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Same-Sex Marriage, Divorce and Families: Selected Recent Developments

Publication No. 2013-74-E
28 August 2013

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Parliamentary Information and Research Service

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(Background Paper)

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Ce document est également publié en français.

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SAME-SEX MARRIAGE, DIVORCE AND FAMILIES: SELECTED RECENT DEVELOPMENTS

1 INTRODUCTION

The first same-sex couple to be legally married in Canada recently celebrated their 10-year wedding anniversary.¹ Despite this milestone, it has not been entirely smooth sailing for same-sex couples and their families since the Supreme Court of Canada first ruled on equality rights in relation to sexual orientation – or even since Parliament passed legislation to make same-sex marriage legal throughout Canada.

This paper highlights some of the recent challenges and developments in this area of law, including adoption, assisted reproductive technologies and the recognition of parentage; the interplay between religious beliefs and civil marriages; and complications surrounding same-sex marriage and divorce when the relationship has spanned more than one country. First, however, some context is established through a review of the evolution of the Supreme Court's thinking with respect to same-sex families, and a discussion of the federal *Civil Marriage Act* and its demographic impact.

1.1 EVOLUTION IN THE SUPREME COURT OF CANADA'S APPROACH

Within a period of less than a decade, the Supreme Court of Canada moved from a position of support exclusively for families with opposite-sex parents to a position recognizing the rights of families parented by same-sex couples.

In 1995, the Supreme Court of Canada rendered its first decision on the topic of same-sex couples in *Egan v. Canada*.² *Egan* is a landmark decision for members of the lesbian, gay, bisexual, transgender and queer (LGBTQ) communities³ because it established sexual orientation as a prohibited ground of discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*;⁴ however, it was a disappointment to the claimants. The Supreme Court denied old age security benefits to a same-sex couple who had lived as partners since 1948. On the topic of families, Justice La Forest wrote:

Because of its importance, [heterosexual] legal marriage may properly be viewed as fundamental to the stability and well-being of the family and, as such ... Parliament may quite properly give special support to the institution of marriage ...

[Heterosexual couples represent the] social unit that uniquely has the *capacity* to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs. This is the only unit in society that expends resources to care for children on a routine and sustained basis.⁵ [emphasis in original]

At the time, some commentators advocating for equal rights for same-sex couples concluded that the "family law sphere ... was too crucial, too controversial, to be at the centre of change."⁶

Three years later in *M. v. H.*, the Supreme Court again considered a same-sex family law issue, specifically whether a woman could seek spousal support from the woman with whom she had been in a conjugal relationship, but this time the Court expressed a higher degree of acceptance of same-sex parents.⁷ The Court held that the heterosexual definition of the word “spouse” in Ontario’s *Family Law Act* violated section 15 of the Charter.⁸ In that decision, the majority rejected the argument that the heterosexual definition of spouse was “meant to protect children”:

An increasing percentage of children are being conceived and raised by lesbian and gay couples as a result of adoption, surrogacy and donor insemination. Although their numbers are still fairly small, it seems to me that the goal of protecting children cannot be but incompletely achieved by denying some children the benefits that flow from a spousal support award merely because their parents were in a same-sex relationship.⁹

By 2002, the Supreme Court appears to have adopted a position of full support for the equality rights of same-sex parents and their families. The Court rendered a decision on an appeal of a B.C. school board’s decision to decline to approve books for a kindergarten class that depicted many types of families, including families parented by same-sex couples.¹⁰ The Court did not consider the constitutionality of the board’s decision in substance, but rather whether the board acted in accordance with its statutory mandate. It held that the decision was unreasonable because it was inconsistent with the values set out in its enabling statute and referred the decision back to the board. In the majority decision, Chief Justice McLachlin quoted the lower court judge who had noted that families parented by same-sex couples “ought to be valued in the same way as other family models, [and] that they are peopled by caring, thoughtful, intelligent, loving people who do give the same warmth and love and respect that other families do.”¹¹

The Supreme Court’s focus in *Egan* and *M. v. H.* was on some of the issues related to conjugal relationships, such as spousal benefits and spousal support, not the constitutionality of same-sex marriage itself. Similarly, same-sex relationships were a side issue and not the core of the decision in the case on the B.C. school board’s teaching materials. The three decisions may, however, reflect an evolution in the Court’s perception of families parented by same-sex couples, perhaps foreshadowing its eventual response when asked to pronounce on the constitutionality of same-sex marriage.

