

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES AU
STATUT DES ENFANTS, NOTAMMENT CELLES DÉCOULANT DES CONVENTIONS DE
MATERNITÉ DE SUBSTITUTION À CARACTÈRE INTERNATIONAL**

établi par le Bureau Permanent

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**QUESTIONNAIRE ON THE PRIVATE INTERNATIONAL LAW ISSUES
SURROUNDING THE STATUS OF CHILDREN, INCLUDING ISSUES ARISING FROM
INTERNATIONAL SURROGACY ARRANGEMENTS**

drawn up by the Permanent Bureau

*Document préliminaire No 3 d'avril 2013 à l'attention
du Conseil d'avril 2014 sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 3 of April 2013 for the attention
of the Council of April 2014 on General Affairs and Policy of the Conference*

**QUESTIONNAIRE SUR LES QUESTIONS DE DROIT INTERNATIONAL PRIVÉ RELATIVES
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INTRODUCTION

This Questionnaire is addressed to Members of the Hague Conference and other interested States in fulfilment of the mandate provided by the Council on General Affairs and Policy of the Conference ("the Council") in April 2012, following consideration of Preliminary Document No 10 of March 2012.¹ The Council requested that the Permanent Bureau "continue the current work under the 2011 Council mandate and further prepare and distribute a Questionnaire in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage or "filiation" more broadly. The Questionnaire shall seek views on the needs to be addressed and approaches to be taken. The Permanent Bureau is invited to present its final Report to the Council in 2014".²

A detailed chronology of the background to this project is available on the website of the Hague Conference < www.hcch.net >, under "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)".

This Questionnaire has **five parts**:

- **Part I** contains questions on the internal law concerning the establishment and contestation of legal parentage in Member and interested States;
- **Part II** looks to the private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage;
- **Part III** addresses the particular challenges concerning International Surrogacy Arrangements³ ("ISAs");
- **Part IV** considers the current bilateral or multilateral instruments in the field; and
- **Part V** asks for thoughts on possible future work in this area.

Please note that the Permanent Bureau has used the same terminology in this Questionnaire as that which was used in the **Glossary** annexed to Preliminary Document No 10 of March 2012. This Glossary is accessible on the webpage of the project, "The Parentage / Surrogacy Project", then "Chronology of the Project (including relevant documentation)" and then "2011 - 2013".

The Permanent Bureau invites responses to the Questionnaire (in either English or French) by no later than **1 August 2013** in order to allow the Permanent Bureau sufficient time to consider the responses and to prepare the final Report requested by Members for the Council of 2014. Answers should be sent by e-mail to < secretariat@hcch.net > with the following heading and indication in the subject field: "Questionnaire - Parentage / Surrogacy - [name of Member, State or territorial unit, where applicable]".

It is acknowledged that this is a detailed Questionnaire and that, due to the legal position in some States, it may not be possible for Members and interested States to respond to all of the questions. The Permanent Bureau is extremely grateful for any information which may be provided. It is also hoped that the detailed information in the responses to this Questionnaire may be of use to Members beyond this project: for example, where consideration is being given, now or in the future, to domestic legislation in any of the areas considered below.

¹ Prel. Doc. No 10 of March 2012, "A Preliminary Report on the issues arising from international surrogacy arrangements", drawn up by the Permanent Bureau. See also the earlier Prel. Doc. No 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", also drawn up by the Permanent Bureau.

² Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 17-20 April 2012, para. 21. The "2011 Council mandate" referred to therein can be found at paras 17 to 20 of the Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference, 5-7 April 2011.

³ See the **Glossary** annexed to Prel. Doc. No 10 of March 2012 (see note 1) for the definition of the terms used in this paper.

Please note: the Permanent Bureau intends, except where expressly asked not to do so, to place replies to this Questionnaire on the website of the Hague Conference.

Identification

Name of State (or territorial unit, where applicable): **CANADA**

Information for follow-up purposes

Name and title of contact person: Marie Riendeau

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QUESTIONNAIRE

Note: wherever possible, please provide a copy of, or a web-link to, any legislation, rules or case law mentioned in your response, along with a translation into English or French.

Part I: Internal law concerning the establishment and contestation of legal parentage

A. Birth registration

1. Please indicate which authorities in your State are responsible for registering the birth of a child:

PART I OF THE QUESTIONNAIRE

In Canada, birth registration and legal parentage fall under the legislative authority of the provinces. Responses are provided separately (see Annexes 1 to 5) for Alberta, British Columbia, Manitoba, Quebec and the Northwest Territories, which all have distinct legal regimes on such matters. Please note that the legal regimes in the other Canadian jurisdictions are closer to the legal regime of Manitoba. In addition, Quebec has legislation governing clinical and research activities relating to assisted procreation.

Some questions in Part I of the Questionnaire deal with citizenship, which is a matter of federal jurisdiction, and with certain aspects of assisted human reproduction that are regulated under the federal Assisted Human Reproduction Act. In both of these areas, to the extent where federal legislation applies, the responses provided below to questions 16, 17, 18, 25, 30, 38, 39 and 40 are relevant in all the Canadian jurisdictions.

PART II OF THE QUESTIONNAIRE

Private international law rules dealing with birth registration and legal parentage fall under provincial responsibility as well. Responses are provided separately for Quebec and the Canadian common law jurisdictions (see Annexes 6 and 7).

2. Please briefly describe the procedure for birth registration in your State, indicating whether such registration is mandatory⁴ and providing details concerning any specific rules which must be complied with (e.g., within what timeframe must a birth be registered, who can register a birth and where must the birth be registered):

3. Please explain what proof (evidence), if any, of legal *maternity* is required by the authorities in your State in order to register a putative⁵ legal mother:

Please tick all which apply:

- a) Hospital birth record (stating the name of the woman who gave birth to the child)

⁴ See Art. 7 of the United Nations *Convention on the Rights of the Child* ("UNCRC"), 20 November 1989, which states that, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

⁵ "Putative" means "generally considered or reputed to be" and, in this document, is taken to mean the woman or man *claiming or claimed* (where it is not the individual him or herself making the assertion) to be the legal mother or father, respectively, of the child.

- b) Sworn statement by the putative legal mother stating that she gave birth to the child
- c) Signed statement by the putative legal mother stating that she gave birth to the child
- d) DNA test to prove a genetic link between the putative legal mother and child
- e) Other: please explain
4. Please explain what proof (evidence), if any, of legal *paternity* is required by the authorities in your State in order to register a putative legal father:
- Please tick all which apply:
- a) Formal acknowledgement⁶ by the putative legal father
- b) Formal acknowledgement by the putative legal father, with the legal mother and / or the child's evidenced consent: please specify
- c) Judicial decision (court order) establishing or confirming legal paternity
- d) Sworn statement by the putative legal father stating that he is the genetic father
- e) Signed statement by the putative legal father stating that he is the genetic father
- f) Signed agreement between the legal mother and putative legal father
- g) DNA test to prove a genetic link between the putative legal father and child
- h) Other: please explain
5. What are the legal consequences in the internal law of your State of registering persons in the State records⁷ as the parents of a child?
- a) Those persons are the legal parents of the child for all purposes, unless and until the record is contested, and all the legal consequences which flow from legal parentage in your State will automatically follow (e.g., duty to provide maintenance, inheritance rules, naming rules, etc.):
- b) Other: please explain
6. Are there any penalties for failing to comply with the rules concerning birth registration in your State: for example, misrepresenting to the authorities who are / is the legal parent(s) of the child?
7. Is it possible to give birth anonymously in your State?
- Yes
- No

If so, please explain any rules which apply to such an anonymous birth and state what will appear on the child's birth record and / or birth certificate:⁸

⁶ In some States, this is called a "recognition" of paternity: the term "acknowledgement" is used in this document to avoid confusion with the private international law concept of "recognition". See further **Questions 11 et seq.** below.

⁷ It is acknowledged that there are different methods of recording births (and therefore legal parentage) across States, as well as different rules concerning matters such as when birth certificates will be issued, what information should be contained within the certificate and their constitutive value. Where applicable, please provide information concerning the rules in your State.

⁸ In this document, the "birth record" is taken to mean the information concerning the child's birth (including legal parentage) which is stored in the records of the relevant State authority (usually a registry). In contrast, the "birth certificate" is taken to mean the *extract* from this birth record which is usually given to the legal parent(s) to keep. In some States it may be that the information contained within the birth record is comprehensive (e.g., if the child has been adopted, the birth record will identify the birth parent(s)), whereas the birth certificate may provide only a limited part of this information. See also *ibid.*

B. Establishment of legal parentage

8. Who, upon the birth of a child, is the legal mother *by operation of law* in your State (*i.e.*, with no need for the woman to take any steps to establish her legal maternity)?

- a) The woman who gives birth to the child
- b) The genetic mother (*i.e.*, the woman whose gamete (egg) created the child)
- c) There is no legal mother *by operation of law*: please explain
- d) Other: please explain

9. Who, upon the birth of a child, is the legal father *by operation of law* in your State (*i.e.*, with no need for the man to take any steps to establish his legal paternity)?

- a) The husband of the woman who gave birth is *presumed* to be the legal father
- b) The male partner of the woman who gave birth is *presumed* to be the legal father – please provide any conditions (*e.g.*, the couple must be cohabiting, etc.)
- c) The genetic father (*i.e.*, the man whose gamete (sperm) created the child)
- d) There is no legal father *by operation of law*: please explain
- e) Other: please explain

If legal presumptions operate in your State, please specify in what circumstances, if any, it is possible to “rebut” these presumptions:

10. a) Is it possible in your State for a non-contentious (*i.e.*, unchallenged) application to be made to the relevant State authorities for a decision (sometimes called a “declaration”) establishing or confirming the legal parentage of a child?

