



CARBERT//WAITE^{LLP}

Establishing Parentage for Surrogacy Babies Across Canada

Ellen K. Embury

Fellow, American Academy of Assisted
Reproductive Technology Attorneys

(403) 405-3639

embury@carbertwaite.com

canadafertility.law

Facebook: [@surrogacylawatcarbertwaiteLLP](https://www.facebook.com/surrogacylawatcarbertwaiteLLP)

Instagram: [@surrogacylaw_carbertwaite](https://www.instagram.com/surrogacylaw_carbertwaite)

Parentage Declaration

- Legal process by which the Intended Parents are recognized as the only legal parents of the child born via surrogacy
- Different from an adoption process – different tests
 - Less costly
 - Less time (days or weeks vs. months)
 - No home assessments etc.
- Differences in process between the Provinces in Canada (substantial inter-State differences in USA)
- All Canadian provinces are now “same sex friendly” in practice
- Information in this presentation is current to January, 2022

British Columbia

■ *Family Law Act*, SBC 2011, c. 25

Court Order Required?

No

Administrative process available if criteria in legislation are met

Genetic Link to one IP Required?

No

Requirements (s. 29)

1. Child must be conceived through ART (no sexual intercourse)
2. Written surrogacy agreement prior to conception stating
 - a) Surrogate will be Birth Mother
 - b) Surrogate will surrender Child to IPs
 - c) IPs will be the Child's parents
3. Surrogate provides written consent to surrender Child after Birth
4. IPs take the Child into their care

Donor Parentage Not Presumed

s. 24

British Columbia (Cont'd)

Waiting Period for Surrogate Consent: No

DNA Tests required? No

- If s. 29 criteria are all met, judicial scrutiny is dispensed with
- However, Ministry of Attorney General position is that they will only register names listed as IPs on the Surrogacy Contract (must match exactly)
- s. 31 may be used to override Ministry position on registration but this has not yet been tested
- s. 20(1) refers to up to two parents on Birth Certificate – although in practice it is possible to put more
- Specialized Registration of Birth form for Assisted Reproduction
- Usually Birth Certificates obtained within 2 weeks
- No difference for traditional surrogacies

Alberta

- *Family Law Act, SA 2003, c. F-4.5 (s.8.2)*

Court Order Required?

Yes

Genetic Link to one IP Required?

Yes (if donated embryos must adopt)

Requirements (s. 8.2)

Child must be conceived through ART (no sexual intercourse)

Genetic link to one IP

Donor Parentage Not Presumed

s. 7(4)

Time Limit to bring Application:

s. 8.2(4) 30 days from Birth

Waiting Period for Surrogate Consent:

No

DNA Tests required?

No

Alberta (Cont'd)

- Process is fast, usually have Court Order within 2-4 business days of Birth
- Assigned Judges (by order of Chief Justice has streamlined process)
- IPs usually on Birth Certificate within about 2 weeks
- Initial Birth Registration completed with Surrogate as woman who gave birth and genetic father – this is replaced by Court Order before the Birth Certificate is issued
- Surrogate never appears on Birth Certificate and Vital Statistics destroys the first Registration of Live Birth naming the Surrogate
- No difference with traditional surrogacies (as long as no sexual intercourse)
- Flexible – if there is a reason to name only one IP on the Birth Certificate or to keep the Surrogate on the Birth Certificate for purposes of foreign law, the Courts will permit

Saskatchewan

- *Children's Law Act, SS 2020, c. 2 (March, 2011)*

Court Order Required?

Yes

Genetic Link to one IP Required?

No

Requirements (s. 62(2))

1. Surrogacy agreement must be pre-conception
2. Each party must receive independent legal advice before entering into Surrogacy Agreement
3. Surrogacy agreement must meet prescribed regulations
4. Child must be conceived via method other than sexual intercourse

Donor Parentage Not Presumed

s. 57(1)

Time Limit to bring Application:

90 days from Birth

Waiting Period for Surrogate Consent:

Child must be at least 4 days old

DNA Tests required?