1.2 THE SAME-SEX MARRIAGE REFERENCE AND THE *CIVIL MARRIAGE ACT*

In 2003, the federal government referred to the Supreme Court of Canada a series of questions about the constitutionality of proposed legislation that would extend the capacity to marry to persons of the same sex. In short, the Court confirmed in a unanimous 2004 ruling that such a change would be consistent with the Charter, noting in particular that the government’s legislative purpose – addressing the equality concerns of same-sex couples – flowed from the Charter, rather than violating it.¹²

Shortly after this, the federal government introduced legislation to create the *Civil Marriage Act*, as a result of which same-sex marriage has been legal throughout Canada since 2005.¹³ The preamble to the Act speaks of the constitutional guarantee of equality of all individuals, and states that “only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination.” The preamble goes on to say that marriage “is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians.”

Same-sex couples are increasingly taking part in this “fundamental institution.” Census data suggest that the number of same-sex married couples nearly tripled between 2006 and 2011.¹⁴ Of the 64,575 same-sex couple families reported in the 2011 Census, 21,015 were same-sex married couples. This represents a 32.5% share of all same-sex couples in 2011, nearly double the 16.5% of same-sex couples who were married in 2006.¹⁵ As well, nearly 10% of same-sex couples (married or common-law) in 2011 reported having children; nearly 80% of these couples were female.¹⁶

As already noted, however, the nationwide legalization of same-sex marriage did not resolve all legal challenges facing same-sex couples and families. The rest of this paper highlights some of these challenges and other recent developments.

2 FAMILIES PARENTED BY SAME-SEX COUPLES

Same-sex partners who choose to bring children into their families must rely on means other than the obvious one available to most opposite-sex couples. Although not all heterosexual couples are able to conceive without medical intervention, they have generally not had to face the complex social and legal barriers that same-sex couples face.¹⁷

In particular, while heterosexual couples may face “medical infertility” – medical challenges that impede or prevent conception – same-sex couples also generally face “social infertility” – their biology may not permit them to conceive without some sort of outside intervention.¹⁸ Options that help overcome these issues may now be available to same-sex couples as a result of legislation and judicial interpretation of legislation in light of section 15 of the Charter.

2.1 ADOPTION

Regulated by provincial and territorial legislation, adoption is a process through which an applicant gains the legal status of a parent for a child who is not his or her offspring. While there has not been a great deal of empirical study of same-sex parents’ adoption practices, existing studies suggest that these adoptions are becoming more common.¹⁹

Adoption may be particularly attractive to male couples who choose to build a family because they are less able to benefit from advances in assisted reproductive technologies than are families with at least one female partner.²⁰ Male couples may also be more likely to rely on the option of surrogacy, whereby a woman carries a

child to term but then relinquishes parental rights to another individual or couple at the child's birth. However, the option is not universally available across Canada. Quebec's *Civil Code* declares "absolutely null" any "agreement whereby a woman undertakes to procreate or carry a child for another person,"²¹ and the federal *Assisted Human Reproduction Act*, discussed below, prohibits compensation for surrogate mothers.²²

Although same-sex couples are legally entitled to adopt children in Canada, the literature suggests that significant challenges remain for same-sex partners who choose this method of building their family. First, same-sex partners may feel compelled to conceal their sexual orientation in international adoptions.²³ Second, even in Canada, same-sex parents report feeling subtle homophobia during the placement process, and sometimes outright rejection as potential parents because they fall "outside of the community norms."²⁴

While studies suggest that there is growing support for same-sex parenting among adoption agencies, it would appear that significant differences remain in support between urban and rural agencies, between Canadian and international agencies, and between agencies with and without religious or cultural affiliations.²⁵ A study on gay men's experiences with adoption in Quebec reported that, at an information session given at one of Montréal's two main placement agencies, prospective parents were told of a policy that "prioritizes hetero couples, then gay couples, and then single parents, man or woman."²⁶ Ontario's 2009 Expert Panel on Infertility and Adoption noted variability in policies across the province on placing children with same-sex families despite the finding that children's adjustment outcomes in same-sex families were similar to those of children placed with heterosexual couples.²⁷

