6 Family Law

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I. Introduction

Over the past two decades, family law practitioners have struggled in assisting clients to have their relationships recognized for various purposes. The convoluted evolution of the law to recognize equal marriage has made it difficult to advise clients on their rights and obligations. The law was in a state of flux. With the advent of equal marriage across the country in 2005, it became significantly easier to advise same-sex clients of their legal entitlements going forward, although some transitionary areas remain, particularly related to past claims. The history of the development of family law is important to advising clients on how their families are recognized in union, separation, and death.

LGBTQ2+ clients approach lawyers for legal advice with apprehension. The struggle for recognition of our families remains part of our collective experience, and there is a general mistrust of the legal system, which has for so many years been a place of discrimination. When an LGBTQ2+ client comes for legal advice on a family matter, whether that be for parentage recognition, for separation, or upon death of a child or spouse, that client comes with a history of distrust for both laws and lawyers that defined our families as outsiders. Any practitioner must appreciate this history in order to approach clients with empathy, sensitivity, and knowledge.

In this chapter, we will review the major areas of family law both substantively and how individuals and families experience family legal issues. The discussion of the experience of our families is anecdotal and gathered after years of representing these clients while the law struggled (and practitioners struggled) to bring our families into the purview of the legal lens.

II. Marriage and Divorce

A. Marriage

1. Overview

Federal legislation[1] received royal assent in 2005 codifying the gender-neutral definition of marriage. Same-sex marriage was already judicially authorized in multiple provinces, but this legislation extended same-sex marriage to four provinces and territories without the necessity of a constitutional challenge. In addition, there had already been several provinces that had adopted civil union schemes, and these schemes remain in place to date.

Clients approaching family practitioners for legal advice may be unmarried, married, in a civil union, or in a combination of all three over time. Since different legal rights and obligations flow from each type of relationship recognition, it is important to

1 *Civil Marriage Act*, SC 2005, c 33 [CMA].

understand how these constructs intersect. For example, a client may attend who has been in a relationship of 25 years—10 of which were as common law cohabitants, 10 of which were in a civil union, and 5 of which were as married spouses. Very different rights and obligations might flow from each of these relationships with various claims and remedies as a result of evolution of the law. For example, for spouses who could not legally marry but intended to do so as soon as the law permitted, one might argue that their property entitlement on separation should be based upon the entire length of their cohabitation, rather than being limited to the actual duration of the marriage.

2. Legislative and Jurisprudential History

Prior to the legalization of same-sex marriage in Canada, several of the provinces adopted various schemes offering same-sex couples access to "civil unions" or "domestic partnerships" and expanded the rights and obligations of same-sex couples in areas such as spousal support. The evolution of who could be considered a "spouse" under the common law is discussed in more detail in Section III, "Spousal Support."

Marriage was traditionally defined as being a union between a man and a woman. Same-sex couples in Canada were unable to marry or, if they did marry, their marriages were considered nullities and void *ab initio*.

For example, in *C(L) v C(C)*,[2] two women married in Ontario in 1982. The respondent used as identification a driver's licence she had obtained when she decided to change her gender (although she did not ultimately undergo a sex change). The applicant sought a declaration that their marriage was a nullity. The court found that the law as it presently existed did not provide for marriage between members of the same sex. As the parties were both female when they married, the court declared the marriage a nullity and void *ab initio*.[3] In *Re North and Matheson*,[4] the court considered the status of a marriage between two men. Marriage had not been defined in legislation, either by the Parliament of Canada or by the Legislature of Manitoba. However, marriage had been defined judicially as a union between a man and a woman. The judge in this case also declared the marriage a nullity.[5]

The traditional definition of marriage, as being between a man and a woman, also had implications for how transgender individuals were treated. In *M v M(A)*,[6] the husband brought a declaration of nullity of his marriage on the ground that his wife was, at the date of the marriage "a latent transsexual."[7] After marriage, the wife expressed to

2 1992 CanLII 7651 (Ont Sup Ct J).

3 *Ibid* at para 12.

4 1974 CanLII 1220 (MBQB).

5 *Ibid* at 285.

6 [1984] WDFL 1574 (PEISC (Fam Div)).

7 *Ibid* at para 2.

the husband their intent to live as a man and took steps to do so. The court was unable to find any Canadian jurisprudence touching on "trans-sexualism" as a ground for nullity. The court perceived that the law of England, with which the law of Canada conforms, stipulated that the capacity for "natural heterosexual intercourse" is an essential element of marriage. If there is an incapacity to engage in that essential element, then the marriage is void or voidable.[8] The court found that there existed "at the outset of this marriage a latent physical incapacity for natural heterosexual intercourse, which incapacity became patent only subsequent to the solemnization of the marriage, of such consequence as would render the said marriage voidable."[9] The court declared the marriage annulled.

The constitutionality of defining marriage as a union between a man and a woman was challenged in several provinces in the early 2000s. The challenges were based on section 15(1) of the *Canadian Charter of Rights and Freedoms*,[10] which provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. There were eight same-sex marriage decisions across Canada prior to the introduction of the CMA. These landmark decisions, which ruled that the common law definition of marriage was unconstitutional, are as follows (in chronological order):

- British Columbia: *EGALE Canada Inc v Canada (Attorney General)*;[11]
- Ontario: *Halpern v Canada (Attorney General)*;[12]
- Quebec: *Hendricks c Québec (Procureure générale)*;[13]
- Yukon: *Dunbar & Edge v Yukon (Government of) & Canada (AG)*;[14]
- Manitoba: *Vogel v Canada (Attorney General)*;[15]
- Nova Scotia: *Boutilier v Nova Scotia (Attorney General)*;[16]
- Saskatchewan: *W(N) v Canada (Attorney General)*;[17]

8 *Ibid* at para 16.

9 *Ibid* at para 19.

10 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

11 2003 BCCA 251.

12 2003 CanLII 26403 (Ont CA) [*Halpern*].

13 2002 CanLII 23808 (Que SC), aff'd 2004 CanLII 20538 (Que CA).

14 2004 YKSC 54.

15 (2004), [2005] 5 WWR 154 (QB).

16 [2004] NSJ No 357 (SC).

17 2004 SKQB 434.

- Newfoundland and Labrador: *Pottle v Attorney General of Canada*;[18] and
- New Brunswick: *Harrison v Canada (Attorney General)*.[19]

The federal government began to consider the national legalization of same-sex marriage. The *Reference re Same-Sex Marriage*[20] set out to answer several questions in respect of the federal government's *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*. The proposed Act defined marriage, for civil purposes, as the lawful union of two persons to the exclusion of all others. The court answered the reference questions as follows:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

   Answer: With respect to section 1: Yes. With respect to section 2: No.

2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

   Answer: Yes.

3. Does the freedom of religion guaranteed by paragraph 2(*a*) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

   Answer: Yes.

4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Québec in section 5 of the *Federal Law—Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

   Answer: The Court exercises its discretion not to answer this question.[21]

3. Marriage and the Civil Marriage Act

The CMA came into effect with royal assent on July 20, 2005, codifying the gender-neutral definition of marriage. Same-sex marriage was already judicially authorized in British Columbia, Ontario, Quebec, Yukon, Manitoba, Nova Scotia, Saskatchewan, Newfoundland and Labrador, and New Brunswick. The CMA extended same-sex marriage to Prince Edward Island, Alberta, the Northwest Territories, and Nunavut.

18 2004 O1T 3964 (NLSC (TD)).

19 2005 NBQB 232.

20 2004 SCC 79.

21 *Ibid* at para 73.

a. Same-Sex Marriage

The following are some key provisions by which the CMA defines and regulates marriage:

> Marriage
>
> Marriage — certain aspects of capacity
>
> 2 Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
>
> Consent required
>
> 2.1 Marriage requires the free and enlightened consent of two persons to be the spouse of each other.
>
> Minimum age
>
> 2.2 No person who is under the age of 16 years may contract marriage.
>
> Previous marriage
>
> 2.3 No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null by a court order.
>
> Religious officials
>
> 3 It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.
>
> Marriage not void or voidable
>
> 4 For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

b. Marriage for Non-Residents

With the advent of equal marriage, same-sex couples from around the world came to Canada for "marriage tourism"—seeking to get married when they could not do so in their home countries. This marriage tourism illustrates how important legal marriage was to the members of the global LGBTQ2+ community notwithstanding the fact that the Canadian marriage might not be recognized in their own jurisdiction. Problems soon developed, however, when these couples separated and were not able to obtain divorces either in Canada, because of the residence requirement, or in their home countries, where the marriage itself was not recognized (see Section II.C.3.a., "Divorce for Non-Resident Spouses").

The CMA states that non-resident persons can marry in Canada, even if they do not, at the time of the marriage, have the capacity to enter into the marriage under the law of their respective state(s) of domicile:

> Marriage of non-resident persons
>
> 5(1) A marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though

either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile.

Retroactivity

(2) Subsection (1) applies retroactively to a marriage that would have been valid under the law that was applicable in the province where the marriage was performed but for the lack of capacity of either or both of the spouses to enter into it under the law of their respective state of domicile.

Order dissolving marriage

(3) Any court order, made in Canada or elsewhere before the coming into force of this subsection, that declares the marriage to be null or that grants a divorce to the spouses dissolves the marriage, for the purposes of Canadian law, as of the day on which the order takes effect.

4. Provincial and Territorial Legislation

As noted, the provinces have jurisdiction over the solemnization of marriage. The following chart outlines the applicable statutes across Canada. As the age of majority varies across the country, so too does the ability of young persons to enter into a marriage.

TABLE 6.1

Provinces and Territories	Statute	Notes on Age and Consent
Alberta	*Marriage Act*, RSA 2000, c M-5	Sections 17-20 Consent generally required to marriage of a person under 18 years.
British Columbia	*Marriage Act*, RSBC 1996, c 282	Sections 28-29 Consent generally required to marriage of a person under 19 years.
Manitoba	*The Marriage Act*, RSM 1987, c M50	Sections 18-19 Consent generally required to marriage of a person under 18 years.
New Brunswick	*Marriage Act*, RSNB 2011, c 188	Sections 20-20.1 Consent generally required to marriage of a person under 18 years.
Newfoundland and Labrador	*Marriage Act*, SNL 2009, c M-1.02	Sections 18-19 Consent generally required to marriage of a person under the age 19.

Provinces and Territories	Statute	Notes on Age and Consent
Northwest Territories	*Marriage Act*, SNWT 2017, c 2	Section 1-2, 16-18 Consent generally required to marriage of a person under the age of 19.
Nova Scotia	*Solemnization of Marriage Act*, RSNS 1989, c 436	Sections 20-21 Consent generally required to marriage of a person under the age of 19.
Nunavut	*Marriage Act*, RSNWT (Nu) 1988, c M-4	Sections 21, 43-46 Consent generally required to marriage of a person under the age of 19.
Ontario	*Marriage Act*, RSO 1990, c M.3	Sections 5-6 Consent generally required to marriage of a person under the age of 18.
Prince Edward Island	*Marriage Act*, RSPEI 1988, c M-3	Sections 17- 20 Consent generally required to marriage of a person under the age of 18.
Quebec	*Civil Code of Québec*, SQ 1991, c 64 [CCQ]	Articles 120, 373, 3088 The court must authorize the solemnization of the marriage for persons who are minors (16 and 17 years old).
Saskatchewan	*The Marriage Act*, *1995*, SS 1995, c M-4.1	Sections 19, 25-26 Consent generally required to marriage of a person under the age of 18.
Yukon	*Marriage Act*, RSY 2002, c 146	Sections 40-42 Consent generally required to marriage of a person under the age of 19.

a. Registration of a Status Other than Marriage

In Quebec (civil unions), Nova Scotia (domestic partnerships), and Alberta (adult interdependent relationships), it is possible to officially register a status other than marriage.

Civil unions have been available under the CCQ since 2002. The CCQ provides the following:

> A civil union is a commitment by two persons 18 years of age or over who express their free and enlightened consent to share a community of life and to uphold the rights and obligations that derive from that status.
>
> A civil union may only be contracted between persons who are free from any previous bond of marriage or civil union and who in relation to each other are neither an ascendant or a descendant, nor a brother or a sister.
>
> 521.2. A civil union must be contracted openly before an officiant competent to solemnize marriages and in the presence of two witnesses.
>
> No minister of religion may be compelled to solemnize a civil union to which there is an impediment according to the minister's religion and the discipline of the religious society to which he or she belongs.
>
> 521.3. … The solemnization of a civil union is subject to the same rules, with the necessary modifications, as are applicable to the solemnization of a marriage, including the rules relating to prior publication.
>
> …
>
> 521.6. … The effects of the civil union as regards the direction of the family, the exercise of parental authority, contribution towards expenses, the family residence, the family patrimony and the compensatory allowance are the same as the effects of marriage, with the necessary modifications.
>
> Whatever their civil union regime, the spouses may not derogate from the provisions of this article.
>
> …
>
> 521.8. … Civil union regimes, whether legal or conventional, and civil union contracts are subject to the same rules as are applicable to matrimonial regimes and marriage contracts, with the necessary modifications.

Nova Scotia's domestic partnership regime came into effect in 2001. Section 53 of the *Vital Statistics Act*[22] states that "two individuals who are cohabiting or intend to cohabit in a conjugal relationship may make a domestic-partner declaration" under certain conditions. Once the declaration is submitted for registration, together with the prescribed fees and such proof as may be required, and "if satisfied of its truth and sufficiency," the registrar "shall" register the declaration.[23] Section 54(2)(g) of the Act provides that upon registration of the declaration, the domestic partners have "the same rights and obligations" as a spouse under many provincial statutes.

22 RSNS 1989, c 494 [Nova Scotia VSA].

23 *Ibid*, s 54(1).

Alberta introduced "adult interdependent partner agreements" through its *Adult Interdependent Relationships Act*.[24] The Act, which was proclaimed in force on June 1, 2003, with some sections coming into force on January 1, 2004, provides the following:

> Adult interdependent partner
>
> 3(1) Subject to subsection (2), a person is the adult interdependent partner of another person if
>
> (a) the person has lived with the other person in a relationship of interdependence
>
> (i) for a continuous period of not less than 3 years, or
>
> (ii) of some permanence, if there is a child of the relationship by birth or adoption, or
>
> (b) the person has entered into an adult interdependent partner agreement with the other person under section 7.
>
> (2) Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.
>
> Restrictions
>
> 5(1) A person cannot at any one time have more than one adult interdependent partner.
>
> (2) A married person cannot become an adult interdependent partner while living with his or her spouse.
>
> Adult interdependent partner agreement
>
> 7(1) Subject to subsection (2), any 2 persons who are living together or intend to live together in a relationship of interdependence may enter into an adult interdependent partner agreement in the form provided for by the regulations.
>
> (2) A person may not enter into an adult interdependent partner agreement if the person
>
> (a) is a party to an existing adult interdependent partner agreement,
>
> (b) is married, or
>
> (c) is a minor, unless
>
> (i) the minor is at least 16 years of age, and
>
> (ii) the minor's guardians have given their prior written consent.

The AIRA amended a number of other acts, with the result that adult interdependent partners assumed many rights and obligations. For example, as discussed in Section III, "Spousal Support," Alberta's *Family Law Act*[25] sets out the obligation to support an adult interdependent partner.

24 SA 2002, c A-4.5 [AIRA].

25 SA 2003, c F-4.5 [Alberta FLA].

B. Other Issues

The legislative and jurisprudential history of the evolution of common law relationships, civil unions, and marriage is critical to understand how the rights and obligations of the spouses will be treated on relationship breakdown.

1. Recognition of Foreign Same-Sex Civil Partnerships

Ontario has recognized civil unions in other jurisdictions as affording all of the rights and obligations of legal marriage in Ontario. In *Hincks v Gallardo*,[26] the Ontario Court of Appeal considered how to recognize foreign same-sex civil partnerships. The appellant, Mr Gallardo, and the respondent, Mr Hincks, entered into a civil partnership under the United Kingdom's *Civil Partnership Act, 2004*[27] in October 2009. At the time of entering into the civil partnership, same-sex couples could not marry in the UK. Shortly after entering into the civil partnership, the couple moved to Ontario. A year later, they separated. Mr Gallardo commenced and then discontinued an application seeking divorce and other relief pursuant to the *Divorce Act*[28] and the Ontario *Family Law Act*.[29] Mr Hincks then brought an application seeking relief under the same statutes. Mr Gallardo took the position that the parties were not spouses under the *Divorce Act* or the Ontario FLA, and that Mr Hincks did not have the rights of a spouse under either statute. The motion judge found that the civil partnership was a marriage as defined by the CMA and that the parties were spouses as defined by the *Divorce Act* and section 1 of the Ontario FLA. The Court of Appeal unanimously upheld the decision.

At its heart, the case was about statutory interpretation of the terms "spouse" and "marriage." Hourigan JA, for the court, found that the motion judge's interpretation of those terms was "entirely consistent with one of the fundamental purposes of the *Divorce Act* and the FLA—that is to provide an equitable and certain process for resolving their economic issues on the dissolution of a conjugal relationship."[30] Further, the Court of Appeal found that the motion judge's decision did not have the effect of forcing the parties into a non-consensual marriage; there is a "fundamental difference between couples who choose not to marry and instead cohabit, and the parties in this case, who chose not to cohabit and instead entered into a status that was the equivalent to marriage for same-sex couples."[31] Mr Gallardo's argument that if civil partnerships are marriages, then civil partnerships are *ultra vires* the jurisdiction of the provinces

26 2014 ONCA 494 [*Hincks*].

27 2004, c 33.

28 RSC 1985, c 3 (2nd Supp).

29 RSO 1990, c F.3 [Ontario FLA].

30 *Hincks*, *supra* note 26 at para 5.

31 *Ibid* at para 30.

was fundamentally flawed. This argument failed to recognize that civil partnerships were available to both same-sex and different-sex couples in Canada, while UK civil partnerships were only available to same-sex couples.[32] The court found that it was clear that the motion judge had sought to interpret the relevant legislation in a manner consistent with Charter values.[33]

With respect to the intention of the parties to change their status, the court found that the subjective intention of the parties was only relevant as to the issue of whether the civil partnership was voluntary. As it was voluntary, the court had to consider the legal effect of the union. Expert evidence showed that the effect was to bestow upon the parties "all the rights and responsibilities of marriage."[34]

The court also considered the effect of the new UK marriage legislation that passed in 2013, after the motion judge had heard the case and released her reasons. The new legislation legalized same-sex marriage in England but also preserved the existing civil partnership regime. The court found that the legislation made no difference as the parties' relationship was "only ever governed by the legislative scheme in place at the time they entered into their civil union."[35]

Finally, the court considered domestic contracts and part IV of the Ontario FLA. Mr Gallardo took the position that a civil union qualifies as a foreign domestic contract, such that it is enforceable under section 58 of the Ontario FLA. The court found the argument meritless, as a domestic contract is distinct from a UK civil partnership. The provisions of part IV of the Ontario FLA are intended to deal with agreements between individuals. Civil partnerships under UK legislation are fundamentally different; they change the legal status of parties, engage the power of the state, and are not mere contracts between parties.[36] Even if the language of part IV of the Ontario FLA could be construed in the manner suggested by Mr Gallardo, thus giving rise to an ambiguity, the court would decline to adopt that interpretation, stating,

> [t]he notion of requiring same-sex couples to enforce their rights through this cumbersome and ill-suited process is in effect the same as sanctioning a "separate but equal" regime for same-sex couples. Such a parallel regime has been expressly rejected by this court in *Halpern* and is inconsistent with Charter values.[37]

32 *Ibid* at para 31.

33 *Ibid* at para 32.

34 *Ibid* at para 34.

35 *Ibid* at para 36.

36 *Ibid* at para 41.

37 *Ibid* at para 42.

2. Conflict of Laws

In *C (MS) v J (CF)*,[38] the applicant had married the respondent twice, once in Texas and once in Ontario. The applicant, who was a Canadian citizen, was transgender; he transitioned in the 1980s. The respondent, who was an American citizen, was female. The parties were residing in Texas when they married in 1995. When the parties married in Texas, they were not required to identify their birth genders. The applicant provided Ontario and Canadian identification that identified him as male. The following year, the United States federal government enacted the *Defence of Marriage Act* that restricted marriage to a union between one man and one woman.[39] In 1997, the applicant became aware that the issuance of marriage licences to same-sex couples was prohibited in Texas. In 1999, there was a Texas Court of Appeals case, *Littleton v Prange*,[40] that held that a person who had transitioned from male to female remained legally a male. In that case, Littleton was a trans woman who transitioned and then married a male. The appellate court held that the marriage was invalid. In 2003, Texas enacted legislation that marriages and civil unions between same-sex couples were contrary to public policy in Texas and void in that state. As a result of the legal landscape in the US and Texas, the parties' immigration lawyer advised the parties to marry in Canada in order to have a valid marriage for the purpose of the applicant's application for a green card. They married in Ontario in July 2013.