- Yes – go to **Question 10 b**).
- No – go to **Question 11**.

b) Please explain to which State authorities such an application should be made:

- i. The authority responsible for birth registration (see **Question 1** above)
- ii. The judicial authorities (*i.e.*, the courts): please specify
- iii. Other State administrative authorities: please specify
- iv. Other: please explain

c) Please explain who may bring such an application:

- i. Only the individuals currently considered to be the legal mother and / or father and / or the child
- ii. Any person claiming to be the legal mother and / or father of a child
- iii. Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question:
- iv. Any person
- v. Other: please explain

d) Is there a timeframe within which such an application must be made?

- Yes, please specify:
- No
- In certain situations: please explain

11. Is it possible in your State for a putative legal father to “voluntarily acknowledge”⁹ his legal paternity (if his legal paternity has not arisen by operation of law – see **Question 9** above)?

⁹ See note 6 above.

- Yes
 No

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic father, the man must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of the mother and / or child are required:

In particular, please state whether it is possible for an individual to acknowledge legal paternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

12. Is it possible in your State for a putative legal mother to "voluntarily acknowledge" her legal maternity?

- Yes
 No
 Not applicable – legal maternity always arises by operation of law (see **Question 8** above).

If so, please explain (1) if there are any restrictions placed upon who may undertake such an acknowledgement (*e.g.*, it must be the genetic mother, the woman must be over a certain age, etc.), (2) the procedure for undertaking such an acknowledgement, and (3) whether the consent(s) of any others is / are required:

In particular, please state whether it is possible for an individual to acknowledge legal maternity to representatives of your State authorities in another country (*e.g.*, usually to the consulate or embassy in that State). Please explain the procedure and whether there are any conditions which must be fulfilled:

13. Please explain the legal consequences in your State of a "voluntary acknowledgement" of legal parentage:

- a) Once the acknowledgement is authenticated by the State authorities, the author of the acknowledgement is considered a legal parent of the child for all purposes
b) The acknowledgement is merely a declaration by the author that he / she is a legal parent and says nothing of the State's acceptance of that issue
c) Other: please specify

14. Is it possible for legal parentage to be established by agreement between the putative parents?

- Yes
 No

If so, please explain the procedure which must be undertaken and specify any restrictions which operate:

15. Is it possible in your State for two persons of the same-sex to be the legal parents of a child?

- Yes
 No

If so, please explain the legal mechanisms available in your State which enable this. Please tick all which apply and provide a brief explanation of the rule(s) and procedure. This may arise by:

- a) Operation of law:
 b) Order of the court or other State authorities:
 c) Adoption:
 d) Other:

C. Establishment of legal parentage where assisted reproductive technology ("ART")¹⁰ has been used¹¹

16. Is ART permitted in your State?

- Yes, all forms of ART are permitted
 Yes, but there are certain restrictions on the services available and who may access these services: please specify

The Assisted Human Reproduction Act [S.C. 2004, c. 2 <http://laws-lois.justice.gc.ca/eng/acts/a-13.4/FullText.html>] prohibits certain ART activities and regulates certain non-prohibited activities. It is a federal act; it therefore applies in all the Canadian jurisdictions.

The Assisted Human Reproduction Act notably prohibits:

- commercial surrogacy (i.e. paying, offering to pay or advertising that consideration will be paid to a women to be a surrogate mother (section 6(1));
- accepting consideration for arranging for the services of a surrogate mother, offering to make such an arrangement for consideration or advertising the arranging of such services (section 6(2));
- paying consideration to another person to arrange for the services of a surrogate mother, offering to pay such consideration or advertising the payment of it (section 6(3));
- counseling or inducing a woman to become a surrogate mother, or performing any medical procedure to assist a woman to become a surrogate mother, knowing or having reason to believe that the woman is under 21 years of age (section 6(4));
- purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor(section 7(1));
- purchase, offer to purchase or advertise for purchase of an in vitro embryo or sell, offer for sale or advertise for sale an in vitro embryo (section 7(2));
- purchase, offer to purchase or advertise for purchase human cell or gene from a donor or person acting on behalf of a donor with the intent of using the gene or cell to create a human being or making it available for that purpose (section 7(3));

¹⁰ In this document, "assisted reproductive technology" ("ART") is used in a broad sense to refer to any method used to achieve conception which involves artificial or partially artificial means and which is undertaken by a medical / health clinic or institution: *e.g.*, two of the most common methods are artificial insemination and in-vitro fertilisation. Donated gametes (egg and sperm) may be used but will not always be necessary. In this document, ART does not refer to "do-it-yourself" or "DIY" methods of non-procreative conception: *i.e.*, where medical third parties are not involved in the procedure.

¹¹ Please note: surrogacy arrangements are dealt with separately in **Section D** below.

- use of gametes to create an embryo without written consent of the donor (section 8(1));
- removal of human reproductive materials from a donor's body to create an embryo without written consent of donor (section 8(2));
- use of embryo for any purpose without written consent of the donor for that use (section 8(3)); and
- obtaining any ovum or sperm from a donor under 18 years of age, or using any such ovum or sperm, except for the purpose of preserving the ovum or sperm for the purpose of creating a human being that will be raised by the donor (section 9)

Section 12 of the Assisted Human Reproduction Act has not yet been brought into force. It prohibits, except in accordance with the regulations (yet to be adopted), the reimbursement of a donor for an expenditure incurred in the course of donating sperm or an ovum; the reimbursement for an expenditure incurred in the maintenance or transport of an in vitro embryo; and the reimbursement of a surrogate mother for an expenditure incurred by her in relation to her surrogacy. Section 12 also provides that a receipt must be provided for any reimbursement, and that a surrogate mother shall not be reimbursed for a loss of work-related income incurred during her pregnancy, unless (a) a qualified medical practitioner certifies, in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus; and (b) the reimbursement is made in accordance with the regulations (not yet adopted).

Sections 60, 61 and 62 provide for the penalties for contraventions to the Assisted Human Reproduction Act as follows:

60. A person who contravenes any of sections 5 to 7 and 9 is guilty of an offence and
 - (a) is liable, on conviction on indictment, to a fine not exceeding \$500,000 or to imprisonment for a term not exceeding ten years, or to both; or
 - (b) is liable, on summary conviction, to a fine not exceeding \$250,000 or to imprisonment for a term not exceeding four years, or to both.
61. A person who contravenes any provision of this Act — other than any of sections 5 to 7 and 9 — or of the regulations or an order made under subsection 44(1) is guilty of an offence and
 - (a) is liable, on conviction on indictment, to a fine not exceeding \$250,000 or to imprisonment for a term not exceeding five years, or to both; or
 - (b) is liable, on summary conviction, to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding two years, or to both.
62. A court that imposes a fine or term of imprisonment on a person in respect of an offence under this Act may
 - (a) order the forfeiture and disposition, subject to section 54, of any material or information by means of which or in relation to which the offence was committed; or
 - (b) on application by the Attorney General of Canada, order the person not to engage in any activity that, in the court's opinion, may lead to the commission of an offence under this Act.

N.B. The Assisted Human Reproduction Act does not govern the validity and enforceability of surrogacy arrangements or the establishment of legal parentage, which are matters that fall under provincial jurisdiction. See responses to questions 24 to 30 in Annexes 1 to 5.

- No, all forms of ART are completely prohibited – **please go to Section D.**
- Other: please explain

17. Is there regulation of the use of ART in your State?

- Yes, legislation regulates the use of ART: please briefly explain See response to question 16, above, in regard to the application of the Assisted Human Reproduction Act.
- Yes, there are rules or "codes of practice" concerning the use of ART which emanate from the medical regulatory bodies: please briefly explain
- No, there are no rules at all – **go to Question 19**
- Other: please explain

18. If ART is regulated in your State, please state whether the legislation or rules specify the following matters (please tick all which apply and provide a brief explanation, where applicable):

- a) Who may access ART services (e.g., relationship status; age or health requirements; nationality / residency requirements, etc.):
- b) Who may perform ART services:
- c) The regulation of medical or other institutions which perform ART services (e.g., the licensing of clinics or hospitals):
- d) Which ART services may be performed: See response to question 16, above, in regard to the Assisted Human Reproduction Act.
- e) Whether egg donation is permitted and, if so, under which conditions: See response to question 16, above, in regard to the Assisted Human Reproduction Act.
- f) Whether sperm donation is permitted and, if so, under which conditions: See response to question 16, above, in regard to the Assisted Human Reproduction Act.
- g) The costs of ART (including the amount paid to any gamete donors): See response to question 16, above, in regard to the Assisted Human Reproduction Act.
- h) The anonymity of gamete donors:
- i) The right of the child to know his / her genetic or birth origins:
- j) The legal parentage of any child born as a result of ART (see also **Questions 19 to 22** below)
- k) Other: please explain

19. Please explain the consequences of ART for legal *maternity* arising *by operation of law*:

- a) The woman giving birth to the child will always be considered the legal mother of the child, irrespective of any ART which has led to the birth
- b) Other: please specify

Please explain whether the above position results from legislation, rules, case law or other source(s) of law:

20. Please explain the consequences of ART for legal *paternity* arising *by operation of law*:

Please tick all boxes which apply:

- a) The husband of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
- b) The male partner of the woman giving birth following ART is the legal father of the child born: please state whether it is necessary for him to have formally consented to the treatment:
- c) The genetic father will always be the legal father:

d) Other: please explain

Please explain whether the above position results from legislation, rules, case law or other source(s) of law:

21. Please explain whether gamete donors are, in any situations, considered the legal parent(s) of a child born as a result of ART:

22. If your State permits same-sex couples to access ART services, please specify the consequences concerning legal parentage for any child born to a same-sex couple who have used ART to conceive a child:

23. Is information available concerning how many ART procedures are undertaken in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information
 No
 Other: please explain

D. Surrogacy arrangements

Regulation of surrogacy

24. Does your State permit surrogacy arrangements?

- a) Yes, *all* forms of surrogacy arrangements are permitted:
 i. As a result of express legislation or rules: please specify
 ii. By default, because surrogacy is unregulated in internal law.
 Go to **Question 26.**
- b) No, any form of surrogacy is expressly prohibited by law: please specify, including any sanctions for breach of this prohibition:
 Go to **Question 26.**
- c) It depends upon the nature of surrogacy arrangement (*e.g.*, commercial surrogacy arrangements are prohibited): please specify
- d) Other: please specify

Please provide any clarification, where necessary:

See response to Question 16, above, regarding the application of the federal Assisted Human Reproduction Act.