2.2 ASSISTED REPRODUCTIVE TECHNOLOGIES

Assisted reproductive technologies (ART) allow some same-sex partners to conceive children with whom they have a biological connection. It would appear that many same-sex couples are seeking access to ART; data suggest that between 15% and 30% of clients of clinics providing ART in large urban centres such as Toronto are members of the LGBTQ communities.²⁸

In 2004, Parliament enacted the *Assisted Human Reproduction Act*, largely in response to the 1993 report of the Royal Commission on New Reproductive Technologies.²⁹ The report made note of significant barriers for same-sex couples, referring, for example, to a study in which 19 of 33 surveyed clinics that performed ART would deny services to women who identified as lesbian.³⁰ It noted that clinics at the time were receiving few applications from lesbians and speculated that this might be because they knew they would be denied services. The Act reflects some of these findings in its declaration that individuals seeking reproductive assistance must not face discrimination on the basis of their sexual orientation or their marital status.³¹ Despite the statutory declaration, however, there is some indication that same-sex couples still experience some challenges when seeking access to ART.

In 2009, Ontario's Expert Panel on Infertility and Adoption highlighted some of the challenges same-sex couples face when seeking ART. It noted that members of LGBTQ communities found that ART providers did not use gender-neutral language in their assessments or application documents, that brochures and posters depicted

only heterosexual couples, and that LGBTQ communities may face even greater barriers outside major urban centres.³² The panel suggested that framing ART providers as “assisted reproduction” clinics rather than “infertility” clinics was a more inclusive approach, as medical fertility issues are not always present with same-sex couples relying on ART. The panel noted, however, that LGBTQ couples with fertility problems may face barriers in obtaining diagnoses, as neither they nor their care providers expect to find such problems.³³

There may also be significant variation between provinces and territories in the regulation of ART. In 2010, the Supreme Court of Canada rendered its decision on a reference from Quebec on the constitutionality of many provisions of the *Assisted Human Reproduction Act*.³⁴ The Court declared that the more regulatory aspects of the Act fell within provincial jurisdiction. Parliament responded by amending the Act to repeal a large proportion of its provisions, including those related to the handling of human reproductive materials, licensing, and the establishment of a federal agency devoted to administering the Act and advising on ART.

Several provinces and territories have enacted legislation that explicitly addresses the parentage of children conceived through ART. In some provinces, this type of legislation is gender-specific. In Newfoundland and Labrador, for example, the *Children’s Law Act* contemplates children born through artificial insemination, but it uses terms such as “woman,” “father” and “man” and makes presumptions based on marriage and cohabitation.³⁵ Under provisions in B.C.’s *Family Law Act*, which came into force on 18 March 2013, parentage of children conceived through ART is discussed using gender-neutral language wherever possible, and referring to “persons” and “parents” and “marriage-like relationships.”³⁶ Since 2002, Quebec legislation has explicitly contemplated the possibility of same-sex relationships:

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.³⁷

2.3 RECOGNITION OF THREE PARENTS

Some LGBTQ individuals choose to raise their children recognizing multiple parents.³⁸ For example, in a 2007 case known as *A. A. v. B. B.*, two women in a same-sex relationship decided to have a child together and involve the biological father in the child’s life.³⁹ The two women, A. A. and C. C., sought the assistance of a male friend, B. B., to conceive a child. A. A. and C. C. planned to be the child’s primary caregivers, but wanted B. B. to play an important role in the child’s life. B. B. and C. C. were on the child’s birth certificate as his parents, and A. A. sought a court declaration that she was also the child’s mother.

The trial judge held that he did not have jurisdiction under the relevant legislation to name a third parent, although he noted that if he did have jurisdiction to do so, he would have added A. A. as a mother because to do so would be in the best interests of the child. The Ontario Court of Appeal agreed with the trial judge that the existing legislation did not permit the addition of a third parent. It found, however, that the Court’s *parens patriae* jurisdiction, which may be used to “bridge a legislative gap,” did permit the Court to make the declaration the parents were seeking.

Writing for the Court of Appeal, Justice Rosenberg cited a trial-level decision on a similar matter in which the 12-year-old daughter of a lesbian couple provided an affidavit to the court:

I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this – they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women. ...