The court stated that the case had to be decided having regard to the conflict of laws governing the recognition of foreign marriage. No evidence was led as to the foreign law; accordingly, the court determined that the case had to be decided assuming that the foreign law was the same as the law of the forum, in this case, Canadian law.[41] The court accepted the applicant's submission that under Ontario law, the Texas marriage was valid, relying on *Halpern*, *Hincks*, and the CMA. Alternatively, the court found that even if there was admissible evidence that the marriage in Texas was void because the Texas marriage was deemed to be a marriage between same-sex persons, the Texas marriage would still be regarded as valid in Ontario. The court summarized:

> [I]n concluding that the Texas marriage is valid, applying the law in Ontario at the time of the Ontario marriage, I note the following:
>
> a. under Ontario law, the applicant was a male person at the time of the Texas marriage and thereafter, and accordingly the Texas marriage was a marriage of persons of the opposite gender which raised no issue of validity in any event;
>
> b. even assuming that there was evidence as to the foreign law that established that the Texas marriage was void at the date of the Ontario marriage because the parties

38 2017 ONSC 2389 [*C (MS)*].

39 HR 3396 (104th).

40 9 SW3d 223 (US Tex CA 1999).

41 *C (MS)*, *supra* note 38 at para 26.

> were considered a same-sex couple when they married in Texas, then under Ontario law, applying *Hincks*, it would be contrary to the express values of Canadian society, and also discriminatory, to refuse to recognize the Texas marriage as valid.[42]

The court granted a divorce, dissolving the Texas marriage. As a pre-existing marriage is grounds for an annulment at common law, and due to the prohibitions in section 2.3 of the CMA, the Ontario marriage was declared void and annulled.

C. Divorce

1. Overview

Not surprisingly, after fighting for the right to marry, soon came the fight for the right to divorce. Because Canada was one of the first countries to embrace equal marriage, we also became one of the first to consider the particular challenges associated with the need to divorce. Some thought that this was unnecessary, particularly if the couple did not reside in a jurisdiction that recognized their marriage at all. However, it soon became obvious that couples wanted to have their relationships legally dissolved on separation as much as they had sought a legal union. Practitioners in the area received regular calls from non-residents who had married in Canada and were seeking to divorce. Critically, a divorce would permit both spouses to remarry but would also be a legal and symbolical end to their union.

2. The Divorce Act

Until 2005, section 2(1) of the *Divorce Act* defined spouse as "a man or woman who are married to each other." This meant that married same-sex couples were left without recourse when they wanted to divorce. The constitutionality of the definition of "spouse" in the *Divorce Act* was challenged first in Ontario and then in British Columbia. The first same-sex divorce in Canada was granted in the Ontario case *M (M) v H (J)*.[43] The parties were a married same-sex couple. They were unable obtain a divorce as they did not fall within the definition of "spouse."

The Ontario Superior Court of Justice heard the case in September 2004, and issued its written judgment in November 2004. The court found that the definition of "spouse" in the *Divorce Act* violated section 15(1) of the Charter. First, the court found that the law drew a formal distinction between same-sex married spouses and different-sex married spouses by restricting the definition of "spouse," and thus restricting the application of the *Divorce Act* to different-sex married spouses. There was no question that the law excluded same-sex married spouses from the benefits of divorce, failed to take into account their already disadvantaged position, and resulted in substantially

42 *Ibid* at para 34.

43 2004 CanLII 49968 (Ont Sup Ct J) [*M (M)*].

differential treatment based on the personal ground of being in a same-sex relationship.[44] Second, the court found that the differential treatment was on an analogous ground, citing *Egan v Canada*.[45] Third, the court found that the law was discriminatory and demeaned the claimants' dignity.[46] The section 15(1) breach could not be justified under section 1 of the Charter.[47] The court determined that the appropriate remedy for the Charter breach was to sever the words "a man and a woman," and to read in the words "two persons," so that the section would read: "[S]pouse means either of two persons who are married to one another."[48] The remedy was effective immediately.

In June 2005, a similar decision was issued by the British Columbia Supreme Court in *S (J) v F (C)*.[49] The plaintiff brought an application for a declaration on the constitutionality of the definition of "spouse" in the *Divorce Act*, as well as an application for divorce. The court referenced the Ontario decision in *M (M)* and came to the same conclusion. The parties were entitled to a declaration that the definition of "spouse" in section 2(1) of the *Divorce Act* was inconsistent with section 15(1) of the Charter, unjustifiable under section 1, and therefore of no force and effect.[50] The court also stated that section 2(1) of the *Divorce Act* would now read: "[S]pouse means either of two persons who are married to each other."[51] As in the Ontario case, the remedy was effective immediately.

3. Divorce and the Civil Marriage Act

The CMA came into force on July 20, 2005 and amended the *Divorce Act* in order to permit same-sex divorce. Section 2(1) of the *Divorce Act* now states that "spouse means either of two persons who are married to each other."

a. Divorce for Non-Resident Spouses

When it was first introduced, the CMA did not contemplate divorce for non-resident spouses. Section 3(1) of the *Divorce Act* sets out a residency requirement: in order for a court in a province to have jurisdiction, one of the spouses must have been "ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding." This was an onerous requirement for non-resident spouses, particularly where same-sex marriage and divorce is not universally accessible.

44 *Ibid* at para 25.

45 [1995] 2 SCR 513, cited in *M (M)*, *supra* note 43 at para 26.

46 *M (M)*, *supra* note 43 at para 43.

47 *Ibid* at para 45.

48 *Ibid* at para 76.

49 2005 BCSC 1011.

50 *Ibid* at para 52.

51 *Ibid* at para 53.

In 2013, the CMA was amended to address this issue. The Act now contains the following specific provisions addressing divorce for non-resident spouses:

> Divorce—non-resident spouses
>
> 7(1) The court of the province where the marriage was performed may, on application, grant the spouses a divorce if
>
> (a) there has been a breakdown of the marriage as established by the spouses having lived separate and apart for at least one year before the making of the application;
>
> (b) neither spouse resides in Canada at the time the application is made; and
>
> (c) each of the spouses is residing—and for at least one year immediately before the application is made, has resided—in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.
>
> Application
>
> (2) The application may be made by both spouses jointly or by one of the spouses with the other spouse's consent or, in the absence of that consent, on presentation of an order from the court or a court located in the state where one of the spouses resides that declares that the other spouse
>
> (a) is incapable of making decisions about his or her civil status because of a mental disability;
>
> (b) is unreasonably withholding consent; or
>
> (c) cannot be found. …
>
> Effective date generally
>
> 9(1) A divorce takes effect on the day on which the judgment granting the divorce is rendered. …
>
> Legal effect throughout Canada
>
> 10 On taking effect, a divorce granted under this Act has legal effect throughout Canada.
>
> Marriage dissolved
>
> 11 On taking effect, a divorce granted under this Act dissolves the marriage of the spouses.

b. No Corollary Relief

Corollary relief is not available to non-resident spouses. Section 8 of the CMA specifically clarifies, "[f]or greater certainty, the *Divorce Act* does not apply to a divorce granted under this Act."

III. Spousal Support

A. Overview

Historically, entitlement, quantum, and duration of spousal support were determined by heteronormative ideas about the perceived roles of husbands and wives in traditional marriages. The advent of spousal support claims from same-sex spouses commencing

in the 1990s and onward, challenged these preconceptions and stereotypes. Same-sex relationships were sometimes ostensibly different from different-sex relationships. Same-sex relationships, even long-term ones, were not necessarily monogamous. Couples may have retained separate households so as to remain "closeted" so their relationships challenged heteronormative notions of cohabitation. Labour in same-sex relationships may not have been divided along traditional male/female roles, making it difficult to discern the advantages and disadvantages arising from a relationship and its breakdown. HIV/AIDS impacted many gay relationships in intimate ways that changed the economic roles of each spouse. These types of differences meant that legal practitioners had to advocate for their clients by relying on existing jurisprudence while challenging the underlying heteronormative assumptions. Over time and with the advent of equal marriage, the differences in claims by same-sex spouses became less significant but still remain in many cases.

In this section, we will review the statutory basis for spousal support both federally and provincially, including the historical development of the definition of "spouse." We will then examine the case law that has considered LGBTQ2+ relationships in particular.

B. Spousal Support Under the Divorce Act

Persons who are or were married to each other may seek spousal support under the *Divorce Act*.[52] Until same-sex marriage and divorce were legalized, same-sex couples could not access spousal support under the Act. But now they have the same rights as different-sex spouses under the Act.

C. Spousal Support Under Provincial and Territorial Legislation

Spouses who are married and who are separating (not divorcing) may seek spousal support under provincial or territorial legislation. Additionally, persons who were never married may seek support under provincial or territorial legislation if their relationship meets the statutory criteria. Table 6.2 outlines the applicable statute and support provisions in each province and territory.

52 Sections 2(1), 15.2(1), 15.3.

TABLE 6.2

Provinces and Territories	Statute	Support Provisions
Alberta	Alberta FLA	Sections 46, 56-82
British Columbia	*Family Law Act*, SBC 2011, c 25 [BC FLA]	Sections 3, 160-74
Manitoba	*The Family Maintenance Act*, RSM 1987, c F20 [Manitoba FMA]	Sections 4-14
New Brunswick	*Family Services Act*, SNB 1980, c F-2.2 [FSA]	Sections 111-37
Newfoundland and Labrador	*Family Law Act*, RSN 1990, c F-2 [NL FLA]	Sections 35-60
Northwest Territories	*Family Law Act*, SNWT 1997, c 18 [NT FLA]	Sections 1, 14-32
Nova Scotia	*Parenting and Support Act*, RSNS 1989, c 160 [PSA]	Sections 2-5, 32-39
Nunavut	*Family Law Act (Nunavut)*, SNWT 1997, c 18 [Nunavut FLA]	Sections 1, 14-16
Ontario	Ontario FLA	Sections 29-50
Prince Edward Island	*Family Law Act*, SPEI 1995, c 12 [PEI FLA]	Sections 29-49
Quebec	CCQ	Articles 585-96.1
Saskatchewan	*The Family Maintenance Act*, SS 1997, c F-6.2 [Saskatchewan FMA]	Sections 2-11
Yukon	*Family Property and Support Act*, RSY 2002, c 83 [FPSA]	Sections 1, 30-51

D. Who Is a Spouse?

1. Historical Developments in Support for Common Law Spouses

Historically, same-sex couples in common law relationships were not considered spouses for the purposes of support and did not have access to any other type of regime (e.g., civil union, domestic partnership, adult interdependent relationship) that carried the obligation of and right to support.

The right to spousal support for same-sex couples developed in a different way and at a different pace across Canada. British Columbia was groundbreaking in this regard, passing the *Family Relations Act*[53] and the *Family Maintenance Enforcement Act*[54] that extended the definition of "spouse" in the areas of family relations and maintenance to same-sex couples living in "marriage-like" relationships.[55]

The most significant case regarding the right to spousal support for same-sex couples was *M v H*,[56] where the Supreme Court of Canada (SCC) considered whether the definition of "spouse" in section 29 of the Ontario FLA infringed section 15(1) of the Charter. M and H were two women who lived together in a same-sex relationship that lasted for at least five years. On the breakdown of the relationship, M brought a claim for spousal support pursuant to the Ontario FLA and challenged the validity of the definition of "spouse" in the Act.

The majority of the SCC found that section 15(1) of the Charter was infringed by the definition of "spouse" in the Ontario FLA. This section extended the obligation to provide spousal support beyond married persons to include individuals in conjugal different-sex relationships of some permanence. The court noted that same-sex relationships are capable of being conjugal and lengthy. Under the Act, individuals in such relationships were denied access to the court-enforced system of support. The court found that this was differential treatment on the basis of a personal characteristic—sexual orientation—and that the differential treatment discriminated in a substantive sense by violating the human dignity of individuals in same-sex relationships.[57] The infringement was not justified under section 1 of the Charter; not only were the objectives of spousal support not furthered by excluding same-sex couples, but if anything, the goals of spousal support were undermined by the exclusion.[58] The court declared

53 RSBC 1996, c 128 [FRA, 1996].

54 RSBC 1996, c 127.

55 Mary C Hurley, *Sexual Orientation and Legal Rights: A Chronological Overview* (Ottawa: Library of Parliament, 31 May 2007), online (pdf): <http://publications.gc.ca/collections/collection_2007/lop-bdp/cir/921-1e.pdf>.

56 [1999] 2 SCR 3.

57 *Ibid* at paras 2-3.

58 *Ibid* at para 4.

section 29 of no force and effect and suspended the application of the declaration for a period of six months.

Numerous statutory changes quickly followed *M v H*; most provinces and territories passed legislation providing—in a variety of different ways—same-sex couples with access to support upon the dissolution of a relationship.

2. Types of Relationships Qualifying for Support

The requirements of a relationship (other than marriage) that qualifies for support vary significantly across Canada.

Section 56 of the Alberta FLA sets out the obligation to support a spouse or adult interdependent partner.

In British Columbia, section 3(1) of the BC FLA extends the definition of spouse to a person who

> (b) has lived with another person in a marriage-like relationship, and
>
> (i) has done so for a continuous period of at least 2 years, or
>
> (ii) … has a child with the other person.

The Manitoba FMA at section 4(1) provides:

> Spouses and common-law partners have the mutual obligation to contribute reasonably to each other's support and maintenance.

Section 1 of the Act defines "common law partner" as follows:

> "[C]ommon-law partner" of a person means
>
> (a) another person who, with the person, registered a common-law relationship under section 13.1 of The *Vital Statistics Act*, or
>
> (b) another person who, not being married to the person, cohabited with him or her in a conjugal relationship
>
> (i) for a period of at least three years, or
>
> (ii) for a period of at least one year and they are together the parents of a child.

In New Brunswick, the FSA states that

> 112(3) Two persons, not being married to each other, who have lived together
>
> (a) continuously for a period of not less than three years in a family relationship in which one person has been substantially dependent upon the other for support, or
>
> (b) in a family relationship of some permanence where there is a child born of whom they are the natural parents,
>
> and have lived together in that relationship within the preceding year, have the same obligation as [spouses] …

In Newfoundland and Labrador, section 36 of the NL FLA states that spouses and partners have a support obligation. Section 35(c) of the Act defines "partner" as

> either of 2 persons who have cohabited in a conjugal relationship outside of marriage
>
> (i) for a period of at least 2 years, or
>
> (ii) for a period of at least one year, where they are, together, the biological or adoptive parents of a child.

In the Northwest Territories, section 1(1) of the NT FLA defines spouse as follows:

> "[S]pouse" means a person who
>
> a. is married to another person,
>
> b. has together with another person entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or
>
> c. has lived together in a conjugal relationship outside marriage with another person, if
>
> i. they have so lived for a period of at least two years, or
>
> ii. the relationship is one of some permanence and they are together the natural or adoptive parents of a child.

In Nova Scotia, section 2 of the PSA includes non-married couples if they are "domestic partners or former domestic partners within the meaning of section 52 of the *Vital Statistics Act*," or if they have "cohabited in a conjugal relationship … for at least two years," or if "they have cohabited in a conjugal relationship … and have a child together."

In the Nunavut FLA, section 1(1), the definition of "spouse" is extended to non-married couples "who have lived together in a conjugal relationship" for at least two years, or who have a relationship of "some permanence and are together the natural or adoptive parents of a child."

In the Ontario FLA, section 29 provides that a spouse

> includes either of two persons who are not married to each other and have cohabited
>
> a. continuously for a period of not less than three years, or
>
> b. in a relationship of some permanence and are the parents of a child as set out in section 4 of the *Children's Law Reform Act*.[59]

Section 29 of the PEI FLA provides that the term "spouse" includes

> an individual who, in respect of another person,
>
> …

59 RSO 1990, c C12 [CLRA].

iii. is not married to the other person but is cohabiting with him or her in a conjugal relationship and has done so continuously for a period of at least three years, or

iv. is not married to the other person but is cohabiting with him or her in a conjugal relationship and together they are the natural or adoptive parents of a child.

In Quebec, article 585 of the CCQ provides that "[m]arried or civil union spouses … owe each other support." Common law partners (referred to as de facto spouses) in Quebec are not entitled to spousal support. This issue was litigated up to the SCC in *Quebec (Attorney General) v A*,[60] where the parties questioned whether the exclusion of de facto spouses from the support rights granted to married and civil union spouses violated the right to equality under section 15 of the Charter. The majority ruled that the exclusion was not discriminatory and, accordingly, did not violate the right to equality.[61]

In Saskatchewan, section 2 of the FMA extends the definition of spouse to

d. a person who has cohabited with another person as spouses:

i. continuously for a period of not less than two years; or

ii. in a relationship of some permanence if they are the parents of a child.

In Yukon, section 1 of the FPSA defines spouse as

either of two persons

a. who are married to each other, or

b. who are married to each other by a form of marriage that is voidable and has not been voided by a judgment of nullity, even though the marriage is actually or potentially polygamous if the marriage was celebrated in a jurisdiction whose system of law recognizes the marriage as valid, or

c. who have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year.

Note that most of the provinces and territories make an exception to the "length of relationship" requirement if the parties have a child together. Four provinces (British Columbia, Manitoba, Nova Scotia, and Saskatchewan) do not specify whether the child must be a "natural" child of both parties. Four provinces and two territories (Alberta, Newfoundland and Labrador, the Northwest Territories, Nunavut, Ontario, and Prince Edward Island) specify that the child of the relationship may be by birth or by adoption. New Brunswick stands alone in requiring that, in order to be exempted from the "length of relationship" requirement, both parties must be the natural parents

60 2013 SCC 5 [*Quebec v A*].

61 *Ibid* at para 281.

of the child. This description excludes unmarried same-sex couples who have adopted a child, or who are not both the natural parents, from the benefit of this provision.

3. Other Issues

a. Gender Identity and Spousal Support

Although of little application today, as all the provinces and territories have gender-neutral support obligations, the case of *B v A*[62] highlights the discriminatory manner in which gender identity was previously addressed by courts in the context of spousal support. In this case, the applicant B brought a motion for interim spousal support from the respondent A. Master Cork stated that the issue was whether B was a man within the definition of "spouse" in section 29 of the previous Ontario *Family Law Act*.[63]

B and A were both born female and B subsequently transitioned. B and A met in 1969, at which time B was dressing as a woman. A learned that B regarded himself as a man trapped in a woman's body. In 1969, B and his child from a previous relationship moved into the basement apartment of A's home, where she lived with her husband and their four children. B, who was diagnosed as a "transsexual," started wearing men's clothing and began gender confirmation surgery and gender reorientation therapy. As part of this process, B began taking testosterone hormone therapy and ultimately underwent a bilateral mastectomy and a pan-hysterectomy with removal of fallopian tubes and ovaries. In 1971, A and her husband separated, and A and B began a relationship that continued through B's therapy and surgeries. The relationship lasted until January 1990.

Master Cork noted that he had no reference to any decision dealing specifically with a person transitioning from female to male. The parties referred to section 32 of the Ontario *Vital Statistics Act*,[64] which addressed "Changes Resulting From Transsexual Surgery," and B presented the court with his application to amend the registration of his birth from female to male. There were two medical certificates attached, both of which stated that B's registration should be changed. Master Cork disagreed with the medical professionals, emphasizing that B's external genitalia remained female. Master Cork's opinion was that section 32 of the Ontario VSA required

> radical and irreversible surgical intervention with all the fundamental reproductive organs, more than their simple removal, before the legislature anticipated the necessity of changing the initial birth documentation from female to male.[65]

62 1990 CanLII 7012 (Ont Ct J (Gen Div)) [*B v A*].

63 SO 1986, c 4 [Ontario FLA, 1986].

64 RSO 1980, c 524 [Ontario VSA].

65 *B v A*, *supra* note 62 at para 23.

