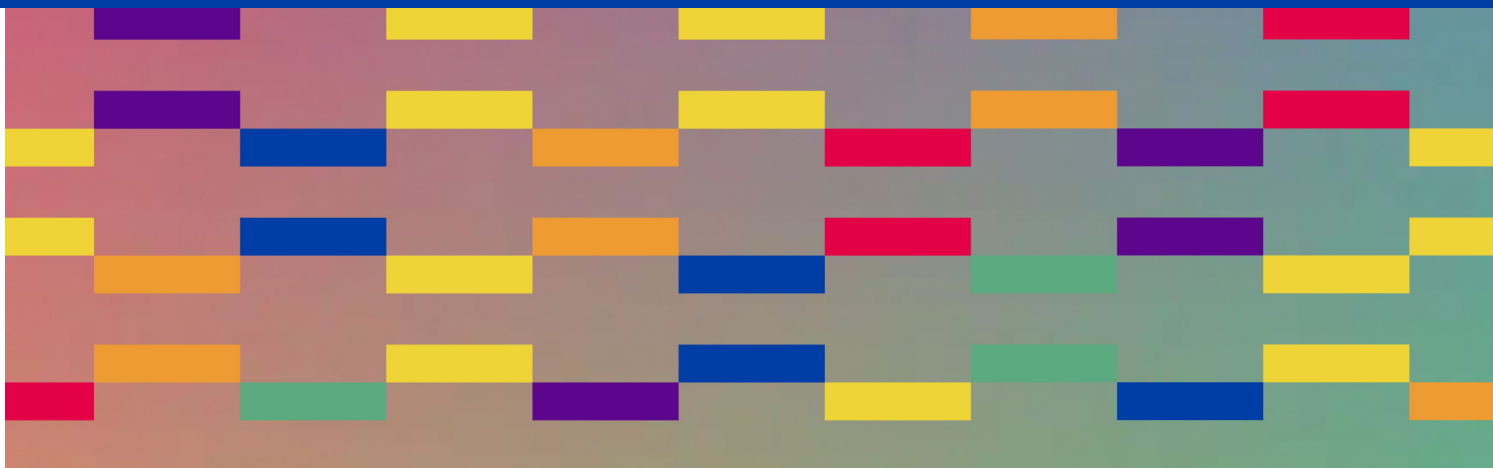




Written Submissions for the Consultations on Budget 2022



September, 2022



Recommendations from Egale Canada

This submission sets out Egale Canada’s comments and recommendations on the provisions of the draft legislation released by the Department of Finance on August 9, 2022, that would extend the Medical Expense Tax Credit (“**METC**”) in the *Income Tax Act* (Canada) (the “**ITA**”)¹ so as to include surrogacy-related expenses.

Egale Canada welcomes and supports the Government’s initiative to extend the METC to include surrogacy-related expenses. However, the proposed amendments to the ITA fail to properly account for the variety of expenses that are typically incurred by intended parents seeking to build families through surrogacy and that are expressly permitted by the *Assisted Human Reproduction Act* (the “**AHRA**”)² and its accompanying *Reimbursement Related to Assisted Human Reproduction Regulations* (the “**Regulations**”).³

Ultimately, the proposed amendments limit the categories of surrogacy-related expenses that are eligible for the METC for reasons that have no health-related justification and which are incongruous with other provisions of the METC regime, such as those pertaining to organ transplant expenses.

Consequently, we suggest that the Government consider amending the proposed legislation to encompass a more realistic scope of the expenses that intended parents incur throughout the surrogacy process and to place surrogacy-related expenses on a similar footing as other medical expenses eligible for the METC.


In summary, Egale Canada recommends the following:

Recommendation 1: That the Government remove the requirement in proposed paragraph 118.2(2)(v) and subsection 118.2(2.21) that surrogacy expenses eligible for the METC be incurred in Canada.

¹ RSC 1985, c 1 (5th Supp), <https://laws-lois.justice.gc.ca/eng/acts/i-3.3/>. Unless otherwise stated, all statutory references in this submission are to the ITA.

² *Assisted Human Reproduction Act*, SC 2004, c 2, <https://laws-lois.justice.gc.ca/eng/acts/a-13.4/> [AHRA].

³ *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193, online: <https://laws-lois.justice.gc.ca/eng/regulations/SOR-2019-193/index.html>.



