8 Conflict of Laws

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I. Introduction

In our highly interconnected world, questions about court jurisdiction, the enforcement of judgments, and applicable law now arise in every field of endeavour and every walk of life. Accordingly, just as with other members of the public, so too can members of the LGBTQ2+ community expect to be affected directly and indirectly by developments in the conflict of laws. However, there are some implications of the conflict of laws that have special significance for members of the LGBTQ2+ community in connection with personal status and family relations. This chapter focuses on the issues arising in these areas.

This chapter considers the issues affecting LGBTQ2+ persons in respect of marriage, divorce, matrimonial property, adoption, custody, and support in cross-border situations. While this chapter aims to provide an indication of the key legal principles affecting LGBTQ2+ persons in these areas, it is important to bear in mind that the field is developing rapidly, both domestically and across borders, and there remain many new and emerging issues that have yet to be addressed.

II. Marriage

A. Marriages and Other Unions in Canada

The Parliament of Canada has the exclusive authority to make laws relating to marriage and divorce.[1] Accordingly, the cross-border issues relating to the validity of marriages arise primarily in the international context and not in the interprovincial context.

1. Canadian Residents

The law on celebrating marriages and other unions between same-sex couples has evolved considerably in Canada in recent times and it is now more advanced than the law in many other countries. Pursuant to the equality guarantees under section 15 of the *Canadian Charter of Rights and Freedoms*,[2] in 2005, Parliament enacted the *Civil Marriage Act*[3] to give same-sex couples equal access to marriage for civil purposes.

1 *Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, ss 91(26), 92(12)-(13).

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

3 SC 2005, c 33 [CMA]. The Act also preserves the freedom of members of religious groups to hold and declare their religious beliefs, and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs; see Gérald Goldstein and Jeffrey Talpis, "Réflexions critiques sur l'avènement de l'union civile boiteuse en droit international privé québéquois" (2003) 82 Can Bar Rev 1; *Civil Code of Québec*, art 3090.1, para 1 [CCQ].

Restricting same-sex couples to civil unions was insufficient to meet the constitutional guarantee of equality.[4]

The CMA provides that marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others and that a marriage is not void or voidable by reason only that the spouses are of the same sex.[5]

As a result of this legislative change, the validity of a marriage or other union celebrated in some other country between couples of the same sex cannot be challenged on that basis alone in Canada. However, whether a same-sex marriage entered into in Canada will be recognized in other countries depends upon the law of the country in which recognition is sought.[6]

2. Foreign Residents

Historically, the legal restrictions on same-sex marriages could be regarded as affecting the *capacity* of persons to marry. In traditional conflict of laws analysis, this would be characterized as a question of the *essential* validity of the marriage. Such a characterization could lead to the application of one or both of the couple's antenuptial domiciles to determine whether those laws permitted them to marry.[7] This could affect the recognition outside of Canada of the validity of an otherwise valid marriage that had been performed in Canada involving one or more persons domiciled elsewhere.

Given the constitutional proscription on discrimination on the basis of sexual orientation, there would seem to be no foundation for seeking a declaration of nullity in Canada of a same-sex marriage on the basis that one or both persons were domiciled in a country that did not permit them to enter into such a marriage. Indeed, many same-sex couples had been prompted by the legislation to come to Canada to marry because they were not permitted to do so in their home country.

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4 *Reference Re Same-Sex Marriage*, 2004 SCC 79. The term "same-sex" to describe relationships is intended to include all relationships involving LGBTQ2+ persons.

5 For discussion of the history of developments in the cross-border recognition of same-sex marriages in Canada, see Donald J MacDougall, "Marriage Resolution and Recognition in Canada" (1995) 29 Fam LQ 541; W Adams, "Same-Sex Relationships and Anglo-Canadian Choice of Law: An Argument for Universal Validity" (1996) 34 Can YB Int'l Law 103; Martha Bailey, "How Will Canada Respond to Same-Sex Marriage?" (1998) 32 Creighton L Rev 105; Martha Bailey, "Hawaii's Same-Sex Marriage Initiatives: Implications for Canada" (1998) 15 Can J Fam L 153; Martha Bailey, "Beyond Sexuality: Same-Sex Relationships Across Borders" (2004) 49 McGill LJ 1005.

6 See e.g. *Wilkinson v Kitzinger (No 2)*, [2006] EWHC 2022, in which the Family Division of the English High Court denied the application of a same-sex couple for recognition of their marriage to one another in British Columbia; *Zappone & Anor v Revenue Commissioners & Ors*, [2006] IEHC 404, in which the High Court of Ireland declined to recognize a same-sex couple's marriage in British Columbia to be valid in Ireland.

7 *Schwebel v Ungar*, 1963 CanLII 28 (Ont CA), aff'd [1965] SCR 148 [*Schwebel*].

Nevertheless, in response to a challenge to the *Divorce Act*[8] restricting court jurisdiction to persons ordinarily resident in the province for one year, the attorney general of Canada argued that the applicant couple was not validly married because the law of their respective domiciles (United Kingdom and Florida) did not recognize their capacity to marry one another.[9] This prompted an amendment to the *Civil Marriage Act* to clarify that the lack of capacity under either spouse's domicile to enter into a marriage cannot invalidate an otherwise valid marriage celebrated in Canada.[10]

B. Foreign Marriages and Other Unions

1. Civil Unions in Places Where This Alone Is Permitted

Generally, the issues concerning the validity of marriages and other unions that would arise in Canada relate to the effect that is to be given in Canada to foreign marriages. As mentioned, it is unlikely that a marriage or other union entered into by a same-sex couple in another country will not be recognized as valid in Canada. However, questions may still arise as to the nature of the union that will be recognized. Couples who have chosen in other countries to enter into unions under legislative regimes equivalent to marriage may be regarded in Canada as married for the purposes of the *Divorce Act* and provincial family law legislation.[11]

This was illustrated in *Hincks v Gallardo*.[12] A same-sex couple decided to move from Canada to the United Kingdom where one of them had citizenship. They wished to formalize their relationship to enable the British citizen to sponsor the Canadian under a civil partnership entry visa. The law in Britain did not have a provision for marriage between same-sex partners but the British *Civil Partnership Act* created a parallel regime for same-sex partners.[13] The parties entered into a civil partnership, and the Canadian obtained a British national identity card, which identified him as a "spouse/partner." He operated his Toronto business remotely but when it began to struggle, the couple relocated to Toronto.

The couple's relationship began to deteriorate, and when it ended, the Canadian brought an action for divorce, equalization of net family property, and spousal support. The petition was resisted on the basis that the parties were never married because the British *Civil Partnership Act* specifically stated that civil partnerships were not marriages

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

9 *Application for Divorce of VM and LW* (5 April 2011), Toronto Region, FS-11-367893 (Ont Sup Ct J), Answer of the Attorney General (17 June 2011), Applicant Submissions (1 September 2005), Respondent Submissions (15 June 2007).