Master Cork queried what would happen if B ceased taking hormones, noting that B would be in the position of legal male, whereas his body would change back to presenting as female. Master Cork also highlighted that he believed there to be some form of official or unofficial prohibition against homosexual marriages or marriages between parties of the same gender:

> In the present case such could be achieved, if after hysterectomy or mastectomy, or perhaps only one of such, the one female partner to the proposed marriage changes the sexual designation under the *Vital Statistics Act*, and then applies with the other female partner, as male and female, for a marriage licence, which would then be required to be issued. Surely, this is well beyond the legislative intent of this amendment in the *Vital Statistics Act*.[66]

Master Cork concluded that B was not a "man" within the meaning of section 29 of the Ontario FLA, 1986 and therefore did not have the right to apply for interim spousal support.

b. Defining Cohabitation

With the imposition of possible spousal support obligations on same-sex couples who were previously inoculated from such exposure, not surprisingly, some prospective spousal support payers attempted to avoid a support obligation by arguing that the relationship did not meet the definition of cohabitation. In addition, the unique nature of some same-sex relationships challenged traditional heteronormative spousal definitions. Same-sex couples, for example, may have been non-monogamous. Same-sex couples may have lived under separate "roofs" in order to avoid discrimination and to remain closeted. The extension of recognition of same-sex relationships led to a more nuanced approach to how we define cohabitation.

One such reported case occurred early after the extension of spousal support rights to same-sex cohabitants. In *Ross v Reaney*,[67] the plaintiff sought interim support from the defendant, retroactive to September 2002. The parties were in a same-sex relationship. Its nature and duration was very much in dispute. The plaintiff claimed that they were in a committed relationship for 18 years, from 1985-2002, and that they cohabited for 17 of those years. He claimed that they made joint decisions with respect to all aspects of their lives and held themselves out as partners to their families and friends. In contrast, the defendant claimed that the relationship lasted for three years, from 1985-1988.

66 *Ibid* at para 27.

67 2003 CanLII 1929 (Ont Sup Ct J) [*Ross*].

The court recognized that the approach to determining whether a relationship is conjugal must be flexible, citing *Molodowich v Penttinen*.[68] The court stated that

> [t]he intentions of the parties can be measured and assessed by the manner in which they reacted to each other. Then there are the more objective factors such as how the couple was viewed by others who were close to them.[69]

In *Molodowich*, the court set out a list of factors to guide the determination of whether two people cohabited within the meaning of the *Family Law Reform Act, 1978*.[70] With these factors in mind, the court in the present case assessed the nature of the relationship between the parties and concluded that their relationship gave rise to an obligation of interim support. The fact that the parties did not continuously reside under the same roof did not disqualify the relationship from the definition of a same-sex partner under section 29 of the Ontario FLA. The court found that when the parties lived apart, they continued to act as a couple, seeing each other on a regular basis during that period of time. The court ordered interim support in the amount of $2,500 per month but declined to order retroactive support and left the determination of the length of the period of cohabitation to the trial judge.

In *Sharp v McLean*,[71] the court heard Ms Sharp's claim for division of family property and spousal support under *The Family Property Act, 1997*.[72] Ms Sharp was born male. She met Ms McLean in 1992. During the course of their relationship, Ms Sharp transitioned to female and, in 1995, underwent gender confirmation surgery. (In this case, unlike in *B v A*, the fact of Ms Sharp's new gender identity was not at issue.)

The first issue the court considered was whether the parties had cohabited as spouses. The court considered the factors used to determine the existence of a common law relationship, including shelter, sexual and personal behaviour, services, social indicators, societal perception, economic support, and children.[73] The court found that although a number of the common law factors were present, on the facts of the case, the factors did not establish a common law relationship or cohabitation as spouses.[74] The court was struck by the "lack of evidence from either of the parties themselves or independent witnesses that the parties held themselves out as a couple or were perceived by the community at large as a couple."[75] The court found that the parties

68 1980 CanLII 1537 (Ont Sup Ct J (Dist Ct)) [*Molodowich*].

69 *Ross*, *supra* note 67 at para 13.

70 SO 1978, c 2.

71 2004 SKQB 169 [*Sharp*].

72 SS 1997, c F-6.3 [Saskatchewan FPA]; *Sharp*, *supra* note 71 at para 22.

73 *Sharp*, *supra* note 71 at paras 30-31.

74 *Ibid* at para 31.

75 *Ibid*.

were not spouses within the meaning of the Act and dismissed Ms Sharp's claim for spousal support and division of family property.[76]

The emphasis the court placed on presenting "as a couple" to the community[77] is worth noting. It is possible that the parties in this case were not in a common law relationship and would not have presented as a couple to the community under any circumstances. However, there is no consideration of the fact that same-sex couples may have felt compelled to hide their status from the community, for fear of discrimination or other negative consequences. It is impossible to know how the courts' explicit or implicit weighing of this particular factor may have disadvantaged individuals whose attempts to have their same-sex, common law relationships recognized were rejected, and who were consequently barred from obtaining the support to which they otherwise would have been statutorily entitled.

With equal marriage and gender-neutral family law statutes, these arguments about whether a same-sex partner is a "spouse" are less frequent but still occur in more subtle ways. Counsel for payers continue to make arguments to distinguish same-sex relationships from typical heterosexual nuclear families in order to limit spousal support by quantum and duration. For example, counsel may emphasize the lack of children in a gay couple—"double income, no kids" —while downplaying other compensatory components, like multiple relocations for one spouse's career. Careful thought should be given to alert courts to these assumptions where they are misleading.

IV. Child Support

A. Overview

A child's entitlement to support flows from the legal relationship between the child's parents. When that relationship was not recognized, the non-recognized parent was not required to contribute to that child's support. Accordingly, historically, the court refused to impose obligations on a person who did not meet the definition of "parent." Over time, this has changed, and now, for the most part, the lack of a biological connection to a child does not shield that intended parent from a child support obligation. In some provinces, parentage laws (discussed in Section VI, "Parentage and Assisted Reproduction") have been updated, albeit only recently, to recognize that the spousal relationship of the parents and/or the biological relationship between parent and child was less important than the intention of the parties. This remains an area, however, where there are still many Canadian jurisdictions that do not immediately recognize one, or even both (or more), of a child's social parents.

76 *Ibid* at para 50.

77 *Ibid* at para 31.

B. Child Support Under the Divorce Act

Persons who were married, or who are married but are divorcing, can apply for child support under the *Divorce Act*. The Act defines a "child of the marriage" as

> 2(1) … a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; …
>
> (2) For the purposes of the definition child of the marriage in subsection (1), a child of two spouses or former spouses includes
>
> (a) any child for whom they both stand in the place of parents; and
>
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

C. Provincial and Territorial Legislation

Spouses who are married and who are separating (not divorcing) must seek child support under provincial or territorial legislation, as must persons who were never married to each other. The chart in Table 6.3 outlines the applicable statute and support provisions in each province and territory.

TABLE 6.3

Provinces and Territories	Statute	Child Support Provisions
Alberta	Alberta FLA	Sections 1, 46-55.8, 64-82
British Columbia	BC FLA	Sections 1, 147-59, 170-74
Manitoba	Manitoba FMA	Sections 1, 35.1-40
New Brunswick	FSA	Sections 1, 111-37
Newfoundland and Labrador	NL FLA	Sections 2, 35-60
Northwest Territories	*Children's Law Act*, SNWT 1997, c 14 [NT CLA]	Sections 57-69

Provinces and Territories	Statute	Child Support Provisions
Nova Scotia	PSA	Sections 2, 8-13, 32-39
Nunavut	*Children's Law Act*, SNWT (Nu) 1997, c 14 [Nunavut CLA]	Sections 57-69
Ontario	Ontario FLA	Sections 1, 29-50
Prince Edward Island	PEI FLA	Sections 1, 29-49
Quebec	CCQ	Articles 585-596.1, 599
Saskatchewan	Saskatchewan FMA	Sections 2-11
Yukon	FPSA	Sections 1, 30-51

D. Who Is a Parent and Who Is a Child?

1. Statutory Definitions

In cases not covered by the federal *Divorce Act*, the definitions of "parent" and "child," for the purposes of child support, vary significantly across Canada. What follows is a non-exhaustive overview of some of the key terms and conditions found in provincial and territorial legislation.

The Alberta FLA, section 1, defines "parent" as:

> (j) … a person determined under Part 1 to be a parent of a child.

And section 46(b) defines "child" for the purpose of support obligations as

> (i) a person who is under the age of 18 years, or
>
> (ii) a person 18 years of age or older who is under his or her parents' charge and is unable by reason of
>
> (A) illness,
>
> (B) disability
>
> (C) being a full-time student as determined in accordance with the prescribed guidelines, or
>
> (D) other cause
>
> to withdraw from his or her parents' charge or to obtain the necessaries of life.

In the BC FLA, "parent" at section 146 is defined as including

> a stepparent, if the stepparent has a duty to provide for the child under section 147(4).

The Act, at section 146, defines a "stepparent" as

> a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life.

The Act, at section 146, defines a "child" as including

> a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians.

The Manitoba FMA defines "parent" as

> a biological parent or adoptive parent of a child and includes a person declared to be the parent of a child under Part II.

Section 1 of the Act includes in its definition of "child" a child to whom a person stands *in loco parentis*. Section 35.1 defines "child" for the purposes of support as

> a child who, at the relevant time
>
> (a) is under the age of 18 years and has not withdrawn from the charge of his or her parents; or
>
> (b) is 18 years of age or over and under their charge but is unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

In New Brunswick, section 1 of the FSA states that "parent"

> means a mother or father and includes
>
> (a) a guardian; and
>
> (b) for purposes of Parts III, IV and VII, a person with whom the child ordinarily resides who has demonstrated a settled intention to treat the child as a child of his or her family;
>
> but does not include
>
> (c) a foster parent.

The Act at section 1 defines a "child" as

> a person actually or apparently under the age of majority, unless otherwise specified or prescribed in the Act or regulations … but, for the purposes of … [child support], does not include a person who has been married.

With regard to support obligations, the Act provides:

> 113(1) Subject to subsection (2), every parent has an obligation, to the extent the parent is capable of doing so, to provide support, in accordance with need,
>
> (a) for his or her child, and
>
> (b) for his or her child at or over the age of majority who is unable to withdraw from the charge of his or her parents or to obtain the necessaries of life by reason of illness, disability, pursuit of reasonable education or other cause.

In Newfoundland and Labrador, the NL FLA, at section 2(1)(d), states that a "parent" means

> the father or mother of a child by birth, whether within or outside marriage, or by virtue of the *Adoption of Children Act*, and includes a person who has demonstrated a settled intention to treat a child as a child of his or her family other than under an arrangement where the child is placed in a foster home for consideration by a person having lawful custody.

The Act, at section 2(1)(a), defines a "child" as

> a child born within or outside marriage and includes
>
> (i) a child adopted under the *Adoption of Children Act*, and
>
> (ii) a child whom a person has demonstrated a settled intention to treat as a child of his or her family, but does not include a child placed in a foster home for consideration by a person having lawful custody.

The Act provides at section 37(7) that a parent's duties to support their children do not extend to

> (a) a child who has attained the age of majority unless that child is under the charge of his or her parent and is unable by reason of illness, disability, pursuit of reasonable education or other cause to withdraw from the parent's charge or to obtain the necessities of life;
>
> (b) a child who has not attained the age of majority and who is married; and
>
> (c) a child over the age of 16 years who has withdrawn from parental care.

In Nova Scotia, the PSA at section 2(i) states that a "parent" includes

> (i) a person who is determined to be the parent of a child under this Act,
>
> (ii) a person who has demonstrated a settled intention to treat a child as the person's own child, but does not include a foster parent under the *Children and Family Services Act*, and
>
> (iii) a person who has been ordered by a court to pay support for a child.

The Act, at section 2(b), defines a "dependent child" as

> a child who is under the age of majority or, although over the age of majority, is unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or the guardians, or to obtain the necessaries of life.

Both the Nunavut CLA and the NT CLA state, at section 57, that a "parent"

> includes a person who stands in the place of a parent for the child, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

Both the Nunavut CLA and the NT CLA define a "child" as a person who

> (a) is a minor and who has not withdrawn from the charge of his or her parents, or
>
> (b) is the age of majority or over, but who is unable, by reason of illness, disability, pursuit of reasonable education or other cause, to withdraw from a parent's charge.

The Ontario FLA at section 1(1) states that a "parent"

> includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

Section 1(1) of the Act states that a "child"

> includes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

With regard to child support obligations, section 31 of the Act provides that

> (1) [e]very parent has an obligation to provide support, to the extent that the parent is capable of doing so, for his or her unmarried child who,
>
> (a) is a minor;
>
> (b) is enrolled in a full-time program of education; or
>
> (c) is unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents.

The PEI FLA provides at section 1(1)(e) that a "parent"

> includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

At section 1(1)(a), the Act provides that a "child"

> [i]ncludes a person whom a parent has demonstrated a settled intention to treat as a child of his or her family, except under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

With respect to support obligations, at section 31, the Act provides:

> Obligation of parent to support child
> (1) Every parent has an obligation, to the extent the parent is capable of doing so, to provide support, for his or her child who is unmarried and is under the age of eighteen years or, if eighteen years of age or over, is enrolled in a full-time program of education or is unable, by reason of illness, disability or other cause, to withdraw from the charge of his or her parents or to obtain the necessaries of life.
>
> *Idem*
> (2) The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control.

The CCQ does not provide specific definitions of "parent" and "child" for the purposes of support.

The Saskatchewan FMA defines "father," "mother," and "parent" separately. A "parent" is defined in section 2 as

> (a) the father or mother of a child, whether born within or outside marriage;
>
> (b) the father or mother of a child by adoption; or
>
> (c) a person who has demonstrated a settled intention to treat a child as a child of his or her family, other than a person who is providing foster care services as defined in *The Child and Family Services Act*.

Section 2 of the Act defines "child" as "a person who is under the age of 18 years." With respect to the maintenance of persons over the age of 18, at section 4(1), a "parent" does not include a person who has demonstrated a settled intention to treat a child as a child of his or her family. Section 4(2) provides that:

> (2) On the application of a parent of a person who is 18 years of age or older, the court may order the person's other parent to pay maintenance to the claimant for the benefit of the person if the person is:
>
> (a) under the claimant's charge; and
>
> (b) unable, by reason of illness, disability, pursuit of reasonable education or other cause, to:
>
> (i) withdraw from the claimant's charge; or
>
> (ii) obtain the necessaries of life.

In Yukon, section 1 of the FPSA defines "parent" as

> the father or mother of a child by birth, or because of an adoption … and includes a person who has demonstrated a settled intention to treat a child as a child of his family other than under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

The Act defines at "child" at section 1 as

> the child of a parent either
>
> (a) by birth, whether within or outside marriage, or
>
> (b) because of an adoption made or recognized under the Part 5 of the *Child and Family Services Act* or any predecessor to that Part,
>
> and who is either
>
> (c) under the age of majority and has not withdrawn from their parent's charge,
>
> (d) of the age of majority or over and under their parent's charge but unable, because of illness, disability, or other cause, to withdraw from their parent's charge or to obtain the necessaries of life;
>
> and includes a person whom the parent has demonstrated a settled intention to treat as a child of their family otherwise than under an arrangement where the child is placed for valuable consideration in a foster home by a person having lawful custody.

2. Case Law: Child Support in Same-Sex Relationships

There has been considerable development in how the courts treat child support for the children of same-sex couples. For the most part, courts err on the side of finding a parent/child relationship where the child is clearly a dependent on the parties and they both intended to be parents. However, issues in this area continue to arise, particularly with ongoing advancements in assisted reproductive technologies and the evolution of the definition of legal parentage (see Section VI, "Parentage and Assisted Reproduction"). These vary from province to province as statutes are very different about who is and is not a parent.

In the 1984 case of *Anderson v Luoma*, the Supreme Court of British Columbia found that the non-biological parent in a same-sex relationship where the children were conceived by donor insemination was not entitled to child support.[78] In this case, the plaintiff claimed that she and the defendant began living together in a common law relationship in 1975. They agreed that they wished to have children, and the plaintiff was artificially inseminated. Both parties agreed to be jointly responsible for the care and maintenance of the children. The parties had two children pursuant to this arrangement. The relationship deteriorated in 1983, and the plaintiff claimed that the defendant

78 1984 CanLII 372 (BCSC) [*Anderson*].

refused to provide her the necessary funds to support the children. The court considered, among other issues, whether a party to a homosexual relationship was entitled to interim maintenance for her children under either the (former) *Family Relations Act*[79] or under the common law.

The court found that the FRA, 1979 did not affect the legal responsibilities that same-sex couples may have to each other or to children born to one of them as a result of artificial insemination.[80] Therefore, the remedy had to be found in law or equity.[81] The court considered whether there was a claim in contract. The plaintiff's contractual claim for support was a claim that the defendant should specifically perform the alleged agreement to pay a monthly sum to the plaintiff. However, the court found that this was not a class of contract for which a court of equity would decree specific performance.[82] The court dismissed the plaintiff's claim.

While *Anderson* may no longer be relevant, the contractual test for child support might be applied by a court where one party, through assisted reproduction, did not meet the province's definition of parent or there was some dispute about the intention of the parties.

In *M (DE) v S (HJ)*,[83] the Court of Queen's Bench for Saskatchewan imposed a child support obligation on the basis of settled intention in a same-sex relationship. The petitioner DEM sought maintenance from her former partner HJS for the two children of whom she had custody. DEM and HJS had lived in a same-sex relationship for approximately 12 years when DEM's niece found herself unable to cope with her two children. DEM and HJS took the children in, and DEM was ultimately awarded custody of the children. Only DEM applied for custody, but the custody judgment stated that for all practical purposes, DEM and HJS "must be considered as a couple who shared this application and who are willing to share the responsibilities of custody."[84] HJS provided for DEM and the children until 1994, when DEM told HJS to leave.

The court stated that for HJS to be responsible for the maintenance of the two children, she had to be shown to have demonstrated a settled intention to treat the children as children of her family, pursuant to Saskatchewan FMA.[85] The term "parent" in the Act did not have a gendered definition. The court found that the case was more analogous to adoption by a couple than a stepparent situation. The court found that although DEM was more involved with the children, HJS did many things that parents do for children. The testimony of HJS at the custody trial and her conduct since that trial

79 RSBC 1979, c 121 [FRA, 1979].

80 *Anderson*, *supra* note 78 at para 8.

81 *Ibid* at para 9.

82 *Ibid* at para 12.

83 1996 CanLII 6960 [*M (DE)*].

84 *Ibid* at para 2.

85 SS 1990-91, c F-6.1.

satisfied the court that she had demonstrated a settled intention to treat the children as children of her family to the extent that she was a parent within the meaning of the Act.[86] The court ordered HJS to pay $150 per child, per month.

In *F(LK) v W(LD)*,[87] the Provincial Court of British Columbia heard an application for child maintenance requiring an interpretation of the 1998 amendment to the FRA, 1979 that extended the definition of "stepparent" to include individuals in marriage-like relationships with same-sex partners. The applicant F and respondent W lived in a marriage-like relationship for approximately five years, from 1982 to 1987. They agreed they wanted children. F gave birth to twins. After F and W separated, the children resided with F, and W had access every second weekend. W agreed to pay $100 per month, per child, then $112.50 per month, per child, but refused subsequent repeated requests for additional increases. Following the amendment to the FRA, 1979 and the incorporation of the Child Support Guidelines into the Act, F applied for a court order obliging W to pay child maintenance at a Guideline-mandated level. In May 1998, W was ordered to pay interim maintenance of $250 per month, per child. At this point, W had been paying child maintenance for 11 years.

The court found that W satisfied the three conditions required by the statutory definition of "stepparent" and would therefore be liable as a "parent" to pay child maintenance. The temporal application of the statute was at issue; it did not expressly state that the amendment applied to separations predating it. The court found that the facts of the case did not involve the retroactive application of the amendment, and therefore it was unnecessary to consider the presumption against retroactivity.[88] The court also determined that the presumption of non-interference with vested rights did not prevent the application of the amendment to W.[89] The court concluded that the amendment of the definition of "stepparent" applied to W and made a final order that W pay a Guideline amount of $617 per month for the children.

In *L (RP) v P (KA)*,[90] the court had to make a determination as to whether children born to parents in a same-sex marriage were entitled to child support from the non-custodial parent on an ongoing basis and retroactively. RPL and KAP began a relationship in 2003 and married in 2006. RPL conceived twins through artificial insemination by a known donor, a mutual friend, and the children were born in 2006. The parties agreed with the donor that he would have no role or obligation in parenting the children but would be known to the children. Prior to the birth, the parties presented "much as any other couple would who were eagerly anticipating the birth of their first child."[91] There

86 *M (DE)*, *supra* note 83 at para 7.

87 1999 BCPC 33.

88 *Ibid* at para 16.

89 *Ibid* para 33.

90 2015 CanLII 36621 (NBQB).

91 *Ibid* at para 9.

was no suggestion that the children were not equally the children of KAP. The parties separated in 2007 when KAP left RPL. The children remained in RPL's care. The parties agreed that RPL would have sole custody and that KAP would have access. KAP was not earning enough to pay child support. In 2008, the parties entered a second agreement, where it was agreed that KAP could remove her name from the twins' birth certificates and that she would be released from any obligation for child support. The parties divorced in 2009.