It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.

Despite the Court of Appeal's finding that there is a legislative gap, the Ontario legislature has yet to address the situation.⁴⁰

In British Columbia, this situation is now contemplated in the 2013 amendments to the *Family Law Act*. Section 30 of the Act sets out provisions under the heading "Parentage if other arrangement" that permit multiple parents under circumstances that may be more common among same-sex couples. For example, if there is a written agreement before a child is conceived through ART that the intended parents will parent along with the birth mother, or that the birth mother and her partner will parent along with a donor, then the parties to the agreement will be established as parents on the birth of the child.

This type of legislation or court order is necessary to permit the legal acknowledgement of multiple parents because there are not currently any jurisdictions in Canada where a child may be adopted by more than two parents. Despite the recognition of a variety of family types in B.C.'s *Family Law Act*, the province's *Adoption Act*, while gender-neutral, limits parents to two adults: "A child may be placed for adoption with one adult or 2 adults jointly."⁴¹ Similarly in *A. A. v. B. B.* in Ontario, had the partner A. A. adopted C. C.'s daughter, she would have extinguished the father's rights as a parent.

A. A. v. B. B. may serve as a model for court-ordered declarations of parentage in other jurisdictions with restrictive legislation. In fact, the Alberta Court of Appeal recently upheld a lower court ruling in which a judge relied on *parens patriae* jurisdiction to recognize a child's second father who had been in a same-sex relationship with her biological father.⁴² The Alberta Court of Appeal held that the lower court judge appropriately exercised the Court's *parens patriae* jurisdiction because the fact that both fathers could not be recognized under the legislation in place at the time constituted a legislative gap and filling the gap was in the best interests of the child.

3 RELIGIOUS BELIEFS OF CIVIL MARRIAGE OFFICIALS

The scope of freedom of religion, as guaranteed by the Charter, has been a recurring theme during discussion of same-sex marriages.

The Supreme Court of Canada, in the reference that predated the *Civil Marriage Act*, stated that:

the guarantee of religious freedom in s. 2(a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.⁴³

The *Civil Marriage Act* affirms this aspect of religious freedom. The preamble states that nothing in the Act:

affects the guarantee of freedom of conscience and religion and, in particular, 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.

Similarly, section 3 of the Act “recognize[s] that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.”⁴⁴

Where the issue has arisen since the coming into force of the *Civil Marriage Act* is with respect to the religious beliefs of *civil* officials, or marriage commissioners.⁴⁵ In 2011, the Court of Appeal for Saskatchewan considered potential legislative amendments that would have allowed marriage commissioners appointed by the province to decline to solemnize a marriage if doing so would be contrary to their religious beliefs. Ultimately, the Court of Appeal held that such amendments would unconstitutionally violate the equality rights of gay and lesbian individuals.⁴⁶

The five members of the Court of Appeal issued two separate sets of reasons. The three-member majority highlighted that marriage commissioners appointed and registered under provincial law are the only way individuals who wish to be married in a non-religious ceremony can have their union solemnized. Since “many religions do not approve of same-sex marriages ... [m]any gay and lesbian couples will not have access to the institution of marriage unless they are able to call on a marriage commissioner to perform the required ceremony.”⁴⁷

The majority also noted the “very significant and genuinely offensive” impact of being told by a marriage commissioner that he or she would not solemnize a same-sex union:

It is not difficult for most people to imagine the personal hurt involved in a situation where an individual is told by a governmental officer “I won’t help you because you are black (or Asian or First Nations) but someone else will” or “I won’t help you because you are Jewish (or Muslim or Budd[h]ist) but someone else will.” Being told “I won’t help you because you are gay/lesbian but someone else will” is no different.⁴⁸

In addition, the majority stated that these amendments would undermine the “deeply entrenched and fundamentally important aspect of our system of government” by

which the state serves everyone equally, without distinction based on factors like race, religion or gender:

Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic. It would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis.⁴⁹

In a concurring judgment, two members of the Court of Appeal agreed with the majority that the proposed legislation was unconstitutional, for many of the same reasons but in arguably even stronger terms.