25. If your State has legislation or rules permitting certain or all forms of surrogacy arrangements:

- a) Are the parties to the surrogacy arrangement required to obtain State approval of the arrangement *prior* to conception?
 Yes, pre-approval by the relevant State authorities is required. Please explain the procedure:

- No, pre-approval is not required – the rules only regulate legal parentage following the birth of the child. Please explain the procedure:
 Other: please specify

b) Please state whether the following aspects of the surrogacy arrangement are regulated in the rules / legislation:

Please tick all which apply:

- i. Who may be intending parents¹² to an arrangement, including:
- a. Nationality, domicile or residency requirements:¹³
please specify
 - b. Marital or other relationship status:
 - c. Age requirements:
 - d. Health requirements:
 - e. Psycho-social requirements:
 - f. Other:
- ii. Who may be a surrogate mother, including:
- a. Nationality, domicile or residency requirements:¹⁴
please specify:
 - b. Marital or other relationship status:
 - c. Age requirements: See response to question 16, above, in regard to the Assisted Human Reproduction Act.
 - d. Health requirements:
 - e. Psycho-social requirements:
 - f. The surrogate mother must already have her own children:
 - g. Other:
- iii. Which types of surrogacy arrangements are permitted, *e.g.*, traditional and / or gestational,¹⁵ etc.: please specify
- iv. Which medical institutions or clinics may facilitate a surrogacy arrangement (where medical intervention is necessary for the type of surrogacy arrangement being undertaken) and the level of financial remuneration which may be paid for these services: please specify
- v. Which other bodies or persons may facilitate a surrogacy arrangement (*e.g.*, by acting as an intermediary and undertaking tasks such as advertising for surrogate mothers, “matching” surrogate mothers with intending parents, organising certain aspects of the arrangements for the intending parents, etc.) and whether such bodies or persons may receive financial compensation for their services: please specify See response to question 16, above, in regard to the Assisted Human Reproduction Act.
- vi. Whether financial remuneration can be paid to the surrogate mother:
- a. No financial remuneration at all is permitted
 - b. Only reasonable expenses may be paid: in which case please state whether the legislation or rules define what are such “reasonable expenses”: See response to question 16, above, in regard to the Assisted Human Reproduction Act.

¹² Please note that, for simplicity, this document always refers to intending parents in the plural form. However, it is understood that, in some States and in certain circumstances, single persons may enter into a surrogacy arrangement. Please specify this, where relevant, in any response.

¹³ See **Parts II** and **III** below for questions concerning the private international law rules regarding legal parentage and international surrogacy arrangements, respectively.

¹⁴ See **Parts II** and **III** below for questions on the private international law rules concerning legal parentage and international surrogacy arrangements, respectively.

¹⁵ See the **Glossary** for the definition of the terms used in this paper.

- c. Compensation beyond reasonable expenses is permitted: please specify what exactly is permitted:
- vii. Whether the surrogacy arrangement is contractually enforceable: please specify
- viii. Who may make decisions concerning the pregnancy (*e.g.*, whether an abortion should be undertaken in certain situations, what medical treatment should be undertaken if problems arise, etc.): please specify
- ix. The legal parentage of the child following his / her birth (see further **Questions 26 to 30** below):
- x. Other: please specify
- c) Please explain any legal consequences, both criminal (*e.g.*, penal sanctions) and civil (*e.g.*, for the legal parentage of the child), if the requirements set down in the legislation or rules are not complied with: See response to question 16, above, in regard to penalties under the Assisted Human Reproduction Act.
- d) Please provide any additional information you think necessary concerning the nature of the regulation of surrogacy in your State:

Surrogacy and legal parentage

26. Upon the birth of a child following a surrogacy arrangement, who is / are the legal parent(s) *by operation of law* (*i.e.*, without any further steps being taken by any individuals) according to the internal law of your State?

Please explain, including whether this results from legislation, case law or other source(s) of law:

27. Where necessary, are there any legal mechanisms in your State to enable intending parents to establish their legal parentage?

Please tick all which apply:

- a) Yes, prior to the birth the intending parents can seek a court order declaring that they will be the parents of the child born to a surrogacy arrangement (a "pre-birth order").

Please specify any legal requirements to obtain such an order (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- b) Yes, *following* the birth the intending parents can seek a court order transferring legal parentage to them (in some States, known as a "parental order" or "parentage order").

Please specify any legal requirements to obtain such a transfer of legal parentage (including any nationality / domicile / residency requirements) and state whether this position arises from legislation, case law or other source(s) of law:

- c) No
- d) Other: please specify
- e) Such mechanisms are unnecessary – the surrogacy contract is sufficient to establish the legal parentage of the intending parents.

- f) Such mechanisms are unnecessary – the intending parents will be the legal parents upon the birth of the child by operation of law: see the response to **Question 26** above.

28. Where a surrogacy arrangement has been undertaken in your State, will the fact of the surrogacy arrangement be visible on the child's birth record and / or certificate?

- Yes: please describe exactly what will be on the record and / or certificate
 No: please explain

29. Is information available concerning how many surrogacy arrangements take place in your State each year and how many children are born as a result?

- Yes: please provide a copy of, or a link to, the information
 No
 Other: please explain

30. Are you aware of any illegal practices in your State concerning surrogacy arrangements?

- Yes – please state the practices of which you are aware and, if possible, how frequently they are occurring: The first charges under the Assisted Human Reproduction Act were laid in February 2013 before a court in the province of Ontario. A company and its owner face 19 charges including charges relating to payment for arranging the services of a surrogate mother, the purchase of ova from a donor and payment to a woman to become a surrogate mother.
 No
 Other: please explain

E. Contestation of legal parentage

31. Which authority(ies) in your State may determine a dispute concerning legal parentage?

- a) The authority responsible for birth registration (see **Question 1** above)
b) The judicial authorities (*i.e.*, the courts): please specify
c) Other State administrative authorities: please specify
d) Other: please explain

32. Who may bring an action to challenge legal parentage?

- a) Only the individuals currently considered to be the legal mother and / or father and / or the child
b) Any person claiming to be the legal mother and / or father of a child
c) Any person determined by the State authorities to have sufficient interest to bring a claim: please explain how the authorities determine this question
d) Any person
e) Other: please explain

33. Is there a timeframe within which legal parentage must be challenged (*i.e.*, after which time, any challenge to legal parentage is effectively barred)?

- Yes, please specify:
 No
 In certain situations: please explain

34. On what grounds may legal *maternity* be challenged before the authorities in your State?
- Only on the basis that the "mother" did not, in fact, give birth to the child
 - Only on the basis that the "mother" is not, in fact, the genetic mother of the child (*i.e.*, the woman from whom the gamete (egg) came)
 - Other: please explain
35. On what grounds may legal *paternity* be challenged before the authorities in your State?
- Only on the basis that the "father" is not, in fact, the genetic father of the child (*i.e.*, the man from whom the gamete (sperm) came)
 - Other: please explain
36. What are the legal consequences of a successful challenge concerning legal parentage?
- The decision of the State authorities concerning legal parentage is binding *erga omnes* (*i.e.*, on all persons, for all purposes)
 - The decision of the State authorities will only be binding for limited, specific purposes: please explain
 - It depends upon the context in which the challenge has been made (*e.g.*, if in the context of a maintenance claim, it will be binding only as concerns the payment of maintenance): please explain
 - Other: please explain
37. What happens to a child's birth record and / or birth certificate when legal parentage is successfully challenged?
- The birth record and / or certificate is revised and the old record and / or certificate will be permanently deleted
 - The birth record and / or certificate is amended but the original record and / or certificate is retained
 - Other: please explain

F. The acquisition of nationality by children

38. How may a child acquire the nationality of your State?

Please tick all which apply:

- By birth within the territory of the State
- By "descent", where one or both of his / her *legal* parents is / are a national of the State: please explain which law, in this context, will apply to the question of who is / are the child's *legal* parents for the purposes of determining nationality:
- By "descent", where one or both of his / her *genetic* parents is / are a national of the State: please explain how the genetic link must be evidenced:
- If the child would otherwise be "stateless" (*i.e.*, without the nationality of any other State):¹⁶ please specify
- Other: please specify

In the responses to the Questionnaire, reference is made to the Immigration and Refugee Protection Act (IRPA) [<http://laws-lois.justice.gc.ca/eng/acts/I-2.5/page-1.html>], to the Immigration and Refugee Protection Regulations (IRPR) [<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/page-1.html>] and to the Citizenship Act [<http://laws-lois.justice.gc.ca/eng/acts/C-29/page-1.html>].