The court considered that the *Divorce Act* was the legal authority governing KAP's relationship with the children. The court determined that there were no circumstances in this situation that would rebut the conclusion that the children were children of the marriage. An agreement made between the parties cannot deny children of the marriage their right to child support.[92] The court stated that neither party stood "in the place of a parent" and that while only RPL could be the biological mother, by force of law, the twins were both children of two former spouses.[93] The court ordered KAP to pay the table amount for child support.

In *MRR v JM*,[94] (which is discussed in detail in Section VI, "Parentage and Assisted Reproduction") the biological mother of a child brought an application for child support against the biological father, who had agreed to assist the mother in having a child by donating his sperm through sexual intercourse. Ultimately, the court declared that the biological father was not the child's parent; therefore, the biological father did not have a duty of support.

V. Family Property

A. Overview

Navigating property division is complex for all spouses, as rights to a division of property vary from province to province and on the basis of marriage status. The complexity of the legal regimes is exacerbated for same-sex couples who at various times, depending on the status of their relationships, may have been dating, cohabiting, in a civil union, or married. When advising clients, counsel may need to strategize about the appropriate jurisdiction and the claims to be made. This section sets out the provincial, territorial, and federal legislation. Where a claim cannot be advanced by statute, recourse can be made to the doctrine of unjust enrichment and joint family venture. Though beyond the scope of this chapter, these types of common law claims are rife with the same problems as spousal support claims where the nature of the economic relationship is often set out in heteronormative terms.

92 *Ibid* at para 16.

93 *Ibid* at para 19.

94 2017 ONSC 2655 [*MRR*].

B. Provincial and Territorial Legislation

A chart setting out the applicable provincial and territorial statutes governing family property is in Table 6.4.

TABLE 6.4

Provinces and Territories	Statute	General Property Provisions	Family Home Provisions
Alberta	*Matrimonial Property Act*, RSA 2000, c M-8 [Alberta MPA]	Sections 1-18, 33-38	Sections 19-32
British Columbia	BC FLA	Sections 81-89, 91-109	Section 90
Manitoba	*The Family Property Act*, RSM 1987, c M45 [Manitoba FPA]	Sections 1-46	Sections 1, 6
New Brunswick	*Marital Property Act*, RSNB 2012, c 107 [NB MPA]	Sections 1-15, 33-50	Sections 1, 16-32
Newfoundland and Labrador	NL FLA	Sections 18-34.1	Sections 6-17
Northwest Territories	NT NLA	Sections 33-47	Sections 48-57
Nova Scotia	*Matrimonial Property Act*, RSNS 1989, c 275 [NS MPA]	Sections 1-5, 12-33	Sections 6-11
Nunavut	Nunavut FLA	Sections 33-47	Sections 48-57
Ontario	Ontario FLA	Sections 4-16	Sections 17-28
Prince Edward Island	PEI FLA	Sections 4-17	Sections 18-28
Quebec	CCQ	Articles 414-26, 521.6	Articles 401-13, 521.6
Saskatchewan	Saskatchewan FPA	Sections 1-3, 20-61	Sections 4-19
Yukon	FPSA	Sections 4-18	Sections 19-29

Statutory family property regimes vary widely across Canada. All of the statutes address family property rights for married couples; however, in more than half the provinces and territories, unmarried cohabiting couples are not covered by such provisions.

1. Family Property Provisions Restricted to Married Couples

The Alberta MPA, New Brunswick MPA, NL FLA, Ontario FLA, and PEI FLA all define "spouse" such that non-married persons are excluded from the application of the family property provisions under their respective Acts.

In Quebec, the family patrimony provisions of the CCQ, articles 414 and 521.6, only apply to married persons and to persons in civil unions. Civil unions are discussed in more detail in Section II, "Marriage and Divorce."

Not only does paragraph 2(g) of the NS MPA exclude non-married persons from the application of the Act; it also excludes married same-sex couples through its gendered definition of "spouse" as "either of a man and woman." It is possible for unmarried same-sex couples (as well as opposite-sex couples) in Nova Scotia to obtain the rights of a "spouse" under the NS MPA by registering a domestic partnership under the NS VSA. Domestic partnerships are discussed in more detail in Section II, "Marriage and Divorce." One of the conditions of making a domestic-partner declaration is that a person may not do so if the person is married.[95] Therefore, married same-sex spouses appear to be shut out of the family property regime in Nova Scotia.

However, in *Bee v Dee*,[96] the court made a comment in *obiter* regarding the applicability of the MPA to married same-sex couples. In this case, the unmarried same-sex parties cohabited between 1996 and 2005. On separation, one of the issues was division of property. The court noted that the parties were neither married (which they could have done in Nova Scotia after September 24, 2004) nor registered as domestic partners (which they could have done in Nova Scotia after June 4, 2001). The court stated that either step would have meant that their breakup would have been subject to the provisions of the NS MPA; as they did not take either step, it was not.[97]

2. Family Property Provisions Not Restricted to Married Couples

In British Columbia, the family property provisions at section 3(1)(b) of the BC FLA extend to all spouses, which includes a person "who has lived with another person in a marriage-like relationship" "for a continuous period of at least two years."

95 NS VSA, s 53(5).

96 2010 NSSC 273.

97 *Ibid* at para 27.

Section 2.1(1) of the Manitoba's FPA states that

> except as otherwise provided in this Act, this Act applies to all common-law partners, whether they commenced cohabitation before or after the coming into force of this section, and whether cohabitation began in Manitoba or in a jurisdiction outside Manitoba,
>
> (a) if the habitual residence of both common-law partners is in Manitoba;
>
> (b) where each of the common-law partners has a different habitual residence, if the last common habitual residence of the common-law partners was in Manitoba; or
>
> (c) where each of the common-law partners has a different habitual residence and the common-law partners have not established a common habitual residence since the commencement of their common-law relationship, if the habitual residence of both at the time that the common-law relationship commenced was in Manitoba.

A "common law" partner under the Manitoba FPA section 1(1) is

> (a) another person who, with the person, registered a common-law relationship under section 13.1 of *The Vital Statistics Act*, or
>
> (b) subject to subsection 2.1(2), another person who, not being married to the person, cohabited with him or her in a conjugal relationship for a period of at least three years commencing either before or after the coming into force of this definition.

Section 1(1) of the NT FLA includes in the definition of "spouse" a person who

> (c) has lived together in a conjugal relationship outside marriage with another person, if
>
> (i) they have so lived for a period of at least two years, or
>
> (ii) the relationship is one of some permanence and they are together the natural or adoptive parents of a child.

Subsection 1(1) of the Nunavut FLA includes the same definition of spouse as is found in the NT FLA.

Section 2(1) of the Saskatchewan FPA includes in the definition of "spouse" a person who

> (c) is cohabiting or has cohabited with the other person as spouses continuously for a period of not less than two years.

C. Case Law

1. Length of Cohabitation

Same-sex couples cannot be said to have made a choice to remain unmarried prior to the legalization of same-sex marriage. On the other hand, couples who did not marry for a long period after legalization could be argued to have considered their legal rights and obligations and chosen not to have the rights and obligations of a married couple.

This issue occurs repeatedly for instance where one party accumulated a significant pension during an unmarried period and the other contributed more to other joint expenses as a result. This issue is likely to be litigated at some point. Consider *B(LD) v S(PR)*[98] (described more fully in Section V.C.2, "Cohabitation Agreements"), where the court included the period of premarital cohabitation in order to determine the length of the relationship for the purposes of dealing with the division of a property.

This length of cohabitation/marriage as it relates to property division will inevitably lead to a reported case on the right facts. It is common that the family property provisions in various statutes include a clause that exempts certain types of property from a distribution. A common exclusion is property acquired before marriage. For example, in Alberta, pursuant to paragraph 7(2)(c) of the Alberta MPA, if the property was acquired by a spouse before the marriage, the market value of that property at the time of marriage is exempted from a distribution under this section. As same-sex marriage was not legalized across Canada until 2005 (see Section II, "Marriage and Divorce"), even if a same-sex couple started cohabiting years prior to being legally permitted to marry, the property they acquired during that time could be considered excluded property.

In *Walsh v Bona*,[99] the SCC heard a Charter challenge to the Nova Scotia MPA concerning whether its failure to include unmarried different-sex cohabitants (described as "opposite sex individuals in conjugal relationships of some permanence") from its ambit violated section 15(1) of the Charter. The majority found that the exclusion of unmarried different-sex cohabitants was not discriminatory within the meaning of subsection 15(1). In its decision, the majority emphasized the concept of choice:

> Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.[100]

Later, in *Quebec v A*,[101] the SCC heard a Charter challenge to a number of provisions in the CCQ, including the provisions dealing with the family residence and family patrimony. The question was whether the impugned provisions infringed section 15(1) of the Charter because their application was limited to relationships between married

98 2011 BCSC 1034 [*B(LD)*].

99 2002 SCC 83.

100 *Ibid* at para 43.

101 *Quebec v A*, *supra* note 60.

spouses and civil union spouses, excluding de facto spouses. The majority held that although the provisions drew a distinction based on marital status, they did not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. The exclusion of de facto spouses from the provisions was not discriminatory within the meaning of section 15(1) of the Charter. This case was also decided in the context of a different-sex, unmarried couple.

For married same-sex couples whose long periods of cohabitation and concomitant acquisition of property prior to marriage are not appropriately addressed by statute, a remedy may lie in the doctrines of unjust enrichment and constructive trust. In *Peter v Beblow*,[102] McLachlin J, for the majority, stated that

> [a]n action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy.[103]

One such remedy is a constructive trust, which is a proprietary concept; the plaintiff is found to have an interest in the property.[104]

2. Cohabitation Agreements

The incremental changes in same-sex relationship recognition also impacted the interpretation of cohabitation and marriage contracts. The effect of legislative changes on cohabitation agreements was considered in *B(LD)*.[105] In this case, the parties began cohabiting in 1995, entered a cohabitation agreement in 1998, married in 2004, and separated in 2008. Grist J noted at the outset that the chronology of the relationship and the changes to the law relating to matrimonial property raised issues related to the relevance of the parties' cohabitation agreement, whether provisions of the agreement were fair to the claimant, and whether the disposition of the proceeds of sale of a significant family asset (a farm property) should be subject to the application of section 65 of the FRA, 1996.

The cohabitation agreement was the central element in the case. The claimant argued that the agreement was, in effect, a marriage agreement, which should be varied as being unfair, applying factors stipulated in section 65 of the FRA, 1996. The cohabitation agreement was dated subsequent to the 1998 amendments to the FRA, 1996, which provided a legal obligation for spousal maintenance between same-sex partners. At the same time that the amendments regarding spousal maintenance came into force,

102 [1993] 1 SCR 980.

103 *Ibid* at para 3.

104 *Feaver v Curno*, 2010 ONSC 4009 at para 172.

105 *B(LD)*, *supra* note 98.

section 120 of the FRA, 1996 was amended to allow enforcement and variation of agreements, which had the character of marriage and separation agreements, if they were contracted by unmarried spouses in marriage-like relationships. The amendments also extended the property sections of the Act to people in such relationships. However, such a relationship had to be between a man and a woman, due to the language of the FRA, 1996.

The court found that regardless of the gendered statutory language, after the decision that permitted same-sex couples to marry,[106] marriage agreements between same-sex spouses who married or formed a marriage-like relationship become subject to enforcement and variation under the property sections of the FRA, 1996.[107] The court considered whether the changes had a retroactive effect, such that they would apply to the parties' cohabitation agreement. The court cited *Wiest v Middelkamp*,[108] where section 120 was found not to have retroactive effect. Therefore, the parties' cohabitation agreement was not a marriage agreement for the purposes of parts 5 and 6 of the FRA, 1996.[109] However, the court was able to consider it as an "antenuptial" settlement under section 68 of the FRA, 1996. Significantly, the court counted the premarital cohabitation in order to determine the length of the relationship for the purposes of dealing with the farm property.

VI. Parentage and Assisted Reproduction

A. Introduction

The decision to parent in the LGBTQ2+ community is often onerous and requires significant commitment and perseverance. It involves research, planning, and a financial commitment. In most cases it is very different from the decision to parent in heterosexual families. It generally requires third parties. The third parties might be donors of reproductive material (e.g., ova, sperm, or embryos), gestational carriers or traditional surrogates, co-parents, fertility agencies, adoption licensees, social workers, doctors, and lawyers.

The first hurdle is that under the *Assisted Human Reproduction Act*,[110] it is illegal in Canada to pay consideration to a donor of reproductive material, to pay for the services of a surrogate, or to pay for someone to find you a surrogate. Expenses can be paid, but they must be in accordance with regulations.

This is a challenge at the outset for many LGBTQ2+ families because it makes finding a third-party donor or gestational carrier more difficult. Frequently, families

106 *Barbeau v British Columbia*, 2003 BCCA 406.

107 *Ibid* at para 31.

108 2003 BCCA 437.

109 *B(LD)*, *supra* note 98 at para 32.

110 SC 2004, c 2 [AHRA].

need to look to other jurisdictions such as the US to find donors or surrogates. Often, the cost of these services in the US is prohibitive. On a practical basis, for example, there are basically no sperm donor banks because the prohibition against paying donors affects supply. Most lesbian couples obtain sperm from the US and have it shipped to a fertility doctor, increasing costs of treatment.

The prohibition against payments makes more and more people depend on friends and families to be gamete donors and surrogates. These negotiations often begin in good faith but can end up in times of separation to be quite difficult and can exacerbate conflict in a separation later.

There is considerable pre-planning required to starting a family. For example, between two women, they must decide whether to choose a known or anonymous sperm donor. The status of donors is different across Canada. The women must research sperm donor banks or negotiate with known third parties (such as friends or brothers). If they purchase the sperm from an American sperm bank, they can count on paying at least $1,500 per month as they try to get pregnant. They must determine whether a contract is necessary and whether any or all parties require independent legal advice. To access a fertility clinic, all parties will likely require counselling. They are examined, often under a microscope, to determine if they are suitable for "fertility" treatment. And although any individual undergoing fertility treatment may experience some of this, many in the LGBTQ2+ community already have felt judged or discriminated against at some point in their lives. This may feel like another layer of discrimination. A decision has to be made as to who will be the gestational parent and even who will be the genetic parent. It is now increasingly common for one mother to donate ova to the other mother so they both have a biological connection the child. This is known as "reciprocal *in vitro* fertilization."

Between two men pursuing gestational carriage, they must decide who will be the genetic parent—whose sperm will be used to fertilize the ova. Often each intended father will fertilize one half of the ova obtained. They must first find an egg donor. Once they have created frozen embryos, they must find a gestational carrier. This can typically take 12-18 months of waiting for a match through the few surrogacy agencies that exist in Canada. The process is also expensive, often costing upward of $75,000, or more if the intended parents must resort to reproductive tourism.

Trans parents may face the added hurdle of having to decide about whether and how to become a parent before a physical transition in order to preserve their gametes for later use (e.g. freezing eggs or sperm). Intended trans parents may also need to consider when or if to remove a uterus.

Where there are more than two intended parents, the complexities increase. Most commonly, this arrangement involves a gay male couple and a lesbian couple who have decided to co-parent together. The parties have to navigate the semen regulations, which, as of the date of this publication, prohibit insemination with sperm that has not been quarantined for six months from someone who is not a sexual partner or someone

who is gay.[111] This rule can lead to parties pretending, to the physicians, to be intimately involved in order to get pregnant.

All of these issues are made increasingly difficult where intended parents live in jurisdictions where there are no fertility clinics, community resources, or lawyers that specialize in the LGBTQ2+ community. This process can involve long commutes into cities. Clients seeking legal advice will frequently travel hours to obtain our services or even retain us from other provinces.

What are the contractual and legal components of making this decision to parent in a legal landscape that is changing constantly?

- Enforceability or non-enforceability of contracts, including sperm and egg donation, embryo donation, gestational carriage contracts, contracts with fertility agencies, or consultants;
- cross-border issues where third-party donors or surrogates are sought from the US or outside Canada;
- immigration issues regarding citizenship where a child's citizenship can be obtained in jurisdictions that might not recognize queer parentage;
- known donor involvement and the donor's rights and responsibilities, such as child support or access; and
- finding and retaining lawyers knowledgeable in the LGBTQ2+ area.

The LGBTQ2+ community has responded to these obstacles. Community resources have been developed to assist intended parents navigating this challenging terrain. In Ontario, the LGBTQ Parenting Network[112] is one of the most comprehensive resources in the world, accessed by LGBTQ2+ parents across Canada and internationally. It contains a library including many legal resources and a directory of LGBTQ2+ or LGBTQ2+-friendly professionals. Perhaps most importantly, the Network offers a variety of courses to assist in the decision to plan a family, often booked long in advance with a waiting list.

111 The *Processing and Distribution of Semen for Assisted Conception Regulations*, SOR/96-254, and Health Canada Directive: Technical Requirements for Therapeutic Donor Insemination are currently in force. These regulations will be repealed when the *Safety of Sperm and Ova Regulations*, SOR/2019-192, come into force on February 4, 2020. The Health Canada Directive: "Technical Requirements for Conducting the Suitability Assessment of Sperm and Ova Donors" (2018), online: *Government of Canada* <https://www.canada.ca/en/health-canada/programs/consultation-assisted-human-reproduction-regulations/technical-directive.html> (which is incorporated by reference into the regulations) will also take effect on February 4, 2020.

112 LGBTQ Parenting Network, online: <https://lgbtqpn.ca/> [the Network].

B. Parentage Overview

Parentage recognition remains an area of significant concern to LGBTQ2+ families and it varies from province to province. To quote Fryer J in *MRR v JM*,[113]

> [t]he definition of parent and family has been undergoing seismic change in recent decades. Many of the seminal cases in this area involve children born by way of assisted reproduction, including surrogacy, and children of gay and/or lesbian parents.[114]

C. Provincial and Territorial Legislation

Legal parentage is defined by the provinces and territories, not the federal government. Table 6.5 provides a chart outlining the applicable statute and parentage provisions in each province and territory.

TABLE 6.5

Provinces and Territories	Statute	Parentage Provisions
Alberta	Alberta FLA	Sections 5.1-15
British Columbia	BC FLA	Sections 20-36
Manitoba	FMA (See also *The Vital Statistics Act*, RSM 1987, c V60)	Sections 15-35
New Brunswick	FSA	Sections 96-110
Newfoundland and Labrador	*Children's Law Act*, RSN 1990, c C-13 [NL CLA]	Sections 3-23
Northwest Territories	NT CLA	Sections 2-14
Nova Scotia	PSA (See also the Nova Scotia VSA and the *Birth Registration Regulations*, NS Reg 390/2007)	Sections 1, 24-27
Nunavut	Nunavut CLA	Sections 2-14
Ontario	CLRA	Sections 1-17.6

113 2017 ONSC 2655.

114 *Ibid* at para 30.

Provinces and Territories	Statute	Parentage Provisions
Prince Edward Island	*Child Status Act*, RSPEI 1988, c C-6 [CSA]	Sections 1-27
Québec	CCQ	Articles 522-42
Saskatchewan	*The Children's Law Act, 1997*, SS 1997, c C-8.2 [Saskatchewan CLA, 1997]	Sections 40-59
Yukon	*Children's Law Act*, RSY 2002, c 31 [Yukon CLA]	Sections 5-27

D. Non-Conventional Reproduction, Assisted Reproduction, and Surrogacy

There are significant differences in how parentage is defined across Canada, particularly regarding non-conventional reproductive arrangements, assisted reproduction, and surrogacy.

Comprehensive parentage legislation is particularly important for same-sex couples, whose paths toward parenthood necessarily involve assisted reproduction, surrogacy, or other non-conventional reproductive arrangements. Without an appropriate statutory framework, same-sex parents are forced to take more onerous measures, such as adopting their own children or initiating court processes to seek declarations of parentage and non-parentage. Further, deficient or ambiguous legislation means that same-sex couples live with deep uncertainty with respect to planning a family.

What follows is a non-exhaustive overview of some of the most notable statutory provisions from the provinces and territories that address parentage and forms of non-conventional reproduction.

1. Most Comprehensive Parentage Regimes

a. Ontario

The *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016*[115] followed shortly after a Charter challenge to some of the parentage provisions in the CLRA.[116] The Bill repealed parts I and II of the CLRA and introduced new provisions, which came into force on January 1, 2017. Ontario's CLRA now provides the most comprehensive statutory framework for parentage in Canada.