10 CMA, s 5(1); Jan Jakob Bornheim, "Same-Sex Marriages in Canadian Private International Law" (2013) 51 Alta L Rev 77.

11 See e.g. the *Family Law Act*, RSO 1990, c F 3 [FLA].

12 2013 ONSC 129 [*Hincks*].

13 *Civil Partnership Act 2004* (UK), c 33 [CPA].

in Britain. However, the Attorney General of Ontario intervened on behalf of the recognition of the relationship as one of "spouses."[14] The court concluded that the CPA met all the statutory criteria of marriage as defined by Canada's CMA. As the court explained,

> Their union is a lawful union under the laws of the UK. Their union is of two persons, to the exclusion of all others. In the simplest terms it meets the statutory definition of marriage in Canada. Because these parties could not marry in the UK, but had to enter into a civil partnership there instead, they have suffered discrimination on the basis of their sexual orientation.
>
> In the particular circumstances of this civil partnership, where the parties were denied the choice to marry in the place where the union was celebrated I would perpetuate impermissible discrimination if I failed to recognize their civil partnership as a marriage.[15]

Accordingly, the parties were regarded as married and the marriage could therefore be dissolved.

2. Marriages in Places Where Same-Sex Unions Are Not Permitted

The issue in *Hincks* related to the interpretation to be given to a relationship equivalent to a marriage where a civil partnership was permitted and where a marriage was not. A further question that arises and that has not yet been considered by the courts in Canada is the status of a marriage ceremony celebrated in a country in which it is not permitted for persons of the same sex to marry at all. This would entail a marriage that was not officially recognized as valid in the place where it was celebrated.

The formal validity of a marriage is usually governed by the *lex loci celebrationis*—the law of the place where the marriage is celebrated. However, the conflict of laws has long recognized the challenges faced by persons who wish to marry in places where it is not possible to comply with the local formalities. The impossibility may arise because there is no local form, as, for example, in an unoccupied territory; because the local means for celebrating marriages has broken down in the course or the aftermath of war; or because the local form is one with which the parties in question cannot conform for legal or moral reasons.[16] While the case law once contained illustrations of this in

14 *Hincks*, *supra* note 12 at paras 68-80.

15 *Ibid* at paras 83-84.

16 C Davies, *Family Law in Canada*, 4th ed (Toronto: Carswell, 1984) cited in *Lin (Re)*, 1992 CanLII 6225 at para 16 (Alta QB); *Flores v Mendez*, 2014 BCSC 951, in which parties participated in a ceremony that, on its face, purported to cause them to be married but failed because one of them was still married to his first wife.

situations of displaced persons[17] and those living in places under belligerent occupation,[18] it has also occurred in situations in which the couple wishes to celebrate in a place that is convenient for their family and friends and yet believe that the official marriage must be celebrated elsewhere.[19]

Where a marriage that is invalid as to form is entered into for the purposes of facilitating a spousal relationship, spousal rights and obligations may accrue despite the formal invalidity of the marriage,[20] but the rights and obligations accruing will depend upon whether in the circumstances the parties can be taken to have understood the ceremony to have created a valid marriage.[21] The test enunciated by an English court is as follows:

> a. whether the ceremony or event set out or purported to be a lawful marriage;
> b. whether it bore all or enough of the hallmarks of marriage;
> c. whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage; and
> d. the reasonable perceptions, understandings and beliefs of those in attendance.[22]

Accordingly, it is possible, in principle, for a ceremony between same-sex partners intended to create a relationship of marriage to be held to be valid in Canada even if it was not officially recognized in the place where it was celebrated. Indeed, this would seem to be a logical extension of the reasoning in *Hincks*, in which the civil union was held to create a valid marriage.[23]

In a slightly different context, the willingness of a court to disregard the potential for invalidation of a foreign marriage through the application of discriminatory laws was illustrated in *MSC v CFJ*,[24] a case involving a Canadian man who was transgender and who married an American woman in Texas. In Canada, a transgender person may

17 *Schwebel*, *supra* note 7, involved a challenge to the validity of religious divorce performed for a Hungarian couple in a displaced persons camp in Italy en route to Israel.

18 *Starkowski (otherwise Urbanski) v AG*, [1954] AC 155 HL (Eng), concerning a religious marriage performed in Austria during Nazi occupation.

19 *Hudson v Leigh*, [2009] EWHC 1306 (Fam) (Eng) [*Hudson*], in which a couple celebrated a large wedding in South Africa but decided to separate before the official civil ceremony was to take place in England, and the marriage was held to be invalid.

20 *Best v Best*, 2015 NLTD(F) 23, aff'd 2016 NLCA 68 [*Best*], in which a couple celebrated an informal ceremony in Nepal in order to be regarded in Saudi Arabia as a married couple and permitted to cohabitate.

21 *Best* (CA), *supra* note 20.

22 *Hudson*, *supra* note 19.

23 *Supra* note 12 at para 84.

24 2017 ONSC 2389 [*MSC*].

obtain a birth certificate and other government identification reflecting the gender with which that person identifies,[25] but in some places, government documents must indicate the person's birth sex. In *MSC*, after the couple married, the Texas courts ruled that a person's birth gender remained their legal gender for life, and Texas enacted legislation prohibiting same-sex marriages.

The husband wished to obtain a green card to work in Texas based on his marital status but thought that he could not do so because the application process required a full physical and medical examination, and the requirement to list all legal names that he had used, including the female name given to him at birth.[26] He sought legal advice and was informed that Texas might regard his marriage as invalid. Later, he wished to divorce in Canada, which would require the Canadian court to recognize his marriage as valid even if it was not valid under the law in Texas.

The Ontario Superior Court recognized the Texas marriage as valid because,

> (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 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.[27]

Accordingly, even if the Ontario court accepted that the marriage was invalid in the place where it was celebrated, the court held that it would be contrary to the express values of Canadian society and also discriminatory to regard it as invalid in Canada.

3. Civil Unions in Quebec

The CCQ recognizes and gives effect to a civil union that is a "commitment by two persons 18 years of age or over who express their free and enlightened consent" to live together and "to uphold the rights and obligations that derive from that status."[28] Accordingly, in Quebec, couples who do not wish to marry, including same-sex couples, may enter into a civil union. The CCQ provides that the essential and formal validity of civil unions is governed by the law of the place of solemnization.[29] The law of the place of solemnization also applies to the effects of a civil union, except those binding

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

26 *MSC*, *supra* note 24 at para 13.

27 *MSC*, *supra* note 24 at para 34.

28 Art 521.1; see also arts 521.2-19.

29 Art 3090.1.

all spouses regardless of the civil union regime, which are subject to the law of the country of domicile of the spouses.

This corresponds with provisions in the CMA enabling same-sex couples not resident in Canada to marry and to divorce in Canada where this is not permitted in the country of their residence.[30] Where a couple who are cohabiting have entered into an agreement regarding their respective rights during or following their cohabitation, their agreement will be subject to the rules of jurisdiction and choice of law discussed in Section IV, Matrimonial Property and Section VII, Support.