¹⁶ As to which, see note 4 above, citing Art. 7 of the UNCRC.

A child born in Canada is recognized as a Canadian citizen, except where a child is born in Canada to parent(s) who are foreign diplomats and their employees or persons with diplomatic immunities and privileges, where neither parent is a citizen or a permanent resident of Canada.

A child of Canadian parent(s) born outside of Canada can acquire Canadian citizenship in three ways:

- (1) CANADIAN CITIZENSHIP BY BIRTH TO A CANADIAN PARENT (paragraph 3(1)(b) of the Citizenship Act) – A child who is born abroad is automatically a Canadian citizen at birth if they share a genetic link with a Canadian citizen who is their legal parent. In addition, the Citizenship Act restricts derivative citizenship to the first generation born abroad (except for persons born abroad to Canadian citizen parent(s) who were at the time of the child's birth employed abroad with the armed forces or Canadian government).

Canadian officials will ordinarily rely on a birth certificate or court order issued by the country of the child's birthplace, listing the Canadian citizen as the parent. DNA evidence may be requested in cases where there are questions concerning the existence of a genetic link, or in cases of suspected fraud.

- (2) GRANT OF CANADIAN CITIZENSHIP TO MINOR CHILD (ss. 5(2) of the Citizenship Act) – A child born abroad can be granted Canadian citizenship if the following conditions are met:

- i) a Canadian citizen is the legal parent of the child, (whether or not there is a genetic link between the child and the Canadian parent, and including a child who is adopted); and
- ii) the child has been admitted to Canada through the immigration process (e.g. sponsored as a member of the family class – see below) and is a permanent resident.

Canadian officials will rely on a birth certificate or court order issued by the country of the child's birthplace, and/or a Canadian court order, listing the Canadian citizen as the legal parent.

There are two ways in which a child may become a permanent resident:

- (A) A Canadian citizen or a permanent resident of Canada may sponsor a dependent child to come to Canada as a permanent resident (ss. 12(1) and 13(1) of IRPA), if they meet the requirements set out in the IRPR. The IRPR defines a dependent child as the biological or adopted child of the parent. The operational manual on Processing Members of the Family Class, provides the following extended meaning for biological child (OP 2, 5.14):

"Biological child" (...) also includes a child who:

- (a) is not genetically related to the parent making the application;
- (b) was born through the application of assisted human reproductive technologies; and
- (c) was born to the parent making the application or to the person who, at the time of the birth of the child, was that parent's spouse, common-law partner or conjugal partner."

Once the child becomes a permanent resident, he or she can apply immediately for a grant of citizenship, as there is no minimum residency requirement.

- (B) Exceptionally, a child can be admitted in Canada through the discretionary immigration process. Once the child has entered Canada on this basis, he/she can file an application for permanent residence on Humanitarian and

Compassionate grounds from within Canada. Again, once the child is a permanent resident, he/she can apply for a grant of citizenship.

- (3) GRANT OF CANADIAN CITIZENSHIP FOR ADOPTED CHILDREN (s. 5.1 of the Citizenship Act) – Where the adoption of a child is completed abroad, the child may be granted citizenship without first going through the immigration process and obtaining permanent residence status.

In addition, two other means for obtaining citizenship are possible. In line with Canada's international obligations under the 1961 Convention on the Reduction of Statelessness, the Citizenship Act also provides for a grant of citizenship for a stateless person who is less than 23 years of age, and who has a birth parent who was a Canadian citizen at the time of the birth, under certain circumstances.

The Minister of Citizenship and Immigration can be directed by the Governor in Council to grant Canadian citizenship to anyone in order to alleviate cases of special and unusual hardship or to reward services of an exceptional value to Canada. CIC has recently received an application for a grant of citizenship for a surrogacy case under this provision. To date, no determination has been made.

G. Legal developments

39. Please state whether the law in your State concerning the matters covered in **Part I** above (*i.e.*, birth registration, establishment and contestation of legal parentage, ART, surrogacy and nationality concerning children) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before parliament or before the courts) to change the law in future:

In 2010, the Uniform Law Conference of Canada adopted the Uniform Child Status Act 2010, to address the status of children born through assisted reproduction, including surrogacy, and recommended that provinces and territories amend their legislation accordingly. To date, Alberta and British Columbia have revised their parentage laws in accordance with the Uniform Act.

There have been no changes to the IRPA or IRPR or the Citizenship Act with regard to the acquisition of nationality by children born to Canadian parents through the use of assisted human reproductive technologies. In 2012, however, the Department of Citizenship and Immigration published a policy (Operational Bulletin 381) clarifying that the automatic acquisition of Canadian citizenship at birth for children born abroad through a surrogacy arrangement and/or assisted human reproduction technologies requires a genetic link between a Canadian citizen parent and the child.

40. Please provide any other information you consider relevant concerning cases (reported, or otherwise) or other developments which have occurred in your State in relation to the Questions appearing in **Part I** above.

Azziz v. Canada (Citizenship and Immigration), 2010 FC 663

A married couple, citizens of both Canada and Morocco, applied for a citizenship certificate on behalf of a child whom they claimed was conceived through in-vitro fertilization in a Montreal clinic and subsequently born to them in Morocco. A

Canadian citizenship officer called into question the validity of their claim and requested DNA evidence which they refused to provide. Their application was refused on the basis of a lack of credible evidence. The Court found that while a birth certificate may be the preferred means of establishing parentage, it is not the only means, and that, in case of doubt, requesting DNA testing to establish parentage is not unfair, unreasonable or a breach of procedural fairness.

Kandola v. Canada (Citizenship and Immigration) 2013 FC 336

A case currently before the Canadian Federal Court of Appeal raises issues with Citizenship and Immigration Canada's requirement of a genetic link between a Canadian citizen parent and child for recognition of derivative citizenship by birth outside of Canada (essentially challenging the policy clarification published in 2012 - see response to question 39 above). The case involves a child born in India to a woman who is a permanent resident of Canada, who was married to a Canadian citizen at the time of the child's birth. The child was conceived through assisted human reproductive technologies, with the use of a donated egg and donated sperm, with the resultant embryo implanted into the birth mother. Both the husband and wife are listed as parents on the child's Indian birth certificate, although neither have a genetic link to the child.

Part II: Private international law ("PIL") and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage

A. PIL and co-operation rules concerning birth registration

41. Please explain when the relevant authorities in your State will assume (international) jurisdiction to register the birth of a child:
- a) Only when the child is born on the territory of the State
 - b) When at least one of the putative *legal* parents is a national of the State, regardless of the place of birth of the child
 - c) When at least one of the putative *genetic* parents is a national of the State, regardless of the place of birth of the child
 - d) When the child is considered a national of the State,¹⁷ regardless of the place of birth of the child
 - e) Other, please specify:
42. When registering a child's birth, which law will the relevant authorities apply to the question of who is / are the legal parent(s) of the child *by operation of law*?¹⁸
- a) The *lex fori* (*i.e.*, the internal law of your State) is always applied by the relevant authorities
 - b) If the situation has foreign elements (*e.g.*, the putative parent(s) or child are foreign nationals, or the child was born overseas, etc.), foreign law may, or must, be applied to this question. Please specify the applicable law rules:
 - c) Other: please specify
43. Have your State authorities ever encountered difficulties resulting from a child's birth being registered in two (or more) States (*e.g.*, the child is registered in your State as the State of birth, and in the State of the parents' nationality and the registers conflict)?

¹⁷ As to which, see **Question 38** above.

¹⁸ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identify in **Question 45** below.

- Yes: please explain the circumstances of the case(s) and the difficulties which arose:
 No

44. Are there any bilateral or multilateral¹⁹ agreements in force between your State and any other State such that:

- a. When a child's birth is registered which involves foreign elements (*e.g.*, one or more foreign national parents), this information is communicated to the authorities in the other relevant State?

- Yes: please specify
 There are no formal agreements but this may happen in practice: please explain
 No

- b. When there are changes to a child's legal parentage *subsequent to* birth registration as a result of steps taken in your State (*e.g.*, due to a subsequent voluntary acknowledgement of paternity in your State, or a contestation of legal parentage, etc.), this information is communicated to the relevant authorities in the State of the child's birth (where this is not your State)?

- Yes: please specify
 There are no formal agreements but this may happen in practice: please explain
 No

B. PIL rules concerning the establishment of legal parentage

By operation of law or agreement

45. Does your State have rules specifying which law is applicable to the establishment of legal parentage by operation of law?²⁰

- Yes: please specify
 No: the *lex fori* (*i.e.*, the internal law of the State) will always be applied where a question of legal parentage arises

46. Does your State have rules specifying which law is applicable to the establishment of legal parentage by agreement?

- Yes: please specify
 No: the *lex fori* (*i.e.*, the internal law of the State) will always be applied where a question of legal parentage arises
 Not applicable: it is not possible to establish legal parentage by agreement

By voluntary acknowledgement

47. Please explain in which circumstances your State authorities will consider they have (international) jurisdiction to accept a voluntary acknowledgement of legal parentage by a putative parent:

Please tick all which apply:

- a) When the child is (habitually) resident in your State: please specify

¹⁹ *E.g.*, the *Conventions on the international exchange of information relating to civil status* of 4 September 1958 and of 12 September 1997 or the *Convention on the recognition and updating of civil status booklet*, 5 September 1990, all adopted under the aegis of the International Commission on Civil Status (< www.ciecl.org >).

