OTTAWA -- Amid a $5.2-billion list of budget cuts, the closure by Health Canada of Assisted Human Reproduction Canada barely warranted more than a passing glance.

The agency and its $10-million annual budget barely registered when they did exist, said Karen Busby, a law professor at the University of Manitoba and legal expert in issues of reproductive rights.

"That board wasn't doing anything," she said. "They always had an unclear mandate."

But what the closure did do was highlight the murky world of assisted human reproduction in Canada that leaves infertile couples and their health teams working in an environment with gaping holes in legislation and regulations.

"There are a whole bunch of things that are just really unclear," Busby said.

The agency was created in 2006 to develop regulations to support a new government law on assisted human reproduction. That law did everything from ban payments to surrogate mothers and sperm and egg donors to setting in motion room for the federal government to license and regulate fertility treatments, doctors and clinics.

It barely got off the ground before Quebec challenged the law in court for stepping into provincial jurisdiction. The Quebec Court of Appeal and, ultimately, the Supreme Court of Canada agreed, striking down sections of the Assisted Human Reproduction Act they said infringed on provincial jurisdiction.

Fifteen months later, neither Ottawa nor the provincial governments have moved to address the grey areas the court decision created.
recommending statutory bans on certain activities and federal regulations to oversee others.

1995: The federal government issues a moratorium on nine activities as it worked on legislation to address the commission's issues. Bans include no cloning of human embryos, no commercial surrogacy arrangements, no buying or selling of sperm, eggs or embryos, no donation of eggs in exchange for in-vitro services, no genetic alterations that could be passed on to subsequent generations, no creation of artificial wombs, no sex-selection for non-medical purposes, no creation of human/animal hybrids and no retrieving eggs or sperm from cadavers or fetuses to be used for donation, fertilization or research.

2002: The Assisted Human Reproduction Act is introduced in Parliament. It establishes laws and sets the ground for further regulation in a number of areas, including banning payments for sperm and egg donations or for surrogacy, although allowing reimbursement for out-of-pocket expenses. It also sets out to license fertility clinics and regulate their operations.

2004: The Assisted Human Reproduction Act receives royal assent. The act makes most of the items in the 1995 moratorium law, sets an age limit of 21 for surrogate mothers and establishes penalties up to $500,000 or a 10 years in jail, or both.

2006: The Assisted Human Reproduction Agency is established as the oversight body for the act and to set and police the regulations for the act.

2008: Quebec Court of Appeal rules a number of aspects of the Assisted Human Reproduction Act are not while Ottawa could still ban things such as human cloning and payments for sperm donors, egg donors or surrogate mothers, the courts said the provinces have the jurisdiction for health-care matters such as regulating fertility treatments and deciding how many embryos can be implanted.

Some of the gaps actually open the door for black-market surrogacy arrangements.

While it is illegal to pay for a surrogate to carry your baby or for people to donate sperm or eggs, it is legal to pay them for out-of-pocket expenses. There just isn't anything that says what out-of-pocket expenses actually are.

"The Criminal Code says you can't be paid except according with the regulations, but there are no regulations," Busby said.

Sally Rhoads-Heinrich, founder of Surrogacy in Canada Online, said there are far more couples looking for a surrogate than there are surrogates available.

"When you have one surrogate for every 20 couples, then it becomes about who is offering the most money," Rhoads-Heinrich said. One couple might say they’ll pay reasonable expenses for gas to get to and from the doctor's office or clinic. Another may see paying for groceries, or even compensation for time lost at work as a reasonable expense.

Surrogacy in Canada Online tells most couples looking into surrogacy it will cost about $60,000, including $2,000 to $3,000 a month for the surrogate mother, legal fees, in-vitro treatments, life insurance and DNA to prove the baby is, in fact, related to the intended parents.

If the baby is carried to term and born in Canada, the health-care expenses are also paid by provincial health plans, even if the baby will never be a resident of Canada.

About one in four couples who work with Rhoads-Heinrich's business come from Europe. A small number come from the United States. Many come to Canada in part because the costs are lower when they don't have to pay for the mother's or baby's health-care bills.

"It seems wrong in principle for the Canadian state to pay for all the health care," Busby said.

Rhoads-Heinrich, who delivered twins for a Maryland couple in 2000, said women who choose to be surrogates aren't doing it for the money, but from an altruistic desire to help couples who can't have children on their own.