They noted the clear distinction in provincial law between religious marriages and non-religious civil marriages, “where the ceremony is expressly intended to carry no religious implications,” and held that the potential legislative amendments would undermine this distinction in that it would permit marriage commissioners to import their personal religious beliefs into what was necessarily intended to be a non-religious civil ceremony.⁵⁰

In addition, the two members stated that the proposed amendments would be both “extraordinary” and “unprecedented” as the only instance in provincial law that would operate notwithstanding the province’s human rights legislation:

Astonishingly, this clause would grant to a public official, charged with the delivery of a public service, an immunity to the anti-discrimination provisions of the *Code* not enjoyed by any other person in this Province. Moreover, in practice, it would deny to gays and lesbians the protection from discrimination that the *Code* provides to others. In the words of the Supreme Court’s decision in *Vriend* ... this clause would send “a strong and sinister message” that “gays and lesbians are less worthy of protection as individuals in Canada’s society.”⁵¹

Ultimately, all five members of the Court agreed that the potential legislative amendments would unjustifiably curtail equality rights, and that in this situation religious freedom must yield to the larger public interest.

4 SAME-SEX MARRIAGE AND DIVORCE SPANNING INTERNATIONAL BOUNDARIES

In addition to defining marriage, for civil purposes, as “the lawful union of two persons to the exclusion of all others,” the *Civil Marriage Act* amended a variety of existing federal statutes in order to “ensure equal access for same-sex couples to the civil effects of marriage and divorce.”⁵² For example, the definition of “spouse” in the *Divorce Act* was changed to mean “either of two persons who are married to each other,” rather than “either of a man or woman who are married to each other.”⁵³ As a result, Canadian couples nationwide were able to get married and divorced regardless of whether they were same-sex or opposite-sex couples.

The situation is not as clear-cut, however, when there are international elements to the marriage. By mid-2005, only four countries in the world had legalized same-sex marriage – the Netherlands, Belgium, Spain and Canada⁵⁴ – as a result of which some couples from countries where same-sex marriage was not legal travelled to Canada for the purpose of getting married. Because of the principles of private international law (also known as conflict of laws), a variety of questions have arisen in relation to these multi-jurisdictional marriages, often at the point when the couple attempts to obtain a divorce.

These questions include whether the marriage is valid, even in Canada, and whether a divorce could be granted to couples who married in Canada but do not meet the residency requirements for a Canadian divorce. Another important question is whether Canada should recognize as a marriage another form of union performed in a jurisdiction that does not allow same-sex marriage.

4.1 THE VALIDITY OF MARRIAGES OF NON-RESIDENTS AND THE POSSIBILITY OF DIVORCE

The issue of the validity under Canadian law of the marriage of a same-sex non-resident couple arose in early 2012, when two women who had married in Ontario in 2005 attempted to obtain a divorce from a Canadian court. The women resided in jurisdictions that did not recognize same-sex marriages (London, United Kingdom, and Florida, United States), so they sought to apply jointly for a divorce in Canada. Among other arguments, the women challenged the one-year residency requirement under Canada's *Divorce Act* as being unconstitutional because it operated to prevent them from obtaining a divorce anywhere – unlike same-sex couples residing in Canada (who could obtain a divorce in Canada) or opposite-sex couples residing in the United States or the United Kingdom (who could obtain a divorce in their home jurisdictions) – and therefore violated the equality guarantee found in section 15 of the Charter.⁵⁵

In response, the Attorney General of Canada defended the constitutionality of the one-year residency requirement under the *Divorce Act*, but also argued that, because of the principles of private international law, the women could not get divorced because they were not legally married, even in Canada:

In order for a marriage to be legally valid under Canadian law, the parties to the marriage must satisfy both the requirements of the law of the place where the marriage is celebrated (the *lex loci celebrationis*) with regard to the formal requirements, and the requirements of the law of domicile of the couple with regard to their legal capacity to marry one another.⁵⁶

In this case, neither party had the legal capacity to marry a person of the same sex under the laws of their respective domicile – Florida and the United Kingdom. As a result, their marriage is not legally valid under Canadian law.