No

Saskatchewan (Cont'd)

- Declarations are available in traditional surrogacies
- Surrogate is listed as “mother” on an initial Birth Certificate together with both IPs
 - *Vital Statistics Act* defines mother as “person who gave Birth”
- Court application proceeds to remove the Surrogate
- Total process is 2 weeks

Manitoba

- *Family Maintenance Act*, CCSM c. F20 (December, 2021)
- Resulted from successful constitutional challenge by Robynne Kazina

Court Order Required?

Yes

Genetic Link to one IP Required?

No

Requirements (s. 24)

1. Surrogacy agreement must be pre-conception
2. Must be assisted reproduction (no sexual intercourse)
3. Surrogacy Agreement must say
 - a) Surrogate will be birth parent
 - b) Surrogate agrees not to be a parent & IPs will be parents
4. Each party must receive independent legal advice before entering into Surrogacy Agreement & Certificate of ILA must be attached to Agreement
5. Surrogacy agreement must meet prescribed regulations
6. Child must be conceived via method other than sexual intercourse

Manitoba (Cont'd)

Donor Parentage <u>Not</u> Presumed	s. 20
Time Limit to bring Application:	30 days from Birth
Waiting Period for Surrogate Consent:	Yes – 2 days post-Birth
DNA Tests required?	No

- Declarations are available in traditional surrogacies
- Surrogate is listed as “mother” on an initial Birth Certificate together with one IP
 - Does not need to be the Bio Dad
- Court application proceeds to remove the Surrogate
- Designated Judge – Court Order issued within 2-3 days of bringing application
- Court appearance is required
- Total process is 2 weeks from bringing application

Ontario

■ *Children's Law Reform Act s.10*

Court Order Required?

No

Administrative process available if criteria in legislation are met

Genetic Link to one IP Required?

No

Requirements (s. 10(2))

1. Surrogacy agreement entered into prior to conception

2. Each party received ILA

3. No more than 4 IPs

4. Conception through ART (no sexual intercourse)

Donor Parentage Not Presumed

s. 5

Time Limit to bring Application:

1 year from Birth

Waiting Period for Surrogate Consent:

7 days from Birth

DNA Tests required?

No

Ontario (Cont'd)

- Only need Court Order if:
 - More than four IPs
 - Consent must be obtained prior to 7 days after Birth
 - Any of the criteria in s. 10 not met (eg. no ILA, surrogacy agreement post-conception)
 - Required by foreign jurisdiction
- Court retains inherent residual jurisdiction “any other declaration” per s. 7(b)
- No difference for traditional surrogacy

Quebec

Civil Code Article. 541 *“Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.”*

Current Process:

- Surrogacies do occur in Quebec
- Surrogate does not need to go on initial Birth Certificate
- Cannot get both (male or heterosexual) IPs on Birth Certificate in absence of adoption (residency requirements)
- Same sex couples - do not have to put the IP with the genetic link on the Birth Certificate
- 2 women on Birth Certificate do not have to adopt – will both go on if living together

Bill 2: Introduced in late 2021 NOT YET LAW

1. Notarized surrogacy agreement prior to conception
2. Legally enshrines right of surrogate mother to change her mind without legal consequences
3. Child has right to know born via contribution of a 3rd party

* Controversial & may still change

New Brunswick

“No legislation anticipating Surrogacy but no problem” - Jocelyne Leger-Nowlan

Practice:

- Birth initially registered with Surrogate as “mother” and Intended Father as father
- Intended Father does not need to be the genetic Intended Father
- Birth Certificate naming Surrogate is never actually issued
- Court application to remove Surrogate & replace with both IPs
- No legislation on donors but courts have no concerns (Judges becoming more knowledgeable)
- DNA evidence might be requested but unlikely
- Not yet had one with no genetic link but does not anticipate a problem
- Typically 2-3 weeks from time of Birth for new Birth Certificate

Nova Scotia

■ *Birth Registration Regulations, Reg 390*

Court Order Required?

