

**UNIFORM LAW CONFERENCE OF CANADA
CIVIL LAW SECTION**

**UNIFORM VITAL STATISTICS ACT (RENEWAL)
Report of the Working Group**

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UNIFORM VITAL STATISTICS ACT RENEWAL PROJECT REPORT

Report of the Working Group August 2016

1. Introduction

1.1 Background

[1] The ULCC *Uniform Vital Statistics Act* was last updated in 1987 (the “1987 Act”). Provincial and territorial legislation has often incorporated the 1987 Act. Appendix C provides a jurisdictional comparison to the 1987 Act and current vital statistics legislation, emphasizing where the law has been adapted in whole, in part, or where it has not been adopted.

[2] Although some jurisdictions have updated certain provisions of their legislation to reflect modern needs¹, many have not, and the lack of uniformity across jurisdictions continues to pose challenges for registries. Vital statistics legislation across Canada must continue to adapt to current legal and societal needs. Many provisions in current vital statistics legislation, including some arising from the 1987 Act, are out of date and in need of reform.

[3] Vital statistics agencies across Canada collect important data. It includes records of births, deaths, and marriages. Basic vital statistics information, such as birth rates and causes of death, are an important source of information for statisticians and other researchers. As health and social issues become more complex, it is increasingly necessary to ensure that the content of vital statistics information collected better reflects modern requirements, the means of collection can be adapted to new technologies, and the purpose for the collection of information remains relevant and constitutionally sound. Reforming vital statistics legislation to address these issues will ensure that vital statistics agencies can better fulfill their mandate to collect and register vital information.

[4] Since the 1987 Act was published, many medical and social changes have taken place. Consequent to such changes as the development of new assisted reproductive technologies, new and dynamic family structures, same-sex marriage, and gender confirmation surgery,² vital statistics legislation across Canada once again requires modernization to be harmonious across jurisdictions.

1.2 Project Status

[5] This report sets out the ULCC Working Group’s final policy recommendations for

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renewal and modernization of the *Uniform Vital Statistics Act* of 1987. Upon approval of the recommendations by the ULCC, the ULCC WG will proceed to the drafting phase with the support of ULCC legislative drafters.

2. Project organization

[6] The *ULCC Uniform Vital Statistics Act Renewal Project* is guided by two committees.³

2.1 Vital Statistics Group

[7] The Vital Statistics Group (“VSG”) of the ULCC Uniform Vital Statistics Act Renewal Project is a national advisory committee. It includes vital statistics Registrars and senior staff, government counsel, and statisticians. The VSG 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). See Appendix A for a list of the VSG committee members.

[8] VSG members provide expert front-line experience and knowledge, highlighting and discussing problematic areas where current vital statistics legislation is (or will soon be) inadequate. Members are involved with ongoing policy developments in their jurisdictions, as well as relevant litigation on issues under discussion.

[9] At its monthly meetings, the VSG examined issues, related experiences dealing with these issues, and proposed reforms for consideration by the ULCC Working Group.

2.2 ULCC Working Group

[10] The ULCC Working Group (“ULCC WG”) of the *ULCC Uniform Vital Statistics Act Renewal Project* is a ULCC project committee. Members include provincial and territorial vital statistics registrars, ministry counsel responsible for their jurisdiction’s vital statistics file, and legislative counsel. Jim Emmerton, Executive Director of the BC Law Institute, chaired the ULCC WG until his retirement in June 2015. His successor, Kathleen Cunningham, has assumed the role. See Appendix B for a complete list of committee members.

[11] The ULCC WG reviewed research carried out by British Columbia Law Institute (BCLI) staff and the recommendations of the Vital Statistics Group. They applied their expertise and considered the legal and political landscapes of their respective jurisdictions,

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the processes for developing internal vital statistics policies, and anticipated or ongoing legislative and judicial developments.

2.3 Funding

[12] Research and writing to support the development of the ULCC recommendations has been carried out by the BC Law Institute. Funding to secure BC Law Institute services was provided by the following provincial and territorial governments, as well as a generous contribution from Statistics Canada: British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, and Nunavut.

3. Key issues and subjects of research

3.1 Priority Issues

[13] The following subjects were identified as priority topics for review:

- Change of sex designations on birth registrations, and birth certificates that respect the human rights of transgender persons;
- Modernization of privacy and information disclosure provisions;
- Registration of the births of children conceived using assisted human reproduction technologies;
- Development of uniform standards for the registration and disclosure of information relating to adoption, including Aboriginal customary adoptions;
- Updating naming convention rules to align with the recommendations of the Truth and Reconciliation Commission report recommendations; and
- Addressing discrete administrative issues, including the requirement that both parents must sign a birth registration parental signatures on birth registrations, the development of a uniform standard for delayed registrations, and the expansion of standards for certifying deaths on death registrations.

4. Guiding principles

[14] As an initial step, the ULCC WG developed a set of “first principles” to guide discussions and recommendations throughout the project. These principles may also guide vital statistics offices when developing local policies during implementation of the *Uniform Vital Statistics Act* and related regulations. Proposed recommendations should recognize the need for vital statistics legislation and registries to:

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- provide essential vital statistics data on populations across Canada;
- remove obstacles which could interfere with human rights according to provincial, territorial, and federal human rights legislation and the Charter of Rights and Freedoms⁴;
- respect the privacy of all parties whose information is being registered;
- provide, to the extent that it is practicable, uniform practices that can be adopted generally by all Canadian jurisdictions and that do not impose unreasonable or unjustifiable obligations on registry staff; and
- provide practices and policies which reflect current societal needs and, to the extent that it is practicable, anticipate future developments in the law.