III. Divorce

A. Canadian Divorces

Pursuant to section 4 of the CMA, a marriage is not void or voidable solely by reason of the fact that the spouses are of the same sex. Following the enactment of this legislation, the definition of "spouse" in the *Divorce Act* was amended to mean "either of two persons who are married to each other."[31] These legislative changes clarify that the fact that the spouses are of the same sex cannot serve as a ground for a decree of nullity and that divorce and corollary relief under the *Divorce Act* are available to same-sex couples.

Pursuant to the *Divorce Act*, a court in Canada has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the forum province for at least one year immediately preceding the commencement of the proceeding. The jurisdictional challenges faced by same-sex couples who maintain a peripatetic lifestyle are no different from those faced by other couples. However, as mentioned earlier, following the introduction of the CMA, many same-sex couples visited Canada to marry because they were not capable of marrying under the law of their residence. Having then returned to reside in their country of origin, they would not meet the residential requirements in Canada under the *Divorce Act* to obtain a divorce. This caused considerable difficulty for same-sex couples who had been married in Canada and wished to end their marriage.[32]

In response, the CMNRA amended the CMA to provide that all marriages performed in Canada between non-residents, whether they are of the same sex or opposite

30 *Civil Marriage of Non-Residents Act*, SC 2013, c 32, ss 5, 7 [CMNRA]; JG Castel & ME Castel, "The Marriage and Divorce in Canada of Non-Domiciled and Non-Resident Persons" (2012) 31 Fam LQ 297; Bornheim, *supra* note 10; Brenda Cossman, "Exporting Same-Sex Marriage, Importing Same-Sex Divorce—Or How Canada's Marriage and Divorce Laws Unleashed a Private International Law Nightmare and What to Do About It" (2013) 32 Can Fam LQ 1.

31 *Divorce Act*, s 2.

32 Janet Walker, "Same-Sex Divorce Tourism Comes to Canada" (2012) Law Q Rev 344 at 344-46.

sex, that would be valid in Canada if the spouses were domiciled in Canada are valid for the purposes of Canadian law even if one or both of the non-residents did not, at the time of the marriage, have the capacity to enter into the marriage under the law of their respective state of domicile. It also established a new divorce process that allows a Canadian court to grant a divorce to non-resident spouses who reside in a state where a divorce cannot be granted to them because that state does not recognize the validity of their marriage.[33]

B. Foreign Divorces

Questions related to the recognition in Canada of foreign divorce decrees may arise in various kinds of proceedings, including nullity suits, claims for spousal support, the custody of children or a share in an estate, efforts to obtain a marriage licence, and prosecutions for bigamy. The questions facing same-sex couples in relation to the recognition of foreign divorces are largely the same as those facing all married persons. Pursuant to the *Divorce Act*, a divorce granted by a foreign tribunal having jurisdiction to do so will be recognized for all purposes of determining the marital status in Canada of any person provided proper notice was given to the respondent and the divorce was not obtained by fraud.[34]

The availability of a divorce for a same-sex couple implies the recognition of their marriage. Accordingly, questions of the recognition in Canada of a divorce granted in another country are unlikely to raise issues specific to LGBTQ2+ persons. Whether a divorce granted by a Canadian court in respect of a same-sex couple—and the corollary relief that is granted as an incident to that divorce—will be recognized in another country would be determined by the law of that country.

C. Canadian Nullity Decrees

Canadian courts have exercised jurisdiction in nullity proceedings in the case of marriages that were alleged to be void on the basis of the domicile or residence of both parties within the province; or, in some provinces, on the basis of the domicile or residence of either party within the province; or on the basis that the marriage was celebrated within the province.[35] The CCQ provides that a "Québec authority has jurisdiction in matters relating to the nullity of a marriage … when the domicile or place of residence

33 *Ibid.*

34 *Powell v Cockburn*, [1977] 2 SCR 218, concerning fraud going to jurisdiction.

35 *Re Capon, Capon and O'Brian v McLay*, 1965 CanLII 197 (Ont CA); *Savelieff v Glouchkoff*, 1964 CanLII 438 (BCCA); *Grewal v Kaur*, 2011 ONSC 1812, in which the husband sought annulment when the wife immigrated to Canada to live with her family and not with him; *Whitaker v McNeilly* (1957), 11 DLR (2d) 90 (BCSC); *CMD v RRS*, 2005 BCSC 757; *MSC*, *supra* note 24.

of one of the spouses or the place of the solemnization of their marriage is in Québec."[36] In light of section 4 of the CMA, which provides that a marriage is not void or voidable by reason only that the spouses are of the same sex, no special issues arise for LGBTQ2+ persons in respect of nullity decrees sought in Canada.

D. Foreign Nullity Decrees

Generally, a decree of nullity of a marriage pronounced by a foreign court of competent jurisdiction will be recognized as binding and conclusive by Canadian courts provided that both parties were domiciled or resident in that jurisdiction or were domiciled in a state whose courts would recognize the decree, or the marriage was celebrated there.[37] Generally, the grounds on which a foreign decree of nullity of marriage is pronounced are irrelevant to its recognition. In Quebec, the provisions of the CCQ relating to the recognition and enforcement of foreign decisions apply to nullity decrees as well.[38]

However, Canadian courts will not recognize a foreign decree of nullity of marriage if it was obtained by fraud or in a manner contrary to natural or substantial justice, or if recognition would be contrary to Canadian public policy.[39] Pursuant to the CMA provision that a marriage is not void or voidable by reason only that the spouses are of the same sex, it would follow that a foreign decree of nullity granted solely because the spouses were of the same sex would be denied recognition in a Canadian court. This was illustrated by the reasoning in the *MSC* decision in which the court held that

> 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 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.[40]

E. Declarations of Status

Where a couple is resident in a Canadian province, the courts have jurisdiction to grant a declaration as to the matrimonial status of the parties, even though no other relief is sought. The courts also have jurisdiction to grant a declaration as to the matrimonial status of the parties where this is incidental to a petition for divorce or an action for a declaration of nullity of marriage. In view of the evolving state of the law in many

36 Art 3144.

37 N Rafferty, "Recognition of Foreign Nullity Decrees" (1982) 46 Sask L Rev 73.

38 Arts 3155-60, 3164.

39 *Salvesen (or Von Lorang) v Administrator of Austrian Property*, [1927] AC 641 at 652, 663, 671-72 HL (Eng); *Merker v Merker*, [1962] 3 All ER 928 at 934, 936 (Eng); *Lepre v Lepre*, [1963] 2 All ER 49 at 56-57.

40 *MSC*, *supra* note 24 at para 34.

countries, couples may have reason to seek declarations as to their matrimonial status. The need for this was reflected in both *Hincks*[41] and in *MSC*.[42]

The law that the court would ordinarily apply would be that arising from the nature of the declaration sought, such as that of the validity of a foreign marriage or of a foreign divorce. However, in view of the constitutional underpinnings of the CMA, it would seem unlikely that the declaration granted would be inconsistent with section 4 of the Act stating that a marriage is not void or voidable by reason only that the spouses are of the same sex.

