

UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

INTERIM REPORT TO UNIFORM LAW CONFERENCE OF CANADA

RE: VITAL STATISTICS ACT PROJECT: 2014-2017

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Yellowknife N.W.T.

August 2015

UNIFORM VITAL STATISTICS ACT PROJECT INTERIM REPORT

Interim Report of the Working Group August 2015

1. Introduction

[1] Vital statistics legislation and regimes in many jurisdictions across Canada have remained substantially unchanged for many years since the last ULCC *Uniform Vital Statistics Act* was written in 1987. Consequently, the policies and infrastructure are out of date compared to other governmental bodies, such as corporate and land title registries.

[2] Basic vital statistics information, such as birth rates and causes of death, are an important source of information for statisticians and other researchers who analyze and use the data. We often take vital statistics such as these for granted, most of us having never lived at a time when such details were not recorded. It is second nature to record our children's births, our marriages, and the deaths of our loved ones.

[3] Vital statistics agencies across Canada collect important data on births, deaths, and marriages, among other things. As health and social issues become more complex, it has become increasingly necessary to ensure the content of the vital statistics information collected better reflects modern requirements, that the means of collection are continuously adapted to new technologies, and that the purpose of the collection remains useful and legitimate.

[4] In all Canadian jurisdictions, provincial vital statistics legislation requires modernization. With medical and social changes such as assisted reproductive technologies, dynamic family structures, same-sex marriage, sexual re-assignment, etc., vital statistics acts across Canada are in need of modernization. This project considers the current state of vital statistics legislation in Canadian jurisdictions, which, in many cases, has not been substantially updated in many years. In order to modernize these statutes, the Uniform Law Conference of Canada is developing a new *Uniform Vital Statistics Act* to reflect the modern requirements of statistics use, the new technologies available for collecting information, and to ensure the purpose of the data collection reflects modern and ethical practices.

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2. Project Organization

[5] The *ULCC Uniform Vital Statistics Act Project* is directed by two committees working together to develop the new uniform legislation.

2.1 Vital Statistics Group

[6] The “Vital Statistics Group” of the *ULCC Uniform Vital Statistics Act Project* is a national advisory committee composed of approximately 20 vital statistics workers, Crown counsel, and statisticians. It is co-chaired by Krista Dewey (Director and Deputy Registrar General of Vital Statistics in Nova Scotia) and Josée Dubé (Director and Registrar General of New Brunswick Vital Statistics).

[7] This committee uses its front-line experience and knowledge to highlight and discuss problematic areas where current vital statistics legislation is (or will soon be) inadequate. They are involved with ongoing policy developments in their provinces, as well as any litigation being pursued over issues being discussed by the committees.

[8] At its monthly meetings, the Vital Statistics Group examines a potential list of issues, relates their experiences dealing with these issues, and proposes reforms. These proposals are conveyed to the project’s second committee.

2.2 ULCC Working Group

[9] The “ULCC Working Group” of the *ULCC Uniform Vital Statistics Act Project* is a national project committee composed of approximately 11 provincial and territorial vital statistics registrars, Crown counsel, and ULCC participants. It was chaired by Jim Emmerton prior to his retirement in June 2015. BCLI’s new executive director, Kathleen Cunningham has assumed the role of chair.

[10] The committee reviews the research done by the staff of the British Columbia Law Institute (BCLI) and the recommendations of the Vital Statistics Group, applying their knowledge and taking into account the legal and political landscape of their respective jurisdictions. As the group is mostly represented by Registrars and Directors, the group is well-informed about the development of internal policies, legislative developments, and the complex processes by which vital statistics agencies across Canada work with each other and with other agencies.

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[11] The recommendations of the ULCC Working Group will be incorporated in a final report and draft *Uniform Vital Statistics Act*.

