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Via email: Marie.Riendeau@justice.gc.ca

Marie Riendeau
Senior Counsel, Constitutional, Administrative & International Law Section
Public Law and Legislative Services Sector
Department of Justice Canada
284 Wellington Street
Ottawa ON K1A 0H8

Dear Marie Riendeau:

Re: HCCH Parentage and Surrogacy Project

We are writing on behalf of the Family Law Section, Sexual Orientation and Gender Identity Community Section, Immigration Law Section, Child and Youth Law Section, Constitutional and Human Rights Section, International Law Section and Health Law Section of the Canadian Bar Association (CBA Sections) to comment on the Report of the Hague Experts' Group on Parentage and International Surrogacy Arrangements¹ (Report) and on the possibility of further work in this area by the Hague Conference on Private International Law (HCCH).

The CBA is a national association of 37,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law, to the administration of justice and to access to justice. The CBA Sections thank Justice Canada for seeking their views on the Report.

Context

We understand that the Experts' Group proposes that a Working Group be established to explore possible provisions for a Convention and a Protocol, to inform further policy considerations and decisions on the scope, content and approach of any new instruments. The Working Group would proceed on the basis that the aim of a new instrument is to increase predictability, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their human rights. For children, these rights include those enshrined in the *United Nations*

¹ Parentage / Surrogacy Experts' Group, Final Report "The feasibility of one or more private international law instruments on legal parentage", [online](#).

Convention on the Rights of the Child, in particular their right that their best interests be a primary consideration in all actions concerning them. The Working Group would draw on the ideas and assessments in the Experts' Group Report, recognising that a number of elements and approaches identified could feature either on their own or in a combined way.

The CBA Sections recommend that Canada agree with the Experts' Group proposal and establish a working group. We agree that it will lead to greater predictability and consistency in Canadian legislation.

In Canada, the determination of parentage is a provincial matter constitutionally. Eight of ten provinces and all three territories² have legislation addressing parentage of children conceived by assisted human reproduction technology (AHRT). Generally, the intent of the parties on who will parent trumps a genetic connection in registering the parentage of children born by AHRT. However, an international instrument would guide all provincial and territorial legislation on parentage and create a more uniform legal environment.

Considerations for the 2SLGBTQ1+ community

The 2SLGBTQ1+ community is particularly vulnerable to the gaps and differences in the laws around parentage, especially as the issues for queer and transgender parents are not always straightforward issues of biology or adoption. Group parenting structures and polyamorous families are becoming more common in Canada, and our nation is at the forefront of protecting the parentage of the children raised in parenting structures with more than two parents, transgender parents, and children with intended parents different than their biological parents.

Greater certainty around parentage laws can help vulnerable or marginalized populations navigate what is required to ensure that a child's intended parents are recognized as such, and can reduce discrimination on the basis of gender or sexual orientation. Great care must be taken in drafting those regimes to avoid inadvertently creating more barriers for queer and trans parents.

Immigration law considerations

With some exceptions, Canada adopts the principle of *jus sanguinis*, or "derivative citizenship" for a person born to a parent who is a Canadian citizen. Unfortunately, "parent" is not defined in the *Citizenship Act*.³ To determine who is a parent for derivative citizenship, Immigration, Refugees and Citizenship Canada (IRCC) required a genetic link between biological parent and child, evidence of

² See Alberta: *Family Law Act*, SA 2003, c F-4.5, ss 5.1–15 (part 1); Saskatchewan: *The Children's Law Act, 2020*, SS 2020, c 2, ss 55–77 (part 7); Manitoba: *The Family Maintenance Act*, RSM 1987, c F20, CCSM c F20, ss 15–24 (part II); Ontario: *Children's Law Reform Act*, RSO 1990, c C.12, ss 1–17.6 (part I); Québec: *Civil Code of Québec*, CQLR c CCQ-1991, arts 522–542; New Brunswick: *Family Services Act*, SNB 1980, c F-2.2, ss 96–110 (part VI)—no provisions on assisted reproduction; Prince Edward Island: *Children's Law Act*, RSPEI 1988, c C-6.1, ss 17–30 (part 4); Nova Scotia: surrogacy: NS Reg 390/2007, s 5—no provision on assisted reproduction; Newfoundland and Labrador: *Children's Law Act*, RSNL 1990, c C-13, ss 3–23 (parts I–II); Yukon: *Children's Law Act*, RSY 2002, c 31, ss 5–27 (part 1); Northwest Territories: *Children's Law Act*, SNWT 1997, c 14, ss 2–14 (parts I–2); Nunavut: *Children's Law Act*, SNWT 1997, c 14, ss 2–14 (parts I–2).

³ [Citizenship Act \(R.S.C., 1985, c. C-29\)](#).

an intent to parent, and demonstration of parentage as displayed by the existence of a legal parent/child relationship.⁴

In *Canada (Citizenship and Immigration) v. Kandola*⁵ the Federal Court of Canada found that only a genetic link was required between the applicant and her Canadian legal guardian for derivative citizenship to be conveyed. In *Caron c. Attorney General of Canada*⁶ the Superior Court in Quebec declared that the interpretation of the *Citizenship Act* requiring a biological link between parent and child breaches section 15(1) of the *Canadian Charter of Rights and Freedoms*, and should be read and applied such that “parent” in the English text and “*père et mère*” in the French text refer to both biological and legal parentage. On July 15, 2020, IRCC superseded OB 381 in their online [Program Delivery Instructions](#) to expand the interpretation of “parent” for applications of citizenship by descent to include non-biological [legal parents at birth](#) and biological parents. Parents who have been recognized as their child’s legal parent at birth by way of the original birth certificate or relevant birth records (surrogacy contracts, court orders, hospital records, etc.) are eligible to pass down Canadian citizenship with or without a genetic or gestational link to their children.

The Quebec Superior Court and IRCC positions conflict with a Federal Court of Canada decision. Formulating a Convention and Protocol should offer greater predictability and certainty in rules relating to “parentage”, and hopefully lead to clarification in the legislation.

Conclusion

The CBA Sections appreciate the opportunity to raise concerns on this issue. We would be pleased to discuss our recommendations or offer additional insights.

Sincerely,

(original letter signed by Véronique Morissette for Annie Kenet, Hossein Moghtaderi, Lisa Middlemiss, Sarah Dennene, Balraj K. Dosanjh, Ewa Gosal and Valerie D. Wise)

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⁴ IRCC, Operational Bulletin 381 “Assessing Who is a Parent for Citizenship Purposes Where Assisted Human Reproduction (AHR) and/or Surrogacy Arrangements are Involved” (8 Mar 2012), [online](#).

⁵ *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85, [online](#).

⁶ *Caron c. Attorney General of Canada*, 2020 QCCS 2700, [online](#).