Not being legally married to each other, the Joint Applicants are not “spouses” within the meaning of the *Divorce Act*, and the Court has no jurisdiction to grant them a divorce as it is not legally possible to end a marriage that was void *ab initio* [from the outset].⁵⁷

Subsequently, the federal government introduced Bill C-32, An Act to amend the Civil Marriage Act (otherwise known as the *Civil Marriage of Non-residents Act*), in February 2012. Bill C-32 validates, for the purposes of Canadian law, marriages that are performed in Canada and that would be valid if the spouses lived in Canada, and includes a provision that retroactively validates such marriages as well. It also creates a divorce procedure for non-residents who get married in Canada and are unable to divorce elsewhere because their own jurisdictions do not recognize the validity of the marriage.⁵⁸ Bill C-32 received Royal Assent on 26 June 2013, with the provisions relating to marriage taking effect immediately. The provisions relating to divorce took effect on 14 August.⁵⁹

4.2 THE RECOGNITION OF FOREIGN UNIONS AS MARRIAGES IN CANADA

The issue of whether a foreign “civil partnership” should be recognized in Canada as a marriage arose in the 2013 case of *Hincks v. Gallardo*.⁶⁰ Mr. Hincks, a dual citizen of Canada and the United Kingdom, and Mr. Gallardo, a dual citizen of Canada and Mexico, entered into a civil partnership in 2009 under the United Kingdom’s *Civil Partnership Act*. The *Civil Partnership Act* is described as creating – for same-sex but not opposite-sex partners – a “parallel regime that affords ... the same rights and responsibilities as civil marriage by virtue of a civil partnership.”⁶¹

The decision sets out much of the history of the relationship between Mr. Hincks and Mr. Gallardo including that, after the ceremony where vows and rings were exchanged, “they were no longer single persons, but became civil partners with virtually identical rights and responsibilities as those enjoyed by married persons in the UK.”⁶² The couple returned to Canada in January 2010, and the relationship ended in February 2011. According to the decision, Mr. Gallardo filed for divorce in February 2011, but later withdrew the application, and when, in March 2011, Mr. Hincks sought a divorce plus division of property and spousal support, Mr. Gallardo took the position that the parties were not married and so these remedies were not available.

In reaching a decision, the judge referred to private international law principles concerning the validity of a marriage, but her primary reasoning concerned section 15 of the Charter, the equality guarantee. In particular, she indicated that “the parties’ civil partnership is a ‘lawful union of two persons to the exclusion of all others,’ ” which “[a]t first blush ... falls into the definition of civil marriage under [Canadian law].”⁶³ The civil partnership was “a marriage in all but name,” she wrote, and the parties should not be penalized for not having married in the United Kingdom when that choice was not open to them:

The parties’ only choice in the UK was to enter into their civil partnership if they wished to change their legal status from single persons to another status that in all ways is functionally equivalent to marriage.⁶⁴

She then went on to address the argument that the couple could have married in Ontario on their return to Canada, since at that point the option of marriage would have been open to them. The “uncontradicted evidence” in the case, however, indicated that Mr. Hincks had asked local officials about the possibility of getting

married and “was told there was no need, because as civil partners, he and Mr. Gallardo were considered already married.”⁶⁵ As well, the judge noted:

Mr. Gallardo must have considered the parties married as well, at least in February of 2011. After all, it was he who first commenced divorce proceedings in Ontario, although he later discontinued them.⁶⁶

The judge summarized her reasoning as follows:

The parties entered into a civil partnership in the UK. They could not choose to get married in the UK because that country does not permit same sex couples to marry. That policy position runs contrary to Canadian public policy because Canadian law finds discrimination on the basis of sexual orientation prohibited under the *Charter*. Canadian law specifically holds that only equal access to marriage for civil purposes would respect same sex couples’ right to equality without discrimination. Canadian law specifically holds that a civil union, as an institution other than marriage, would not offer same sex couples that equal access and would violate their human dignity, in breach of the *Charter*.

Failing to recognize this UK civil partnership as a marriage would perpetuate impermissible discrimination, primarily because in the UK these parties could not marry because of their sexual orientation, but had to enter into a civil partnership instead.

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.⁶⁷

The judge declared the civil partnership entered into by the parties in the United Kingdom to be a marriage under the Canadian *Civil Marriage Act*. This decision is currently under appeal.⁶⁸

5 CONCLUSION

In recent years, the law governing same-sex couples and their families has evolved significantly from a viewpoint that prioritized the heterosexual nuclear family, through the recognition of certain rights to financial benefits for same-sex partners, to a focus on the equality rights of the same-sex partners themselves. Certain challenges remain, however, including differential treatment that persists in starting families in Canada and legal complications that can arise when the relationship also spans one or more foreign jurisdictions.