3. Funding

[12] Research and writing being carried out by BCLI is being funded by the governments of each Canadian jurisdiction, with each province and territory aiming to contribute \$4000 for a total of \$45,000. To date, the following provinces and territories have contributed in funding:

- British Columbia (\$4000)
- Saskatchewan (\$4000)
- Manitoba (\$4000)
- Ontario (\$4000)
- Nova Scotia (\$4000)
- New Brunswick (\$2000 per year for 2 years)
- Nunavut (\$50)
- Newfoundland and Labrador (approval for \$2000 per year for 2 years – funding not yet received)

4. Key Issues and Subjects of Research

[13] In developing the project scope, certain subjects were highlighted as being priority topics for research, including:

- Change of sex designation on birth certificates and other vital records
- Privacy and information security
- Updates relating to assisted human reproduction technologies
- Updates relating to new legislation relating to open adoptions, same-sex parent adoption, out-of-province adoptions, etc.

[14] A long list of other subjects was also developed with input from vital statistics registries, including:

- Increasing integration of online applications and records
- Legal presumptions of parentage
- Recognition of signatures in an increasingly digital format
- Certifying deaths and causes of deaths
- Eligibility for name changes

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- Fingerprinting requirements

[15] As of June 9, 2015, the ULCC Working Group has substantially finalized its recommendations on the first three topics of research listed above (change of sex designation, privacy and information security, and assisted human reproduction). The ULCC Working Group will proceed with its recommendations on adoption starting in September 2015.

5. Current Recommendations

5.1 Change of Sex Designation

Sex Designation at Birth

- [16] Where there is certainty as to the anatomical sex of the infant, as determined by the medical professional which attended the birth, the Registrar will make a record of each birth which includes a designation of the male or female sex of the infant.
- [17] Where there is uncertainty as to the anatomical sex of the infant, as determined by the medical professional which attended the birth, the Registrar will make a record of the birth without a sex designation until such time that a sex designation can be determined and the registration is amended to reflect the new information. Mechanisms used to determine the sex of the infant will be determined by regulation.

Sex Designation on Birth Certificates

- [18] The Registrar shall make available for order a birth certificate which displays either the sex of the person as male or female, or a “short form” birth certificate which does not display the sex field. For the latter, the Registrar will clearly disclaim that such a certificate may not be an acceptable form of foundational identification by third parties.

Change of Sex Designation Applications

- [19] An individual may apply for a change of sex designation on a birth registration if the individual is:
 - an adult;
 - a minor with the capacity to make decisions about their vital records; and
 - a parent on behalf of a minor who does not have the capacity to make decisions about their vital records.

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- [20] The Registrar shall not make inquiries as to the capacity of applicants for a change of sex designation on a birth registration. Capacity shall be assumed unless there is a genuine reason to believe otherwise.
- [21] The evidence sufficient for the Registrar to accept an application for a change of sex designation on a birth registration shall include:
 - a statement by the applicant that they:
 - are currently identifying as their desired sex designation; and
 - they intend to live full-time as their desired sex designation; and
 - a statement by a guarantor/supporter¹ stating that:
 - they have known the applicant for a certain period of time²;
 - they have an honest belief that the applicant identifies as their desired sex designation; and
 - they have an honest belief that the application is made in good faith.

5.2 Information and Privacy Protection

Disclosure Principles

- [22] Principles which focus on the use of the information should be prioritized, primarily with principles emphasizing the use of information by specific programs, and the protection and authentication of identity.

Information Sharing Agreements

- [23] The discretion of Registrars to enter into Information Sharing Agreements (ISAs) will be supported and circumscribed by a legislated list of categories of ISA recipients with which information to be shared must be done via ISA.
- [24] Registrars will have the discretion to choose whether or not to accept and enter into an ISA.
- [25] The Minister in charge of vital statistics will have the ability to add or modify categories of recipients to account for ongoing or bulk disclosure, as well as pilot or research projects.
- [26] Compliance with the ISA requirements is mandatory. Departments and organizations which fall within the legislated categories must have an ISA with Registrar before information can be shared. This empowers the Registrar by ensuring their ability to negotiate high-level security and access requirements in the agreements.
- [27] The act will include a purpose-based “catch-all” provision that, rather than relying on organizational distinctions, instead focuses on the purpose and use of information being requested.