5. Recommendations

[15] The ULCC WG recommendations are set out below. Unless otherwise noted, these issues are not addressed in the 1987 Act.

5.1 Change of sex designation

[16] The first major issue examined as part of the *Uniform Vital Statistics Act Renewal Project* was the legislative scheme for change of sex designation applications. The procedure recommended by the 1987 Act was to require applicants to have obtained change of sex surgery. This requirement was later found to be discriminatory under both provincial human rights legislation⁵ and the Charter.⁶ Legislative amendments to change of sex designation procedures adopted in response to this litigation often differs from one jurisdiction to the next and lack uniformity.

Sex designation on birth registrations

[17] The project committees considered the possibility of allowing a third sex on birth registrations and certificates.⁷ The committees concluded that flexible reform on the issue of displaying additional (or no) sexes on birth certificates could be achieved, but registrations should continue to display a binary designation.

[18] The project committees unanimously agreed that the birth registration system should continue to register children at birth as either male or female, with one exception for situations where the medical professional certifying the birth is unable to make a determination as to the sex of the child. This third option would provide for a temporary registration of “undetermined”. This option would allow the birth registration to be completed, but a birth certificate would not be issued until the information on the sex of

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the child is accurately collected in a follow-up examination by a medical professional and provided to the registry.

RECOMMENDATION 1 (ADDITION TO SECTION 3)

Where there is certainty as to the anatomical sex of the infant, as determined by the medical professional who attended the birth, the Registrar will make a record of the birth which includes a designation of the male or female sex of the child.

RECOMMENDATION 2 (ADDITION TO SECTION 3)

Where there is uncertainty as to the anatomical sex of the infant, as determined by the medical professional who attended the birth, the Registrar will make a record of the birth as “undetermined” until such time that a sex designation can be determined and the registration is amended to reflect the updated information. Once the sex is confirmed, a birth certificate may then be issued.

The evidence required to update the registration of the sex of the infant should be determined by regulation.

Sex designation on birth certificates

[19] The ULCC WG agreed that while birth *registrations* require accurate information about a person’s sex, birth *certificates* may not. Demographic and other vital statistics information are collected from the registration process, not from the issuance of birth certificates themselves, allowing for the information displayed on birth certificates to be more flexible.

[20] The ULCC WG concluded that birth certificates without sex designations should be an available option for applicants who wish to exercise their freedom to choose whether sex information should be displayed. This short form would be similar to other forms of birth certificates already issued by vital statistics agencies, such as ceremonial birth certificates, or long-form certificates which list the parents’ names. However, as with the other types of issued birth certificates, vital statistics legislation cannot impose a duty on third parties to recognize them as official identity documents. The ULCC WG agreed that the *Uniform Vital Statistics Act* should make birth certificates without sex designations available, but it would be up to other agencies to amend their policies or legislation to accept this new form of birth certificate.

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RECOMMENDATION 3 (ADDITION TO SECTION 31(2))

The Act should provide that the Registrar should make available an optional “short form” birth certificate which does not display the sex field. The Registrar will clearly warn on the application form that such a certificate may not be an acceptable form of identification by third parties.

Change of sex designation applications - eligibility

[21] The 1987 Act restricted change of sex designation applications to adults only. This limitation arose because only an adult could consent to making medical decisions, and the Act required applicants to have obtained change of sex surgery as a prerequisite to the application process. This requirement, now ruled discriminatory,⁸ no longer applies. The remaining application limitations based on the surgery requirement are therefore in need of reform to align with the less onerous application process proposed in this report.

RECOMMENDATION 4 (REPLACEMENT/ADDITION TO SECTION 12)

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; or
- a parent or guardian applying on behalf of a minor who does not have the capacity to make decisions about their vital records.

RECOMMENDATION 5 (REPLACEMENT/ADDITION TO SECTION 12)

The Registrar should not make inquiries as to the capacity of adult applicants for a change of sex designation on a birth registration. Capacity should be assumed unless there is a genuine reason to believe otherwise.

Change of sex designation applications - evidence

[22] The project committees closely followed the Ontario Human Rights Tribunal decision in *X.Y. v. Ontario*⁹ and the Alberta Court of Queen’s Bench decision in *C.F. v. Alberta (Vital Statistics)*¹⁰ when considering reform options on the issue of change of sex surgery. The ULCC WG also heard from a representative of the Canadian Human Rights Tribunal, who provided advice on developing recommendations that will comply with human rights legislation. Individual Vital Statistics Group members also held local consultations with stakeholders from the transgender community on the topic.

[23] The project committees reviewed a range of options to lower or remove the barrier created by requiring change of sex surgery, including requiring that applicants have started

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(or plan to start) hormone replacement therapy, requiring that applicants have an examination and a diagnosis from a doctor as to their gender dysphoria, and/or requiring that applicants swear an affidavit that they intend to live full-time as their designated sex.

[24] The project committees agreed that requiring medical evidence was the most common obstacle for transgender applicants looking to change the sex designation on their vital records. This requirement risks being too onerous and could be held as discriminatory in a similar vein as previous requirements. This is a particularly live issue in remote areas, or areas where prevailing religious or cultural beliefs may make it difficult for an applicant to obtain such evidence.

[25] To address this concern, the ULCC WG concluded that the participation of a guarantor, rather than medical evidence, would be sufficient to meet the information integrity standards needs of vital statistics agencies while also respecting the privacy and dignity of transgender applicants.

RECOMMENDATION 6 (REPLACEMENT/ADDITION TO SECTION 12)

The evidence sufficient for the Registrar to accept an application for a change of sex designation on a birth registration should include:

- a statement by the applicant that they:
 - are currently identifying as their desired sex designation; and
 - intend to live full-time as their desired sex designation; and
- a statement by a guarantor/supporter¹¹ stating that they:
 - have known the applicant for a certain period of time¹²;
 - have an honest belief that the applicant identifies as their desired sex designation; and
 - have an honest belief that the application is made in good faith.