NOTES

1. See, for example, Emily Senger, "[Michael and Michael celebrate 10 years of legalized same-sex marriage in Canada](#)," *Maclean's*, 10 June 2013. Note that this marriage took place after the Court of Appeal for Ontario's landmark ruling in *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.), and so it predates federal legislation on same-sex marriage.
2. *Egan v. Canada*, [1995] 2 S.C.R. 513.
3. Different individuals and groups may use slight variations on the term "LGBTQ." For example, the T may refer to people who identify as transgender, transsexual or two-spirited, and the Q may refer to people who identify as queer or questioning.
4. Section 15(1) of the *Canadian Charter of Rights and Freedoms* states:

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.
5. *Egan*, pp. 536–537.
6. Martha A. McCarthy and Joanna L. Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course," *Canadian Journal of Family Law*, Vol. 15, No. 2, 1998.
7. *M. v. H.*, [1999] 2 S.C.R. 3.
8. *Family Law Act*, R.S.O. 1990, c. F.3. The impugned provision was section 29 of the Act, which has since been amended to reflect a gender-neutral definition of the word "spouse."
9. *M. v. H.*, para. 114.
10. *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710.
11. *Ibid.*, para. 68.
12. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, para. 43.
13. *Civil Marriage Act*, S.C. 2005, c. 33. For background and legislative history, see *Bill C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes*, 1st Session, 38th Parliament. See also Mary C. Hurley, *Bill C-38, The Civil Marriage Act*, Legislative Summary, LS-502E, 14 September 2005. The operative section states that marriage, for civil purposes, "is the lawful union of two persons to the exclusion of all others."
14. Statistics Canada, Table 3, "[Distribution \(number and percentage\) and percentage change of couple families by opposite-sex or same-sex status, Canada, 2001 to 2011](#)," *Portrait of Families and Living Arrangements in Canada*, Catalogue no. 98-312-X2011001, September 2012.
15. Statistics Canada, *Portrait of Families and Living Arrangements in Canada*, September 2012.
16. Statistics Canada, "[Conjugal Status \(3\), Opposite/Same-sex Status \(5\) and Presence of Children \(5\) for the Couple Census Families in Private Households of Canada, Provinces, Territories and Census Metropolitan Areas, 2011 Census](#)," *Families, households and marital status*, Catalogue no. 98-312-XCB2011046, 19 September 2012.
17. For a review of some of the challenges that lesbian parents have faced, see Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood*, UBC Press, Vancouver, 2011.

18. Stefanie Carsley, "Funding In Vitro Fertilization: Exploring the Health and Justice Implications of Quebec's Policy," *Health Law Review*, Vol. 20, No. 3, 2012.
19. Malcolm Dort, "Unheard Voices: Adoption Narratives of Same-Sex Male Couples," *Canadian Journal of Family Law*, Vol. 26, No. 2, 2010.
20. Ibid.
21. [Civil Code of Québec](#), Chapter I.1, "Filiation of Children Born of Assisted Procreation," 2002, c. 6, s. 30, art. 541.
22. [Assisted Human Reproduction Act](#), S.C. 2004, c. 2, s. 6(1).
23. Lori Ross et al., "Lesbian and queer mothers navigating the adoption system: The impacts on mental health," *Health Sociology Review*, Vol. 17, No. 3, 2008.
24. Ibid., p. 260.
25. Lori Ross et al., "Policy and Practice Regarding Adoption by Sexual and Gender Minority People in Ontario," *Canadian Public Policy*, Vol. 35, No. 4, December 2009.
26. Dort (2010), para. 40.
27. Expert Panel on Infertility and Adoption, [Raising Expectations: Recommendations of the Expert Panel on Infertility and Adoption](#), Toronto, Summer 2009.
28. See Rachel Epstein, [The Assisted Human Reproduction Act and LGBTQ Communities](#), March 2008; LGBTQ Parenting Network, [Meeting the Assisted Human Reproduction \(AHR\) Needs of Lesbian, Gay, Bisexual, Trans and Queer \(LGBTQ\) People in Canada: A Fact Sheet for AHR Service Providers](#), 2012.
29. For more information, see Monique Hébert, Nancy Miller Chenier and Sonya Norris, [Bill C-6: Assisted Human Reproduction Act](#), Publication no. LS-466E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 17 February 2004.
30. Royal Commission on New Reproductive Technologies, *Proceed with Care*, Final Report, Ottawa, 1993, p. 454.
31. *Assisted Human Reproduction Act*, s. 2(e).
32. Expert Panel on Infertility and Adoption, p. 133.
33. Ibid., p. B-9.
34. [Reference re Assisted Human Reproduction Act](#), [2010] 3 S.C.R. 457.
35. [Children's Law Act](#), R.S.N.L. 1990, c. C-13, s. 12.
36. [Family Law Act](#), S.B.C. 2011, c. 25.
37. *Civil Code of Québec* (2002), art. 539.1.
38. See, for example, Barbara Findlay and Zara Suleman, [Baby Steps: Assisted Reproductive Technology and the B.C. Family Law Act](#), Continuing Legal Education Society of British Columbia, January 2013.
39. [A. A. v. B. B.](#), 2007 ONCA 2. None of the parties appealed, and the Supreme Court of Canada dismissed an application by the Alliance for Marriage and the Family to be added as a party in order to seek leave to appeal ([Alliance for Marriage and Family v. A. A.](#), [2007] 3 S.C.R. 124).