IV. Matrimonial Property

A. Matrimonial Property in Same-Sex Relationships

The law of matrimonial property in Canada has evolved to keep pace with changes in the law more generally on same-sex relationships. In 1999 in *M v H*, the Supreme Court of Canada (SCC) held that a distinction between cohabiting heterosexual couples and cohabiting same-sex couples was an analogous ground under section 15(1) securing the Charter guarantee of equality between them.[43] In light of the more recent changes to the law of marriage, it would appear that the law governing matrimonial property upon dissolution of either formal marriages or relationships of cohabitation would not give rise to any special considerations in cases of same-sex relationships.[44]

Furthermore, provincial legislation recognizes the rights of same-sex couples to enter into cohabitation agreements in the same way as other couples. For example, section 53 of the Ontario FLA provides that

> two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including … ownership in or division of property.

The absence of any qualification as to the gender of the persons clarifies that there is no legal distinction to be drawn between heterosexual and same-sex relationships.

This is different from the approach that is taken in other countries, notably those countries in which same-sex marriages are not permitted and especially in those countries in which same-sex relationships are discriminated against.[45]

41 *Hincks*, *supra* note 12.

42 *MSC*, *supra* note 24.

43 [1999] 2 SCR 3.

44 See e.g. *Ruskin v Dewar*, 2005 SKCA 89, considering disposition of the property of a same-sex couple following the termination of their common law relationship.

45 See Section IV.B for a discussion of *Droit de la famille—102375*, 2010 QCCS 4390.

B. Applicable Law

The main question that arises for same-sex couples in proceedings involving determinations of matrimonial property, then, is whether the law of a province of Canada or a foreign law should apply. The *Uniform Jurisdiction and Choice of Law Rules in Domestic Property Proceedings Act*[46] provides that the proper law of the relationship is the internal law of the jurisdiction in which the spouses had their most recent common habitual residence.[47] Where this jurisdiction is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the proper law is the internal law of the jurisdiction that is most closely associated with the relationship between the spouses.[48]

Although the question has yet to be considered in the context of the rights of same-sex couples, the choice of law determination for matrimonial property has been held to be subject to considerations of public policy. In *Vladi v Vladi*,[49] the Nova Scotia Supreme Court was asked to determine which law governed the disposition of matrimonial property between a couple who were Iranian nationals and whose last common habitual residence was in West Germany. On considering the application of the law of West Germany (as it then was), it was argued that if the matter were tried in West Germany, the court might give effect to Iranian matrimonial law under which Mrs Vladi would receive only a symbolic or token gift.

This result was viewed as "archaic and repugnant to ideas of substantial justice in the province" and was rejected.[50] Accordingly, it may be suggested that where the prescribed choice of law analysis leads to the application of a law that is archaic and repugnant to ideas of substantial justice in the province by reason of its discrimination against LGBTQ2+ persons, the result might be rejected in favour of one that accorded equality to the relationship.

46 Uniform Law Conference of Canada, online: <https://www.ulcc.ca/en/home/482-josetta-1-en-gb/uniform-actsa/jurisdictionchoice-of-law-rules-in-domestic-prope/308-jurisdiction-and-choice-of-law-rules-in-domestic-property-proceedings-act/> [Uniform Act]. The Uniform Law Conference of Canada promulgates uniform legislation that may be adopted by the provinces.

47 Uniform Act, s 8(1); *Parker v Mitchell*, 2016 BCSC 723, in which the court found that although parties regularly spent summers in British Columbia, they lived together in California and separated during a period when they were living in California, and so California law governed the matrimonial property claim.

48 Uniform Act, s 8(2).

49 (1987), 79 NSR (2d) 356.

50 *Ibid* at para 30.

V. Adoption and Parentage

A. Legitimacy

At one time, only children born to parents validly married were deemed "legitimate" in law. But today provincial legislation[51] provides that a child is the child of his or her parents and there is a presumption in respect of a child conceived through sexual intercourse that a person is the parent if any of the following situations apply:

1. The person was the birth parent's spouse at the time of the child's birth.
2. The person was married to the child's birth parent by a marriage that was terminated by death or judgment of nullity within 300 days before the child's birth or by divorce where the judgment of divorce was granted within 300 days before the child's birth.
3. The person was living in a conjugal relationship with the child's birth parent before the child's birth and the child is born within 300 days after they cease to live in a conjugal relationship.
4. The person has certified the child's birth, as a parent of the child, under the *Vital Statistics Act* or a similar Act in another jurisdiction in Canada.
5. The person has been found or recognized by a court of competent jurisdiction outside Ontario to be a parent of the child.[52]

These presumptions are not gender specific.

Historically, legitimacy could affect a child's domicile of origin, citizenship and immigration rights, as well as guardianship claims. However, the most common issue affected was the right to succession. Until recently, a bequest to an unnamed "child" meant a "legitimate child" unless the will stated otherwise; and intestate succession also depended upon the claimant's legitimacy. Alberta and Nova Scotia have legislation providing for the recognition of legitimation by the subsequent marriage of the child's parents.[53] The statutes provide that in the requisite circumstances, the child is legitimate from birth for all purposes of the law of the province; and in the case of Nova Scotia, the statute specifies this to include the right to inherit property upon an intestacy.

To the extent that a child's legitimacy is determined by the validity of the child's parents' marriage in Canada or elsewhere, all the cross-border issues affecting the validity of marriages could have implications for the rights of the children of those unions. Accordingly, for example, the marriage of a same-sex couple could create

51 See e.g. *Children's Law Reform Act*, RSO 1990, c C.12, s 4(1) [CLRA].

52 CLRA, s 7(2).

53 *Legitimacy Act*, RSA 2000, c L-10, s 1; *Maintenance and Custody Act*, RSNS 1989, c 160, ss 47-50.

rights of citizenship and succession for the child, and custody and support for the parents. So, too, could the recognition of the parent's status as married create such rights. Whether rights such as these existing under the law in Canada would be recognized under the law of another country would depend on the law of that country.

B. Adoptions, Surrogacy, and Declarations of Parentage

The law relating to adoptions and surrogacy in Canada is, in principle, no different for LGBTQ2+ persons from the law as it applies to non-LGBTQ2+ persons except where the law of another country applies to some aspect of the parental relationship and that law places restrictions on the permissibility of adoption or surrogacy for LGBTQ2+ persons.[54]

In Canada, there are no legal prohibitions to adoption by same-sex couples. Joint adoption by same-sex couples is permitted by law in 26 countries, and step-adoption is permitted in a number of other countries. However, very few countries permit international adoptions by same-sex couples. Accordingly, while there may be few formal barriers to adoptions within Canada, confronted with the challenges of finding a child for adoption in Canada, same-sex couples may turn to the possibility of adopting elsewhere; and, confronted with the legal challenges of international adoption,[55] they may then consider the possibility of surrogate parenting.