²⁰ Please note that the applicable law rules identified in your response to this Question may be the same as the rules you identified in **Question 42** above.

- b) When the child is a national of your State
 c) When the individual acknowledging the child is (habitually) resident in your State: please specify
 d) When the individual acknowledging the child is a national of your State
 e) Other: please specify

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
 ii. At the time of the acknowledgement, or
 iii. At another time: please specify

48. Which law will be applied to determine: a) the formal validity of the acknowledgement; and b) the substantive validity of the acknowledgement, *i.e.*, whether it validly establishes legal parentage?

Please tick all which apply:

- a) For the formal validity of the acknowledgement:
 i. The *lex fori* (*i.e.*, the internal law of your State)
 ii. The law of the State of the child's nationality
 iii. The law of the State of the (habitual) residence of the child: please specify
 iv. The law of the State of the putative parent's nationality
 v. The law of the State of the putative parent's (habitual) residence: please specify
 vi. Other: please specify
- b) For the substantive validity of the acknowledgement:
 i. The *lex fori* (*i.e.*, the internal law of your State)
 ii. The law of the State of the child's nationality
 iii. The law of the State of the (habitual) residence of the child: please specify
 iv. The law of the State of the putative parent's nationality
 v. The law of the State of the putative parent's (habitual) residence: please specify
 vi. Other: please specify

Please state whether, in relation to a) and / or b), one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

Please specify, in relation to a) and b), whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled: (1) at the time of the child's birth; (2) at the time of the acknowledgement; or (3) at another time (in which case, please specify):

- a)
 b)

C. PIL rules concerning the recognition of legal parentage established abroad

Birth certificates

49. Please explain when, if ever, a birth certificate drawn up in another State will be recognised in your State *as validly establishing the legal parentage of those persons recorded within it* (*i.e.*, the recognition of the content of the certificate).²¹

Please explain in your answer:

²¹ It is understood that, from time to time, this issue may arise in the course of other proceedings (*e.g.*, proceedings concerning succession or maintenance).

- a) which authorities are responsible for determining whether the foreign birth certificate will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition (e.g., the birth certificate must be authenticated by way of legalisation or apostille²²); and
- d) any grounds of *non*-recognition.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign birth certificate, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Voluntary acknowledgements

50. Please explain when, if ever, a voluntary acknowledgement undertaken in another State will be recognised in your State *as validly establishing the legal parentage of the author of the acknowledgement* (i.e., the recognition of the content of the acknowledgement).²³

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign acknowledgement will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign acknowledgment of parentage, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

Decisions of judicial authorities

51. Please explain when a decision of the relevant judicial authority of another State establishing a child's legal parentage (i.e., a court judgment or order) will be recognised in your State as validly establishing legal parentage.²⁴

Please explain in your answer:

- a) which authorities are responsible for determining whether the foreign decision will be recognised;
- b) the procedure which must be undertaken for recognition;
- c) any conditions for recognition; and
- d) any grounds of *non*-recognition.

If public policy ("*ordre public*") is a ground for the non-recognition of a foreign decision, please explain, with reference to case law where applicable, the interpretation of this concept in your State in this context:

²² See, in this regard, the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, available on the Hague Conference website at < www.hcch.net > under "Apostille Section".

²³ It is understood that, from time to time, this issue may arise in the course of other proceedings (e.g., proceedings concerning succession or maintenance).

²⁴ *Ibid.*

52. Please specify the *effects* of the recognition of the legal parentage established abroad (see **Questions 49 to 51** above) and which law(s) govern(s) these effects:

D. PIL rules concerning the contestation of legal parentage

53. Please explain when the relevant State authorities (which you identified in **Question 31** above) have (international) jurisdiction to determine a dispute concerning a child's legal parentage:

- a) When the child whose parentage is disputed is (habitually) resident in your State: please specify
- b) When the child whose parentage is disputed is a national of your State
- c) When a putative parent disputing legal parentage is (habitually) resident in your State: please specify
- d) When a putative parent disputing legal parentage is a national of your State
- e) Other: please specify

Please specify whether these criteria (*i.e.*, the (habitual) residence / nationality of the individual(s) – depending upon the boxes ticked above) have to be fulfilled:

- i. At the time of the child's birth
- ii. At the time the relevant State authorities are seized with the dispute, or
- iii. At another time: please specify

54. In the context of a contestation of legal parentage, which law will the authorities apply to the question of who is / are the legal parent(s) of a child?

Please tick all which apply:

- a) The *lex fori* (*i.e.*, the internal law of your State)
- b) The law of the State of the child's nationality
- c) The law of the State of the (habitual) residence of the child: please specify
- d) The law of the State of the putative parent's nationality
- e) The law of the State of the putative parent's (habitual) residence: please specify
- f) Other: please specify

Please state whether one or more of these laws will be applied (possibly in a "cascade"), with a view to favouring the establishment of legal parentage:

E. "Cross-border reproductive care"²⁵ and the consequences for legal parentage

55. If persons resident in your State access ART services in another State, are there any specific PIL rules concerning the establishment of the legal parentage of the child born as a result (*e.g.*, the law of the State in which the ART service was obtained will apply to the question of the child's legal parentage)?

- Yes: please explain
- No

²⁵ In this paper, "cross-border reproductive care" is taken to mean when person(s) who wish to access ART services cross a border to do so, for whatever reason (often it is linked with the restrictive rules in their "home" jurisdiction, lower costs or better success rates abroad).

Other: please explain

56. Are you aware of any cases, other than international surrogacy cases (see **Part III** below), where difficulties concerning the establishment or recognition of a child's legal parentage have arisen as a result of individuals resident in your State accessing ART services in another country, or individuals resident abroad accessing ART services in your State?

Yes: please provide details

No

F. Legal developments and practical challenges

57. Please state whether the law in your State concerning the matters covered in **Part II** above (*i.e.*, the PIL and co-operation rules concerning birth registration and the establishment, recognition and contestation of legal parentage) has changed in the past five years, or whether any initiatives are underway (*e.g.*, in government, before Parliament or before the courts) to change the law in future:

58. Other than cases involving international surrogacy arrangements (as to which see **Part III** below), are there any other cases of which you are aware where difficulties have arisen in your State in relation to establishing, contesting, or recognising a child's legal parentage as a result of the cross-border movement of the child and / or his / her putative parents?

(Some possible examples can be found at Part IV (b) of Prel. Doc. No 11 of March 2011.)

Please provide as much detail as possible concerning the situation which arose and the difficulties encountered:

Part III: The particular challenges concerning International Surrogacy Arrangements²⁶ ("ISAs")

This Part asks for information regarding the experience of State authorities with ISAs. It is divided into two sections:²⁷

- **Section A** asks a number of questions concerning "**Incoming cases**" of ISA: *i.e.*, those cases in which your State was the State of residence of the intending parents, and the State to which it was sought to bring child(ren), born to a surrogate abroad, to live.
- **Section B** continues with questions concerning "**Outgoing cases**" of ISA: *i.e.*, those cases where your State was the State in which the surrogate mother gave birth and from which the child(ren) needed to leave to travel to the State of residence of the intending parents in order to live with them in that State.

²⁶ See the **Glossary** for the definition of the terms used in this paper.

²⁷ Please note: it is understood that, in relation to both "Incoming" and "Outgoing" cases, there may be more than two States involved in a particular case: *e.g.*, the surrogate may be resident in a different State to the State in which she travelled (or, in some cases, was trafficked) to give birth; in other cases, a gamete donor may be resident in a third State etc. Please explain any such elements in your responses to the questions in this part.

A. Incoming cases²⁸

- This Section is inapplicable – there have been no “Incoming cases” of ISA in this State. Go to Section B.**

Basic empirical data

59. Do you have any information concerning:

- a) The number of **Incoming cases** of ISA which have required the assistance of your State authorities in recent years?

- Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

- No information is available

- b) How many children have been born to surrogate mothers in another State as a result of ISAs involving intending parents resident in your State?

- Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

- No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Incoming cases of ISA involving your State²⁹ and, further, please provide a general comment concerning the prevalence of Incoming cases of ISAs and whether such cases have increased in the past five years:

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Incoming cases of ISAs involving your State and / or whether this has increased in the past five years: There is no legal requirement for applicants to state whether the child was conceived through an ISA on application forms submitted for immigration or citizenship purposes. However, the limited information available at the government level suggests that the number of incoming cases of ISAs involving Canadian intending parents has increased in the past 5 years.

60. Please list all the States in which intending parents resident in your State have engaged a surrogate mother (*i.e.*, entered into an ISA), insofar as you are aware:

Non exhaustive list: China, India, Thailand, Ukraine, United States of America

²⁸ *I.e.*, those cases where your State was the State of residence of the intending parent(s), and the State to which it was sought to bring the child(ren), born to a surrogate abroad, to live.

²⁹ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

The procedure for Incoming cases of ISA

61. Please explain the procedure, including any immigration and legal processes, which intending parents resident in your State need to undertake (before leaving your State, before returning to your State or upon return to your State, as applicable) in order to:

- a) Enter your State with a child born abroad as a result of an ISA:
For citizenship and immigration purposes, there are no procedures that intending Canadian citizen parents are required to undertake prior to leaving Canada in order to subsequently enter Canada with a child born abroad as a result of an ISA.

Prior to travelling back to Canada with the child, the parent(s) must apply for and obtain legal status for the child, such as a permanent resident visa or citizenship. See response to question 38 above.