5.2 Information and privacy protection

[26] Disclosure of information by vital statistics agencies is governed by a collection of legislation, information sharing agreements (“ISAs”), and internal policies. The agencies are bound by strict confidentiality requirements in vital statistics legislation, making it crucial to ensure that the requirements are clear and effective at keeping information secure.

Disclosure principles

[27] The ULCC WG took the position that the *Uniform Vital Statistics Act* should emphasize the need to closely examine the intended use of the information to be disclosed.

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When making decisions to disclose information, Registrars should examine the proposed use of the information being requested and evaluate whether that use justifies the disclosure.

RECOMMENDATION 7 (ADDITION TO SECTION 30)

The *Uniform Vital Statistics Act* should include a guiding principle that requires the Registrar to be satisfied that the proposed use of the information justifies the disclosure of the information.

Information Sharing Agreements

[28] Bulk and ongoing disclosure of vital statistic information is most commonly provided pursuant to ISAs. The scope, efficiency, and enforceability of ISAs can vary greatly between jurisdictions. In British Columbia for example, the *Vital Statistics Act* regulations generally identify and list the types of bodies to which information may be disclosed, and the Act gives the government the authority to amend that list as necessary. In Alberta, while it is in the Registrar's best practice to enter into ISAs generally, an ISA is only required in accordance with the regulations when vital statistics information is being disclosed for research purposes.¹³

[29] The project committees agreed that a hybrid approach should be used. The discretion of the Registrar to enter into ISAs should be supported with a legislated list of prescribed ISA recipients for which information may only be shared if an ISA is agreed upon.¹⁴ The requirement to enter ISAs allows the Registrar to establish the terms and conditions under which the prescribed recipient can receive and use the shared information.

[30] The Registrar may also exercise its discretion to enter into ISAs with third parties who are not prescribed in legislation where there is a need for bulk or ongoing disclosure.

RECOMMENDATION 8 (ADDITION TO SECTION 30)

Unless otherwise required by regulation, the *Uniform Vital Statistics Act* should provide the Registrar with discretion to decide whether or not to enter into an ISA.

RECOMMENDATION 9 (ADDITION TO SECTION 30)

The *Uniform Vital Statistics Act* should set out categories of prescribed recipients with whom information may only be shared subject to an ISA.

RECOMMENDATION 10 (ADDITION TO SECTION 30)

The Registrar should have the discretion to set the information disclosure terms before entering into an ISA with a prescribed recipient.

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RECOMMENDATION 11 (ADDITION TO SECTION 30)

The Minister in charge of vital statistics should have the ability to add or modify categories of prescribed recipients in order to provide for ongoing or bulk disclosure, as well as disclosure to support pilot or research projects.

RECOMMENDATION 12 (ADDITION TO SECTION 30)

The *Uniform Vital Statistics Act* should make compliance with the legislative requirement to use an ISA mandatory. Agencies included under the legislated list of authorized recipients must enter into an ISA with the Registrar before information can be obtained from the vital statistics agency.

RECOMMENDATION 13 (ADDITION TO SECTION 30)

The *Uniform Vital Statistics Act* should include a purpose-based discretionary provision that allows the Registrar to enter into ISAs with any other agency or organization, subject to the Registrar's approval of the purpose and use of information being requested.

Eligibility of other recipients to access information¹⁵ - certificates

[31] Over the course of the project committee meetings, many of the participating jurisdictions described their current vital statistics legislation as being broadly written regarding information requests by prescribed recipients. Rather than relying on explicit lists of prescribed parties in vital statistics legislation, Registrars are given discretion in the legislation to disclose information to recipients where the request was appropriate and not for an unlawful or fraudulent purpose. While Registrar discretion was generally held as being a positive aspect of the legislation worth keeping, the project committees raised concerns about the need (and the ability and resource cost) to evaluate each third party request.

[32] The project committees concluded that the *Uniform Vital Statistics Act* should assist in defining the scope of vital statistics agencies' mandate to release information, and to outline who can access such information. This must be done while taking into account the importance of not disclosing too much information (at once or over time, as frequent non-identifiable disclosure can accumulate and become identifiable), as well as the available resources of the responsible vital statistics agency.

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RECOMMENDATION 14 (AMENDMENT TO SECTION 31)

The access provisions of the *Uniform Vital Statistics Act* should permit the following people to request a birth certificate:

- the subject of the certificate;
- a parent or guardian of the subject, if the subject is a minor or is incapable;
- an adult with written authorization from the subject, if they have known the subject for at least one year;
- a person with a court order;
- a person authorized in writing by the registrar; or
- any other person, as defined by regulation.

RECOMMENDATION 15 (AMENDMENT TO SECTION 31)

The access provisions of the *Uniform Vital Statistics Act* should permit the following people to request a death certificate:

- Any person who, in the opinion of the registrar, is able to supply all the required information for the application.

RECOMMENDATION 16 (AMENDMENT TO SECTION 31)

The access provisions of the *Uniform Vital Statistics Act* should permit the following people to request a marriage certificate:

- a party to the marriage;
- an adult with written authorization from a party to the marriage, if they have known the subject for at least one year;
- a person with a court order;
- a person authorized in writing by the Registrar; or
- any other person, as defined by regulation.