For the LGBTQ2+ community, this raises two questions: First, where the couple have used a sperm donor or a surrogate to have a child, should it be necessary to apply for formal recognition of the couple's status as parents, for example by adoption? And second, where the couple have had a child in another country with the assistance of a surrogate, may they adopt the child in Canada, or obtain a declaration of their parentage, so as to provide them with certainty of their status as parents?

Adoption and declarations of the status of children can have a variety of implications for the rights and obligations of the persons affected. For example, official recognition of a person's status as the parent of a particular child may carry with it certain presumptions of rights of access and of involvement in the life of the child and certain presumptions of responsibilities for support. Where a child's parentage is in doubt, a declaration may serve both to establish the parental rights and responsibilities of one person and to limit the rights and responsibilities of another. The forum that is

54 See e.g. Malcolm Dort, "Unheard Voices: Adoption Narratives of Same-Sex Male Couples" (2010) 26 Can J Fam L 289.

55 See David C Bell, "The Ironic Twist and International Adoption: Same-Sex Couples and International Adoption Challenges" (2012) 12 Whittier J of Child & Family Advocacy 151; Lynn D Wardle, "The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners" (2008) 18:1 Ind Intl & Comp L Rev 113.

appropriate for determining a child's parentage may vary depending on whose interests are likely to be affected.[56]

Certainty of parental status has been available in Ontario for some years but, until recently, only through a formal application either to adopt or obtain a declaration of parentage. In one example in 2014, where a gay couple had used a surrogate and donor eggs to conceive a child, they sought and obtained a declaration of parentage.[57] While it happened that one of the applicants was the only one of the three parties to have a biological relationship with the child, it is not clear whether this was a factor in the ruling. Fortunately, at least in Ontario, it is no longer necessary for same-sex couples who have children to adopt them or to obtain a formal declaration of parentage in order to have official recognition of their status as parents. Since the passage of the *All Families Are Equal Act, 2016*,[58] couples, including same-sex couples, who use sperm donors or a surrogate are legally recognized as parents without the need to adopt.

C. Foreign Declarations of Status

Turning to the issues of intercountry adoption,[59] provincial legislation governing the recognition of foreign adoptions and the effect to be given to them within the province[60] generally provides that an adoption made according to the law of any other jurisdiction that is substantially similar in effect to a domestic adoption shall be recognized and shall have the same effect in the province as a domestic adoption.[61]

56 *Olney v Rainville*, 2010 BCCA 155, in which a mother, domiciled in British Columbia sought a declaration that her current husband and not her previous husband, domiciled in Quebec, was the natural father of their child and the court found that Quebec was the more appropriate forum.

57 *AWM v TNS,* 2014 ONSC 5420.

58 SO 2016, c 23.

59 Although immigration and citizenship is beyond the scope of this chapter, it is worth noting that the challenges faced by surrogate parents in benefitting from the citizenship rights of other parents of children born outside Canada has been considered in Stefanie Carsley, "DNA, Donor Offspring and Derivative Citizenship: Redefining Parentage Under the Citizenship Act" (2016) 39 Dal LJ 525. See Chapter 10, Immigration for further discussion on LGBTQ2+ issues and immigration.

60 This is based on the Hague Conference on Private International Law, *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, CTS 1997/12 (1993) 32 ILM 1134, online: (pdf) <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>; see Vaughan Black, "GATT for Kids: New Rules for Intercountry Adoption of Children" (1995) 11 CFLQ 253; Peter Pfund, "Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation and Promise" in *Special Issue on International Family Law* (1994) 28 Fam LQ 53.

61 See e.g. *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Schedule 1, s 218.

In Quebec, the CCQ rules that apply to filiation are equally applicable to the establishment of parentage. Since the CCQ permits same-sex parents to have children, a court may homologate a foreign order declaring the paternity of two men of a child born of a surrogate mother.[62] This was illustrated in an application by two men for recognition of a Pennsylvania judgment declaring that they were the parents of a child yet to be born and asking that the Registrar of Civil Status issue a birth certificate for the child or insert the American birth certificate in the Quebec civil status registry as though it had been drawn up in Quebec, with the applicants as fathers.[63]

The application was opposed by the attorney general of Quebec on the basis that this would be tantamount to endorsing a mode of filiation that was not recognized in the CCQ.[64] The applicants were Canadian residents, but the child was born to an American resident surrogate mother, who was joined as a third party.[65] The applicants argued that the best interests of the child must prevail, and the court agreed that it should grant the order because it was not being asked to apply a foreign law to declare the couple's parentage but merely to recognize the order of a foreign court duly declaring the child's status.[66]

In matters of filiation, the law applied in Quebec is that of the domicile or nationality of the child or of one of the child's parents at the time of the child's birth, whichever is more beneficial to the child.[67] It is submitted that the assessment of the best interests of the child in making this determination is likely to be influenced by the constitutional support given in Canada for non-discriminatory treatment of LGBTQ2+ persons, for example, as reflected in the rights of same-sex couples to be parents.

VI. Custody

As with a number of the previous sections, the law in Canada with regard to interprovincial custody matters involving LGBTQ2+ persons is similar to that for other persons. It is only with respect to international custody matters that special considerations have emerged. Two main areas of the law have given rise to concerns for LGBTQ2+ persons.

62 *Droit de la famille—151172*, 2015 QCCS 2308, applying arts 3166 and 115 of the CCQ.

63 *Ibid* at paras 1-4.

64 *Ibid* at para 5.

65 *Ibid* at para 7.

66 *Ibid* at para 96.

67 CCQ, art 3091.

A. Custody Rights of Couples Residing Elsewhere

Courtney v Springfield[68] relates to the rights of LGBTQ2+ parents under *The Hague Convention on the Civil Aspects of International Child Abduction*[69] and, in particular, the rights of parents where their marital relationship and their parental relationship is not officially acknowledged as one giving rise to custody rights under the Hague Convention. Pursuant to article 8 of the Hague Convention, a court in a contracting state upon a request from another contracting state must ensure the prompt return of a child wrongfully removed or retained in breach of rights of custody or access.

A court hearing a request for the return of the child does not make a custody determination, but the wrongfulness of the removal of the child depends upon a finding that the applicant had custody rights and was exercising them at the time removal. Accordingly, the application of the Hague Convention depends upon the recognition of custody rights, which may be complicated where a couple's relationship does not have the same degree of official recognition that it has in Canada.

In *Courtney,* the Ontario Superior Court considered custody rights in the context of the application of the Hague Convention to a same-sex couple residing in England.[70] The parties had cohabited for nine years in England where they were approved as foster carers and in whose care were placed two children who had medical problems. The applicable law did not permit same-sex parents to jointly adopt a child and, accordingly, the respondent alone adopted the children.[71]

When the couple separated, a joint residence order (JRO) was issued prohibiting the removal of one of the children from the United Kingdom without the written consent of every person with "parental responsibility."[72] The respondent relocated to Canada with the children without the consent of the applicant. The official solicitor with administrative responsibility for the Lord Chancellor's International Child Abduction and Contact Unit provided an opinion that the applicant had "inchoate rights of custody."[73] The respondent conceded the JRO had the legal effect of conferring rights of custody on the applicant that were actually being exercised at the relevant time.[74] Accordingly, the Hague Convention applied and the application was granted.[75]

68 *Courtney v Springfield*, 2008 CanLII 35920 (Ont Sup Ct J) [*Courtney*].