Recommendation 2: That the Government amend proposed paragraph 118.2(2) (v) to clarify that fees paid or payable to agencies or services, in addition to fertility clinics or donor banks, to obtain sperm or ova to enable conception are eligible for the METC.

Recommendation 3: That the Government amend proposed subsection 118.2(2.21) to provide that expenses incurred by intended parents pursuant to section 8 of the Regulations—which concerns reimbursements paid to gestational carriers in respect of certain work-related income losses attributable to her pregnancy—are eligible for the METC.

Introduction

The prevalence of Canadians becoming parents via surrogacy has significantly increased in recent years. This is particularly true for parents outside of the “traditional” family model centred around a couple consisting of a cisgender woman and cisgender man. As has been repeatedly acknowledged by the Government,⁴ making surrogacy accessible and affordable for Canadians is an issue not only of health care, but also one of equity and inclusion, in particular (though by no means exclusively) for Two Spirit, lesbian, gay, bisexual, trans, queer, and intersex (“**2SLGBTQI**”) parents. Removing legal and financial barriers to parents having children through assisted reproduction and surrogacy—and thereby enabling 2SLGBTQI parents and others to form families and contribute on an equal footing to Canadian society as parents—is very welcome Government policy.

Surrogacy in Canada is regulated by the AHRA, which among other things prohibits paying a person to be a “surrogate mother” (referred to in these submissions as “gestational carrier”⁵) or to arrange for the services of a gestational carrier.⁶ However, subsection 12(1) of the AHRA permits intended parents, in accordance with regulations, to reimburse “a donor for an expenditure incurred in the course of donating sperm or an ovum”, “any person for an expenditure incurred in the maintenance or transport of an in vitro embryo” or “a surrogate mother for an expenditure incurred by her in relation to her surrogacy”. Similarly, subsection 12(3) of the AHRA permits intended parents to “reimburse a surrogate mother for a loss of work-related income incurred during her pregnancy”, provided that “a qualified medical practitioner certifies,

4 See for example, the Liberal Party Election Platform, September 2021, “Pathways to Parenthood, for Everyone” online: <https://liberal.ca/wp-content/uploads/sites/292/2021/09/Platform-Forward-For-Everyone.pdf>; Health Canada “Health Canada finalizes regulations to better protect Canadians who use reproductive technologies to build their families”, June 26, 2019, online: <https://www.canada.ca/en/health-canada/news/2019/06/health-canada-finalizes-regulations-to-better-protect-canadians-who-use-reproductive-technologies-to-build-their-families.html>; Health Canada “Towards a strengthened Assisted Human Reproduction Act”, December 7, 2020, online: <https://www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction/document.html>.

5 Although we recognize the proposed legislation refers to a “surrogate mother”, that language is increasingly disfavoured in the assisted reproduction community given the tremendous emotional weight that attaches to the word “mother” in our society. To be sensitive to the emotional needs of both intended parents and the pregnant person carrying the child, members of the assisted reproduction community increasingly favour the terms “gestational carrier”, “gestational surrogate”, or “traditional surrogate” as the context requires. (A “gestational surrogate” is distinguished from a “traditional surrogate” in that in only the latter case does the pregnant person donate eggs.)

6 AHRA, s 6.

in writing, that continuing to work may pose a risk to her health or that of the embryo or foetus” and “the reimbursement is made in accordance with the regulations.”

The Regulations, which came into force on June 2, 2020, specify among other things which expenses are lawfully reimbursable under subsections 12(1) and/or 12(3)—as well the supporting documentation that a intended parent must keep in respect of such expenses.

Generally speaking the Regulations set out the following expenses that may be reimbursed under subsections 12(1) and (3) of the AHRA:

- Section 2 relates to “expenditures incurred by a donor in the course of donating sperm or ova”, divided into nine broad subcategories.
- Section 3 relates to expenditures incurred for the maintenance or transport of an *in vitro* embryo.
- Section 4 relates to “expenditures incurred by a surrogate mother in relation to her surrogacy, divided into 15 broad subcategories.
- Section 8 relates to reimbursements to “a surrogate mother for a loss of work-related income incurred during her pregnancy”. Section 8 does not impose any substantive restrictions on a gestational carrier’s right to reimbursement but rather set out documentary requirements.

