. This might also encourage egg donors and intended parents to stay within Canada. In the short term, we can work towards collecting long-term data on the physical and psychological risks of egg transactions and focus on more stringent regulation of fertility clinics when it comes to their treatment of egg donors. Health Canada, the CFAS, and fertility counselors and lawyers could encourage intended parents to reimburse donors as the donation unfolds, where appropriate. Health Canada might consider putting in place a process that allows egg donors to report failures to be adequately reimbursed. Finally, in an effort to not repeat past mistakes, the most important step we can take is to conduct more research on egg donors' lived experiences with egg transactions, seek advice from donors when we design this research, and consult these women when we develop legislation, regulations, and guidelines that affect their experiences and their bodies.

**Data Availability Statement**

Due to the nature of this research, participants of this study did not agree for their data to be shared publicly, so supporting data is not available.

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