69 The Hague Conference on Private International Law, *Collection of Conventions (1951-1980)*, 1983 CTS 35 XXVIII at 264, online (pdf): <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf> [the Hague Convention].

70 *Courtney*, *supra* note 68.

71 *Ibid* at paras 2-7.

72 *Ibid* at para 3.

73 *Ibid* at paras 1, 21-24.

74 *Ibid* at para 10.

75 *Ibid* at paras 77-80.

B. Responding to Foreign Discrimination Against LGBTQ2+ Parents

Droit de la famille—102375[76] also relates to the rights of LGBTQ2+ parents under the Hague Convention, but in this case, the issues related to a request to return a child to an environment in which the respondent, the child's mother, was discriminated against by reason of her sexual orientation.

In this case, the Quebec Superior Court heard an application by a Mexican national, the child's father, for the return of the parties' five-year-old daughter. The child had been born in Mexico but had been brought to Quebec at the age of three by her mother when she fled Mexico and claimed refugee status in Canada. The mother, who was a lesbian, alleged acts of conjugal violence against her by the father, and discrimination in Mexico against homosexuals. The father had sued for divorce in Mexico.[77] Due to lack of assistance from the authorities and concerns that the father would take the child from her, the mother had moved from her home state. She had gone into hiding in Mexico before leaving for Canada. The family court judge in Mexico awarded custody of the child to the father on the basis of the mother's sexual orientation, and a Mexican criminal court found the mother guilty of the corruption and exploitation of a minor.[78]

In response to the Hague Convention application, the mother argued that the child had become settled in her new environment over the intervening 23 months. In addition, the mother argued that to return the child to Mexico would be contrary to her human rights and freedoms recognized in Quebec and would expose the child to psychological harm.[79] The Quebec court agreed that the mother had been discriminated against by the Mexican courts because of her sexual orientation and that there was a grave risk of incarceration for the mother if she returned with the child to Mexico. As a result, there was a clear and grave risk that ordering the child to be returned would expose the child to psychological or emotional harm or otherwise place her in an intolerable situation. The court therefore refused the application for the child's return.[80]

VII. Support

An application for an order requiring a spouse to pay for the support of the other spouse and of any or all of the children of the marriage may be made as corollary relief in a proceeding under the *Divorce Act*[81] or as an application under provincial legislation.[82]

76 *Droit de la famille—102375*, *supra* note 45.

77 *Ibid* at paras 2-5, 11, 20-22.

78 *Ibid* at paras 33, 42, 53.

79 *Ibid* at paras 76-79.

80 *Ibid* at paras 209, 218-21, 233.

81 Sections 4, 15.1(1), 15.2(1), 15.3(1).

82 See e.g. FLA, Part III, ss 29-50.

Applications for support involving parents who reside in different jurisdictions are facilitated by the interjurisdictional support orders legislation of the various provinces.[83] It does not appear that the courts have addressed issues of support as they might particularly affect LGBTQ2+ persons, but certain issues may be anticipated as of relevance to members of the LGBTQ2+ community.

A. Following Foreign Divorces

The *Divorce Act* does not authorize a Canadian court to grant corollary relief in respect of a foreign divorce decree[84] or to vary the corollary relief granted by a foreign court in the course of granting a divorce,[85] although a Canadian court may do so pursuant to provincial legislation for interjurisdictional support where the respondent resides in a reciprocating jurisdiction.[86] Accordingly, where a divorce has been granted to a couple in a country where an application for an award for support has been affected by discrimination against LGBTQ2+ persons, it would be necessary to apply under the provincial legislation and not the *Divorce Act* to vary the award. It should also be noted that the *Divorce Act* does not permit foreign courts to vary orders made under it.[87] Accordingly, efforts to alter a support order issued in Canada under the *Divorce Act* in order to reflect the law of another country that discriminated against LGBTQ2+ persons would not be recognized in Canada.

B. Applicable Law

In a world in which the rights of same-sex couples—as between one another and as parents—are often not given treatment equal to other couples, the law governing an application for support on behalf of a spouse or a child is of particular importance.

83 See e.g. *Interjurisdictional Support Orders Act, 2002*, SO 2002, c 13 [ISOA].

84 *Wlodarczyk v Spriggs*, 2000 SKQB 468; *Jahangiri-Mavaneh v Taheri-Zengekani*, 2003 CanLII 1962 (Ont Sup Ct J) [*Jahangiri-Mavaneh*]; *Virani v Virani*, 2006 BCCA 63 [*Virani*].

85 *Rothgiesser v Rothgiesser*, 2000 CanLII 1153 (Ont CA); *Mercieca v Mercieca*, 2002 CanLII 2754 (Ont Sup Ct J), finding no power to vary relief granted in Texas divorce; *Jahangiri-Mavaneh*, *supra* note 84; *Domise v Oyadiran*, 2006 CanLII 2614 (Ont Sup Ct J), finding no power to challenge or vary support order in a Michigan divorce; *Dashtarai v Shahrestani*, [2006] OJ No 5367 (QL) (Sup Ct J (Fam Ct)), finding no power to vary relief granted in Iranian divorce; *Virani*, *supra* note 84; *Leonard v Booker*, 2007 NBCA 71, finding restriction applies even where the parties reside in the province and consent to the court's jurisdiction.

86 *H (JC) v H (MB)*, 2006 BCPC 76; *Virani*, *supra* note 84, in which the court lacked jurisdiction to vary support granted in foreign divorce where respondent's residence was not a reciprocating jurisdiction; *Cheng v Liu*, 2017 ONCA 104, in which the respondent, having obtained a stay in favour of the Chinese courts where the petitioner and child resided, failed to make the financial disclosure necessary for the Chinese court to determine support and matrimonial property division. The court found there was no longer jurisdiction under the *Divorce Act,* but jurisdiction existed under the FLA for corollary relief.

87 *Darel v Darel*, 1999 ABQB 881.

There is assurance of equality within Canada, in that a court making an order pursuant to the *Divorce Act* applies the *lex fori,* which, due to the requirements for judicial jurisdiction, will be the law of residence of one or both spouses. Moreover, the application of the *Federal Child Support Guidelines*[88] would appear to be mandatory even where both parties have ceased to be resident in Canada at the time of determining support pursuant to a divorce in a Canadian court.[89]

In the case of provincial interjurisdictional support legislation, the law governing support may be an important threshold issue affecting the entitlement to support. Pursuant to the legislation, in a claim for child support, the court first considers the law of the place where the child resides in determining the child's basic entitlement, including any arrears that might have accrued.[90] However, if the child is not entitled to support under that law, the court may apply its own law.[91]

In determining the amount of support, the courts are directed to apply the law of the payer's residence.[92] However, even where a separation agreement provides for the application of foreign law under which support obligations are less than those under the Guidelines, the Guidelines may prevail.[93]

Where the application is for spousal support, the court first applies its own law, but if there is no entitlement under that law, the court applies the law of the jurisdiction in which the parties last maintained a common habitual residence. In determining the amount of support, the court applies its own law.