115 SO 2016, c 23.

116 See *Grand v Ontario (AG)*, 2016 ONSC 3434.

Pursuant to section 5 of the CLRA, the provision of reproductive material or an embryo is not determinative of parentage. However, section 6 provides that in the case of surrogacy, there is an exception to the presumption that the birth parent is a parent of the child.

Section 7, which sets out a presumption of parentage in respect of a child conceived through sexual intercourse, is deemed not to apply to a person "whose sperm is used to conceive a child through sexual intercourse" if, before the child is conceived, the person and the intended birth parent agree in writing that the person does not intend to be a parent of the child.

Section 8 contemplates the parentage of the birth parent's spouse in cases of assisted reproduction or insemination by a sperm donor. It provides:

> Assisted reproduction
>
> 8(1) If the birth parent of a child conceived through assisted reproduction had a spouse at the time of the child's conception, the spouse is, and shall be recognized in law to be, a parent of the child. …
>
> Insemination by a sperm donor
>
> (2) If the birth parent of a child conceived through insemination by a sperm donor had a spouse at the time of the child's conception, the spouse is, and shall be recognized in law to be, a parent of the child.
>
> Non-application, lack of consent
>
> (3) This section does not apply if, before the child's conception,
>
> (a) the spouse did not consent to be a parent of the child; or
>
> (b) the spouse consented to be a parent of the child but withdrew the consent. …
>
> Non-application, surrogacy or posthumous conception
>
> (4) This section does not apply if the birth parent is a surrogate or if the child is conceived after the death of a person declared under section 12 to be his or her parent.

Section 9 addresses parentage under pre-conception parentage agreements. Section 9(1) defines a pre-conception parentage agreement as "a written agreement between two or more parties in which they agree to be, together, the parents of a child yet to be conceived." Section 9 applies only if the following conditions in section 9(2) are met:

> (a) there are no more than four parties to the agreement;
>
> (b) the intended birth parent is not a surrogate, and is a party to the agreement;
>
> (c) if the child is to be conceived through sexual intercourse but not through insemination by a sperm donor, the person whose sperm is to be used for the purpose of conception is a party to the agreement; and
>
> (d) if the child is to be conceived through assisted reproduction or through insemination by a sperm donor, the spouse, if any, of the person who intends to be the birth parent is a party to the agreement, subject to subsection (3).

However, section 9(3) provides that clause 9(2)(d) does not apply if, "before the child is conceived, the birth parent's spouse provides written confirmation that he or she does not consent to be a parent of the child and does not withdraw the confirmation."

Section 9(4) provides that

> [o]n the birth of a child contemplated by a pre-conception parentage agreement, together with every party to the pre-conception parentage agreement who is a parent of the child under section 6 (birth parent), 7 (other biological parent) or 8 (birth parent's spouse), the other parties to the agreement are, and shall be recognized in law to be, parents of the child.

Section 10 addresses surrogacy for up to four intended parents. Section 10(1) defines "intended parent" as "a party to a surrogacy agreement, other than a surrogate." And it defines "surrogacy agreement" as

> a written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate, in which
>
> (a) the surrogate agrees not to be a parent of the child and,
>
> (b) each of the other parties to the agreement agrees to be a parent of the child.

Section 10(2) provides that section 10 applies only if the following conditions are met:

> 1. The surrogate and one or more persons enter into a surrogacy agreement before the child to be carried by the surrogate is conceived.
>
> 2. The surrogate and the intended parent or parents each received independent legal advice before entering into the agreement.
>
> 3. Of the parties to the agreement, there are no more than four intended parents.
>
> 4. The child is conceived through assisted reproduction.

Upon the surrogate's written consent "relinquishing … entitlement to parentage of the child" (which, according to subsection (4) cannot be provided "before the child is seven days old"),

> (a) the child becomes the child of each intended parent, and each intended parent becomes a parent of the child; and
>
> (b) the child also ceases to be the child of the surrogate, and the surrogate ceases to be a parent of the child.

If the surrogate's consent is withheld or otherwise impossible to obtain, subsection (6) provides that "[a]ny party to a surrogacy agreement may apply to the court for a declaration of parentage." Subsection (7) provides that the court may make such a declaration or any other declaration respecting the parentage of the child born to the surrogate.

In making such a declaration, subsection (8) provides that the child's best interests "shall be" the "paramount consideration." According to subsection (9), although "a surrogacy agreement is unenforceable in law, it may be used as evidence of

(a) an intended parent's intention to be a parent of the child … ; and

(b) a surrogate's intention not to be a parent of the child.

Section 11 addresses cases of surrogacy where there are more than four intended parents. It provides the following:

Surrogacy, more than four intended parents

(1) If the conditions set out in subsection 10 (2) are met other than the condition set out in paragraph 3 of that subsection, any party to the surrogacy agreement may apply to the court for a declaration of parentage respecting a child contemplated by the agreement.

…

Declaration

(4) If an application is made under subsection (1), the court may make any declaration that the court may make under section 10 and, for the purpose, subsections 10 (8) and (9) apply with necessary modifications. …

Post-birth consent of surrogate

(5) A declaration naming one or more intended parents as a parent of the child and determining that the surrogate is not a parent of the child shall not be made under subsection (4) unless, after the child's birth, the surrogate provides to the intended parents consent in writing relinquishing the surrogate's entitlement to parentage of the child. …

Waiver

(6) Despite subsection (5), the court may waive the consent if any of the circumstances set out in subsection 10 (6) apply. …

Section 13, which governs declarations of parentage provides:

Declaration of parentage, general

(1) At any time after a child is born, any person having an interest may apply to the court for a declaration that a person is or is not a parent of the child. …

…

Declaration

(3) If the court finds on the balance of probabilities that a person is or is not a parent of a child, the court may make a declaration to that effect.

However, subsection (4) ensures that the court shall not make a declaration of parentage that results in the child having more than two parents or a declaration of parentage that results in the child having as a parent one other person, in addition to

his or her birth parent, if that person is not a parent of the child under the section, unless specific conditions are met.

Section 2 provides the following:

> References assuming two parents
>
> (4) If, under this Part, a child has more than two parents, a reference in any Act or regulation to the parents of the child that is not intended to exclude a parent shall, unless a contrary intention appears, be read as a reference to all of the child's parents, even if the terminology used assumes that a child would have no more than two parents.
>
> …
>
> References to "le père ou la mère", "le père et la mère", etc.
>
> (5) For the purposes of construing the French version of any Act or regulation, unless a contrary intention appears, the terms "père" and "mère" used together, conjunctively or disjunctively, in relation to a child, shall be construed as referring to a parent or parents of the child as set out in this Part.

b. British Columbia

Pursuant to section 24(1), of the BC FLA, a donor is not automatically a parent. Section 27(1) sets out parentage in cases where "a child is conceived through assisted reproduction, regardless of who provided the human reproductive material or embryo," and where section 29 (surrogacy agreements) does not apply.

Section 28 addresses assisted reproduction where the person who provided the human reproductive material or embryo dies before the child's conception. (See also sections 29(5), 29(7) and 30(3), which address the death of an involved party in various situations.)

Section 29(3) provides that on the birth of a child, the child's birth mother is the child's parent and, subject to section 28, a person who was married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived is also the child's parent, unless there is proof that, before the child was conceived, the person did not consent to be the child's parent, or withdrew the consent to be the child's parent.

Section 29 covers parentage in cases where there was a pre-conception written surrogacy agreement. It provides the following:

> (3) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (2), a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met:
>
> (a) before the child is conceived, no party to the agreement withdraws from the agreement;
>
> (b) after the child's birth,
>
> (i) the surrogate gives written consent to surrender the child to an intended parent or the intended parents, and

(ii) an intended parent or the intended parents take the child into his or her, or their, care.

(4) For the purposes of the consent required under subsection (3) (b) (i), the Supreme Court may waive the consent if the surrogate

(a) is deceased or incapable of giving consent, or

(b) cannot be located after reasonable efforts to locate her have been made.

…

(6) An agreement under subsection (2) to act as a surrogate or to surrender a child is not consent for the purposes of subsection (3) (b) (i) or (5), but may be used as evidence of the parties' intentions with respect to the child's parentage if a dispute arises after the child's birth.

Section 30 addresses parentage in cases of assisted reproduction. If the written agreement meets specific conditions (set out in subsection (1)), then according to subsection (2), "on the birth of a child born as a result of assisted reproduction in those circumstances," "the child's parents are the parties to the agreement."

Section 31 provides that "if there is any dispute or uncertainty about whether a person is or is not a parent under this Part," a court may make an order of parentage or non-parentage.

c. Alberta

Under the Alberta FLA:

7(4) A person who donates human reproductive material or an embryo for use in assisted reproduction (not for his or her own reproductive use) is not automatically a parent of the child.

7(5) A person who was married to or in a conjugal relationship of interdependence of some permanence with a surrogate at the time of the child's conception is not a parent of a child born as a result of the assisted reproduction.

Assisted reproduction

8.1(1) In this section and section 8.2,

(a) a reference to the provision of human reproductive material by a person means the provision of the person's own human reproductive material to be used for his or her own reproductive purposes;

(b) a reference to the provision of an embryo by a person means the provision of an embryo created using the person's own human reproductive material to be used for his or her own reproductive purposes.

(2) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a male person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person is declared to be a parent, the male person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the male person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(3) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a female person only, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the female person is declared to be a parent, the female person and a person who

(i) was married to or in a conjugal relationship of interdependence of some permanence with the female person at the time of the child's conception, and

(ii) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(4) If a child is born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by both a male person and a female person, the parents of the child are

(a) unless clause (b) or (c) applies, the birth mother and the male person;

(b) if the birth mother is a surrogate and, under section 8.2(6), she is declared not to be a parent and the male person and female person are each declared to be a parent, the male person and the female person;

(c) unless section 8.2(9) applies, if the birth mother is a surrogate but does not consent to the application under section 8.2, the birth mother only.

(5) If a child is born as a result of assisted reproduction without the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(a) or (b), the parents of the child are the birth mother and a person who

(a) was married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child's conception, and

(b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent before the child's conception.

(6) Unless the contrary is proven, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if the person was married to or in a conjugal relationship of interdependence of some permanence with,

(a) in the case of a child born in the circumstances referred to in subsection (2), the male person referred to in that subsection,

(b) in the case of a child born in the circumstances referred to in subsection (3), the female person referred to in that subsection, or

(c) in the case of a child born in the circumstances referred to in subsection (5), the birth mother.

…

Surrogacy

8.2(1) An application may be made to the court for a declaration that

(a) a surrogate is not a parent of a child born to the surrogate as a result of assisted reproduction, and

(b) a person whose human reproductive material or embryo was provided for use in the assisted reproduction is a parent of that child.

…

8.2(6) The court shall make the declaration applied for if the court is satisfied that

(a) the child was born as a result of assisted reproduction with the use of human reproductive material or an embryo provided by a person referred to in subsection (1)(b), and

(b) the surrogate consents, in the form provided for by the regulations, to the application.

…

8.2(8) Any agreement under which a surrogate agrees to give birth to a child for the purpose of relinquishing that child to a person

(a) is not enforceable,

(b) may not be used as evidence of consent of the surrogate under subsection (6)(b), and

(c) may be used as evidence of consent for the purposes of section 8.1(2)(b)(ii) or (3)(b)(ii).

8.2(9) The court may waive the consent required under subsection (6)(b) if

(a) the surrogate is deceased, or

(b) the surrogate cannot be located after reasonable efforts have been made to locate her.

…

8.2(12) An application may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

9(1) If there is a dispute or any uncertainty as to whether a person is or is not a parent of a child under section 7(2)(a) or (b), the following persons may apply to the court for a declaration that the person is or is not the parent of a child:

(a) a person claiming to be a parent of the child;

(b) a person claiming not to be a parent of the child;

(c) the child;

(d) a parent of the child, if the child is under the age of 18 years;

(e) a guardian of the child;

(f) a person who has the care and control of the child.

9(2) This section does not apply where a child is born to a surrogate who has consented to an application under section 8.2.

…

9(7) An application or declaration may not be made under this section if

(a) the child has been adopted, or

(b) the declaration sought would result in the child having more than 2 parents.

2. Less Comprehensive Parentage Regimes

a. The Northwest Territories

The NT CLA contains the following relevant provisions regarding assisted reproduction and parentage:

Assisted reproduction

2(1.1) A child born as a result of assisted reproduction is the child of the birth mother and a person who is a parent under section 8.1.

…

Application: assisted reproduction

5.1(1) Any interested person may apply to a court for declaratory order that a person is or is not recognized in law under section 8.1 to be a parent of a child born as a result of assisted reproduction.

…

Donor

5.1(3) A person who donates human reproductive material or an embryo for use in assisted reproduction is not, by reason only of the donation, a parent of a child born as a result and may not, by reason only of the donation, be declared under this section to be a parent of the child.

Exception

5.1(4) Subsection (3) does not apply in respect of a person who provides his or her own human reproductive material or an embryo created with his or her own human reproductive material for use in assisted reproduction for his or her own reproductive use.

…

Presumption of parentage: assisted reproduction

8.1(1) A person is presumed to be and is recognized in law to be a parent of a child born as a result of assisted reproduction, if he or she

(a) was married to the birth mother or was cohabiting with the birth mother in a relationship of some permanence at the time of the child's conception; and

(b) consented to be a parent of a child born as a result of assisted reproduction and did not withdraw that consent prior to the child's conception.

Presumed consent

8.1(2) Unless the contrary is proven on a balance of probabilities, a person is presumed to have consented to be a parent of a child born as a result of assisted reproduction if, at the time of conception, the person was married to the birth mother or was cohabiting with the birth mother in a relationship of some permanence.

Exception

8.1(3) Notwithstanding subsections (1) and (2), a person who was married to a birth mother or cohabiting in a relationship of some permanence with a birth mother at the time of the conception of a child born as a result of assisted reproduction, is not presumed to be or recognized in law to be a parent of that child if the birth mother, at the time of conception, intended to relinquish the child to

(a) the person whose human reproductive material was used in the assisted reproduction or whose human reproductive material was used to create the embryo used in the assisted reproduction; or

(b) the person referred to in paragraph (a) and the person who was married to or cohabiting in a relationship of some permanence with him or her.

b. Prince Edward Island

Although Prince Edward Island's CSA references "assisted conception," its provisions are quite limited. It provides:

Application for declaration

(1) Any person having an interest may apply to the Supreme Court (in this Part referred to as the "court") for a declaration that the person is or is not recognized in law to be the parent of a child.

…

Presumptions

(2) If the court finds that a presumption of parentage exists under section 9, the court shall make a declaratory order confirming the presumed parentage, unless the court finds on the balance of probabilities that the presumed parent is not the parent of the child.

Section 9 provides:

Presumption

(1) Subject to a declaration under section 5, the presumptions in this section apply to births occurring before or after the coming into force of this section and shall be recognized in law.

"assisted conception," defined

(2) In this section, "assisted conception" means conception by a means other than sexual intercourse and includes the fertilization of the mother's ovum outside of her uterus and subsequent implantation of the fertilized ovum in her.

Presumed parent

(3) A person is presumed to be the parent of a child if

(a) the person was the spouse of the mother of the child at the time of the birth of the child;

(b) the person has filed a statement pursuant to subsection 3(1) or an application for amendment pursuant to subsection 3(5) of the *Vital Statistics Act* R.S.P.E.I. 1988, Cap. V-4.1, or a document under a similar provision of a corresponding Act in any jurisdiction in Canada; or

(c) the person has been found or recognized during his or her lifetime by a court of competent jurisdiction in Canada to be the parent of the child.

No assisted conception

(4) A male person is presumed to be the parent of a child if

(a) he was married to the mother of the child by a marriage that was terminated by death or judgment of nullity within 300 days before the birth of the child or by divorce where the divorce was granted within 300 days before the birth of the child;

(b) he marries the mother of the child after the birth of the child and acknowledges that he is the natural father; or

(c) he was cohabiting in a conjugal relationship with the mother of the child at the time of the birth of the child or the child is born within 300 days after they ceased to cohabit.

Presumed parent in assisted conception

(5) In the case of birth by assisted conception, a person is presumed to be the parent of a child if the person was, at the time the mother is inseminated, the spouse of, or cohabiting in a conjugal relationship with, the mother unless

(a) the person did not consent in advance to the assisted conception and did not demonstrate a settled intention to treat the child as the person's child; or

(b) the person did not know that the child was born by assisted conception.

Status of donor

(6) A person who donates the semen or ovum used in the assisted conception of a child is not, by that reason alone, a parent of the child.

Birth mother

(7) A woman who gives birth to a child is deemed to be the mother of the child, whether the woman is or is not the genetic mother of the child.

Conflicting presumptions

(8) The presumptions in this section shall not be applied if they result in more than one person being considered to be the parent of a child, in addition to the mother.

c. Quebec

The CCQ addresses the "filiation of children born of assisted procreation." The Code provides the following:

538. A parental project involving assisted procreation exists from the moment a person alone decides or spouses by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project.

…

538.2 The contribution of genetic material to the parental project of another cannot be the basis for any bond of filiation between the contributor and the child consequently born.

However, if the contribution of genetic material is provided by way of sexual intercourse, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.

538.3 If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within 300 days after its dissolution or annulment, the spouse of the woman who gave birth to the child is presumed to be the child's other parent.

The presumption is rebutted if the child is born more than 300 days after the judgment ordering separation from bed and board of the married spouses, unless they have voluntarily resumed their community of life before the birth.

The presumption is also rebutted as regards the former spouse if the child is born within 300 days of the termination of the marriage or civil union, but after a subsequent marriage or civil union of the woman who gave birth to the child.

…

539.1 If both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child.

Surrogacy agreements are not permitted in Quebec. Pursuant to article 541,

> [a]ny agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.

3. Least Comprehensive Parentage Regimes

a. Yukon

The Yukon CLA addresses paternity in the case of artificial insemination in section 13 in the following relevant provisions:

> (2) A man whose semen was used to artificially inseminate a woman is deemed in law to be the father of the resulting child if he was married to or cohabiting with the woman at the time she is inseminated even if his semen were mixed with the semen of another man.
>
> (3) A man who is married to a woman at the time she is artificially inseminated solely with the semen of another man shall be deemed in law to be the father of the resulting child if he consents in advance to the insemination.
>
> (4) A man who is not married to a woman with whom he is cohabiting at the time she is artificially inseminated solely with the semen of another man shall be deemed in law to be the father of the resulting child if he consents in advance to the insemination, unless it is proved that he refused to consent to assume the responsibilities of parenthood.
>
> (5) Despite a married or cohabiting man's failure to consent to the insemination or consent to assume the responsibilities of parenthood under subsection (3) or (4) he shall be deemed in law to be the father of the resulting child if he has demonstrated a settled intention to treat the child as his child unless it is proved that he did not know that the child resulted from artificial insemination.
>
> (6) A man whose semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination is not in law the father of the resulting child.

b. Newfoundland and Labrador

Section 12 of the NL CLA is virtually identical (but for a few words that do not change the meaning of any of the provisions) to section 13 of the Yukon's CLA.

E. The Assisted Human Reproduction Act

The AHRA contains important provisions affecting assisted reproduction and surrogacy in Canada. This federal legislation does not affect the legal concept of parentage as defined by each of the provinces and territories. There are some noteworthy prohibitions in the AHRA, particularly those on remuneration in connection with surrogacy and the purchase of gametes or reproductive material. The Act prohibits various financial transactions in connection with assisted reproduction. For example, section 6 prohibits payment for surrogacy services, as well as buying or selling sperm, ova, and *in vitro* embryos. Section 7 prohibits buying or selling human cells or genes with the

intention of using the gene or cell to create a human being. New regulations regarding reimbursement of expenditures for surrogates and donors are coming into force on June 9, 2020.[117]

Section 8 of the AHRA addresses consent regarding use of human reproductive material, removal of human reproductive material from a donor's body after the donor's death, and use of an *in vitro* embryo. The *Assisted Human Reproduction (Section 8 Consent) Regulations*[118] contain detailed regulations that apply to section 8 of the AHRA. See *KLW v Genesis Fertility Centre*, where the court thoroughly considered the AHRA and the AHRA Regulations in the context of a petitioner who wished to use the stored sperm of her deceased spouse.[119]

In 2008, the Court of Appeal of Quebec ruled that certain sections of the Act were not valid criminal law and declared the provisions unconstitutional. In 2010, the Supreme Court of Canada heard the appeal in *Reference re Assisted Human Reproduction Act*.[120] In a split decision, the majority upheld some of the impugned provisions but struck down others.

The federal government's use of the criminal law power to legislate in this area remains controversial, and many in the LGBTQ2+ community object to the current scheme of the AHRA.