Eligibility of other recipients to access information - registrations

[33] The ULCC WG also agreed that registrations should be characterized as internal documents, and that disclosure of registrations (or production of certified copies of registrations) may only occur in limited circumstances – such as where there is a court order, or where an ISA has been entered into in order to ensure the information’s security. However, where jurisdictions only produce one document which contains all of a person’s

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information *and* serves as identification, the use of separate certificates and registrations is also recommended to facilitate the different disclosure standards.

RECOMMENDATION 17 (ADDITION TO SECTION 31)

The *Uniform Vital Statistics Act* should distinguish between certificates and registrations. The access provisions of the *Uniform Vital Statistics Act*'s should permit the following people to request a copy or extract of a birth, death, or marriage registration:

- a person¹⁶ who requires it for a stated reason that, in the opinion of the Registrar, justifies the issuance of the certified copy or extract;
- an officer of Her Majesty in the right of Canada who requires it for use in the discharge of official duties of the officer;
- a person with a court order; or
- any other person, as defined by regulation.

Residual discretion

[34] The project committees believed in the need to ensure Registrars maintain their discretion to make disclosure decisions where it is appropriate to do so. The ULCC WG heard examples of vital statistics agencies that had applicants which were not able to provide the necessary documents due to a variety of circumstances (one example was given of one elderly applicant whose original birth documents were lost in World War 2). In such cases, vital statistics agencies' discretion to accept special-case applications would allow them to better serve their clients' needs to access their own records.

RECOMMENDATION 18 (ADDITION TO SECTION 31)

Discretionary powers should be preserved for the Registrar, along with language to help guide the registry staff in exercising that discretion. This discretion would allow for both registry staff as well as the Registrar to make appropriate disclosure decisions in accordance with the "information use principle".

Conflicts of law

[35] The project committees agreed that the *Uniform Vital Statistics Act* should include a provision that places the exceptions to privacy legislation within the Act itself, rather than being subject to other legislation's disclosure rules. The ULCC WG used Manitoba's *The Child and Family Services Act*, CCSM c C80, s.86.1¹⁷ as a model for this recommendation.

RECOMMENDATION 19 (ADDITION TO SECTION 31)

If a provision of the *Uniform Vital Statistics Act* is inconsistent or in conflict with a provision of provincial or federal privacy legislation, that provision of the *Uniform Vital Statistics Act* should prevail.

5.3 Assisted Human Reproduction (“AHR”)

Default approach to registration of children conceived using AHR

[36] The third topic examined as part of the *Uniform Vital Statistics Act Renewal Project* was assisted human reproduction (“AHR”). Specifically, the project committees discussed the changes needed to ensure that births arising from AHR are accurately registered. In many jurisdictions, the process of determining the validity of AHR arrangements (and defining the subsequent parental rights) is defined in other legislation,¹⁸ while the Vital Statistics Act itself merely acts as a vehicle to register the resulting births.

[37] The project committees faced complications due to the fact that the ULCC previously published a *Uniform Child Status Act* in 2010 which outlined recommendations in this area for family or child status legislation. The *Uniform Child Status Act* contained a series of recommended changes, including a restriction against using surrogacy agreements, the preservation of conjugal presumptions of parentage, and an applicability restriction against intended parents without genetic links to children conceived using AHR.

[38] At the 2015 annual ULCC conference in Yellowknife, Northwest Territories, the ULCC WG was asked to consult with the *Uniform Child Status Act* working group to obtain their feedback on the project’s proposed approach. A research memorandum was prepared which outlined the legal reasoning used by the ULCC WG in developing the new recommendations.

[39] The representatives of the working group for the *Uniform Child Status Act Project*, the Coordinating Committee of Senior Officials in Family Justice ministries (“CCSO Family Justice Council”), expressed a concern that the approach taken by the *Uniform Vital Statistics Act* overstepped the scope of vital statistics and risked interfering with family or child status legislation. The CCSO Family Justice Council was concerned about the possibility that the Act would conflict with existing legislation and create opposing methods by which parentage would be determined. They suggested that the *Uniform Vital Statistics Act* should be limited to registering children and parents as defined by family or child status legislation, and be silent to all other aspects involving AHR.

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[40] The project committees agreed that the *Uniform Vital Statistics Act* should not extend beyond its mandate of registering births and recording parents. Where there exists other legislation in force which determines parentage for children conceived using AHR, the project committees believed such legislation should apply. A broad recommendation was developed to defer to such legislation regardless of regional differences or future changes and amendments.

RECOMMENDATION 20 (ADDITION TO SECTION 3)

The *Uniform Vital Statistics Act* should include a provision which defers to the jurisdiction's family law legislation definitions and principles governing births conceived using AHR.

Interim approach in the absence of other legislation

[41] In the absence of existing family or child status legislation, the ULCC WG believed that some guidance was needed to ensure that Registrars are able to fulfill their responsibility to register births. In Nova Scotia, for example, no law exists to standardize determinations of parentage for children conceived using AHR, and the Registrar is placed in the difficult position of having to evaluate each registration on an individual basis with no legislative guidance.

[42] The ULCC WG reviewed its original recommendations in an effort to address the concerns expressed by jurisdictions lacking AHR provisions in family and child status legislation. The recommendations provide guidance to the Registrar on the necessary process to register births conceived using AHR. They also modernize the approach taken by the *Uniform Child Status Act* to align with the Charter and human rights principles referred to in Part 5.1 (which emphasize the need to remove discriminatory obstacles to accessing personal vital records).