In either situation, it is clear from the case law that, particularly in respect of child support, the courts will readily depart from the law of the payer's residence both in terms of entitlement and in terms of quantum where the result departs significantly from the award that would be granted under Canadian law.[94]

88 SOR/97-175, s 3 [Guidelines].

89 *Hughes v Alfano*, 2006 BCSC 109, where the parties and their children had moved to England by the time child support was determined.

90 See e.g ISOA ss 13, 35; *Baugh v Samuels*, 2001 CanlII 32833 (Ont Ct J); *Mathusz v Carew*, 2011 NLTD(F) 28, in which the entitlement of child to support was determined in accordance with foreign law; *Sheehan v Sheehan*, 2011 NLTD(F) 43, in which the law of Massachusetts applied; *Stewart v Stewart Estate*, 2011 BCSC 774, in which the law of Mississippi provided that the obligation to maintain life insurance with a child as a beneficiary ended when the child reached age of majority.

91 *AG v LS*, 2006 ABCA 311, where a support order from Kazakhstan was uncertain and parties were required to make submissions on appropriate quantum of support.

92 See e.g ISOA s 35; *Mathers v Bruce*, 2005 BCCA 410.

93 *Blagaich v Blagaich*, 2007 CanLII 37352 (Ont Sup Ct J).

94 *Hastings v Deakin*, 2014 ONCJ 618, in which the court refused recognition of a variation obtained in the payee's jurisdiction based on its law, as contrary to public policy; *de Somer v Martin*, 2012 ONCA 535, finding that a foreign order for a variation may be rejected, particularly where the applicant has evidently chosen a jurisdiction to bring a variation application in order to minimize the payment obligation.

PERSONAL REFLECTION

THE STRUGGLE FOR LGBTQ2+ FAMILIES TO BE RECOGNIZED IN CANADA

Robynne B Kazina

Society changes more quickly than legislation. As a result, legislation often lags behind and fails to address the current realities of Canadian society. Such is the case with assisted reproduction, where legislation is based on outdated assumptions and is discriminatory towards individuals in same-sex relationships with respect to their reproductive options, marital status, and recognition of parenthood. There is a lack of consistency in how the various governments regulate these issues. Some provinces (British Columbia and, recently, Ontario) have made strides to meet these new challenges, while others (Manitoba, notably) are behind.

Let me illustrate this with the stories of three couples who have had to navigate their ways through the miasma of uncertainty that our current lack of comprehensive and consistent legislation has created.

Susan and Mary were a common law couple who wanted to have a child and both be listed as the child's parents on the initial birth registration, as would any couple. In Manitoba, however, this is complicated because of discriminatory provisions of *The Vital Statistics Act*.[95] In Manitoba, those in a lesbian common law couple can only both be registered as the parents of their child if they used artificial insemination (AI), which—as defined by the province—is the direct insertion of sperm into the mother's womb only. However, like many couples, Susan and Mary attempted AI without success and had to use *in vitro* fertilization (IVF) to achieve a pregnancy.

In Manitoba, same-sex couples are treated differently depending on their marital status. Whereas heterosexual couples enjoy the benefit of being able to both be registered as parents regardless of how they conceived or whether they are common law or married, same-sex couples do not have those same rights under current law. Married, same-sex couples in Manitoba who choose IVF or frozen embryo transfer can register the non-birthing woman as a parent; common law same-sex couples cannot. The non-birthing woman in a common-law relationship must apply for a court order for parentage to be registered. This defines lesbian women as somehow less legitimate parents than the birth mother or other parents, and it denies them the ability to make medical care decisions on their child's behalf immediately after the birth. It also adds concomitant stress, uncertainty, delay, and expense.

Susan and Mary discovered that Manitoba would not recognize their desired family structure, and like many same-sex couples, they responded

95 CCSM, c V60 [VSA].

to this by getting married to meet the requirements of the VSA. A couple's choice to marry or not should not be obstructed by heteronormative legislation that diminishes or restricts their freedom of choice in family structure.

Mark and Ben, our second couple, faced a different obstacle common to gay men: limited access to a surrogate. The federal *Assisted Human Reproduction Act*[96] makes it a criminal offence, with a penalty of up to ten years in jail or a fine of $500,000, to provide a surrogate with any compensation other than reimbursement for receipted, out-of-pocket expenses. With these criminal prohibitions there are a limited number of surrogates available in Canada, and the demand for surrogates is growing. In the United States, the states control surrogacy law, leading to a spectrum from commercialized surrogacy in some states to an outright ban of surrogacy in others. This results in Canadians turning to the United States to find a surrogate in states where compensation leads to more surrogates being available. The barriers to gay men in being able to find a surrogate in Canada would be mitigated if the criminalization of surrogacy in the AHRA was removed, leaving each province the responsibility to regulate the practice.

Mark and Ben had difficulty being matched with a surrogate through the Canadian agencies because of the limited availability of surrogates and their own complicated circumstances. What complicated their case is that Mark and Ben only wanted to acknowledge Mark as the father. Mark's family lives in China and would refuse to accept him were they to discover that he is gay. The men wanted their son to attend a particular summer school in China, which would have required Mark's parents to have their grandchild's birth certificate to facilitate that attendance. The birth certificate, of course, would have outed Mark and made this arrangement unlikely, if not impossible.

After failing to match with a surrogate through Canadian surrogacy agencies, Mark and Ben turned their search to the United States. They were able to find a surrogate through an American agency but found that they could not afford the fees. They told me that they were considering working with the surrogate outside of the agency but I advised them against this as it would mean the surrogate would be in breach of her contract with the agency and was not a viable option for them.

Mark and Ben took up their search in Canada again and were ecstatic when they called me to say that they had found "a friend of a friend" as a surrogate. Further discussion unveiled some red flags, however. The prospective surrogate did not have care or any contact with her own young children and had told the couple that she wanted to be a surrogate because she "liked the attention she received when she was pregnant." I encouraged them to see a counsellor for some screening. As I suspected, the counsellor recommended they not proceed with the prospective surrogate.

96 SC 2004, c 2 [AHRA].

All of these disappointments did not deter them, and they continued to work with Canadian agencies. After a lengthy search, they found a suitable surrogate. Mark and Ben are now proud parents.

Surrogate scarcity is not the only obstacle to making a happy family. The provinces vary widely in how they recognize parentage; some are more "surrogate-friendly" than others. Our third couple, Rob and Chris, discovered some of the drawbacks to this inconsistency among the provinces.

I represented Rob and Chris, who are from Saskatchewan, in their relationship with Anna, a surrogate from Manitoba. Anna had already gone through two failed transfer attempts and a miscarriage before finally becoming pregnant. Because of the uncertainty of both men being listed as parents in Manitoba, they considered having Anna travel from Winnipeg to Kenora, Ontario (a two-and-a-half-hour drive on a highway with a high incidence of fatal accidents) to give birth in a friendlier parentage regime.