Currently, surrogacy expenses are substantial, and can therefore present roadblocks to creating a family. These costs associated with surrogacy expenses are disproportionately incurred by members of the 2SLGBTQI community who want to have children, given that the reality of family planning for 2SLGBTQI parents is that assisted reproductive technologies and/or services, such as surrogacy, are generally required for them to have children who may share one or more parent’s biological traits.

The proposed additions of paragraph 118.2(2)(v) and subsection 118.2(2.21) to the ITA aim to reduce these financial barriers by including surrogacy expenses in the METC scheme. Specifically, paragraph 118.2(2)(v) would include, in

the definition of “medical expense” eligible for the METC, amounts paid, the following amounts (with emphasis added on the words relevant to the submission):

(v) to a fertility clinic, or donor bank, in Canada as a fee or other amount paid or payable, to obtain sperm or ova to enable the conception of a child by the individual, the individual’s spouse or common-law partner or a surrogate mother on behalf of the individual.

(v) à une clinique de fertilité ou une banque de donneurs, au Canada à titre de frais ou d’autres montants payés ou payables, pour obtenir des spermatozoïdes ou des ovules afin de permettre la conception d’un enfant par le particulier, son époux ou conjoint de fait ou une mère porteuse pour le compte du particulier.

Section 118.2(2.21) would deem certain amounts paid in respect of a gestational carrier or donor to be “medical expenses”, on the following conditions (with emphasis added on the words relevant to the submission):

(2.21) An amount is deemed to be a medical expense of an individual for the purposes of this section if the amount

(2.21) Pour l’application du présent article, est réputé constituer des frais médicaux d’un particulier le montant qui, à la fois :

(a) is paid by the individual or the individual’s spouse or common-law partner;

(a) est payé par le particulier ou son époux ou conjoint de fait;

(b) is

(b) est, selon le cas:

(i) an expenditure described under any of sections 2 to 4 of the Reimbursement Related to Assisted Human Reproduction Regulations, or

(i) une dépense visée à l’un des articles 2 à 4 du Règlement sur le remboursement relatif à la procréation assistée,

(ii) paid in respect of a surrogate mother or donor, and would be an expenditure described in subparagraph (i) if it was paid to the surrogate mother or donor;

(ii) payé relativement à la mère porteuse ou au donneur, et serait une dépense visée au sous-alinéa (i) si elle était payée à la mère porteuse ou au donneur;

(c) would be a medical expense of the individual (within the meaning of subsection (2)) if the amount was paid in respect of a good or service provided to the individual or the individual's spouse or common-law partner;

(c) constituerait des frais médicaux du particulier, en vertu du paragraphe (2), si le montant a été payé relativement à un bien ou un service fourni au particulier, ou à son époux ou conjoint de fait;

(d) is an expense incurred in Canada; and

(d) est une dépense engagée au Canada;

(e) is paid for the purpose of the individual becoming a parent.

(e) est payé afin que le particulier devienne parent.

While well-intended, as discussed below, the proposed additions do not extend to the full range of expenses that intended parents regularly incur when pursuing surrogacy arrangements, and arbitrarily excludes whole categories of significant expenses that are both necessary and completely lawful under the AHRA. Such exclusions undermine the effectiveness of the proposed revisions and perpetuate the obstacles that can discourage and prevent 2SLGBTQI intended parents from seeking to form families on an equal footing as other Canadians.

Surrogacy-Related Expenses Incurred Outside of Canada

(Recommendation 1)

As a practical matter, many Canadian 2SLGBTQI intended parents engage gestational carriers located outside of the country. This may be done for various reasons, including having family outside of the country and the limited availability of gestational carriers in Canada due to Canada being a global

destination for surrogacy. When intended parents engage a gestational carrier outside of Canada, many, if not most, of the surrogacy expenses that will be eligible for reimbursement—including medical bills, maternity clothes, prenatal classes and the delivery, to name a few—will necessarily be incurred outside of Canada.

However, proposed paragraph 118.2(2)(v) limits the eligibility of expenses incurred for sperm or ova costs to those incurred “in Canada”. Similarly, proposed paragraph 118.2(2.21)(d) limits the eligibility of expenses incurred as surrogacy expenses to expenses incurred “in Canada”.