She said the fact women aren't allowed to be paid for their time works to make surrogacy seem like it's not an acceptable thing to do.
constitutional because they delve into provincial jurisdiction, mainly as it relates to health care.

2010: The Supreme Court of Canada upholds the Quebec appeal court decision, throwing open gaps in legislation and regulation around human-assisted reproductive health that have yet to be closed.

SUPREME COURT OF CANADA DECISION


Four judges say the act is entirely valid. Four judges say several provisions are not, because they cross into provincial jurisdiction. One judge rules some of the provisions are valid, others are not.

The decision grants provinces the jurisdiction over regulating fertility clinics, licensing fertility doctors, and deciding who could reimburse sperm, egg and embryo donors or surrogate mothers for out-of-pocket expenses. It leaves the federal government to bar payments beyond out-of-pocket expenses for surrogates, sperm, egg and embryo donors, as well as the ability to bar other practices such as human cloning or creating embryos for research.

But the government feared women would be exploited -- particularly poor young women -- if having a baby for someone else can net a profit.

Busby said similar sentiments were behind the decision to ban payments to sperm and egg donors, but banning the practice here didn't actually solve the problem, if there was one to solve, she said.

Dr. Jeremy Kredentser, co-director of the Heartland Fertility and Gynecology Clinic in Winnipeg, said now patients in need of sperm donations buy it on the Internet and it is shipped to Heartland. The ban is on paying the person donating the sperm, not buying the sperm.

That said, Busby proves just how out of touch the Canadian ban on paying for sperm is, because all it means is Canadian patients and clinics are paying for sperm from donors in the United States who were paid to donate.

There is also nothing regulating how surrogacy works or what is required, including counselling, screening and informed consent. Nothing requires a legal contract between surrogates and intended parents or regulates what such a contract should say. Nothing in law even protects surrogates from being abandoned.

Rhoads-Heinrich said she knows of five cases in Canada where a surrogate mother was abandoned by intended parents before the birth, leaving her with the baby.

It's unknown how many babies are born of surrogate mothers in Canada each year, Busby said. Some clinics report 30 to 40 per year. Kredentser said Heartland deals with just a handful.

But with more and more couples struggling to conceive, it's becoming more common, said Busby. It's estimated about one in six couples will have trouble conceiving on their own. In Winnipeg, Heartland receives 1,500 to 2,000 new clients every year.

Steve Outhouse, spokesman for federal Health Minister Leona Aglukkaq, said at the moment, the government is focused on moving the still-needed functions of the Assisted Human Reproduction Canada agency within Health Canada itself.

"Regulations aren't a top priority," he said.

Manitoba Health Minister Theresa Oswald's office provided written answers to some questions about fertility treatments. A spokesman said the province is planning to start consultations with the Winnipeg Regional Health Authority and the College of Physicians and Surgeons about what needs to be regulated. That will include a discussion with Ottawa to figure out exactly what the Supreme Court decision means for both levels of government. Kredentser said from the clinic's perspective, there aren't really many gaps that cause problems. The doctors who work there are licensed by the College of Physicians and Surgeons of Manitoba. The clinic is accredited by the college, which means it must
follow guidelines and standards, and it is inspected periodically to ensure it meets certain criteria.

Heartland has mandatory screening and counselling for all its clients, regardless of the treatment being undertaken.

Kredentser said the Supreme Court decision was the right one, but he doesn’t think it caused any major headaches for fertility clinics or their patients.

“All that’s happened is we got the federal government out of things they had no business being in,” he said.

Kredentser said from his perspective, the cost of fertility treatments is a bigger issue than any gaps in legislation or regulations, because it means they are available to some couples but not all.

In-vitro fertilization, where an embryo is created outside the body using sperm and eggs retrieved either from the intended parents or from donors and then implanted in a woman’s uterus, can run upwards of $12,000 per attempt for the drug therapies and procedures involved.

Ontario will pay for up to three cycles of in-vitro treatments for women whose fallopian tubes are blocked.

Since 2010, the province of Quebec has paid for infertility treatments. It covers up to three cycles of in-vitro fertilization, but has limited the number of embryos that can be implanted to a maximum of three at one time.

Manitoba does not cover in-vitro or any other fertility treatments, but since 2010 has offered a fertility treatment tax credit up to $8,000 a year.

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