

# Surrogacy In Canada

**Produced By**

Lisa Feldstein Law Office Professional Corporation



## *SURROGACY IN CANADA*

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### *Is surrogacy legal in Canada?*

Yes, surrogacy is legal in Canada. Canada's *Assisted Human Reproduction Act* ("AHRA") does not prohibit surrogacy; thus, surrogacy in Canada is legal. What is not legal is paying a woman to act as a surrogate (often referred to as "commercial surrogacy"). This means that if a woman chooses to become a surrogate, it must be an altruistic act and not financially motivated. Although a surrogate in Canada cannot be paid, she can be reimbursed for any out-of-pocket expenses. Effective June 9, 2020, the law will provide specific detail about what expenses can be reimbursed; these are usually negotiated and included in surrogacy agreements and will continue to be even after the law is amended.

Canada is a very welcoming country for surrogacy. Intended parents can be single, gay, transgendered and/or any age or religion. Both traditional and gestational surrogacy are legal.

### *Who is allowed to be a surrogate in Canada?*

There is very little criteria about who is allowed to be a surrogate; however, there is an age requirement. Surrogates must be at least 21 years of age. It is against the law to counsel or induce a female person to become a surrogate mother; or perform any medical procedure to assist a female person to become a surrogate mother, if they know or have reason to believe the woman is not yet 21 years old. Surrogates are usually required by fertility clinics and lawyers to go through counselling before becoming a surrogate.

## What is the legal process for surrogacy in Canada?

### Part 1: The Surrogacy Agreement

Early in the surrogacy journey the intended parents meet with a lawyer to discuss the details of the arrangement. The lawyer for the intended parents will provide legal advice and draft a surrogacy agreement. The surrogate meets her own lawyer to obtain independent legal advice (“ILA”) and discuss the agreement. The surrogate’s lawyer typically proposes changes to the agreement. The lawyers discuss the changes and, in consultation with their clients, prepare the final version of the agreement. It is very important the agreement is signed before the embryo is transferred. Some lawyers in Canada facilitate e-signing of surrogacy agreements, which can be more convenient for international clients.



## **Part 2: Court / Statutory Declaration**

The second part of the legal process is to ensure the intended parents are legally recognized as the parents of the child (as opposed to the surrogate or her partner). There are two different paths available to intended parents. The intended parents' lawyer will advise which path is appropriate and available in the circumstances.

It is important to note that the laws that tell us who is a parent are different throughout Canada. Every province has its own laws and some places are more surrogacy-friendly than others. Additionally, some provinces have stronger laws about sperm/egg donation than others.

Path 1: This step is referred to as the "declaration of parentage" (since a judge is asked to make a declaration about the parents). A "declaration of parentage", practically speaking, means going to Court. A "declaration of parentage" is not required in all cases, depending on the province in Canada where the surrogate delivers the child. The lawyer for the intended parents will prepare the documentation. The intended parents and surrogate (and possibly her partner) will be asked to sign affidavits (sworn statements) after the birth. At a later date the lawyer will appear before a judge and receive a Court Order naming the intended parents as the legal parents of the Child. After receiving the Court Order, the intended parents can then go on to register the birth of their child with the provincial government, obtain a birth certificate and a Canadian passport. The time to go through all of these steps varies by province.

Path 2: In some provinces, such as Ontario and British Columbia, an alternate and more stream-lined path is available. Provided the intended parents and surrogate enter into a surrogacy contract before the embryo transfer, and the parties receive independent legal advice, it is possible to sign relatively simple paperwork (called a "statutory declaration") and obtain a birth certificate without going to Court. However, intended parents who are not from Canada must speak with a lawyer from their own jurisdiction to confirm what is necessary to bring their child back home. In many cases a Court Order will be required, even if a statutory declaration would otherwise be an option. In some parts of the world the intended parents will need the Canadian Court Order to contain very specific language. Seeking advice from a local lawyer is essential to ensure the intended parents will be legally recognized as the child's parents in their home country.