- b) Reside permanently in your State with the child:
A child who is recognized as a Canadian citizen or approved for permanent residence can lawfully enter and remain in Canada. See response to question 38 above.
- c) Have their legal parentage recognised (or established) under the law of your State (*if* this is possible):
Intending parents wishing to regularise the child's legal status under Canadian law could apply to the competent provincial or territorial court. See responses to questions 27.

Please include an estimate of the time it may take to complete each stage of this process:

- a) No statistical information on the average processing time for citizenship or immigration applications involving ISA is currently available. However, the process may take well over 2 years.
- b) See response above
- c)

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- i. The country in which the child was born: please explain
- ii. The particular document(s) produced by the intending parents to establish their legal parentage (*e.g.*, a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
- iii. Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
- iv. The nationality of the intending parents: please explain
- v. Any other factor: please explain Processing times vary in all cases, not specifically with regard to applications involving ISAs, for a number of reasons, *e.g.* the need for additional information/documents, unreliable/unavailable documents to confirm relationship/identity, poor communication or transportation infrastructure, need to translate documents, security concerns in the countries of origin, DNA testing, poor

infrastructure to arrange interviews, need for further investigation if fraud is suspected, etc.

62. Have your State authorities engaged in cross-border administrative or judicial co-operation with the authorities in any other State in order to resolve an ISA case?

- Yes – please specify:
- a) Which authorities in each State were involved:
 - b) The nature of the co-operation:
 - c) Whether the co-operation resulted from legislation, guidelines or practice:
 - d) The result:
- No

63. In your experience, which documents are generally produced to your State authorities to substantiate the claim of the intending parents to an ISA to legal parentage?

Please tick all which apply:

- a) A birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these birth certificates originate and any other details necessary: From what Citizenship and Immigration Canada has experience so far, China, India, Ukraine, and the United States of America issue birth certificates with the names of intending parents.
- b) An amended birth certificate from the State of birth, including the name(s) of the intending parents: please state from which countries these amended certificates originate and any other details necessary:
- c) A pre-birth court order from the State of birth: please state from which countries these orders originate and any other detail necessary: Citizenship and Immigration Canada is aware of a case where a US court (Connecticut) declared 2 fathers to be the intended parents of an unborn child; the state was ordered to issue a replacement birth certificate, following the birth, removing the birth mother and naming the 2 fathers as parents. However, Citizenship and Immigration Canada refused an application for proof of Canadian citizenship based on this court order in the absence of proof of a genetic link between the child and one of the fathers.
- d) A post-birth court order from the State of birth (*i.e.*, transfer of parentage): please state from which countries these orders originate and any other details necessary:
- e) An adoption order from the State of birth: please state from which countries these orders originate and any other details necessary, including whether use of the 1993 Convention³⁰ was attempted by either State³¹:
- f) Other: please specify
 - Documentation from hospital (*i.e.*, ultrasounds, doctor reports, etc.);
 - Documentation from lab/clinic (*i.e.*, records of procedures, contractual agreements);
 - Contractual agreement with surrogate;
 - DNA testing results;
 - Parentage orders from Canadian courts in the parents' place of ordinary residence.

Note – depending on the circumstances, this documentation may not be considered sufficient to meet specific statutory requirements.

³⁰ Full title: the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (hereinafter, "1993 Convention"). For further information, please see < www.hcch.net >, under "Intercountry Adoption Section".

³¹ See the Conclusions and Recommendations of the Special Commission meeting on the practical operation of the 1993 Convention (17-25 June 2010), which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate", paras 25-26.

If possible, please state (using the relevant letter) which of the above documents your authorities are presented with most frequently in these cases:

64. In general, what is the outcome of these cases in your State for the child:

Please tick all which apply and provide as much detail as possible:

- a) The child is able to travel to your State and reside there with the intending parents *and* the intending parents are recognised as the legal parents of the child.

Please explain how this is achieved:

- b) The child is able to travel to your State and reside there with the intending parents *but* one or both of the intending parents is not able to be recognised as the child's legal parents: please explain

- c) The child is not able to travel to your State and has to remain in the State of his / her birth: please explain why and what has happened to the children in such cases

- d) Other: please explain i) If the child born through the ISA has a genetic link with a Canadian citizen who is his/her legal parent, the child will be recognized as a Canadian citizen at birth (as long as he/she is not subject to the first generation limit; see response to question 38 above). Once the child has obtained a citizenship certificate (proof of Canadian citizenship), he/she will be able to travel and reside in Canada as a Canadian citizen.

- ii) Where there is no genetic link between the child born through the ISA and his/her Canadian citizen legal parent(s), and where legal parentage has been established to the satisfaction of immigration authorities, and so adoption is not possible, the child may be issued a temporary resident permit to enter Canada and an application for humanitarian and compassionate permanent residence processing subsequently made on behalf of the child from within Canada, followed by a grant of citizenship under subsection 5(2) of the Citizenship Act.

If possible, please state which of the four outcomes above occurs most frequently in your State: In most of the known instances, citizenship has been granted through evidence of a genetic link between the child and a Canadian legal parent.

The challenges encountered

65. In general, which of your State authorities are involved in assisting those who encounter difficulties as a result of Incoming cases of ISA?

Please tick all which apply and provide information concerning their particular role:

- a) The embassies / consulates in the State of the child's birth
 b) The immigration authorities
 c) The judicial authorities (*i.e.*, the courts): please specify which see below
 d) The Ministry of Justice (or equivalent)
 e) The Ministry of Foreign Affairs (or equivalent)
 f) The Ministry of Health (or equivalent)
 g) The Ministry of Social Affairs (or equivalent)
 h) Other: please explain

Immigration authorities do not provide "assistance" per se, but they are involved where proof of citizenship, a grant of citizenship or a grant of permanent residence is requested by the intending parents on behalf of the child. Similarly, the courts do not "assist" per se; they may however be involved in both the country of the child's birth and/or in Canada where necessary to determine the question of legal parentage. As for Canadian embassies and consulates in the State of the child's birth, they may be called upon to provide

consular services to Canadians abroad, including therefore to Canadian intending parents, as part of their consular responsibilities.

66. Please explain any legal problems your State has encountered in relation to Incoming cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved in the ISA. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave his / her State of birth:
- b) The child being able to enter your State:
- c) The child being able to reside in your State:
- d) The child's nationality:
- e) The child's legal parentage:
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (e.g., trafficking, sale of children, exploitation of women, etc.):
- g) The treatment of the surrogate mother in any State (e.g., whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: e.g., due to either of the parties reneging on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain
- i) Other: please explain

Legal problems regarding the right of a child to enter and reside in Canada, or his or her right to Canadian citizenship, regularly arise in cases involving ISA. Efforts are made to resolve these cases in the best interests of the child. In addition, some instances of legal problems with ISAs have been reported to government authorities such as:

- instances where the intending parents have been surprised that the child does not have a genetic relationship to the parents (while the cause is unknown, this is possibly due to either the clinic using the wrong gametes or using mixed sperm);
- instances where there were delays in obtaining required documents for the child to leave the country of birth, and delays in the child obtaining required documents to come to Canada, due to uncertainty about legal parentage.

Please provide any further information you consider relevant concerning the above problems:

67. Using the categories set out below, please provide any available information concerning the costs intending parents resident in your State have paid for an ISA. If, in your experience, costs have varied significantly depending upon the country in which the surrogate mother resided or gave birth, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
- c) Fees or other costs paid to an intermediary: e.g., a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain No information is collected on this question.

Areas of concern

68. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your particular concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (e.g., in terms of age, criminal records, psycho-social suitability, etc.):
- k) Contractual matters: e.g., issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) Other:

Depending on the circumstances, all of the issues listed under a) to j) are of potential concern for Canada. In particular, we want to emphasize our concern that the lack of certainty and predictability regarding the establishment of legal parentage for children born through ISAs leaves open the possibility that parental-child status may be challenged legally (e.g. children may be denied inheritance and other benefits later in life). We also want to emphasize three main areas of concerns in regard to nationality: delays and complexities for determining nationality due to legal uncertainty regarding the establishment of legal parentage; the risk that a child may be stateless due to incompatibilities between citizenship laws of the State of birth and that of the intending parents' nationality; and the risk of fraud. The financial aspects and the role of intermediaries are also of particular concern given that Canadian law prohibits commercial surrogacy, as well as the risks of potential child abuse and the exploitation of surrogates, which may be greater in some States.

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

Legal developments

69. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents resident in your State engaging in ISAs?

- Yes: please explain There is no legislation, rules or guidance specifically for Canadian intending parents engaging in ISAs other than, in the immigration context, Operational Bulletin 381 (updated in March 2012), which clarifies that, for the purposes of assessing entitlement to derivative citizenship in cases of assisted human reproduction, including surrogacy arrangements, a genetic link is required between a Canadian citizen parent and the child.

No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

70. Please provide any other information you consider relevant concerning your State's experience of Incoming cases of ISA:

B. Outgoing cases³²

This Section is inapplicable – there have been no “Outgoing cases” of ISA in this State. Go to Part IV.

Basic empirical data

71. Do you have any information concerning:

a) The number of **Outgoing cases** of ISA which have required the assistance of your State authorities in recent years?

Yes – please provide any figures available:

Pre-2009

2009

2010

2011

2012

2013 (so far)

No information is available

b) How many children have been born to surrogate mothers in your State as a result of ISAs involving intending parents resident in another State?