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Prescribed Third Parties

- [28] Some prescribed third parties would be eligible (but not automatically entitled – the Registrar would have final discretion) to obtain certificates or extracts of registrations to which they have a close connection – such as their own birth or marriage certificates, or a parent requesting their minor child’s birth certificate.
- [29] Reforms will aim to limit the availability of extracts or copies of registrations to select applicants, as the information contained on a registration is considered primarily for internal use only by the registry. This will be achieved by separating access to certificates and extracts of registrations in the legislation, as opposed to combining them (as is currently the case in many Canadian jurisdictions).

Residual Discretion

- [30] Residual discretion would be preserved, along with language to help guide the registry staff in exercising that discretion. This discretion would allow for both front-line decision-making powers by registry workers, as well as Registrars with policy-making powers to give jurisdictions the ability to adapt to their own jurisdictional issues.

5.3 Assisted Human Reproduction

Dual Approach

- [31] In Canadian law, some jurisdictions do not yet have family or child status legislation defining parental presumptions when children are born using assisted human reproduction technologies. In response, the Working Group chose to develop two models: one for use in jurisdictions *without* accompanying family law legislation, and one for use in jurisdictions *with* accompanying family law legislation.
- [32] The model used in jurisdictions *with* family law legislation aims to defer to the family law legislation’s definitions and principles, and avoid conflicting definitions or principles. Instead, the model will focus exclusively on registration in a manner that is as unobtrusive as possible. This model has not yet been finalized.
- [33] The model used in jurisdictions *without* family law legislation will work as follows:
 - Prior to conception, the birth mother/surrogate and the intended parent(s)

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- will complete sworn affidavits such as those used in British Columbia.
- The birth mother/surrogate will initially be registered as the parent of the child.
 - The intended parent(s) will apply to the registrar to amend the birth registration with their parental information on it in place of the birth mother/surrogate. They will provide the affidavits as evidentiary support for this application.
 - A party who contests the procedure will bear the burden of proving that the surrogacy arrangement ought to be changed – whether that is a surrogate who wishes to revoke her consent to rescind her parental rights, or intended parents who do not wish to have the child.
 - Any disputes will be dealt with by an application to court.
 - There will be no distinction between intended parents with or without genetic links to the child.

6. Future Research and project development

[34] At the next meeting of the project committees in September 2015, the committee will begin to examine the next topic for discussion: adoptions.

[35] In Canada, adoption legislation was enacted in a social context where secrecy was necessary to avoid the social stigma of illegitimacy or infertility. As such, in most provinces and territories vital statistics legislation provides that after adoption, the birth certificate must be amended as if the adoptive child (the “adoptee”) was born to the adoptive parents, and nothing should appear on the certificate that would indicate the child was adopted. Also, the original birth registration is withdrawn from the Vital Statistics registers and permanently sealed away. In effect, the legislation deems the birth mother to not have had a child, and the adoptive mother to have given birth to the adoptee.

[36] The traditional view that emphasizes secrecy tended to encourage legislation that provides for the release of only non-identifying information and strict controls for identifying information, which is generally only released for emergency purposes. For example, some provinces specifically allow the Registrar to disclose information where one of the parties to a proposed marriage is an adopted child, in order for the marriage official to determine whether the parties are within the prohibited degrees of consanguinity, or where the disclosure is crucial to prevent serious harm to the health or welfare of the adoptee or a close relative. Over time, jurisdictions have begun to embrace

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the idea of “open adoptions” and allow for the release of formerly-secret birth information, but with limitations on contact preferences.

Preliminary research on the subject has highlighted the following potential areas of reform:

- Disclosure vetos
- Cross-jurisdictional adoptions
- Lack of uniform language generally

[37] Additional subjects of research and reform will likely be raised by the committees as needed.

[38] Based on the progress to date, it is anticipated that work on developing draft legislation could begin in 2016. A draft final report including a draft Uniform Vital Statistics Act will be submitted to the ULCC for consideration and approval.

This interim report was submitted by:

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¹ The persons who may act as guarantor or supporters have not been finalized, but are intended to be broader than the current practice of limiting supporters to medical professionals who have treated the applicant. In doing so, the Working Group believes this will avoid future human rights issues.

² This figure has not been finalized, but will likely be in the range of one to two years, mirroring the current certifying measures in place for medical professionals who have treated the applicant.