[43] The ULCC WG believed that the *Uniform Vital Statistics Act* should contain provisions which would provide guidance in the absence of other legislation and address issues of particular importance, such as:

- clarifying the need to have a surrogacy agreement, and for registrants to swear an affidavit to that fact;
- developing a registration process that protects the rights of all parties to the surrogacy arrangement, including the biological donor(s), the surrogate, the intended parent(s), as well as the child;
- ensuring a dispute resolution process be used to make findings of parentage, rather than the Registrar; and

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- removing the distinction between genetically and non-genetically linked intended parents and the child conceived using AHR.¹⁹

[44] However, the ULCC Working Group recognized the limited scope of the *Uniform Vital Statistics Act*, and firmly believed that the proposed approach should only be used in the absence of any other legislation on this issue in order to avoid potential conflicts or confusion.

RECOMMENDATION 21 (ADDITION TO SECTION 3)

Where a jurisdiction lacks definitions and principles relating to births originating from AHR in their family law legislation, the *Uniform Vital Statistics Act* provisions should apply until such a time as such legislation is adopted.

RECOMMENDATION 21.1 (ADDITION TO SECTION 3)

Prior to conception, the birth parent/surrogate and the intended parent(s) should complete sworn affidavits which include:

- Basic information about the parties (names, addresses, intended parents' date of marriage/marriage-like relationship if applicable)
- Date of the surrogacy agreement, though the registrar does not view or collect a copy of this agreement.
- Affidavits from the parties that confirm:
 - That the surrogacy agreement was completed before conception;
 - That the surrogate will not be a parent of the child;
 - That the intended parent(s) will be the parent(s) of the child;
 - That prior to the conception, no party to the surrogacy agreement withdrew from the agreement or died; and
 - That after the birth of the child, the surrogate gave written consent to surrender custody of the child to the intended parents.

RECOMMENDATION 21.2 (ADDITION TO SECTION 3)

The birth parent/surrogate will initially be registered as the parent of the child.

RECOMMENDATION 21.3 (ADDITION TO SECTION 3)

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 parent/surrogate. They will provide the affidavits completed before conception as evidentiary support for this application.

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RECOMMENDATION 21.4 (ADDITION TO SECTION 3)

There will be no distinction between intended parents with or without genetic links to the child.

RECOMMENDATION 21.5 (ADDITION TO SECTION 3)

Any disputes will be dealt with by a hearing in a court of competent jurisdiction.

RECOMMENDATION 21.6 (ADDITION TO SECTION 3)

A party who contests the surrogacy agreement will bear the burden of proving that the surrogacy agreement ought to be changed.

Privacy of the birth parent

[45] The project committees also concluded that, in order to preserve uniformity, privacy considerations for birth surrogate birth parents should be aligned with the provisions in a jurisdiction's adoption, family, or child status legislation.

RECOMMENDATION 22 (ADDITION TO SECTION 3)

Information about the birth parent/surrogate in a surrogacy arrangement will be handled according to the privacy provisions in that jurisdiction's adoption, family, or child status legislation.

5.4 Adoptions

[46] Adoptions are primarily regulated under a jurisdiction's adoption legislation, but vital statistics agencies register adoptions and amend birth registrations to reflect the changes contained in the adoption order. They may also play a key role in disclosing information about the adoption. The project committees believed that the *Uniform Vital Statistics Act* reforms regarding adoptions should address two key issues.

[47] First, vital statistics agencies should ensure that applications from persons seeking adoption information are handled by other agencies responsible for post-adoption services. These "post-adoption" agencies are better equipped to deal with the complex nature of adoption information disclosure, and are able to provide additional support to the applicant as needed. Vital statistics agencies, by contrast, operate under a limited mandate to register vital events, produce certificates of those events, and share information under limited circumstances with select recipients.

[48] Second, the *Uniform Vital Statistics Act* should be drafted in such a way that ensures the open exchange of information with these post-adoption agencies. All available adoption

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information should be made available to the post-adoption agency – who can then decide whether or not to disclose it to the applicant. Such openness would address the current concerns facing vital statistics agencies, where information disclosure laws often raise obstacles to communication between agencies communicating with one another. For example, the VS Group explained that the Registrar in Ontario is unable to share information with the Registrar in Newfoundland and Labrador, as the two have conflicting adoption information disclosure rules. Such conflicts make it difficult for the agencies to fulfill their mandates.

[49] The following recommendations reflect the ULCC WG’s reconciliation of these two issues. These recommendations for reform ensure information requests are handled by post-adoption agencies rather than vital statistics agencies, and maximize the amount of support vital statistics agencies can provide to post-adoption agencies in order for both agencies to fulfill their mandates.

Registration

RECOMMENDATION 23 (PRESERVE FROM 1987 ACT)

Vital statistics agencies, upon receipt of an adoption order, should amend the birth registration of the adopted child to reflect the names of the adoptive parents.

Privacy and disclosure

RECOMMENDATION 24 (ADDITION TO SECTION 13)

Adoption orders in the possession of vital statistics agencies should be considered evidence of the registration process and should be treated with the same level of scrutiny and confidentiality as all other evidentiary documents used in other vital statistics applications.

RECOMMENDATION 25 (ADDITION TO SECTION 13)

Subject to applicable restrictions on disclosure contained in legislation governing adoptions, the original birth registration should only be released by vital statistics agencies to the agency responsible for providing post-adoption services once:

- a) An application by a party to the adoption has been made to the agency responsible for providing post-adoption services, and
- b) A request for the original birth registration is relayed from that agency to the vital statistics agency possessing such records.

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RECOMMENDATION 26 (ADDITION TO SECTION 13)

Where there is no agency responsible for providing post-adoption services, or where vital statistics agencies have traditionally fulfilled that purpose, additional regulations should be implemented to ensure that the information is properly disclosed.