F. Parentage Case Law

1. Number of Parents

The Ontario Court of Appeal, in the landmark decision of *AA v BB*,[121] recognized that a child may have more than two parents. In this case, the biological mother's same-sex partner wished to be a parent of the child, along with the biological mother and the

117 *Reimbursement Related to Assisted Human Reproduction Regulations*, SOR/2019-193 [RRAHRR].

118 SOR/2007-137 [AHRA Regulations]. The *Regulations Amending the Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2019-195, were published in the Canada Gazette II, Vol 153, No 13, on June 26, 2019, online: <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-10-27/html/reg5-eng.html>. These regulations amend the AHRA Regulations and provide that the title of the *Assisted Human Reproduction (Section 8 Consent) Regulations* will be replaced by *Consent for Use of Human Reproductive Material and In Vitro Embryos Regulations*. These amendments come into force on December 26, 2019. Also published in the Canada Gazette on June 26, 2019, were the *Administration and Enforcement (Assisted Human Reproduction Act) Regulations*, SOR/2019-194 (in force as of June 9, 2019), online: <http://gazette.gc.ca/rp-pr/p2/2019/2019-06-26/html/sor-dors194-eng.html>, the *Safety of Sperm and Ova Regulations*, SOR/2019-192 (coming into force on February 4, 2020), online: <http://www.gazette.gc.ca/rp-pr/p1/2018/2018-10-27/html/reg2-eng.html>, and the RRAHRR (coming into force on June 9, 2020).

119 2016 BCSC 1621.

120 2010 SCC 61.

121 2007 ONCA 2.

biological father. The biological parents recognized the biological mother's partner's equal status. The court summarized the importance of a declaration of parentage:

- [T]he declaration of parentage is a lifelong immutable declaration of status … ;
- it allows the parent to fully participate in the child's life;
- the declared parent has to consent to any future adoption;
- the declaration determines lineage;
- the declaration ensures that the child will inherit on intestacy;
- the declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child;
- the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada … ;
- the declared parent may register the child in school; and
- the declared parent may assert her rights under various laws such as the *Health Care Consent Act, 1996*.[122]

The court found that it was contrary to the child's best interests that he be deprived of the legal recognition of the parentage of one of the mothers and made a declaration of parentage on the basis of its *parens patriae* jurisdiction. The court stated that there was no other way to fill the deficiency; the biological mother and her partner could not apply for an adoption order without depriving the biological father of parentage of the child, which would not be in the child's best interests.[123]

Ontario is the only province with parentage legislation that now contemplates specific situations where a child may have more than two parents.

2. International Surrogacy Agreements

The prohibition on the payment to surrogates in Canada has resulted in a demand for altruistic surrogates that exceeds supply. As a result, families requiring a surrogate may engage in "reproductive tourism," seeking a surrogate outside Canada. Interestingly, because of Canada's non-discriminatory laws regarding same-sex parents, Canada is a reproductive tourism destination for international same-sex couples. For Canadians pursuing international surrogacy, however, complications may arise with international surrogacy agreements, depending on the legislation in the intended parents' home province or territory.

For example, in Quebec, surrogacy agreements are forbidden. This issue arose in the *Droit de la famille—151172*,[124] where the applicants sought a declaration that they

122 *Ibid* at para 14.

123 *Ibid* at para 37.

124 2015 QCCS 2308.

were the parents of the child. The applicants were a same-sex couple residing in Quebec. They used the services of an American surrogate mother residing in the US. One of the applicants was an American citizen. The other applicant was the biological father of the child. The child was born in Pennsylvania. The court stated that the filiation of the child was established in Pennsylvania by foreign judgment; what remained to be determined was whether it was appropriate to give effect to this filiation in Quebec. The court noted that "procreative tourism" has given rise to several judgments from courts asked to recognize the filiation of children born of surrogate mothers living in different jurisdictions from the intended parties.[125] The court engaged in a review of the legal landscape across Canada, in the US, and in other foreign jurisdictions. The court noted that the Quebec legislature had not enacted any rules prohibiting the approach taken, which was to enter into a surrogacy agreement abroad, obtain a declaration of parental status, and subsequently have it recognized in Quebec.[126] Ultimately, the court declared the applicants to be parents of the child and ordered the registrar of civil status to insert into the register the Pennsylvania birth certificate issued for the child.[127]

3. Declarations of Parentage and Non-Parentage in Provinces Without a Statutory Framework

In provinces and territories without a statutory framework that addresses parentage in the context of non-conventional reproductive arrangements, the courts must determine, on a case-by-case basis, whether to make a declaration of parentage or non-parentage. Two examples—one from Saskatchewan and one from New Brunswick—follow.

In *M (WJQ) v A (AM)*,[128] the petitioners, a same-sex couple, had a gestational carrier agreement with the respondent. The respondent carried an embryo with the sperm of one of the petitioners and the ova of a donor. The respondent waived her rights with respect to the child and supported the petitioners' application. The petitioners applied pursuant to section 43(3) of the Saskatchewan CLA, 1997 and/or section 11 of *The Queen's Bench Act, 1998*[129] for a declaration that the respondent was not the child's mother and to have her removed from the registration of live birth.

The court noted that there was no case law in Saskatchewan with respect to the removal of a "mother's" name from a child's registration of live birth where that mother was a gestational carrier. The court looked to other jurisdictions to see how the issue had been handled by other superior courts and considered the cases of *CJ v*

125 *Ibid* at para 26.

126 *Ibid* at para 108.

127 *Ibid* at para 127.

128 2011 SKQB 317 [*M (WJQ)*].

129 SS 1998, c Q-1.01.

Manitoba,[130] *RJ v HL*,[131] and *D (M) v L (L)*.[132] The court concluded that the respondent gestational carrier was not the biological mother and that neither the petitioners nor the respondent ever intended that she would assume any parental rights or obligations. As such, a declaration that the respondent was not the child's mother was warranted.[133] The court made a declaration of non-parentage pursuant to section 43(3) of the Saskatchewan CLA, 1997 and an order that the registration of live birth be amended accordingly.[134]

In *M (MA) v M (TA)*,[135] the applicants, a married different-sex couple, brought an application for a declaration of parentage and non-parentage. The applicants entered into an agreement with a gestational carrier, who was impregnated with embryos consisting of sperm from the applicant father and donated ova. The gestational carrier gave birth to twins. The applicants sought a declaration that the applicants be recognized as the father and mother of the children and a declaration that the gestational carrier and her partner were not the mother and father of the children. The application was uncontested. The applicants relied on sections 96-110 of the FSA, as well as section 8 of the AHRA and section 3 of the AHRA Regulations.

The applicants also relied on *N (BA) v H (J)*,[136] where the Supreme Court of British Columbia made a declaration of parentage in a case with similar facts. The declaration was based on the court's power to grant equitable relief as to legal status. The court noted that in *AA v BB*,[137] the Ontario Court of Appeal dealt with a request that three persons be declared parents based on the *parens patriae* jurisdiction of the court. The court also cited *M (AW) v S (TN)*,[138] where the court stressed the intent of the parties as a significant factor with respect to declarations of parentage. The court noted that the FSA did not contemplate assisted reproduction. The court recognized that the changes in relationships and the evolution of reproductive science and technology have meant that there are gaps in the FSA's legislative scheme. Based on the evidence, the court concluded that the applicants were the children's "intended and social parents."[139]

Given the parties' intentions, and the fact that it was in the children's best interests, the court declared the applicants to be the mother and father of the children, on the

130 2000 MBQB 173.

131 2002 CanLII 76705 (Ont Sup Ct J).

132 2008 CanLII 9374 (Ont Sup Ct J).

133 *M (WJQ)*, *supra* note 128 at para 25.

134 *Ibid* at para 26.

135 2015 NBQB 145 [*M (MA)*].

136 2008 BCSC 808.

137 *Supra* note 121.

138 2014 ONSC 5420.

139 *M (MA)*, *supra* note 135 at para 32.

basis of subsection 100(1) of the FSA. Based on subsection 11(4) of the *Judicature Act*,[140] the court declared that the gestational carrier and her partner were not the mother and father of the children. The court referred to *R (J) v H (L)*,[141] stating the "right to know whether or not one is a parent of a child is of such significance that the issue may be the subject of a declaratory order."[142]

4. Declarations of Parentage and Non-Parentage in Provinces with a Comprehensive Statutory Framework

Even in provinces where there are updated legal frameworks for parentage, where fact situations arose that were not contemplated by the legislation, the courts have attempted to deal with the situations by following parties' intentions. The following two cases were decided after recent statutory reforms concerning parentage in British Columbia and Ontario.

In *Family Law Act (Re)*,[143] Fitzpatrick J applied the new British Columbia legislation concerning parentage. A married different-sex couple, KG and SG, wished to have a child. Their friend, LK, offered to assist and was artificially inseminated with KG's sperm. They made a verbal surrogacy agreement. LK surrendered custody of the child to KG and SG upon the birth, and LK renounced all parental rights. The petitioners sought a declaration that they were the parents of the child, an amendment of the birth certificate to reflect the declaration, and a declaration that LK was not a parent of the child.[144]

The court noted that the application engaged the relatively new provisions of part 3, "Parentage," of the BC FLA. (Another application involving declarations of parentage in a surrogacy situation was also heard the same day.[145]) Since 2013, British Columbia law has expressly addressed parenting status where assisted reproduction is used. The court noted that the new surrogacy provisions in the BC FLA focus on the intentions of the parties as to who is to be the parent of the child.[146]

A difficulty in this case was that the parties did not enter into a written surrogacy agreement prior to the child's conception, as required by section 29 of the Act. If they had, the petitioners would easily have been considered as the "intended parents" as defined by section 20(1). Section 29 did not apply in the circumstances.[147] The court

140 RSNB 1973, c J-2.

141 2002 CanLII 76705 (Ont Sup Ct J) [*R (J)*].

142 *M (MA)*, *supra* note 135 at para 37.

143 2016 BCSC 598 [*FLA (Re)*].

144 *Ibid* at para 2.

145 See *Family Law Act (Re)*, 2016 BCSC 22.

146 *FLA (Re)*, *supra* note 143 at para 26.

147 *Ibid* at para 30.

considered whether relief was available in the absence of a written surrogacy agreement. The court noted that prior to the enactment of the BC FLA, it had inherent jurisdiction to make declarations of parentage where appropriate, citing *Rypkema v HMTQ*[148] and *BAN v JH*[149] as examples.[150] Section 31 of the BC FLA confirms the court's continuing (now statutory) jurisdiction to make declarations of parentage where there is uncertainty or a dispute. The court accepted that there was some uncertainty in these circumstances in relation to the petitioner's parentage arising not only from the birth registration but also in terms of their rights and the child's rights in the future. The court stated that the many benefits of declarations of parentage as accepted by the court in *AA v BB* applied equally in this case.[151]

The court stressed that the reasons were not meant to stand as a precedent for future parties to disregard the requirement of a written agreement in a surrogacy arrangement. Without such an agreement, one of the issues the intended parents will inevitably face is to either satisfy the hurdle of section 31 of the BC FLA, by showing a dispute or uncertainty related to parentage, or to seek adoption.[152] The court granted the declaration of parentage, the amendment of the birth registration, and declared LK not to be a parent.[153]

In *MRR v JM*,[154] the Ontario Superior Court heard a motion that raised what it characterized as

> important, fundamental and novel issues about the definition of "parent" in the current social context, the rights of parties to define a child's family unit, and the departure from the historical legal focus on biology toward an emphasis on the intent to parent.[155]

In this case, the court applied the newly enacted provisions of the CLRA. The applicant, MRR, was the biological mother of the child. The respondent, JM, was the biological father. MRR had wanted to have a child and was not in a relationship. JM and MRR had previously dated but remained friends. JM offered to assist MRR by donating his sperm through sexual intercourse. According to JM, the parties had a verbal agreement that if MRR conceived, he would not be the child's legal parent. After the baby was born, the parties executed a contract confirming the agreement that JM would not be the child's legal father. In his motion, JM sought a declaration of non-parentage or,

148 2003 BCSC 1784.

149 2008 BCSC 808.

150 *FLA (Re)*, *supra* note 143 at paras 34-37.

151 *Ibid* at para 42.

152 *Ibid* at para 47.

153 *Ibid* at para 59.

154 2017 ONSC 2655 [*MRR*].

155 *Ibid* at para 2.

in the alternative, that the contract be upheld. MRR opposed the declaration of non-parentage and sought an order setting aside the contract or declaring it invalid and an order declaring JM the father of the child pursuant to section 1 of the Ontario FLA.

Between the time the application was commenced and the time the motion was heard, the CLRA was amended to expand the definition of "parent" and to include provisions for declarations of parentage and non-parentage. The court undertook an overview of the legislation and case law predating, and leading to, the recent amendments to the CLRA. Prior to the amendments, there were two sources of declaratory relief with respect to parentage: section 4 of the CLRA, for a declaration of parentage; and section 97 of the *Courts of Justice Act*,[156] for a declaration of non-parentage. The court reviewed previous case law, including *R (J)*,[157] *AA v BB*,[158] and *AWM v TNS*.[159] In *AWM*, the applicants, married men, conceived a child using a donor egg, AWM's sperm, and a surrogate. The applicants waived any claim for child support and the respondent waived any claims to custody or access. Henderson J noted that "[i]n these changing times, court decisions on parentage focus less on the biological connection between child and parent and more on the substance of the relationship."[160] The court noted that although biology is still an important factor in parentage, the case law demonstrates a shift toward intent.[161] The amended CLRA provided a comprehensive legislative framework for determining the issues raised in this case. Pursuant to section 4(1) of the amended CLRA, JM was presumptively a parent. The child was not conceived through assisted reproduction, and JM was not automatically excluded as a parent pursuant to section 5 of the amended CLRA. JM was also deemed to be the child's parent pursuant to section 7(1) of the amended CLRA. However, section 7(4) of the amended CLRA states that a finding of parentage in section 7(1) does not apply

> to a person whose sperm is used to conceive a child through sexual intercourse if, before the child is conceived, the person and the intended birth parent agree in writing that the person does not intend to be a parent of the child.

Applying the plain and ordinary meaning of section 7(4), the agreement between MRR and JM failed to qualify, as it was not signed by the parties prior to the child being conceived.[162]

The court, in *MRR*, then considered whether a declaration of non-parentage was available, despite JM not meeting the criteria under section 7(4). Section 13 of the

156 RSO 1990, c C.43.

157 *Supra* note 141.

158 *Supra* note 121.

159 2014 ONSC 5420 [*AWM*].

160 *Ibid* at para 24.

161 *Ibid* at para 45.

162 *MRR*, *supra* note 154 at para 82.

amended CLRA is a general provision permitting "any person having an interest" to "apply to the court for a declaration that a person is or is not a parent of the child." This section does not contain guidance regarding what factors the court should consider. The court found that the legislative intent in enacting the amendments and the overall scheme of the Act and the legislative context all suggested that pre-conception intent is an important consideration.[163]

The court found that the balance of the evidence supported the finding that the intention of the parties prior to the child's conception was that JM would be a sperm donor, not a parent.[164] The court recognized that it was possible that in certain cases, the actions of the parties following the conception of the child could be so different from the pre-conception intentions that a declaration of non-parentage would not be appropriate. However, the overall legislative purpose of part I of the CLRA suggests that the parties' pre-conception intent is granted significant weight.[165] The court also noted that there are policy reasons why putting too much emphasis on post-conception actions or intentions may be inappropriate.[166] The court put less weight on the parties' post-conception actions and intentions but found on balance that the parties acted reasonably consistently with their initial pre-conception intentions.[167]

Finally, the court considered whether the child's best interests were relevant. MRR argued that the child's best interests took precedence and that JM continued to have a financial obligation to the child. The court noted that the amended CLRA does not stipulate that the court consider the best interests of the child in making a declaration under section 13. The court stated that where the "best interests of the child" consideration was omitted, it assumed that it was intentional.[168] The court also cited the Pennsylvania Supreme Court decision in *Ferguson v McKiernan*,[169] in which the court stated:

> This Court takes very seriously the best interests of the children of this Commonwealth, and we recognize that to rule in favour of Sperm Donor in this case denies a source of support to twin children who did not ask to be born into this situation. Absent the parties' agreement, however, the twins would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe from a support order.[170]

163 *Ibid* at para 85.

164 *Ibid* at para 108.

165 *Ibid* at para 130.

166 *Ibid* at para 131.

167 *Ibid* at para 135.

168 *Ibid* at para 144.

169 940 A 2d 1236, 1238 (Pa 2007).

170 *MRR*, *supra* note 154 at para 146.

The court stated that the "best interests of the child" test "may not readily translate into a determination of a declaration of parentage," and that applying it in a parentage case could in fact produce results directly contradicting "the spirit and purpose of Part I of the CLRA."[171] Although a child would benefit from additional sources of financial support, this approach could undermine the autonomy of those seeking to exclude sperm donors and surrogates as legal parents and could discriminate against people who choose, prior to conception, to be single parents. As the court explained, "[i]f parties do not have confidence in their pre-conception agreements, they may simply opt not to have a child at all."[172] The court concluded its best interests analysis with the following observation about the nature of the provision:

> Section 13 is a broad provision, and it is not possible to anticipate every circumstance wherein a declaration of parentage or non-parentage might be sought. There may be circumstances wherein the "best interests of the child" would be a factor in making a making a declaration under s 13. However in my view, the court is not *required* to look to the child's "best interests" in the traditional sense in every case when making a declaration of parentage.[173]

In this case, the court found that a number of factors supported a pre-conception agreement that JM was acting as an intentional sperm donor rather than as a prospective parent. JM satisfied the burden of demonstrating that a declaration of non-parentage was appropriate, and the court declared that he was not the father of the child. The court cautioned that

> [t]his case should not stand for the proposition that parties are not required to reduce their arguments to writing; rather, the facts of this case highlighted how crucial it is to have a written agreement clearly defining their intentions before a child is conceived.[174]

G. Adoption

Historically, same-sex spouses wishing to raise children often looked to adoption both domestically and internationally. Where they could not adopt as a couple, prospective adoptive parents would have one spouse pose as a "single" applicant, undergoing a home study that would drive the couple back into the closet. Although there are no longer any prohibitions on same-sex couples adopting children domestically, same-sex couples and "single" applicants for international adoption are prohibited in all but a

171 *Ibid* at para 148.

172 *Ibid* at para 149.

173 *Ibid* at para 150 (emphasis in the original).

174 *Ibid* at para 164.

few countries.[175] International adoption is now increasingly unavailable generally as countries seek to find placements for children domestically. In addition, there are fewer children available for adoption domestically. While anecdotally it appears that some gay male couples may have greater success in matching with adoption agencies in Canada, more same-sex couples are pursuing third-party reproduction as it gets more difficult to successfully adopt.

Adoption is governed by provincial and territorial law. The particulars of who is eligible to adopt and who is eligible to be adopted vary across Canada. The chart in Table 6.6 outlines the applicable statute and parentage provisions in each province and territory.

TABLE 6.6

Provinces and Territories	Statute	Adoption Provisions
Alberta	*Child, Youth and Family Enhancement Act*, RSA 2000, c C-12	Sections 58-105
British Columbia	*Adoption Act*, RSBC 1996, c 5	Sections 1-103
Manitoba	*The Adoption Act*, SM 1997, c 47	Sections 1-136
New Brunswick	FSA	Sections 63.1-94
Newfoundland and Labrador	*Adoption Act, 2013*, SN 2013, c A-3.1	Sections 1-93
Northwest Territories	*Adoption Act*, SNWT 1998, c 9	Sections 1-79
Nova Scotia	*Children and Family Services Act*, SNS 1990, c 5 [NS CFSA]	Sections 67-88
Nunavut	*Adoption Act*, SNWT 1998, c 9	Sections 1-79
Ontario	*Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1 [CYFSA]	Sections 179-242
Prince Edward Island	*Adoption Act*, SPEI 1992, c 1	Sections 1-59
Quebec	CCQ	Articles 543-84.1
Saskatchewan	*Adoption Act, 1998*, SS 1998, c A-5.2	Sections 1-47
Yukon	*Child and Family Services Act*, SY 2008, c 1	Sections 95-155

175 For cases that initially challenged the restrictions on same-sex couples applying jointly to adopt a child, see e.g. *M (SC) Re*, 2001 NSSF 24, and *Re K Adoption*, 1995 CanLII 10080 (Ont Ct J).

VII. Custody and Access

A. Overview

Over the last twenty years, the courts' approach to the consideration of sexual orientation and gender identity in custody and access matters has improved dramatically. While little reported case law exists, courts in many jurisdictions will not tolerate arguments that suggest that custody and access decisions be determined by factors regarding sexual orientation or gender identity. Nevertheless, parenting cases that deal with these issues are often the most contentious and high-conflict, particularly when one spouse transitions or comes out post-separation. In addition, courts are grappling with how to deal with separated parents whose children have gender identity issues.