Yes – please provide any figures available:

Pre-2009 The only information available was provided by the province of British Columbia indicating that it has some figures for parentage declarations made in favour of foreign residents in that province for the period from November 2004 - April 2013 (but they are not broken down by year):

Australia 12; Belgium 1; France 8; Italy 3; Norway 1; Scotland 1; USA 1; Hong Kong 1.

2009

2010

2011

2012

2013 (so far)

No information is available

If you have provided any figures above, please comment upon whether you consider that these figures reflect the true number of Outgoing cases of ISA involving your State³³ and, further, please provide a general comment concerning the prevalence of Outgoing cases of ISAs and whether such cases have increased in the past five years:

³² *I.e.*, those cases where your State is the State in which the surrogate mother gives birth and from which the child has to leave to travel to the place of residence of his / her intending parents.

³³ Since it is recognised that there may be many cases which do not come to the attention of the State authorities.

If you have not provided figures above, are you able to provide any comment concerning the prevalence of Outgoing Cases of ISAs involving your State and / or whether this has increased in the past five years? The limited information available at the government level suggests that the number of outgoing cases has increased in the past 5 years.

72. Please list any States in which intending parents, engaging a surrogate mother in your State by way of ISA, have been resident:

Passport Canada (which is now part of the Department of Citizenship and Immigration) is aware of at least one case involving intending parents who were nationals of a European State.

The procedure for Outgoing cases of ISA

73. In general, which of your State authorities are involved in assisting those who undertake an ISA with a surrogate mother in your State?

Please tick all which apply and provide information concerning their particular role:

- a) The immigration authorities: please specify
- b) The judicial authorities (*i.e.*, the courts): please specify which
- c) The Ministry of Justice (or equivalent)
- d) The Ministry of Foreign Affairs (or equivalent)
- e) The Ministry of Health (or equivalent)
- f) The Ministry of Social Affairs (or equivalent)
- g) Other: please explain The courts in Canada may be called upon to determine legal parentage of a child born as a result of a surrogacy arrangement.

Passport Canada (which is now part of the Department of Citizenship and Immigration) may be requested to issue a passport to allow a child to travel with the intending parents.

74. Do foreign-resident intending parents require a visa or any other immigration document(s), or do they have to meet any other conditions, to *enter* your State to be able to undertake the necessary meetings and medical procedures to enter into an ISA in your State?

Please tick all which apply:

- Yes, they have to meet the following conditions – please specify:
- Yes, they have to obtain a visa or other immigration document(s) – please specify what type of document is required, the conditions for obtaining it and the procedure:
- No
- It depends upon the State of residence or nationality of the intending parents: please specify

There is no specific requirement to obtain a visa where the purpose of travel is to access surrogacy services in Canada. However, depending on their State of residence, intending parents may be required to obtain a visa as part of the normal requirements for travel to Canada.

75. Is the law of the State of the habitual residence of the intending parents taken into account in any way when considering whether intending parents are permitted to undertake an ISA in your State (*e.g.*, where this law forbids surrogacy arrangements).³⁴

³⁴ *E.g.*, see clause 34(19) of the *Indian Assisted Reproductive Technologies (Regulation) Bill 2010* still pending, explained in Prel. Doc. No 10 of March 2012 (note 1) at para. 45. In addition, the recent Indian visa requirements now impose on foreign nationals visiting India to undertake a surrogacy arrangement, a condition to similar effect: *i.e.*, that the intending parents must have a letter from the embassy of their State of residence indicating that the State recognises surrogacy and that the child born will be permitted to enter this State. See also the Ukrainian Draft Law No 0989 (former No 8282) on the restrictions pertaining to the use of assisted reproductive technology (rejected by the Parliament of Ukraine on 21 March 2013). This bill also

- Yes – please explain how this law is taken into account:
 No
 It depends upon the State of residence or nationality of the intending parents:
 please explain

76. How do foreign-resident intending parents, who are party to an ISA, obtain legal parentage for a child born to a surrogacy arrangement in your State?

*Your response to this question will likely depend upon your answer to **Questions 26 to 27** above.*

Please tick all which apply:

- a) They will be the legal parents by operation of law and therefore their names will be placed immediately on the child's birth certificate: please explain
 b) They can obtain an amended birth certificate: please explain
 c) They can obtain a *pre*-birth court order confirming their legal parentage: please explain any conditions for obtaining such an order
 d) They can obtain a *post*-birth court order (*i.e.*, a transfer of parentage): please explain any conditions for obtaining such an order
 e) They can adopt the child: please explain, including whether use of the 1993 Convention has been attempted in this regard³⁵
 f) Other: please specify See responses to questions 26 and 27 in Annexes 1 to 5.

Please explain the procedure for any of the options ticked above and any specific requirements which apply to *foreign*-resident intending parents:

Please further specify whether the surrogate mother's consent, and her husband or partner's consent where applicable, is required for any of these procedures and the consequences if this consent is not forthcoming at the relevant time:

77. Please explain the procedure, including any immigration and legal processes, which foreign-resident intending parents need to undertake in order to *leave* your State with a child born to a surrogacy arrangement:

There are no legal requirement under Canadian law as Canada does not issue exit visas.

Please state the time it may take to complete this process:

If the answer to this question varies depending upon the factors set out below, please provide a brief explanation, including the impact the particular factor has on the procedure which must be undertaken and any timeframes.

Please tick all which apply:

- a) The country in which the intending parents live: please explain
 b) The particular document(s) produced by the intending parents to establish legal parentage (*e.g.*, a birth certificate, voluntary acknowledgement, court decision, etc.): please explain
 c) Whether the child(ren) is / are genetically related to one or both of the intending parents: please explain
 d) The nationality of the intending parents: please explain
 e) Any other factor: please explain

envisaged, in particular, restrictions on the use of surrogacy arrangements for nationals of those States where surrogacy is prohibited by law.

³⁵ See note 31 above concerning the 2010 Special Commission meeting on the practical operation of the 1993 Convention which concluded that use of the 1993 Convention in cases of international surrogacy arrangements was "inappropriate".

78. Have your State authorities engaged in cross-border administrative or judicial co-operation with authorities in any other State in order to resolve an ISA case?

- Yes – please specify:
- a) Which authorities in each State were involved:
 - b) The nature of the co-operation:
 - c) Whether the co-operation resulted from legislation, guidelines or practice:
 - d) The result:
- No

79. In general, what is the outcome of these cases in your State for the child?

Please tick all which apply:

- a) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *and* the intending parents are recognised as the legal parent(s) of the child.
Please explain how this is achieved:
- b) The child is able to leave your State, travel to the State of residence of the intending parents, reside there with the intending parents *but* one or both of the intending parents are not able to be recognised as the child's legal parents: please explain
- c) The child is able to leave your State but is not able to travel to the State of residence of the intending parents and has to remain in your State: please explain what has happened to the children in such cases
- d) The child is not able to leave your State: please explain why and what has happened to the children in such cases
- e) Other: please explain At the government level, we are not aware of instances where a child has been unable to leave Canada. We are aware of one case involving intending parents who were nationals of a European State where a child's legal parentage established in Canada was not recognized by authorities in their State of residence.

If possible, please state which of the five outcomes above occurs most frequently in your State:

The challenges encountered

80. Please explain any legal problems your State has encountered in relation to Outgoing cases of ISA.

Please tick all boxes which apply and provide explanations, including the other country(ies) involved. Where reported cases are referred to please provide the full text of the judgment, including a translation into English or French where possible.

Problems relating to:

- a) The child being able to leave your State:
- b) The child being able to enter the State in which his / her intending parents are resident:
- c) The child being able to reside in the State in which his / her intending parents are resident:
- d) The child's nationality:
- e) The child's legal parentage: See response to question 79
- f) The behaviour of any party(ies) which is criminal according to international legal standards or according to the domestic rules of the countries involved (e.g., trafficking, sale of children, exploitation of women, etc.):

- g) The treatment of the surrogate mother in any State (*e.g.*, whether her consent was free and informed, concerning the financial payments made to her, the medical care provided, etc.): please specify
- h) The breakdown of the ISA: *e.g.*, due to either of the parties reneging on the agreement, for example, due to the child's disability or ill health, the wish of the surrogate mother to keep the child, the relationship breakdown of the intending parents or the clinic using the wrong gametes or another reason, etc.: please explain At the government level, we are aware of one case where foreign intending parents who accessed surrogacy services in Canada reneged on their ISA when prenatal testing showed that the child had a disability.
- i) Other: please explain

Please provide any further information you consider relevant concerning these legal problems:

81. Using the categories set out below, please provide any information you have concerning the costs intending parents resident abroad have paid for an ISA in your State. If, in your experience, costs have varied significantly depending upon the country in which the intending parents resided, please specify per country.

Please tick all which apply and provide any known figures and a description of to whom the money was paid and for what service:

- a) Medical costs:
- b) Legal costs:
- c) Fees or other costs paid to an intermediary: *e.g.*, a surrogacy agency:
- d) Expenses and / or other costs paid to the surrogate mother:
- e) Other: please explain No information is collected

Areas of concern

82. Do any of the following areas give your State authorities cause for concern in these cases?

In each case, where possible, please specify your concerns in the field provided:

- a) The uncertainty of the legal status of children born to ISAs, in particular in terms of their legal parentage:
- b) The nationality of children born to ISAs:
- c) The right of children born to ISAs to know their (genetic and birth) origins:
- d) The surrogate mother's free and informed consent to the surrogacy arrangement:
- e) The psychological impact of an ISA on the surrogate mother:
- f) The medical or other care provided to the surrogate mother:
- g) The financial aspects of ISAs:
- h) The competency and / or conduct of the intermediaries involved (lawyers, agencies, etc.):
- i) The (mis)-information provided to intending parents or surrogate mothers:
- j) The eligibility and / or suitability of the intending parents to care for the child (*e.g.*, in terms of age, criminal records, psycho-social suitability, etc.):
- k) Contractual matters: *e.g.*, issues surrounding the enforceability of the surrogacy agreement or the capacity of any of the parties to enter into the agreement:
- l) Other:

Please state (using the letters above) which of the concerns you have identified above are the most troubling:

Legal developments

83. Does your State have any legislation, rules or guidance which has been specifically enacted or drawn up for intending parents or surrogate mothers engaging in ISAs in your State?