There is no legal, health, or fiscal justification for limiting proposed paragraphs 118.2(2)(v) and 118.2(2.21)(d) to expenses incurred “in Canada”. As an initial matter, no such limitation appears in the AHRA or the Regulations with respect to surrogacy expenses; intended parents in Canada can lawfully reimburse surrogacy expenses as described in the Regulations wherever in the world they are incurred.

Moreover, most categories of “medical expenses” eligible for the METC have no territorial requirement. For example, expenses incurred with respect to locating and reimbursing expenses of transplant donors are eligible for the METC regardless of where in the world they are incurred, as described at paragraph 118.2(1.1) (with emphasis added):⁷

(1.1) on behalf of the patient who requires a bone marrow or organ transplant,

((1.1) au nom du particulier, de son époux ou conjoint de fait ou d'une personne à charge visée à l'alinéa a), qui doit subir une transplantation de la moelle osseuse ou d'un organe:

⁷ In *Zieber v The Queen*, 2008 TCC 328, <https://canlii.ca/t/1xcbf>, the Tax Court of Canada actually held that surrogacy expenses paid by a married couple in respect of gestational carrier were described by paragraph 118.2(2)(1.1) and thus eligible for the METC as transplant costs. *Zieber*, however, was rejected in subsequent cases (see eg *Zanatta v The Queen*, 2014 TCC 293, <https://canlii.ca/t/gdt2t>), which is why legislative reform is now required.

(i) for reasonable expenses (other than expenses described in subparagraph 118.2(2)(l.1) (ii)), including legal fees and insurance premiums, to locate a compatible donor and to arrange for the transplant, and

(ii) for reasonable travel, board and lodging expenses (other than expenses described in paragraphs 118.2(2)(g) and 118.2(2)(h)) of the donor (and one other person who accompanies the donor) and the patient (and one other person who accompanies the patient) incurred in respect of the transplant;

(i) pour les frais raisonnables, excluant les frais visés au sous-alinéa (ii) mais incluant les frais judiciaires et les primes d'assurance, engagés dans la recherche d'un donneur compatible et dans les préparatifs de la transplantation,

(ii) pour les frais raisonnables de déplacement, de pension et de logement, à l'exclusion des frais visés aux alinéas (g) et (h), du donneur (et d'une autre personne qui l'accompagne) et du particulier (et d'une autre personne qui l'accompagne) engagés relativement à la transplantation;

Similarly, paragraph 118.2(2)(a) provides that expenses paid “to a medical practitioner, dentist or nurse or to a public or licensed private hospital” are eligible for the METC. There is no requirement that such expenses be incurred in Canada. *Income Tax Folio S1-F1-C1* (Medical Expense Tax Credit), published by the Canada Revenue Agency, confirms that “As a general rule, however, eligible medical expenses are not restricted to those paid in Canada or for medical services provided in Canada.”⁸ Simply put, if a Canadian taxpayer has to visit a doctor or dentist in another country for medical treatment, the expenses for that visit are eligible for the METC and, indeed, are routinely claimed without controversy.

The *Tax Measures: Supplementary information* document, published by the Department of Finance in respect to Budget 2022, offers the following

⁸ *Income Tax Folio S1-F1-C1*, Medical Expense Tax Credit, dated July 28, 2020, at paragraph 1.25, online: <https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-1-individuals/folio-1-health-medical/income-tax-folio-s1-f1-c1-medical-expense-tax-credit.html>.

explanation for not allowing surrogacy expenses incurred outside of Canada to qualify for the METC:

Only expenses incurred in Canada would be eligible. In Canada, surrogacy and gamete and embryo donation are regulated under the *Assisted Human Reproduction Act*. The *Reimbursement Related to Assisted Human Reproduction Regulations* outline which reimbursements are permissible under the *Assisted Human Reproduction Act*. All expenses claimed under the METC would be required to be in accordance with the *Assisted Human Reproduction Act* and associated regulations.⁹

With respect, this explanation simply does not make sense. The AHRA and the Regulations allow the reimbursement of surrogacy-related expenses incurred outside of Canada, provided of course that they are properly documented and otherwise in compliance with the Regulations. There is no legal, health, or fiscal reason why that documentation should not be sufficient for the ITA as well.¹⁰