Yes

Genetic Link to one IP Required?

Yes (if donated embryos must adopt)

Requirements:

1. Surrogacy arrangement initiated by IPs
2. Surrogacy arrangement planned pre-conception
3. Surrogate does not intend to be a parent
4. Intended Parents intend to be parents
5. Genetic link to one IP
6. Assisted reproduction (no sexual intercourse)

Donor Parentage Not Presumed:

Only anticipates sperm donors (but practically not an issue)

Time Limit to bring Application:

None

Waiting Period for Surrogate Consent:

No

DNA Tests required?

Not in practice

Nova Scotia (Cont'd)

Practice:

- Birth initially registered & Birth Certificate issued with Surrogate as mother and Intended Father as father
- Has been proceeding via desk application
- 2 weeks to get the initial Birth Certificate naming Surrogate and Intended Father from the Registrar
- then 1-2 weeks to get the Order
- then initial Birth Certificate is replaced with new Birth Certificate eliminating Surrogate

Requirement for genetic link: Discrimination?

Prince Edward Island

■ *Children's Law Act*, RSPEI 1988 c. C-6.1 (March, 2021)

Court Order Required?	Yes
Genetic Link to one IP Required?	No
Requirements (s. 23):	<ol style="list-style-type: none">1. Written pre-conception surrogacy agreement2. Surrogate will be Birth Mother3. Surrogate will relinquish child to IPs4. IPs will be parents5. Declaration in form required by Director6. Must have ILA
Donor Parentage <u>Not</u> presumed:	s. 18(4)
Time Limit to bring Application:	None
Waiting Period for Surrogate Consent:	No
DNA Tests required?	No

Prince Edward Island (Cont'd)

Practice:

- Have been able to obtain declarations in past with no genetic link – genetic link not required by Statute
- Same Judge hears all applications
- 2015 problem – Vital Statistics took the position that they would not change Birth Registration despite Court Order. Registrar made one appearance, Judge encouraged them to make the changes and warned of potential cost consequences
- No problems since

Newfoundland

- Parentage Declarations are available pursuant to ss. 6 and 7 of the *Children's Law Act* R.S.N.L. 1990 c.C-13
- There is a reference to Surrogacy in *Vital Statistics Act* S.N.L. 2009 c. V-6.01 (refers to parents being IPs where Declaration has been made)

Process:

- 3 step process
 1. Apply before baby is born for an interim custody based on agreement and affidavits (unique)
 2. At Birth Registration shows surrogate as mother
 3. Post-birth obtain order to change Birth Registration
- Legislation is silent on requirement for genetic link to obtain Declaration
- First Judge to hear one asked for DNA to eliminate surrogate – may not be required
- Timing 3-4 weeks for the Order
- Orders proceed by teleconference not personal appearance
- Neither *Vital Statistics Act* nor *Children's Law Act* appear to contemplate more than 2 parents

Nunavut

- Some express recognition of artificial insemination
- No express reference in the statute to surrogacies
- *Children's Law Act* S.N.W.T. 1997 c. 14 provides for Parentage Declarations
- Recognize other Canadian declarations pursuant to s. 8(d)

Northwest Territories

- *Children's Law Act S.N.W.T.*, 1997 c.14 – no express mention of surrogacy
- Parentage declarations appear to be available – however clear statement that Child is presumed to be Child of Birth mother
- S. 5.1(3) – sperm/egg donors are not by that reason alone parents
- While word surrogacy is not used, s. 8.1 of the Act talks about intent to relinquish the Child to “a person whose human reproductive material was used in the assisted reproduction” – modelled on Alberta?
- Many cultural adoptions take place in NWT – very streamlined and simple – Declaration process may be so new and untested that adoption preferred

Yukon

- *Vital Statistics Act* – no anticipation of surrogacy
- Parentage Declarations may be available under the *Child and Family Services Act*, RSY 2002
- Definition of parents is limited to “natural” parents – with references to DNA testing if necessary