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Uniform Vital Statistics Act Project Background

The aims of this project are threefold:

- (a) to develop a modern approach to effectively collect vital statistics information, taking into account modern requirements of statistics use, new technologies, and ethical practices;
- (b) to reconcile Canadian vital statistics legislation with judicial decisions which have ruled current sections dealing with change of sex designation applications discriminatory or unconstitutional; and,
- (c) to develop a *Uniform Vital Statistics Act* which will address and reform the highlighted issues in the current legislation.

Reasons for this Project

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

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

In all Canadian jurisdictions, provincial vital statistics legislation have begun to show their age. With medical and social changes such as assisted reproductive technologies, dynamic family structures, same-sex marriage, sexual re-assignment, etc., vital statistics acts across Canada are in need of modernization. This project considers the current state of vital

statistics legislation in Canadian jurisdictions, which, in many cases, have not been substantially updated in many years. In order to modernize these statutes, the Uniform Law Conference of Canada and the BCLI are developing a uniform *Vital Statistics Act* to reflect the modern requirements of statistics use, the new technologies available for collecting information, and to ensure the purpose of the data collection reflects modern and ethical practices.

Of particular importance is the need to modernize the current laws relating to change of sex designation applications, which are increasingly being held by courts and human rights tribunals as discriminatory. As a result, not only are the application process and standards different between provinces, but the procedures used by vital statistics offices to approve these applications remain dated and ethically problematic.

Legal Background

Vital statistics legislation and regimes in many jurisdictions across Canada have remained substantially unchanged for many years. Consequently, the policies and infrastructure are dated compared to other governmental bodies, such as corporate and land title registries.

Some issues that will be targeted for research and reform include:

- How to incorporate the increasingly popular use of assisted reproductive technologies in the vital statistics framework.
- Access to pre-adoption birth registrations by vital statistics offices, adoptees, adoptive parents, etc.
- Consistent standards for delayed registration of vital events. Consistent registration procedures and methods, such as online registrations.
- The impact of privacy legislation on personal information and personal health information retained by vital statistics offices.
- Uniform birth registration, change of name, marriage, and death registration procedures.
- Legal presumptions of paternity where a birth mother is married during pregnancy; as well as the requirement for both parents' signatures on birth registrations.
- Implementation and recognition of electronic records of vital events without paper back-ups.

However the primary issue to be examined, as flagged by vital statistics groups and the Uniform Law Conference of Canada, are the rules relating to change of sex designation applications across Canada. With the exception of Nunavut, each province and territory in Canada includes provisions in its vital statistics legislation allowing applicants to change or amend the sex designation on their birth registrations. However, not only are the requirements and prerequisites different from one province to another, but the procedures themselves reflect a dated approach to sex and gender issues.

The issue is divided in two parts:

- (1) how should sex be designated, and what sex designations should be used by vital statistics offices; and
- (2) what process should be used to grant a person the ability to change their sex designation on vital records?

How should sex be designated?

Registration of sexes exclusively as “male” or “female”, whether at birth or on re-assignment, is proving to be increasingly problematic due to a rising demand for one or more non-binary sex designations. Many foreign jurisdictions have formally adopted third sexes or genders¹ on government identification:

- Australia and New Zealand have adopted the third sex “X”, for those who are indeterminate, intersex, or unspecified.
- Germany has adopted “indeterminate” as a third sex for intersex persons.
- Nepal has adopted “third gender/other” for transgendered persons.
- India adopted “other” in 2009, and in April 2014 formally recognized “third gender”, with all legal rights and protections.
- In Canada, Ontario is the only province which has adopted the third sex of “undetermined” for intersex persons.

The possibility of adding a third sex or gender to vital statistics registrations and documents raises significant issues that overlap into many other reform areas, such as family law, international law, and human rights law.

The language used for third sexes or genders directly affects the use of the designation, as well as the requirements that may be imposed by vital statistics legislation. Those jurisdictions using medically-defined terms like “indeterminate”, for example, are confined to its strict use and excludes transgendered persons who identify as either male or female. Conversely, non-specific terms such as the Australian and New Zealand “X” are broad enough to encapsulate all gender minorities, but are so vague that they may lead to undesirable enquiries by those unfamiliar with the designation.