B. Custody and Access in Legislation

Married spouses may obtain custody and/or access orders under the *Divorce Act*, as part of a divorce proceeding, or under provincial legislation. Unmarried spouses may not obtain custody and/or access orders under the *Divorce Act*.

Custody and access for unmarried couples, and for married couples who are not obtaining a divorce, are governed under provincial legislation by the statutes in Table 6.7.

TABLE 6.7

Provinces and Territories	Statute	Relevant Provisions
Alberta	Alberta FLA	Sections 18, 32-45.1
British Columbia	BC FLA	Sections 37-80
Manitoba	Manitoba FMA	Section 39
New Brunswick	FSA	Sections 117-37
Newfoundland and Labrador	NL CLA	Sections 24-54
Northwest Territories	NT CLA	Sections 15-39
Nova Scotia	PSA	Sections 18-20
Nunavut	Nunavut CLA	Sections 15-39
Ontario	CLR	Sections 18-46
Prince Edward Island	*Custody Jurisdiction and Enforcement Act*, RSPEI 1988, c C-33	Sections 1-29
Quebec	CCQ	Articles 597-612

Provinces and Territories	Statute	Relevant Provisions
Saskatchewan	Saskatchewan CLA, 1997	Sections 3-29
Yukon	Yukon CLA	Sections 28-54

C. Custody

1. Custody and Sexual Orientation

Presently, a parent's sexual orientation is treated as a completely neutral factor in a custody determination. Previously, even if the sexual orientation of a parent was not considered a bar to custody, it was treated as a negative factor (for example, similar to drug use) that required mitigation.[176] In considering custody and access claims, courts have been unequivocal in refusing to draw a negative inference:

176 In *Elliott (Amorosa) v Elliott*, 1987 CarswellBC 797 (SC) at para 29, the court stated that it could not conclude that homosexuality was "something for the edification of young children," and, under the circumstances, unless the child was removed from the environment, she would suffer.

In *Nicholson and Storey, Re*, 1982 CarswellBC 3027 (Prov Ct) at paras 20-21, the court noted that the cases were unanimous that "homosexuality is not a bar to claim for custody, but one factor to be considered with all the others." However, the court considered that at a minimum, a homosexual relationship was "a minus factor" for a custody claimant.

In *B v B*, 1980 CanLII 1187 (Ont Ct J (Fam Div)), the court noted that any possible "ill effects" for the child from the mother's sexual orientation were minimized by a number of factors, including that the mother was "not militant," did not "flaunt" her homosexuality, was not biased about the child's sexual orientation, and did not have "overt sexual contact" with her partner apart from sleeping in the same bed, and that the mother's partner had a good relationship with the child.

In *Bezaire v Bezaire*, 1980 CarswellOnt 324 (CA) at para 6, the court imposed a condition that no person reside with the mother without the approval of the court, stating, "I am attempting to improve the situation and that includes negativing any open, declared and avowed lesbian or homosexual relationship" [*Bezaire*].

In *D v D*, 1978 CanLII 817 (Ont Co Ct) at para 19, the court considered the father's homosexuality as follows:

> [I]t continues to be the welfare of the children which is paramount, whether you are dealing with a problem of homosexuality, a racial problem, a psychiatric one or any other kind of problem which may damage the children's psychological, moral, intellectual or physical well-being, and their orderly development and adaptation to society. It is in that context that homosexuality must be viewed.

In *Wine v Wine*, 1976 CarswellOnt 162 (H Ct J) at paras 4-5, the father alleged that the mother was a lesbian, who espoused bisexuality, and this created a danger for their children. The court found that it was unable to reach a conclusion on that issue but stated that "if it is true, then obviously it could have a detrimental effect upon the children and quite possibly the mother should not have custody."

> There is no evidence that families with heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than are families with homosexual parents: see *Re K.* (1995), 15 R.F.L. (4th) 129 (Ont. Prov. Div.) at 161-2 per Nevins J. Furthermore, lesbian relationships do not break down at a significantly different rate than do heterosexual relationships and the sexual orientation of children is not influenced by the gender preference of their parents. It is true that the children of a lesbian in a same-sex relationship may be ostracized by some peers because of the lifestyle of their mother. However, I do not think that a rational decision by this court should be precluded by the possibility that it may provoke an irrational response in others.
>
> The end result of all of this is that the same-sex preference of a parent is merely one of the many factors which a court should consider when determining the best interests of children. A lesbian relationship, conducted with discretion and sensitivity, is no more harmful to children than a heterosexual relationship, conducted with discretion and sensitivity. Heterosexual parenting is not better than lesbian parenting—just different.[177]

Now, even where a party argues that the sexual orientation of a parent was contrary to another cultural or religious value to the family, the courts have refused to see sexual orientation as a negative factor.

For example, in *Boots v Sharrow*,[178] the parties, both of whom were Mohawk, had four children. The mother had entered into a new, same-sex relationship. The father wanted sole custody and for the children to reside primarily with him. His position was that a same-sex relationship was viewed as deviant by Mohawk people and was incompatible with traditional Mohawk ways. The court cited the (at the time) recent decision in *Halpern*[179] and highlighted several comments the Court of Appeal made with regard to the respect and recognition of same-sex relationships.[180] The court granted sole custody of the children to the mother.

Courts have also awarded joint custody to lesbian co-mothers even where the intention to parent was not formed pre-conception. In *Murphy v Laurence*,[181] the former same-sex partner of the child's biological mother brought a motion for interim joint

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In *K v K*, 1975 CanLII 1587 (ABPC) at paras 29-31, the court was of the opinion that the mother's homosexuality was no more of a bar to her obtaining custody than the father's drug use. The court stated:

> One must guard against magnifying the issue of homosexuality as it applies to the capacity for performing the duties of a parent. Heterosexuals produce children who become homosexual and the evidence of the psychiatrist and psychologist in this case did not indicate the odds of becoming or being a homosexual would increase solely by reason of being reared by a homosexual parent.

177 *Bubis v Jones*, 2000 CanLII 22571 (Ont Sup Ct J) at paras 22-23.

178 2004 CanLII 5031 (Ont Sup Ct J) [*Boots*].

179 *Supra* note 12.

180 *Boots*, *supra* note 178 at para 104.

181 2002 CarswellOnt 1281 (Sup Ct J).

custody. When the two women started a relationship, the child was in the care of the biological mother. The relationship lasted for approximately three years. Based on the evidence, the court was satisfied that both women, jointly and individually, had acted as parents to the child. The court stated that the best interests of the child would govern the decision relating to custody: "[S]ame-sex parents seeking custody are no different from opposite-sex parents seeking custody."[182] The court granted the two women temporary joint legal custody of the child.

Where parties enter into a same-sex relationship, post-separation, courts have found that the new relationship should be treated no differently than a heterosexual relationship. For example, in *Steers v Monk*,[183] where a mother was in a new relationship with a woman, the court stated that the relationship

> should be seen in the same light as if she were living in a heterosexual relationship with another male person, which could also either be positive or negative, depending on the particular facts surrounding that relationship and outward conduct of the parties.[184]

2. Custody and Gender Identity

There are very few reported cases where a court considered a parent's gender identity in determining custody or access. More recently, there have been a number of cases where a child's gender identity and the parents' response have been an important factor in these decisions. The courts have favoured parents who are best able to support their child's gender identity.

a. Parent's Gender Identity

The case law considering a parent's gender identity is not well developed. However, it is clear that a parent's gender transition itself is not a factor in custody and access decisions.

In *Boyce v Boyce*,[185] the court stated that the biological father's gender dysphoria was "not relevant to the issue of custody, except to the extent that the children have been affected."[186] The court found that the biological father had involved the children too much in her sexual transformation:

> She has insisted that the children call her Mother almost from the outset, notwithstanding her agreement with the petitioner that she would be called M. J. and the petitioner Mom.

182 *Ibid* at para 12.

183 1992 CanLII 7156 (Ont Ct J).

184 *Ibid* at para 25.

185 2004 CanLII 11602 (Ont Sup Ct J).

186 *Ibid* at para 26.

> The children have far too much knowledge of her surgery and the dilation which is required to main her surgically created vagina.[187]

The court considered other factors in making the custody award, including the fact that the children's mother had been their primary caregiver prior to the separation and, in many respects, remained the primary caregiver after the separation.[188] The court ordered that the children be placed in the custody of the mother.[189]

In *Forrester v Saliba*,[190] the mother brought an application to vary the terms of the parties' 1996 consent order for joint custody. The father was undergoing the process of transitioning from male to female. The issue was whether the father's transition, and the consequences that flowed from the change, constituted a material change of circumstances warranting a change in the custodial arrangement. The court indicated at the beginning of the trial that the father's "transsexuality, in itself, without further evidence, would not constitute a material change in circumstances, nor would it be considered a negative factor in a custody determination."[191] The court determined that there had not been a material change in circumstances and dismissed the application.[192]

In *Ghidoni v Ghidoni*,[193] the father told the mother that he was a "transvestite or a transsexual."[194] In determining custody, the court noted that "[t]here was much evidence as to whether this 'gender dysphoria' would have a negative impact on the children."[195] The court found that the father's gender dysphoria would cause the younger child difficulty as he approached and experienced his teenage years, a factor that favoured him living with his mother.[196] However, considering all the factors, the court ultimately awarded joint custody, with an order that the younger child's primary residence be with the father.[197]

b. Child's Gender Identity

In *K (JP) v E (S)*,[198] the father brought a motion to vary the final consent order that provided that the parties would have joint custody of the child. Much of the evidence at

187 *Ibid* at para 27.

188 *Ibid* at para 4.

189 *Ibid* at para 33.

190 2000 CanLII 28722 (Ont Ct J) [*Forrester*].

191 *Ibid* at para 19.

192 *Ibid* at para 31.

193 1995 CanLII 1018 (BCSC).

194 *Ibid* at para 3.

195 *Ibid*.

196 *Ibid* at para 85.

197 *Ibid* at para 87.

198 2017 ONCJ 306.

trial focused on the fact that the child identified as gender-fluid, non-binary. The mother had identified as agender, non-binary transgender. The court noted that the mother's gender identity was a neutral consideration, as it did not impact on the ability of the mother to act as a custodial parent. The child's gender identity was also not a factor; what was relevant was which parent was best able to support the child. The court was guided by expert evidence from a doctor with expertise in the area of adolescent medicine and gender identity issues. The doctor testified that the parents should wait and see and let the child function. The court found that it was the father who was most likely to let the child be and explore their gender identity, whereas the mother had difficulty letting the child be their own person.[199] The court had significant concerns about the mother's ability to meet the child's needs for a number of reasons not solely concerned with the child's gender identity. The court found that the father was best able to meet the child's special needs, noting that the father was supportive of any decision made by the child with respect to gender. The court ordered a change in the child's primary residence from the mother to the father and awarded the father sole custody.[200]

In *Davies v Murdock*,[201] the parties' child was gender non-conforming. This was a serious point of contention between the parents. The mother's position was that the father was not supportive of their child's gender identity. Although the father acknowledged that the child had been assessed as gender non-conforming, he questioned the legitimacy of the identification and believed that the child was being forced to play out the mother's agenda. There was expert evidence from a doctor that the child was expressing authentic female identity and that support for the child's gender non-conformity was extremely important. The fact that the father continued to question the child on gender identity was significant. The court found that the father remained unable or unwilling to recognize the negative impact of his behaviour.[202] The court ordered that the child (and the child's sibling) reside primarily with the mother. The court also ordered that the parents were to follow the recommendations of the director of the Gender Diversity Clinic at the Children's Hospital of Eastern Ontario or another doctor at the clinic if the director was no longer able to provide services for the child.[203]

In *K (N) v H (A)*,[204] the parties' 11-year-old child had been diagnosed with gender dysphoria and the parties did not agree on the proper course of treatment for the child. The child was assigned female at birth but had begun the process of transitioning to the male gender, including using a male name and male pronouns. One aspect of the

199 *Ibid* at para 184.

200 *Ibid* at para 207.

201 2017 ONSC 4763.

202 *Ibid* at para 190.

203 *Ibid* at para 192.

204 2016 BCSC 744.

transition was Lupron, a drug that delayed the onset and progression of puberty. The mother supported this course of treatment and the child's transition, while the father's view was that the child had not been adequately and independently assessed. The court was satisfied that the child should be permitted to participate directly in the proceeding, as the case was really about his role in determining his own future.[205] The court found that it was in the child's best interest that he participate in the proceedings through a litigation guardian.[206]

In *M (G) v M (R)*,[207] the underlying dispute involved custody and access to two children, one of whom was experiencing gender identity issues. The Children's Aid Society (CAS) had become involved and the resulting decision, *Halton Children's Aid Society v GK*,[208] received press coverage. (This case is discussed in detail in Section VIII, "Child Protection.") The parties made a joint request for a sealing order. The court found that there was no question that it was not in the child's interests to be identified in any way. This was particularly so because the child was at an age where their gender identity was not fully formed, and it was not clear whether they were in the process of identifying their preferred gender. However, there was also no doubt that the issue of whether, and to what degree, it was appropriate that the parents influence the gender identity of one of their children was a matter of public interest.[209] The court was not persuaded that an order sealing the entire file was necessary or appropriate, observing that this would shut the public out from the debate altogether.[210] In any event, most of the facts and evidence that could be gleaned from the court's file were extensively reviewed in the child protection decision; not much more could be discovered that was not already in the public domain. The court found that it was sufficient to make an order requiring the use of initials and prohibiting communication or publication of information that might identify the parties or the children.[211]

In *B (KA) v Ontario (Registrar General)*,[212] the court heard an application under the *Change of Name Act*.[213] The applicant was a 17-year-old who was transitioning to female. She presented as female, identified using female pronouns, was undergoing hormone therapy, and anticipated undergoing gender confirmation surgery. She wished to change her name on legal documents to be consistent with her female identity. Her application

205 *Ibid* at para 40.

206 *Ibid* at para 50.

207 2015 ONSC 4026.

208 2015 ONCJ 307 [*GK*].

209 *Ibid* at para 47.

210 *Ibid* at para 49.

211 *Ibid* at para 51.

212 2013 ONCJ 684.

213 RSO, 1990, c C.7 [CNA].

to the Registrar General for a change of name was rejected as it was not accompanied by the required written parental consent. The applicant submitted that her mother's consent was not required because she was not in her mother's lawful custody. The applicant deposed that her mother refused to accept that she was transgender and that she had not been able to speak with her mother in any way about her gender identity. The applicant had moved out of her mother's house and was taking care of all aspects of her life on her own. On the evidence, it was clear that the applicant's mother did not have lawful custody of the applicant. The child was entitled to withdraw from parental control, notwithstanding that she was under the age of majority. For the purposes of the CNA, the court concluded that no person had lawful custody of the applicant and that no consent was therefore required.[214]

D. Access

The following cases highlight instances where the sexual orientation or gender identity of the parent or child was a factor in making an access determination.

1. Access and Sexual Orientation

As with custody, a parent's sexual orientation is now treated as a completely neutral factor in an access determination. Previously, sexual orientation was a factor to be considered.[215] In some cases, the court granted less access as a result of a parent's sexual orientation.

In *Bowles v Coggins*,[216] the paternal grandmother and her same-sex spouse brought an application for access to the paternal grandmother's grandchild. The mother had custody of the child. The father had no access due to drug abuse and anger problems. The applicants had access to the child during the first two years of her life, and then

214 *GK*, *supra* note 208 at para 14.

215 In *Saunders v Saunders*, 1989 CarswellBC 402 (Co Ct) at paras 19-20, the court was not convinced that "the exposure of a child of tender years to an unnatural relationship of a parent to any degree is in the best interests of the development and natural attainment of maturity of that child." The court acknowledged that courts have on occasion found that the best interests of the child are served by granting custody to a homosexual parent. However, in those cases, the children were usually older, and "the parent has exercised great restraint in minimizing the sexual choice of that parent as a role model for the child."

In *Templeman v Templeman*, 1986 CarswellBC 793 (SC) at para 6, the court found that the fears expressed by the mother in terms of the children's exposure to their father's "gay lifestyle" were exaggerated. The court was in agreement with the conclusions of a psychiatrist who had provided consultation to both parties. The psychiatrist pointed out that "[i]t is perhaps particularly pertinent to point out that children of homosexual parents don't 'catch' homosexuality from them and that there is no reason that homosexuality per se need interfere with a sound parent-child relationship." The court ordered unsupervised access, to be increased on a graduated basis.

216 2008 CarswellOnt 2265 (Ct J).

the mother terminated access. The mother did not want the child exposed to the applicants' same-sex lifestyle, which the mother's church deemed immoral. The court stated that despite the mother's feelings in this regard, the applicants' relationship was legal, strong, loving, and stable. The court had no concerns that the applicants would in any way attempt to influence the child with regard to their lifestyle.[217] The court made an order for monthly access.

In *E (E) v F (F)*,[218] the father brought a motion for a temporary order restoring access, and the mother requested the use of initials and a sealing order. She argued that because the case involved the LGBTQ2+ community, there was an added layer of sensitivity or privacy that the court ought to presume exists. The court was not prepared to take judicial notice that, because the case involved LGBTQ2+ parties, privacy issues outweighed the public interest.[219] The mother's request was granted on other grounds.

2. Access and Gender Identity

Presently, a parent's gender identity is not considered, in itself, a negative factor in an access determination. However, in the past, it was possible for a court to place limitations on a parents' expressions of their gender identity as a condition of access. There are several recent cases that demonstrate that a parent's inability to appropriately support their child's gender identity may result in restricted forms of access.

a. Parent's Gender Identity

M (JD) v M (L)[220] concerned a trans man who applied for leave to apply for access to the child. The child's mother and the applicant had commenced a relationship a few weeks after the child was born, and they separated over a year later. The mother had maintained sole custody of the child since the separation. The court noted that while *Forrester*[221] supports the proposition that transsexuality by itself is not a negative factor in a custody situation, the circumstances in that case were substantially different. In that case, the transsexual individual was a natural parent and had an established relationship with the child. In this case, the applicant was not a biological parent, and the relationship with the child was much less established.[222] The applicant's evidence focused almost entirely on what the relationship meant to him, not how it benefited the child. Given the complicated failed relationship between the parties, the fact that

217 *Ibid* at para 39.

218 2007 ONCJ 456.

219 *Ibid* at para 6.

220 2012 NSFC 2 [*M (JD)*].

221 *Supra* note 190.

222 *M (JD)*, *supra* note 220 at para 12.

there was no contact orders, and the age of the child, the court denied leave to apply for access.[223]

In *M (HI) v M (WA)*,[224] the father brought an application for access to his two children. The court noted that the father acknowledged that he was a "transvestite" and that he had, on occasion, dressed in women's clothing in the presence of the children. The court had "no doubt that seeing their father in a woman's clothing would confuse and upset these little boys."[225] In granting the father supervised access, the court made it a condition that the father not be dressed in feminine attire during access visits.[226]

b. Child's Gender Identity

In *McGrath v Sheppard*,[227] the father brought a motion to continue the terms of the access suspension and restraining order against the mother. Among the issues was that one of their children came out with a different gender identity. The father accepted the child's gender identity. The court found that the mother demonstrated "an inability to see past her own needs," which was "particularly evident in her treatment of … [the child's] coming out."[228] The mother showed "an interest in and sensitivity to … [the child's] transition when she perceived it as a source of leverage against the … father" but later rejected the child's coming out and new gender identity.[229] Taking into consideration all the factors, including the mother's failure to support the child's decision regarding gender neutrality, the court concluded that allowing any communication between her and the children would likely "disturb their emotional well-being."[230] The court permitted the mother to record audio or visual messages that were to be delivered to the "children's counselors for their review and consideration."[231]

In *RH v CH*,[232] the issue for trial was to determine the periods of care and control the mother should have with the child, and whether those periods of care and control should be supervised. One of the issues was that the child was experiencing "sexual identification problems."[233] The father's concern was that the mother was actively contributing to the problems by encouraging their son to wear girls' clothing, giving him gender

223 *Ibid* at para 14.

224 1994 CarswellBC 1682 (Prov Ct).

225 *Ibid* at para 7.

226 *Ibid* at para 43.

227 2016 ONSC 8062.

228 *Ibid* at para 17.

229 *Ibid* at para 18.

230 *Ibid* at para 25.

231 *Ibid* at para 26.

232 2009 MBQB 212.