Having surrogates travel to a different province to give birth, unfortunately, is not an uncommon practice. When compiling a birth plan, a pregnant person should be deciding things such as the use of an epidural or doula, not which province to travel to for the birth. Anna's prenatal care was provided by her Manitoba midwife, who would have had to stay in a hotel in Kenora, possibly for a month, and would not have been allowed to assist in the birth in Ontario. Kenora, which has a smaller birthing centre than Winnipeg, has no maternity ward or neonatal intensive care unit—no small matter considering Anna's history. Airlines often do not permit pregnant people to fly after 36 weeks. So the only option for Anna, and others like her, at that point was to travel by car and wait for the delivery without having familiar surroundings and the support of their family and friends.

Rob and Chris weighed the extra expense (both financial and psychological) and the extra risk, and chose to have Anna give birth to their child in Manitoba, despite the difficulties of establishing their parenthood.

As we can see, Canada and the provinces still have a way to go to meet the needs of all their citizens. Rationalizing the definitions and protocols for parenthood for LGBTQ2+ couples and easing some of the restrictions on surrogacy would go a long way to including families as they are currently evolving. We need to advocate as lawyers, as citizens, and as voters to make this progress happen.

PERSONAL REFLECTION

PARTICIPATING IN LGBTQ2+ EQUALITY LITIGATION: A RESEARCHER'S PERSPECTIVE

Lori E Ross

I think it's fair to say that most academics choose this career because we hope to make a difference in the world. We quickly learn, though, that there is no direct path between the research we produce and policy change; indeed, in my experience, it has been rare to directly influence policy. Having the opportunity to participate as an expert witness in LGBTQ2+ equality litigation related to birth registration taught me a great deal about the role that researchers can play in the policy-making process.

I find John Kingdon's multiple streams model[97] to be a helpful framework in conceptualizing the role of research in the policy-making process. Kingdon argues that three separate "streams" operate in parallel to influence public policy-making: the "problem recognition stream," where attention is brought to a policy problem; the "policy stream," where a policy solution to the problem becomes available; and "the political stream," where policy-makers have both the opportunity and the motive to turn the solution into policy. Only when these three streams come together does a "policy window" open to enable change.

As a researcher, I see an important role for my work in the problem recognition stream in drawing attention to inequities faced by LGBTQ2+ people through producing knowledge about their experiences. I do this by researching the various sites of discrimination for LGBTQ2+ people, including policy-regulated processes such as birth registration. Research participants share with me their experiences of discrimination, as well as the impact of those experiences on their lives; I then have the role of demonstrating how social systems and structures operate to produce those discriminatory experiences. At the same time, my work can also contribute to the policy stream by soliciting ideas from LGBTQ2+ people and other stakeholders about potential solutions to inequities. In almost all of my research studies, we ask our participants directly what they would recommend to decision-makers who have influence over the particular systems they are affected by. By documenting the experiences of LGBTQ2+ people, as well as their recommendations for change, and disseminating this information through various academic and non-academic venues, I work to raise awareness among policy-makers and the voting public about policy problems and potential solutions.

97 John W Kingdon, *Agendas, Alternatives, and Public Policies*, 2nd ed (Boston; Montreal: Longman, 2011).

My involvement in LGBTQ2+ equality litigation related to birth registration was an example of the multiple streams model in action. Here are a few of the things that I learned through the process.

A. It Helps to Know the Right People

Although researchers have the tools to document policy problems, we are often not well placed to know which problems most need to be documented. I've been privileged to work alongside community advocates and activists in my research with LGBTQ2+ people who have shared insider knowledge with me and thus directed my research in important ways. Through these partnerships, I've built relationships that help me to be "in the know" when possible litigation is brewing, or when there are equity-related issues that could benefit from some research attention in order to push issues forward on the policy-making agenda. In the case of LGBTQ2+ birth registration, my long-standing partnership with Rachel Epstein (former coordinator of the LGBTQ Parenting Network) created opportunities for me to share my relevant research toward problem recognition. Although I've always been committed to working in partnership with communities to achieve more equitable production of knowledge, I now also appreciate that working in partnership with communities is a key facilitator for research to influence policy. Building these reciprocal relationships enables me to address community-relevant research priorities proactively, in order to have data to contribute to problem recognition when the time comes for a policy window to open.

B. Be Patient

After having had the opportunity to participate in two rounds of LGBTQ2+ equality litigation related to birth registration, I appreciate that change is slow and happens in bits and pieces; policy windows can open and close multiple times in the course of policy change. When I was first asked to contribute as an expert witness to *Rutherford v Ontario (Deputy Registrar General)*,[98] I prepared an affidavit based on data from a study I had recently conducted with non-biological mothers of young children regarding the stress they experienced as a result of their lack of legal recognition as parents. Although the changes to arise from *Rutherford* were positive, they were incomplete, leaving out many members of the LGBTQ2+ community. When, ten years later, I was asked to contribute to *Grand v Ontario (Attorney General)*,[99] I was struck to find that I could prepare a much thicker affidavit, now based on numerous studies with variously situated LGBTQ2+ parents, and yet my conclusions were essentially the same as those in my affidavit

98 2006 CanLII 19053 (Ont Sup Ct J) [*Rutherford*].

99 2016 ONSC 3434 (Ont Sup Ct J).

for *Rutherford*. I conducted a decade's worth of research all to find the same things I had concluded ten years prior on the basis of my first study in the field. I appreciate now that sometimes it is necessary to say the same thing in different ways—that is, to repeatedly draw attention to different dimensions of the problem—until the moment comes when the right kind of policy window opens and policy-makers are ready to hear your message.

C. Understand Your Place in the Process

As someone whose career is largely based on the production of knowledge, I hold research evidence in high regard. Before participating in LGBTQ2+ equality litigation, I found it puzzling and frustrating that producing rigorous research evidence was insufficient to produce policy change. Now, I appreciate that research evidence is but one piece of the very complex puzzle that is policy-making. While the research I produce can provide important support to an LGBTQ2+ equality case, through both drawing attention to the problem and offering policy solutions, what is needed for movement in the political stream are the stories of those directly affected by the issue at hand. Individuals' direct experiences of inequality are, and should be, the key factor that motivates decision-makers to change policies in ways that improve the lives of LGBTQ2+, and other socially marginalized, people. As a researcher, I can play an important role in documenting those experiences in situating them in their social, historical, and political context, and in giving them credibility in circles where certain voices are privileged over others. Still, this work is only effective in changing policy when it occurs alongside LGBTQ2+ individuals doing the difficult work of putting forward their personal stories for the purposes of litigation.

Participating in LGBTQ2+ equality litigation has been a great privilege for me. I am grateful for the opportunity to learn more about the policy-making process, and to see work I have done produce concrete change for communities I care about. I look forward to being ready when the next policy window.