This effectively raises the underlying question of whether or not sex designation ought to be

1 “Sex” refers to the observable biological, anatomical, or chromosomal sex of a person, whereas “gender” refers to a person's psychological gender identity. Sex is typically determined at birth by the attending physician and later recorded on the birth registration by parents, whereas gender is typically developed or identified later in life. For most individuals, sex and gender are congruent (“cisgendered”), but those whose sex and gender are incongruent are “transgendered”. Persons who are born with features of both anatomical sexes, such that they cannot be distinctly identified as male or female (due to genital ambiguity or abnormal chromosomal combinations, for example), are known as “intersex”.

listed at all on vital statistics documents (mainly, birth certificates²), and subsequent identification obtained through the use of the originating vital document. This is an option that will be explored in detail as the project continues.

How should sex designation be changed on vital statistics documents?

The second major issue that must be examined for reform are the procedures (and often, obstacles) in place in many Canadian jurisdictions relating to applicants seeking to change the sex designation on their birth registration. Once recommendations can be made about what sex or gender designations (if any) the vital records should have, it is then possible to address how to change them.

Until a few years ago, all Canadian jurisdictions with provisions relating to changes of sex designations in their vital statistics legislation strictly limited applications to applicants who had undergone sexual re-assignment surgery. This term was inconsistently defined between jurisdictions, but ultimately all provinces and territories (with the exception of Nunavut) required some form of genital surgery, with medical certification of its completion.

In 2012, the Ontario Human Rights Commission was the first body to find the surgery requirement for change of sex designation applications in the Ontario *Vital Statistics Act* discriminatory.³ As provincial human rights legislation are similar, if not identical, between provinces, there was immediate pressure to amend vital statistics legislation so as to avoid those issues raised in Ontario. Quebec followed suit, amending their *Civil Code* provisions on change of sex designation in December 2013.⁴ To date, both British Columbia and Manitoba have also introduced bills in their legislatures which aims to amend their respective vital statistics legislation to remove the surgery requirement. In April 2014, the Alberta Court of Queen's Bench found the Alberta *Vital Statistics Act* unconstitutional, ruling that it be rewritten to comply with the Canadian Charter of Human Rights and Freedoms.⁵

In light of these updates, provincial governments and vital statistics offices are now asking: how should sex designation be changed on vital statistics documents if mandatory sexual re-assignment surgery is discriminatory? The ULCC, supported by BCLI and vital statistics organizations, will work to develop a *Uniform Vital Statistics Act* which proposes alternatives based on thorough consultation with stakeholders in the legal and vital statistics communities.

2 Birth certificates, as foundational identification documents, are primarily used to obtain other forms of identification (such as driver's licenses, passports, and provincial health cards), as opposed to birth registrations which are used for recording statistics.

3 *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726.

4 *An Act to amend the Civil Code as regards civil status, successions, and the publication of rights*, 2013, c 35.

5 *CF v. Director of Vital Statistics*, 2014 ABQB 237.

Other Issues

In addition to the two primary issues of sex designations themselves and alternatives to surgical requirements, the project will also examine other aspects of the change of sex designation procedures, such as:

- the use and scope of professional opinion needed to substantiate a person's application to change their sex designation;
- the use of age limitations and age of consent issues – particularly involving “mature minors” and minors applying with parental consent;
- determining the scope of evidence of capacity and good faith in applications, ensuring that applicants understand and appreciate the consequences of the application;
- evaluating discretionary powers of vital statistics offices handling applications to determine whether registries should have the power to deny applications based on legal or other reasons beyond administrative exceptions such as non-payment of fees, incomplete application package, etc.;
- the style of the change that should be used – whether it is a notation or an amendment, and the consequences for each of those options; and
- whether and to what extent administrative and judicial review procedures should be put in place to ensure procedural fairness and protection of the applicant's rights.

Objectives of the Project

Through consultation with stakeholders and comparative legal research, the project aims to consider Canada's legal landscape and draft a *Uniform Vital Statistics Act* which reflects the needs of public, legal, and vital statistics stakeholders. The project will culminate in draft model legislation for uniform use across all Canadian provinces.

Project Administration

This project is managed through a volunteer ULCC Working Group supported by a Vital Statistics Committee. BCLI is supporting the project with Jim Emmerton, Executive Director of the BCLI as Chair, and Alexandre Blondin, as researcher and writer.

The project has been funded in part through the vital statistics organizations of Nova Scotia and Manitoba.

About the BCLI

The British Columbia Law Institute was incorporated in 1997 under the British Columbia Society Act. Its mission is to be a leader in law reform by carrying out the best in scholarly law-reform research and writing and the best in outreach relating to law reform.

About the ULCC

The Uniform Law Conference of Canada first met in 1918, and has since been an independent organization working closely with the Canadian Bar Association and provincial and federal governments. The ULCC assembles lawyers and policy analysts to develop uniform statutes, which it adopts and recommends for enactment by relevant governments.

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