233 *Ibid* at para 19.

inappropriate gifts, and playing games involving makeup. The court found that if the child did have some ambiguous feelings about gender identification, the mother's actions were likely to have contributed to the confusion.[234] The court further found that the mother did not seem to have any appreciation for the gender identity problem or the part she was playing in it.[235] The court found that supervised access was in the child's best interests.[236]

E. Hague Convention Applications

Canada is a signatory to the Hague *Convention on the Civil Aspects of International Child Abduction*.[237] Article 1 states the following:

> The objects of the … Convention are
>
> a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b. to ensure that the rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States.

Article 3 provides the following:

> The removal or the retention of a child is to be considered wrongful where—
>
> a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Article 4 specifies that the Hague Convention applies to "any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights" and ceases "to apply when the child attains the age of 16."

Article 12 provides:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

234 *Ibid* at para 22.

235 *Ibid* at para 23.

236 *Ibid* at para 31.

237 25 October 1980, Hague XXVIII [the Hague Convention].

> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Articles 13 and 20 provide exceptions where a child does not have to be returned:

> Article 13
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. …
>
> …
>
> Article 20
> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

In *Droit de la famille—102375*,[238] the abducting parent's sexual orientation was the key element in the determination of the Hague Convention application. The mother and her lesbian partner had fled Mexico with the child. The mother's claim for refugee status in Canada was pending. The mother alleged discrimination in Mexico against homosexuals, particularly in the State of Querétaro, specific discrimination against herself as a lesbian parent, and conjugal violence from the child's father, including physical and sexual assault.[239] The father brought an application for the return of the child to Mexico.[240]

There was an extensive legal history between the parties in Mexico, including both family and criminal court proceedings. When they first separated, the mother was awarded provisional custody of the child. This was subsequently modified by a family court judge, who granted provisional custody to the father. The decision, which the Quebec Superior Court found was "largely based on the homosexuality of the mother,"

238 2010 QCCS 4390.

239 *Ibid* at para 5.

240 *Ibid* at para 7.

alleged that the child "risked becoming a lesbian because she … [was] living with lesbians."[241] The family court judge ultimately granted the father permanent custody of the child on the same premise: "[T]he mother's … homosexuality and the danger to the child's normal development."[242] Additionally, in an *ex parte* proceeding, a criminal court found the mother guilty of "corruption and exploitation of a minor," based on the mother's homosexuality and the declarations and accusations filed by the father and other "witnesses."[243] This judgment stated that homosexuality is a form of sexual depravity.[244]

The mother's case was based on the exceptions contained in the Hague Convention. Specifically, she relied on Article 12 (that the child had become settled and integrated into her new home), Article 13(b) (that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation), and Article 20 (that the return was not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms).[245] The court ultimately determined the case on the basis of Article 13(b).[246]

The court found that if returned to Mexico, the child would be taken away from her mother and would not be able to be with her mother for an indefinite period of time, especially if her mother was in prison.[247] The court found that this would evidently cause "distress and harm" to the child.[248] The court considered that the child would not be able to see the mother's partner, who had been "acting like a second mother to her for more than two years."[249] The court found that this would also, no doubt, cause the child distress. The child would be living with her father and in close contact with members of the family who had "denounced her mother."[250] The court found that the child would be at a high likelihood of hearing unfavourable and destructive things about her mother.[251]

Given the nature and the content of the judgments against the mother in Mexico, the court did not have any assurance that the "mother's homosexuality [would] not

241 *Ibid* at para 53.
242 *Ibid* at para 61.
243 *Ibid* at para 33.
244 *Ibid* at para 65.
245 *Ibid* at paras 77-81.
246 *Ibid* at para 277.
247 *Ibid* at para 219.
248 *Ibid* at para 189.
249 *Ibid* at para 190.
250 *Ibid* at para 192.
251 *Ibid* at para 194.

be the major criterion … considered … in the criminal case" as well as in any custody case.[252] The court stated:

> In this specific case, with respect to the judgments rendered against the mother, in the State of Querétaro in Mexico, the decisions evidence discrimination and even homophobia. These decisions showed not only an ignorance of homosexuality and homosexuals, especially lesbians, but a clear bias against them, as did the declarations and statements of the father and of the mother's own parents and relatives.[253]

The court queried what the future of the child would be in Mexico, while her mother was imprisoned, surrounded by relatives who feared or discriminated against homosexuals and held such a negative opinion of her mother. The court found that there was a "serious and clear risk of alienation of the child from her mother or of placing the child in a severe conflict of loyalties."[254] There was no doubt that if this were to occur, "the child would clearly not only be placed in an intolerable situation but would also risk psychological and emotional harm."[255] The court refused the father's application to return the child based on the exception in Article 13(b) of the Hague Convention, as there was "grave risk of psychological harm to the child or of the child being placed in an intolerable situation."[256]

VIII. Child Protection

A. Provincial and Territorial Legislation

It is notable that only two provinces, Nova Scotia and Ontario, include reference to sexual orientation, gender identity, and gender expression in their child protection laws.

The NS CFSA specifically identifies the child's sexual orientation, gender identity, and gender expression as factors to be considered in making an order or determination in the best interests of a child (except in respect of a proposed adoption). There has not been any reported judicial consideration of this provision to date. Section 3 states:

> (2) Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
> …
> (ga) the child's sexual orientation, gender identity and gender expression.

252 *Ibid* at para 195.

253 *Ibid* at para 206.

254 *Ibid* at para 208.

255 *Ibid* at para 209.

256 *Ibid* at para 227.

On April 30, 2018, Ontario's CYFSA replaced the *Child and Family Services Act*.[257] The CYFSA includes several references to children's sexual orientation, gender identity, and gender expression. For example:

> Paramount purpose
> 1(1) The paramount purpose of this Act is to promote the best interests, protection and well-being of children.
>
> Other purposes
> (2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well-being of children, are to recognize the following:
> …
> 3. Services to children and young persons should be provided in a manner that,
> …
> i. takes into account a child's or young person's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression.

Section 74(3)(c) of the CYFSA introduces sexual orientation, gender identity, and gender expression as circumstances to be considered in determining the best interests of a child in a child protection proceeding:

> (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall,
> …
> (c) consider any other circumstance of the case that the person considers relevant, including,
> …
> (iii) the child's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression.

See also section 109 of the CYFSA, which applies to children in interim and extended society care:

> 109(1) This section applies where a child is in interim society care under an order made under paragraph 2 of subsection 101(1) or extended society care under an order made under paragraph 3 of subsection 101(1) or clause 116(1)(c).
> (2) The society having care of a child shall choose a residential placement for the child that,
> …

257 RSO 1990, c C-11.

(b) where possible, respects the child's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, creed, sex, sexual orientation, gender identity and gender expression.

B. Case Law

There are few reported decisions that deal with a child's gender identity and issues of protection. Increasingly though, courts have relied on expert recommendations in this difficult area. For example, in *GK*,[258] the CAS brought a motion for an order that children be placed in the temporary care and custody of their father, subject to the supervision of the CAS. The CAS also sought a temporary order that access between the mother and the children be supervised at the discretion of the CAS.[259] The CAS was concerned that the mother was refusing to follow the recommendations of a gender specialist regarding the older child's gender expressions or gender variance. Specifically, the society submitted that the mother was referring to the child with female pronouns and socially transitioning the child to be a girl, contrary to the specialist's recommendations. The father's position was that the mother was forcing the child, who was born male, to dress like a girl. The mother's position was that she never forced the child to be, to act like, or to dress like a girl, and that the child was seeking out feminine clothing and activities on their own. The mother's position was that she was trying to respect the child's choices and be supportive of their gender expression.[260] The mother submitted that the father did not support the child's gender expressions. The observations and recommendations of the gender specialist were discussed at length in the court's judgment.[261]

The court found that the evidence demonstrated that the child had expressed a number of gender preferences and conflicting views to a number of different adults, including both parents.[262] Although neither parent was directly enforcing their gender views, the child felt they had to regulate their gender expression, particularly in front of their father. At this stage in the child's development (the child was four), it was too early to make a determination about their gender identity.[263] The child was acutely aware of the conflict between their parents and the differing views about their gender expression.[264] The court concluded that the children could be adequately protected in their mother's

258 *Supra* note 208.

259 *Ibid* at para 1.

260 *Ibid* at paras 13-14.

261 *Ibid* at para 51.

262 *Ibid* at para 102.

263 *Ibid*.

264 *Ibid* at para 102.

care under a supervision order and that the decision to remove the children from her care was made without exploring less disruptive or intrusive alternatives.[265]

The court's temporary order included a direction to the parents to follow through with the gender specialist's recommendations, which included allowing the child a variety of ways of expressing themself; that there be greater communication between the child and both parents, so that the child felt comfortable expressing their gender; and that the parents refrain from socially transitioning the child.[266] The court ordered the parents to participate in a follow-up assessment and evaluation with the gender specialist and to follow through with any further recommendations. The court also ordered that neither parent was to unilaterally dress the child as a girl or force them to take on certain gender roles against the child's wishes.[267] In the event that the child expressed a desire to dress as a girl, then the parent with care of the child was directed to respect the child's desire and to contact the other parent and the society to immediately notify them of the child's wishes.[268] The court stated,

> [i]f the mother is forcing [the child] to be a stereotypical girl against his wishes, then this no doubt will cause him emotional harm. If the father is forcing [the child] to be a stereotypical boy against his wishes, then this no doubt will also cause him emotional harm.[269]

The court concluded that the child had the right to express themself the way the child so chose.[270]

265 *Ibid* at para 106.

266 *Ibid* at para 115.

267 *Ibid*.

268 *Ibid*.

269 *Ibid* at para 117.

270 *Ibid*.

PERSONAL REFLECTION

JUDGING LESBIAN MOTHERS

Katherine Arnup

When Joanna invited me to write an article for this volume, what came immediately to my mind was *Bezaire*,[271] one of the first Canadian cases involving a lesbian mother fighting for custody of her children. The matter eventually came before the Ontario Supreme Court, Appellate Division, where my father served between 1970 and 1985. That case and my father's role in it would shape my work for decades to come.

In 1979, Gayle Bezaire was initially granted conditional custody of her two children —"the first open Canadian lesbian mother to win custody of her children."[272] In his original ruling, MacMahon J ordered the mother to live alone with her children, explaining that "I am attempting to improve the situation, and this includes negativing any open, declared, and avowed lesbian, or homosexual relationship."[273] Bezaire breached that condition, however, choosing to live with her lover. As a result of these "changed circumstances," the original order was reversed, giving custody to the father. That order was upheld on by the Court of Appeal by a panel of three judges that included my father.[274]

In 1980, when the case reached the Court of Appeal, I had been "out" for four years and active in lesbian and gay demonstrations, political actions, and organizations. "Out" was a relative term in my case, as it was for many LGBTQ2+ people at the time. I taught grades one and two in a small Ontario town. If my sexual orientation had been "discovered," I would very likely have lost my job. Thus, I kept my personal life a closely guarded secret, avoiding staffroom discussions about my weekend and evening activities. I lived in Hamilton during the week, a half-hour drive from my school, travelling to Toronto every weekend where my partner, friends, and politics resided.

My parents also lived in Toronto, and they did not know that I was a lesbian. I used to joke that it was easy to keep my secret because my parents never travelled south of Eglinton Avenue (in North Toronto) and I never went north of Bloor Street, so we never bumped into one another.

271 *Supra* note 176.

272 "Lesbian Mom Accused of Kidnapping Children" (1987) 4:5 Angles 8, online (pdf): <https://central.bac-lac.gc.ca/.item?id=ANGLESVGCCNEWSfullpdfme&op=pdf&app=Library>.

273 Trial judgment of McMahon J, cited by the Court of Appeal in *Bezaire*, *supra* note 176 at para 6.

274 *Bezaire*, *supra* note 176.

In the fall of 1980, I returned to Toronto to pursue a master's degree. The primary reason for my move was to get pregnant after my request for artificial insemination had been rejected by a large public hospital because I was a lesbian. Thus, I turned to a gay friend to donate sperm.

Still, there were papers to write! As I was searching for a topic, I learned that my father had written the Court of Appeal judgment in *Bezaire*. Since the case hadn't yet been reported in a legal journal, I asked my father if I could get a copy of the decision and invited myself to my parents' home for dinner. My father seemed touched by my request since I rarely expressed any interest in his work.

I can still see us sitting at the dining room table, me in my childhood spot facing the sideboard that now adorns my own dining room, my father and mother at the head and foot of the table. My father had a copy of the judgment for me, and I immediately began to read it.

"Were the children present in the court?" I asked my father, not realizing that the parties rarely appear in the Court of Appeal.

"No," my father explained. "Our decisions are based on the original lower court decision and submissions by the lawyers."

"But that doesn't give you a chance to consider the merits of the parents, does it?"

"That's up to the lower court to determine," he explained. "Our role is to assess whether the court made an error in law. In this case the judge had not."

In their judgment, the appellate judges were critical of the conditions MacMahon J imposed, which they felt reflected a condemnation of homosexual parenting.

Writing the decision for the court, my father explained:

> In my view homosexuality, either as a tendency, a proclivity, or a practiced way of life is not in itself alone a ground for refusing custody to the parent with respect to whom such evidence is given. The question is and must always be what effect upon the welfare of the children that aspect of the parent's makeup and lifestyle has.[275]

(I had always wondered whether my lesbianism is a "tendency, a proclivity, or a practiced way of life." As I approach my 70th birthday, I have concluded that it doesn't really matter!)

Despite that statement, the court ruled in Mr Bezaire's favour, because the mother had breached the original conditions by living with her lover.

275 *Ibid* at para 18.

Fearing that her children would experience abuse from their father,[276] Gayle Bezaire took them to the United States, where they lived under assumed names for many years. Eventually their location came to the attention of the Toronto police and Gayle Bezaire was charged with five counts including abduction. She pleaded guilty and received probation. The children were returned to their father.[277]

My father and I never talked about the case after that initial dinner table conversation. I wrote my essay on lesbian mothers and the law. I continued to research and write about lesbian mothers and child custody for the next three decades, editing the first Canadian book on lesbian parenting[278] and publishing dozens of articles on lesbian and gay parents, donor insemination, and the fight for marriage equality.

Throughout my career, I have never been an impartial or disinterested researcher on this (or any other) issue. As I learned about the centuries-long persecution of "different" mothers—for example, women accused of committing adultery, battered women who left their abusive husbands, and women who worked outside the home—I felt a strong connection to these women. After I gave birth to my first child, I found myself dodging intrusive questions about the baby's (apparently missing) father from hospital staff and my physician. Even in 1982 and 1988 when my daughters were born, they were born "out of wedlock," were "illegitimate," and were "bastards" in the eyes of the law. My research into lesbian mothers just added to my determination to keep my sexual orientation secret as I sought to protect my daughters and myself from discrimination.

Remember, I was raising my daughters in the 1980s and 1990s, when my family essentially had no legal recognition. And, not coincidentally, I wasn't even out to my parents! At my daughters' daycare and school, I was viewed

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276 After the children were returned to their father, Gayle Bezaire stated that her daughter told her that her father was abusing her. See "Abduction Essential," *The Lethbridge Herald* (2 June 1987) A2, online: *Lethbridge Herald Newspaper Archives* <https://newspaperarchive.com/lethbridge-herald-jun-02-1987-p-2/>:

> A mother charged with abducting her children testified Monday that her nine-year-old daughter said that her father had sexually abused her. The woman's lawyer has argued that Gail [*sic*] Bezaire believed removing the children from their father's home in Windsor, Ont., was essential. Mrs. Bezaire, 35, a lesbian who lost custody of her children to their father, told a district court jury that the subject of sexual abuse came up when the children visited her in March 1980.

277 See "Toronto Woman Guilty on 5 Abduction Counts for Hiding Her Children," *The Globe and Mail* (10 June 1987) A15; and see "Hid Children, Mother Gets Probation: Outside Court, Outraged Father Denies Abuse," *The Globe and Mail* (19 June 1987) A17.

278 Katherine Arnup, ed, *Lesbian Parenting: Living with Pride and Prejudice* (Charlottetown, PEI: Gynergy Press, 1995).

as a single parent, an assumption I chose not to challenge. I knew there were some who might disagree with that approach, but I put my girls first, believing that the school was ultimately their world, not mine.

There were no families like ours in my children's world, especially when we moved to Ottawa in 1993. Many of my older daughter's friends had stay-at-home mothers; none of the parents were even divorced! There was certainly no mention of same-sex families in the curriculum. Not surprisingly, my daughter hid our family whenever a friend would visit, turning all the LGBTQ2+ books in my home office around so their titles weren't visible. It was a very different world from today.

But as I wrote and researched, the world around us changed—ever so slowly at first and, eventually, dramatically. My research helped to bring about those changes. I provided evidence as an expert witness in the marriage equality cases in Ontario and British Columbia, and I was a go-to commentator about the fight for rights of LGBTQ2+ families.

As the law evolved—through litigation, political activism, and the increasing presence of LGBTQ2+ parents—so too did my relationship with my father. He was extremely proud of my career as a writer and university professor. When I once attempted to make amends for my judgmental attitudes in my youth, he dismissed the conversation, remarking that "that was a long time ago."

In 2003, at the age of 92, my father was diagnosed with myelodysplastic syndrome, a terminal blood disorder. For the next two years, I travelled regularly between Ottawa and Toronto to assist with his care and to keep him company. During one of those visits, I finally mustered the courage to bring up the subject of marriage equality.

I started hesitantly: "So, do I get to ask you your opinion on same-sex marriage?"

"You can ask me that," he said, ever precise in his use of language.

"Okay then," I said, after what seemed like an interminable pause, "I'm asking."

"At this point in the 21st century, if two people of the same sex want to take the solemn vows, I see no reason to oppose it."

There was another pause and I took the opportunity to wipe my eyes while I waited for him to continue. After all, my Dad was 93. And this was the first time we'd broached this subject.

He continued:

> I think my views on this issue have changed to about the same extent as my views towards homosexuals who, by most people my age, were looked upon with disfavour when we were in our 20s and 30s. And now in our 60s to 90s, our attitude is, "Oh well, if that's what they want, it

> isn't going to bother me ... I'm not directly affected." ... I guess you could say I am acquiescing.

I didn't point out the obvious, that he was at the very far end of "the 60s to 90s," nor that, as the father of a lesbian daughter and the grandfather of two children conceived by donor insemination, he was perhaps more "directly affected" than the average person on the street.

There's a reason (among many) that I miss my father enormously more than a decade after his death in 2005. The world needs more people like Mr Justice John Arnup.

PERSONAL REFLECTION

THE FIGHT FOR ALL FAMILIES TO BE EQUAL

Raquel Grand

Gay people are used to being marginalized. It's a part of our identity that many of us accept as we go through the often-tumultuous process of figuring out who we really are.

I grew up with no option of gay marriage until I was well into my twenties. When gay marriage first became legal, I had no real understanding of the impact it would have on my life. When I finally understood, I was grateful to those who had led the fight to make it happen. It legitimized my sense of self, my relationship, and my life.

However I was still used to a certain amount of marginalization. When you are constantly told you are different, you learn to live along the sidelines and stay out of the way of people who are oppositional to your existence.

When my wife gave birth to our first child, I barely questioned that I had to adopt her. We were different and leading a life that fell outside of the heteronormative narrative, and so naturally we had to run a different obstacle course than everyone else.

My wife had major medical issues during the delivery of our first daughter, and it occurred to me that I could end up as a single parent with no legal right to our daughter. Still, I accepted it as part of our fate. As my wife recovered, I dragged her to appointments with our lawyer to finalize the legal process of adopting our child.

There were complications when I gave birth to our second daughter. She was born blue and unable to breathe on her own. The midwives who were with me stepped into action. Two of them were attending to me while the other two attended to my daughter's needs, helping her take her first breath. Within minutes there were two ambulances, two fire trucks, and police in

front of my home. They came racing up my stairs to transport my daughter and I to the hospital. The Canadian health care system gave amazing support to our family. I knew that both my daughters' lives and my own life were valued and were a clear priority to the team that rescued us.

As our daughter spent the next week in neonatal intensive care, I realized that while we were supported by the Canadian health care system, we were not supported by Canadian laws. My wife and I did not have equal rights to our daughter, and we once again had to go through an adoption process.

This discrepancy made me angry, and I used that anger to take part in the legal fight that resulted in the *All Families Are Equal Act*. I was tired of feeling ostracized, and I am sure that many families like mine felt the same. I am grateful that I was given a platform to tell our story and perhaps influence change for others. Everyone who worked on this case gave me a sense of support that replaced the marginalized feeling that I had accepted as normal my whole life. I can only hope that my participation, along with the legal efforts of everyone involved, has helped other LGTBQ2+ families believe that we should no longer accept being invisible within the Canadian justice system. Our families matter as much as every other Canadian family.