The Minister of Health, when recommending the Regulations in 2020, did not exclude expenses incurred outside of Canada from eligibility for reimbursement. The Regulations were adopted accordingly. This was an appropriate policy determination of the Minister of Health that the ITA should respect and reinforce, not undermine through additional restrictions that lack any apparent policy justification. Indeed, under the proposed legislation, Canadian 2SLGBTQI intended parents who seek the help of a gestational carrier located abroad are uniquely subject to discriminatory treatment as a result of a legislative lacuna: While favourable tax treatment is available to both Canadians seeking medical treatment abroad and Canadian intended parents seeking to grow their families with the help of a gestational carrier in Canada, no such favourable tax treatment is available to Canadian 2SLGBTQI intended parents seeking to grow their families with the help of a gestational carrier abroad—even though they

⁹ Tax Measures: Supplementary information, at 14, online: https://budget.gc.ca/2022/report-rapport/tm-mf-en.html#a2_7.

¹⁰ To the extent the government's concern flows from its inability to regulate foreign surrogacy practices, that concern is misplaced in this context because any claimed surrogacy-related expenses outside of Canada would need to comply with the requirements of the AHRA and Regulations. In particular, compensation for a gestational carrier outside of the categories recognized in the AHRA and Regulations would not be eligible.

incur the same surrogacy-related expenses they would have in Canada, such as *in vitro* fertilization and delivery-related costs.

In light of the foregoing, the requirement that an expense be incurred “in Canada” to qualify for the METC under proposed paragraph 118.2(2)(v) and subsection 118.2(2.1) is arbitrary, inconsistent with the AHRA and the Regulations, and at odds with the policy objectives of the proposed provisions, in a manner that will disproportionately affect 2SLGBTQI intended parents. Egale Canada recommends that the requirement be removed.

Donor Agencies

(Recommendation 2)

Sperm or ova required for surrogacy may be obtained either frozen (*i.e.*, from pre-deposited samples in a donor bank), or fresh (*i.e.*, from an agency-matched donor). Fresh samples are preferred to frozen samples as they have a higher chance of a successful pregnancy. Many agencies provide services to screen and match donors with intended parents, and use of these services is very common in Canada. While donor banks and fertility clinics may offer these services, they are not the only institutions that do so.

For many same-sex couples and other 2SLGBTQI intended parents, it is important to work with a professional that is open to, and experienced in, supporting family planning for 2SLGBTQI individuals. There are many agencies both within and outside of Canada that offer reliable and trusted donor-matching services to members of the 2SLGBTQI community, and the use of such agencies is particularly common among minority communities who often seek a donor from within their community. These agencies provide a vital, and often essential, step in the process of becoming a parent through surrogacy.

The proposed paragraph 118.2(2)(v) will allow amounts paid “to a fertility clinic, or donor bank, in Canada as a fee or other amount paid or payable, to obtain sperm or ova to enable the conception of a child by [...] a surrogate mother on behalf of the individual” to qualify for the medical expense tax credit. There is ambiguity as to whether pure donor agencies are described by the expression

“fertility clinic, or donor bank”. While Egale Canada hopes that the Canada Revenue Agency would adopt a liberal and generous interpretation of what constitutes a “fertility clinic, or donor bank”, and accept the deduction of donor agency expenses, there is no assurance that it would do so. Parents or intended parents seeking to claim METC’s in respect of such expenses would thus be forced into litigation.

There is no principled reason to exclude expenses paid to pure donor agencies to locate sperm or ova donor from the METC. If such services are incurred by a fertility clinic or a donor bank, then the costs of such services are unquestionably described by proposed paragraph 118.2(2)(v) and thus eligible for the METC. The eligibility of donor-location services for the METC should not depend on whether the provider of the service happens to also operate a full-service fertility clinic or donor bank.

This approach is consistent with the Explanatory Note accompanying proposed paragraph 118.2(2)(v),¹¹ which states:

New paragraph 118.2(2)(v) adds to the list of eligible medical expenses amounts paid to a fertility clinic or donor bank in Canada as a fee or other amount paid or payable, to obtain sperm or ova to enable the conception of a child by the individual, the individual’s spouse or common-law partner or a surrogate mother on behalf of the individual. Through this amendment, expenses for the acquisition of sperm or ova for use by an individual in order to become a parent would be eligible for the medical expense tax credit.