- Yes: please explain See the responses to part I of the Questionnaire for the provinces of Alberta and British Columbia (Annexes 1 and 2) on legislation dealing with legal parentage of children born as a result of surrogacy arrangements. In addition, the federal Assisted Human Reproduction Act applies in all cases where surrogacy services are offered and obtained in Canada.

No

If your State is contemplating any such legislation, rules or guidance in future, please provide further information:

84. Please provide any other information you consider relevant concerning your State's experience of Outgoing cases of ISA:

Part IV: Current bilateral or multilateral instruments in the field

85. Please list any bilateral, regional or multilateral instruments which currently, or may in future, bind your State concerning:

- a) Any matters related to the establishment, recognition or contestation of the legal parentage of children;

N/A

- b) Any matters specifically related to surrogacy arrangements;

N/A

Please provide any detail you consider necessary:

Part V: Thoughts on possible future work

86. What, if any, are the **needs** you consider ought to be addressed by any possible future global work in this area?

Please specify:

Ensure greater predictability and legal certainty regarding the legal parentage of children in cross-border situations generally, including children born through ART or ISAs.

Explore the possibility of developing legal and procedural safeguards to protect the fundamental rights and best interests of children born as a result of cross-border surrogacy arrangements, taking into account the interests of intending parents and surrogate mothers, as well as the wide variety of public policy considerations arising from ISAs.

87. Please provide your thoughts concerning the **approach** that should be taken in relation to any possible future regulation of any of the matters mentioned in this Questionnaire.

In this response, you may wish to consider and comment upon the thoughts set out in Section VIII of Preliminary Document No 11 of March 2011 and Section IV of Preliminary Document No 10 of March 2012.

*You may also wish to comment upon the **nature** of any possible future regulation: e.g., whether a binding instrument should be considered or whether approaches such as a model law, non-binding principles or guidance, etc. would meet the needs you identified in **Question 86** above.*

Issues regarding legal parentage resulting from the use of ART in cross-border situations, including surrogacy, are likely to be encountered in all States, regardless of whether they ban/allow/regulate assisted reproduction and/or surrogacy under their domestic regimes; such issues are therefore of global interest and concern. Given the important differences between States regarding AHR, it may not be possible to reach international consensus on substantive rules on the establishment and the recognition of parentage of children resulting from the use of ART, especially in regard to children born as a result of ISAs. In our view, the harmonization of conflict of law rules on the legal parentage of children would therefore provide the best opportunity to ensure greater predictability and legal certainty for children and their parents.

In addition to the issue of legal parentage, international surrogacy potentially raises important public policy concerns that may affect the fundamental rights and the best interests of children, as well as the interests of the adult parties involved - i.e. intending parents and surrogate mothers. While these concerns may appear similar to some of those that arise in the context of intercountry adoption, the two situations also present important differences that may make the transfer of the framework provided by the 1993 Convention on Intercountry Adoption to international surrogacy undesirable and/or not feasible without further review and necessary adaptation.

At this time, Canada would support the establishment of a Group of experts to assist the Permanent Bureau in further considering possible future international rules to harmonize conflict of law rules on the legal parentage of children in all cross-border situations, including children born through the use of ART and ISAs. The Group of experts should examine the development of a private international law instrument on legal parentage generally (covering the matters listed in paragraph 50 of Preliminary Document No 11 of March 2011), which could include, if necessary, specific rules dealing with the establishment, recognition and contestation of legal parentage where surrogacy is used. In our view, this should be the primary focus of the Hague Conference's work in this area.

As a secondary matter, the Group of experts could also explore the need, and possible options, for the establishment of legal and procedural safeguards dealing specifically with international surrogacy arrangements and practices - addressing, as suggested in paragraph 51 of Preliminary Document No 11 of March 2011, issues such as: administrative cooperation between States, notably to ensure that the birth registration process is effective and transparent; and the establishment of various safeguards, possibly via a division of responsibilities between Contracting States and the accreditation and monitoring of intermediaries. If it were determined that the development of such a regime were desirable and feasible, then the establishment of international rules could be considered as a separate, and possibly optional, part of a convention on the legal parentage of children or as a separate instrument (e.g. as a protocol to a convention on the legal parentage of children).

In our view, the Group of experts should be composed of experts in the area of private international law as well as government representatives, to reflect the different approaches and perspectives adopted by States on the issues the subject raises.

88. If the Hague Conference were to develop a global instrument on the private international law issues surrounding the status of children (in particular, the cross-border recognition of legal parentage), which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage: please comment
- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party, in compliance with the instrument's rules, in all other States Parties: please comment

Safeguards

- c) The establishment of safeguards (minimum standards) to ensure that any procedures for the establishment, recognition and contestation of legal parentage take place with respect for the fundamental rights and welfare of all parties involved, in particular the child(ren) concerned: please comment

Co-operation

- d) The establishment of a system for co-ordination, communication and co-operation between States in relation to the establishment, recognition and contestation of legal parentage. Such a system may include a clear division of responsibilities between States, as well as the establishment of defined channels for communication between the relevant authorities.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

Other

- e) Other: please specify See responses to questions 86 and 87

89. If the Hague Conference were to develop a global instrument specifically on international surrogacy arrangements,³⁶ which of the following general features *may* be desirable to include in such an instrument?

Please tick all which apply (and please note that these features are not mutually exclusive and necessarily overlap):

The child's legal status

- a) Harmonisation of the private international law rules relating to the establishment, recognition and contestation of legal parentage, limited to legal parentage arising following a surrogacy arrangement: please comment

³⁶ See **Part III** of the Questionnaire above.

- b) Recognition *by operation of law* of child(ren)'s legal parentage established in one State Party following a surrogacy arrangement, in compliance with the instrument's rules, in all other States Parties: please comment
- c) Provisions concerning the child(ren)'s nationality: please comment

Safeguards

- d) The establishment of safeguards (minimum standards) to ensure that such arrangements take place with respect for the fundamental rights and welfare of all parties involved, *i.e.*, the child(ren) to be born, the surrogate mother and intending parents: please comment, including in relation to which elements you consider there ought to be such minimum standards (*e.g.*, the surrogate mother's free and informed consent, the child's right to know his / her origins, etc.)
- e) Safeguards (minimum standards) specifically in relation to the intermediaries involved in such arrangements (*e.g.*, surrogacy agencies, lawyers, etc.). These standards may be combined with a system of licensing and supervision to ensure compliance: please comment
- f) Safeguards (minimum standards) specifically in relation to medical institutions undertaking the procedures connected with international surrogacy arrangements: please comment

Co-operation

- g) The establishment of a system for co-ordination, communication and co-operation between States in relation to such arrangements. This may include a clear division of responsibilities between States, for example, such that: (a) the competent authorities of the State of the habitual residence of the intending parents would be responsible for determining that the intending parents are eligible to enter into the arrangement, and that any child born as a result will be permitted to enter and reside in their State;³⁷ and (b) the competent authorities of the State in which the surrogate mother habitually resides would be responsible for determining that the surrogate mother is eligible and suitable to enter into the arrangement and that the child will be entitled to leave this State following his / her birth. The co-operation system could also include the creation of defined procedures which must be complied with by the parties to such arrangements.

Please comment, including in relation to whether you see a need for the establishment of "central authorities" within such a system:

Other

- h) Provisions concerning the financial aspects of international surrogacy arrangements: please comment
- i) Other: please specify See responses to questions 86 and 87

90. What priority would you give working towards a future instrument on the private international law issues concerning the status of children (in particular, the cross-border recognition of legal parentage) generally?

- a) High priority / urgent
- b) Medium priority – desirable but not urgent
- c) Low priority – possibly desirable but other projects should take priority
- d) No priority – no further work should be done in this field

³⁷ Following the trend in some States in which international surrogacy arrangements are regularly entered into to take into account the legal position in the State of the habitual residence of the intending parent(s) before permitting the surrogacy arrangement to proceed: see note 34 above.

- e) Other: please specify Canada views the establishment of a Group of experts to assist the Permanent Bureau in considering options for the development of a private international law instrument on the legal parentage of children as a high priority. See response to question 87.

91. What priority would you give working towards a future instrument specifically on the challenges occurring as a result of international surrogacy arrangements?

- a) High priority / urgent
b) Medium priority – desirable but not urgent
c) Low priority – possibly desirable but other projects should take priority
d) No priority – no further work should be done in this field
f) Other: please specify Canada views the need to establish a group of experts to assist the Permanent Bureau as a high priority. However, the primary focus of this group should be the consideration of private international law rules on the legal parentage of children. The need to explore possible options for the establishment of legal and procedural safeguards dealing specifically with international surrogacy arrangements and practices should be a secondary matter. See responses to questions 87 and 90.

92. Please provide any other comment(s) you may have concerning the possible future global regulation of matters contained within this Questionnaire:

Thank you for your time: this information will greatly assist the work of the Permanent Bureau.