Information sharing

RECOMMENDATION 27 (ADDITION TO SECTION 13)

The *Uniform Vital Statistics Act* should include a provision that will ensure the unimpeded sharing of adoption information between vital statistics agencies and agencies providing post-adoption services, but should not mandate the mechanics of the information sharing process. The Act should ensure that vital statistics agencies are free to communicate with post-adoption agencies and disclose the original birth registration of an adopted child or their biological parent(s) making an application for disclosure.

Disclosure vetoes and contact preferences

RECOMMENDATION 28 (ADDITION TO SECTION 13)

The *Uniform Vital Statistics Act* should ensure that a vital statistics agency can inquire about, and disclose the existence of, a veto or other contact preferences²⁰ to the vital statistics or post-adoption agencies in the jurisdiction where a disclosure application has, or had the opportunity to have been made.²¹

Aboriginal customary adoptions

[50] Across Canada, certain Aboriginal groups²² practice a form of adoption that differs from those used by the state. In jurisdictions with significant populations of Aboriginal residents, these alternative adoptions consist of a large proportion of the total number of adoptions in general. While adoption legislation provides the guidance necessary to direct vital statistics agencies to amend birth registrations after a state or private adoption is completed, there is a lack of legislative provisions explicitly regulating Aboriginal customary adoptions (“ACAs”) in most jurisdictions.

[51] While adoption and vital statistics agencies will typically recognize ACAs in practice (a failure to do so risks giving rise to a court challenge given section 35 Charter protection recognizing Aboriginal customs), only three jurisdictions reflect ACAs in their respective vital statistics legislation.²³ The recommendations by the ULCC WG aim to address this gap by providing a framework, modeled on the forms used in Nunavut,²⁴ for recognizing and registering ACAs.

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[52] This framework consists of a detailed list of minimum standards which must be adhered to in order to ensure that as much information as possible is collected about the parties to the adoption. It also ensures that the information collected would be uniform across all Canadian jurisdictions. This framework will achieve the purpose of legislating equality between ACAs and adoptions under adoption legislation.

RECOMMENDATION 29 (ADDITION TO SECTION 1)

“Aboriginal customary adoption” should be defined as: “an adoption performed in accordance with the customary traditions of an Aboriginal group in Canada to which some or all of the parties of the adoption (birth parents, adoptive parents, adopted child) are members.”

RECOMMENDATION 30 (ADDITION TO ADOPTIONS SECTION)

The *Uniform Vital Statistics Act* should include the following provision for recognizing and registering Aboriginal customary adoptions:

- An applicant may give notice to the Registrar of an “Aboriginal Customary Adoption” occurring in accordance with Aboriginal customs or traditions.
- A notice under this section must be given in a form required by the Registrar, and must include, at minimum:
 - The name, date of birth, place of birth, and particulars of birth of the adopted child;
 - The names, dates of birth, and places of birth at the time of adoption of adoptive parent(s);
 - Where applicable, the Aboriginal group to which the biological parents, the adoptive parent(s), and/or the adopted child are members;
 - The names, dates of birth, and places of birth of the birth parents; and
 - An attestation by the biological parents (where applicable) and the adoptive parent(s) that the information supplied is true and that the child was adopted in accordance with local aboriginal customs or traditions.
- Additional requirements may be added as necessary at the discretion of the Registrar or by provincial or territorial regulation.
- An order of a court, or a certificate of an Aboriginal customary adoption that is deemed to be an order of a court from any Canadian jurisdiction, should be registered in lieu of notice under the Act.

5.5 Naming conventions

[53] The law reform issues surrounding naming conventions in vital statistics legislation arose as a result of the recommendations in the Truth and Reconciliation Commission

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Report in 2015. In the report, the Commission recommends the following:

17. We call upon all levels of government to enable residential school Survivors and their families to reclaim names changed by the residential school system by waiving administrative costs for a period of five years for the name-change process and the revision of official identity documents, such as birth certificates, passports, driver's licenses, health cards, status cards, and social insurance numbers.

[54] In response, the Vital Statistics Group recognized that the *Uniform Vital Statistics Act* should address the needs of Aboriginal persons in accordance with this recommendation. While the project committees recognized that the recommendation to waive fees for changes of name was not suited for the *Uniform Vital Statistics Act*,²⁵ it was agreed that the Act should include uniform provisions which would facilitate the reclamation of names for Aboriginal persons. The two key aspects of this objective were the recognition and registration of single names, as well as the recognition and registration of names using Aboriginal characters and syllabics.

[55] Steps to address these issues have already begun in the Northwest Territories, where Health and Social Services Minister Glen Abernathy announced on July 13, 2016 that incoming changes to the territory's *Vital Statistics Act* would allow children to be registered using Dene, Inuvialuit, and Cree characters – and that those characters would be displayed on all identification documents issued by the agency.²⁶ The *Uniform Vital Statistics Act* aims to follow in this direction.

[56] Due to the overlapping nature of vital statistics and change of name legislation, the *Uniform Vital Statistics Act* cannot unilaterally change naming conventions. Instead, the act must provide a name registration framework which harmonizes with change of name legislation. By making changes to the process by which the name of a child is registered at birth, which is within the scope of the *Uniform Vital Statistics Act*, the ULCC WG concluded that the changes to naming conventions would naturally flow to change of name legislation over time.

Single names

RECOMMENDATION 31 (ADDITION TO SECTION 4)

In response to the Truth and Reconciliation Commission Report recommendations, the *Uniform Vital Statistics Act* should include a provision which allows Aboriginal applicants to register their child's name with single name at the time of birth.

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Aboriginal characters and syllabics

RECOMMENDATION 32 (ADDITION TO SECTION 4)

In response to the Truth and Reconciliation Commission Report recommendations, the *Uniform Vital Statistics Act* should include a provision which allows Aboriginal applicants to register their child's name with Aboriginal characters and syllabics at the time of birth.