To avoid ambiguity and unnecessary litigation—the risks and costs of which are disproportionately likely to be borne by 2SLGBTQI intended parents—Egale Canada recommends revising proposed 118.2(2)(v) to make clear that it includes amounts paid to donor-location agencies are eligible for the METC. This might be most simply accomplished by simply deleting the phrase “to a fertility clinic, or donor bank, in Canada”.

¹¹ Explanatory Notes to Legislative Proposals Relating to the Income Tax Act and Regulations (Budget 2022 and Regulations), online: <https://fin.canada.ca/drlreg-apl/2022/ita-lir-0822-n-2-eng.html#metcsurrogacy>.

Loss of Work-Related Income Expenses

(Recommendation 3)

Gestational carriers often have to take time off work in relation to their pregnancy for medical reasons. Consequently, subsection 12(3) of the AHRA expressly authorizes intended parents, in accordance with the Regulations, to reimburse gestational carriers for “a loss of work-related income incurred during her pregnancy” when “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.”¹² Section 8 of the Regulations sets out the procedural and documentary requirements for reimbursements pursuant to section 12(3) of the AHRA.

Health Canada, in its *Guidance document: Reimbursement related to Assisted Human Reproduction Regulations*, explains that the reimbursement of such work-related expenses should be given a large and generous interpretation in order give “primacy to the health and safety of the surrogate mother and the child”, which a “key principle” underpinning the AHRA:¹³

“[...] surrogate mothers may be reimbursed for the loss of work-related income both for extended absences from work (e.g., doctor-prescribed bedrest) and short absences from work (e.g., to attend regular doctor appointments), provided they obtain the required written certification and the reimbursement is made in accordance with the regulations.

Similarly, Health Canada is of the view that surrogate mothers may be reimbursed for the loss of work-related income during the pre-pregnancy and the post-partum period, provided they obtain the required written certification from the qualified medical professional and provided the reimbursement is made in accordance with the regulations. Such an interpretation gives primacy to the health and safety of the surrogate

¹² AHRA, s.12(3).

¹³ Health Canada, *Guidance document: Reimbursement related to Assisted Human Reproduction Regulations*, online: <https://www.canada.ca/en/health-canada/programs/consultation-reimbursement-assisted-human-reproduction/document.html#a10>.

mother and the child, which is consistent with key principles underpinning the AHR Act. [emphasis added]


However, proposed subsection 118.2(2.21), at subparagraph 118.2(2.21)(b) (i), restricts surrogacy expenses eligible for the METC to those “described under any of sections 2 to 4 of the *Reimbursement Related to Assisted Human Reproduction Regulations*”. For reasons which are apparently not explained either in the Explanatory Notes or other Budget 2022 materials, expenses described under section 8 of the Regulations are excluded from the proposed provision. This is a very concerning omission given the importance of such expenses—as recognised by Health Canada—in ensuring the health and safety of the gestational carrier and child.

The Minister of Health, when recommending the Regulations in 2020, authorised parents to reimburse gestational carriers for lost work-related income resulting from the pregnancy, subject to complying with documentation requirements. The Regulations were adopted accordingly. This was an appropriate policy determination of the Minister of Health that the ITA should respect and reinforce, not undermine through additional restrictions adopted without any explanation.

In light of the foregoing, the exclusion from proposed subsection 118.2(2.21) of expenses incurred by intended parents pursuant to section 8 of the Regulations is arbitrary, inconsistent with the AHRA and the Regulations, and at odds with the policy objectives of the proposed provisions, in a manner that will disproportionately affect 2SLGBTQI parents. Egale Canada recommends that subsection 118.2(2.21) be revised so as to insure that such expenses—provided that the documentary requirements set out in the Regulation are complied with—are eligible for the METC.

Conclusion

The stated purpose of proposed paragraph 118.2(2)(v) and subsection 118.2(2.21) is to help alleviate the additional financial burden those engaging gestational carriers face—including in particular, 2SLGBTQI parents. This is a laudable goal



that Egale Canada enthusiastically supports. However, the effectiveness of the proposed provisions would be improved by removing ambiguities and arbitrary restrictions that are not based in the AHRA or Regulations, that do not reflect the reality of parents seeking to form a family through surrogacy, and/or that are not otherwise supported as a matter of legal, health, or fiscal policy

Fortunately, as outlined in this submission, the deficiencies in the proposed provisions are easily remedied. Egale Canada thanks the Department of Finance for considering this submission and would be pleased to discuss it further.

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