5.6 Remaining administrative issues

Parental signatures on birth registrations

[57] Of the remaining discrete issues for consideration by the project committees of the *Uniform Vital Statistics Act Renewal Project*, the disparate approaches to parental signature requirements on birth registrations was prioritized as needing reform. Across Canada, the standards for parental signature requirements lack uniformity, and a cautious approach is needed to ensure that parental rights are protected and that discrimination on the basis of sex or marital status is avoided.

[58] In New Brunswick, for example, as birth registration is incomplete unless the “mother” and the “father” of a child sign the registration form. An application must be made to the Registrar General for an exception.²⁷ This contrasts with Alberta, where the birth mother may complete the registration alone if the “other parent” is unknown or unacknowledged – but whose information may not be included on the registration unless the other parent signs the registration as well.²⁸ In Manitoba, there is a presumption of parentage for married couples, and the birth of a child to a married woman is automatically registered showing the particulars of the birth mother's “husband” as those of the child's “father”.²⁹

[59] The ULCC WG concluded that removing presumptions of parentage based on marital or cohabitation status and adopting gender-neutral language was an appropriate reform option. The project committees noted that this approach is currently working well in Alberta,³⁰ and agreed that marriage or cohabitation alone is not necessarily indicative of who the parents of a child are (or are intended to be). This neutral approach also allows vital statistics agencies to focus on and fulfill their mandate of *registering* parentage, rather than making decisions which *determine* parentage.

[60] The project committees also reviewed how the *Uniform Vital Statistics Act* should address the registration of absentee, unavailable, or deceased parents when the birth parent is the only person available to complete the birth registration.

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[61] The British Columbia approach was examined as a possible model. In that province, where the birth parent seeks to unilaterally add the particulars of another parent without their signature, they must provide an affidavit with evidence supporting the addition. Evidence can vary (proof of marriage, supporting statements from the other parent's family, etc.) but it is all reviewed by the Registrar for approval. The project committees agreed that this model was a balanced approach to limit the risks inherent in unilaterally registering details of an absentee parent.

RECOMMENDATION 33 (REPLACEMENT OF SECTION 3)

The *Uniform Vital Statistics Act* should include a provision governing parental signatures on birth registrations which provides for the following:

- A birth registration may be completed by:
 - The birth parent alone;
 - The birth parent and the other parent of the child;
 - The other parent of the child alone, if the birth parent is incapable or deceased; or
 - Any other person present at the time of the birth, if both the birth parent and other parent are incapable.
- A birth registration may only include the particulars of another parent if:
 - The other parent completes the registration at the time of the child's birth;
 - The other parent completes a joint request for parentage with the birth parent and the request is submitted to the registry;
 - The birth parent submits an affidavit and supporting evidence to the Registrar that the other parent is deceased or incapable of completing the birth registration.
 - An order of parentage from a court of competent jurisdiction, is obtained by the birth parent or other parent; or
- A birth registration may be amended to remove a parent of a child from a birth registration if an order from a court of competent jurisdiction is submitted to the registry which demonstrates that a registered parent is not a biological parent of the child.

Delayed registrations

[62] Standards for delayed registrations of birth, marriage, and death are typically found in vital statistics legislation, and provide a basis for defining a cut-off point after which additional evidence must be provided to the Registrar to complete the registration. Separate provisions for delayed registrations are required to ensure that these delayed registrations are not being requested fraudulently or in bad faith.

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[63] The project committees confirmed that a one-year limitation period for delayed registrations is sufficient as it aligns with yearly reporting requirements. It is also a sufficiently long period of time to allow registrants to overcome their unavailability – such as sickness, being out of the province, or other delays.

RECOMMENDATION 34 (ADDITION TO SECTIONS 1, 7, 17, 23)

The *Uniform Vital Statistics Act* should define a “delayed” registration as a registration that occurs after one year of the event having taken place. An applicant submitting a delayed registration should be required to provide the Registrar with satisfactory evidence that the registration should be completed.

Responsibility for certifying deaths

[63] The final administrative issue examined by the project committees was expanding the responsibility for certifying deaths to other health professionals. Currently, vital statistics legislation typically provides that only physicians may certify the death of a person for the purpose of registering their deaths. The project committees agreed that the categories of professionals could be expanded, by regulation, to include other health practitioners. Such a provision will become particularly important in light of Canada’s incoming legislation on physician-assisted dying, as the *Uniform Vital Statistics Act* will need to accommodate the potential for health practitioners other than physicians who may assist a person in dying and then certify the death.

RECOMMENDATION 35 (AMENDMENT TO SECTION 20)

The responsibility for certifying deaths should be delegated to the medical practitioner last in attendance of the person before their death, or any other prescribed person as provided by regulation.

6. Drafting a renewed Uniform Vital Statistics Act

[64] The ULCC WG discussed options for a renewed Uniform Vital Statistics Act. Committee members reviewed the 1987 Act and agreed that the remainder of the Act continues to be appropriate. The committee considered whether the recommendations in this report should be incorporated into the 1987 Act, or passed as a new separate amendments statute.

[65] The committee members noted that the likelihood of a jurisdiction adopting the recommendations would be significantly increased if a complete statute, following modern drafting rules was prepared. The committee agreed that the recommendations in this report

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should repeal and replace the 1987 Act, and that as part of the VSA renewal, the preserved language of the 1987 Act should be modernized and translated into French.

RECOMMENDATION 36:

The 1987 Act should be repealed and replaced, and the recommendations in this report should be drafted to modernize the 1987 Act, reflect modern drafting styles, and provide a French version of the legislation.

7. Notes

¹ Many jurisdictions have adopted discrete provisions relating to assisted human reproduction for example, and all jurisdictions have revised their legislation to remove references to the discriminatory practice of requiring change of sex surgery as a prerequisite to obtaining a change of sex designation. However, these amendments are not uniform between jurisdictions.

² The preferred term “gender confirmation surgery” is used in this report instead of “change of sex surgery” or its variants, except where directly quoting legislation.

³ To ensure clarity, discussions, decisions, and recommendations made throughout this report by both committees will be referred to as being made by the “project committees” generally. Where a discussion, decision, or recommendation was made by one committee alone, the report will refer to the discussion, decision, or recommendation as being made by either the “ULCC Working Group”/“ULCC WG” or the “Vital Statistics Group”/“VSG”.

⁴ The ULCC Working Group carefully considered the implications of human rights litigation decided under provincial and territorial human rights legislation (such as the Ontario Human Rights Tribunal’s decision in *X.Y. v. Ontario*, 2012 HRT 726) and under the Charter (such as the Alberta Court of Queen’s Bench decision in *C.F. v. Alberta (Vital Statistics)*, 2014 ABQB 237).

⁵ *X.Y. v. Ontario*, supra at 3.

⁶ *C.F. v. Alberta (Vital Statistics)*, supra at 3.

⁷ A “birth registration” is the document typically completed by the birth parent at the time of birth which records the birth of the child. The birth registration contains information about the birth parent, the other parent(s) of the child, the child’s name, the child’s sex, the place of birth, the attending physician, and a range of other information used internally by vital statistics agencies for statistical research. A “birth certificate” is “foundational identification” (a piece of identification that is the foundation for other forms of identification – such as passports and drivers’ licenses) that is produced with some of the information contained on the birth registration – such as the child’s name, date of birth, place of birth, and sex. A birth certificate is used as a piece of identification, whereas a birth registration is primarily informational.

⁸ Supra at 4, 5.

⁹ Supra at 4.

¹⁰ Supra at 5.

¹¹ The list of persons who may act as guarantor or supporters has not been finalized, but is intended to be as broad as possible in order to protect against potential geographical, cultural, or religious barriers the applicant may face. The ULCC Working Group believed development of this list is best left to regulation.

¹² 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. The ULCC Working Group believed the final figure is best left to regulation.

¹³ Vital Statistics Information Regulation, Alta. Reg. 3/2012, s.33(2).

¹⁴ This prescribed list would generally include government agencies (such as adoption/post-adoption services, health services, child and family services, etc.), and could also include such non-governmental agencies such as universities or research organizations which frequently require bulk or ongoing disclosure for research purposes.

¹⁵ In contrast to the preceding section which discussed bulk or ongoing disclosure with agencies, this section is concerned with one-time or infrequent disclosure or applications by individuals – typically those searching for their own records.

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- ¹⁶ Including the subject of the certificate themselves.
- ¹⁷ The Child and Family Services Act, CCSM c C80, s.86.1: “If a provision of this Act is inconsistent or in conflict with a provision of The Freedom of Information and Protection of Privacy Act, the provision of this Act prevails”.
- ¹⁸ Family or child status legislation such as Division 2 of the Family Law Act, SBC 2011, c 25 in British Columbia.
- ¹⁹ It is worth noting that Bill 137 (“Cy and Ruby’s Act (Parental Recognition), 2015”), currently in committee in the Ontario Legislature, aims to remove the current distinction between genetically-linked and non-genetically-linked parents, bringing Ontario in line with the recommendations proposed in this report.
- ²⁰ A “contact veto” is a unilateral prohibition against contact registered by a party to an adoption. A party to an adoption can register a contact veto with the appropriate agency, and this would bar any attempt by another party to the adoption to obtain information about the registrant. “Contact preferences” are a registered description of the means by which a party to an adoption is willing to receive contact from another party to the adoption (such as choosing between: telephone, letter, email, or in person).
- ²¹ This option will remain available until such time that adoption legislation in the jurisdiction moves towards an open disclosure model.
- ²² The term “Aboriginal” is used in this report and refers to First Nations, Indigenous, Inuit, and Métis people, keeping in accordance with the use of the term in Charter jurisprudence.
- ²³ Northwest Territories, Nunavut, and British Columbia.
- ²⁴ Though the proposed notice mirrors the forms used in Nunavut, Nunavut benefits from having a discrete Office of the Custom Adoption Commissioner who is responsible for regulating ACAs. In the absence of such a body in most other jurisdictions, the recommendations of the Uniform Vital Statistics Act err on the side of caution and do not overly restrict the recognition and registration of ACAs. Minimum notice standards also allows jurisdictions to individually set their own stricter standards if they believe it is necessary.
- ²⁵ Given the limited time frame of the recommendation, this was seen as an administrative issue best left by local policies or case-by-case exceptions, rather than something to be included in legislation.
- ²⁶ Hillary Bird, “Baby named Sahai?a prompts changes to Vital Statistics Act” CBC (13 June 2016), online: CBC <<http://www.cbc.ca/news/canada/north/nwt-aboriginal-font-official-id-1.3630353>>.
- ²⁷ Vital Statistics Act, SNB 1979, c V-3, ss.7(2)-(3).
- ²⁸ Vital Statistics Information Regulation, Alta Reg 3/2012, ss.2(4)-(5).
- ²⁹ Vital Statistics Act, CCSM c V60, s.3(5).
- ³⁰ Some concerns have been raised by advocacy groups which take issue with the birth mother’s power in acknowledging the fatherhood of the child. Such groups have expressed that the structure is discriminatory by potentially depriving the father from fully participating in the child’s life where the birth mother unilaterally chooses not to register the father’s name. This remains an unresolved issue.