40. A media report suggests that this legislative gap may be relevant to parents for reasons beyond the recognition of three parents. A lesbian couple in Ottawa reportedly sought legal assistance to petition Service Ontario to recognize both women as biological mothers of their child. One of the women acted as the egg donor, and the other woman carried the child to term. The article indicates that Service Ontario has agreed to comply with the request: Meghan Hurley, "Female partners to be recognized as biological and genetic mothers of their newborn son," *Ottawa Citizen*, 19 July 2013.
41. [Adoption Act](#), R.S.B.C. 1996, c. 5, s. 5(1).
42. The lower court decision is [D. W. H. v. D. J. R.](#), 2011 ABQB 608, and the Court of Appeal decision is [D. W. H. v. D. J. R.](#), 2013 ABCA 240.
43. [Reference re Same-Sex Marriage](#), para. 60. Section 2(a) of the Charter states that "Everyone has the following fundamental freedoms: ... freedom of conscience and religion."
44. Note, however, the discussion in the *Reference re Same-Sex Marriage* decision that such statements are merely declaratory, since exemptions relating to who is required to perform a marriage fall within provincial jurisdiction over "The Solemnization of Marriage in the Province" (section 92(12) of the [Constitution Act, 1867](#)) rather than federal jurisdiction over "Marriage and Divorce" (s. 91(26)).
45. For a more in-depth discussion, see Bruce MacDougall et al, "[Conscientious Objection to Creating Same-Sex Unions: An International Analysis](#)," *Canadian Journal of Human Rights*, Vol. 1, No. 1, 2012.
46. [Marriage Commissioners Appointed Under The Marriage Act \(Re\)](#), 2011 SKCA 3.
47. *Ibid.*, para. 10.
48. *Ibid.*, para. 41.
49. *Ibid.*, paras. 97 and 98.
50. *Ibid.*, para. 141.
51. *Ibid.*, paras. 157 and 158; [Vriend v. Alberta](#), [1998] 1 S.C.R. 493.
52. See the summary included in [Bill C-38, An Act respecting certain aspects of legal capacity for marriage for civil purposes](#), 1st Session, 38th Parliament.
53. [Divorce Act](#), R.S.C., 1985, c. 3 (2nd Supp.), s. 2.
54. As noted in Statistics Canada, [Portrait of Families and Living Arrangements in Canada](#), 9 January 2013, same-sex marriage is now also legal in South Africa, Norway, Sweden, Portugal, Iceland, Argentina and Denmark, and in some jurisdictions in the United States and Mexico. Since then, New Zealand, France, Uruguay, and England and Wales have all passed legislation to legalize same-sex marriage. For more information about other jurisdictions, including the recent court rulings in Brazil and the United States, see "[The Freedom to Marry Internationally](#)," *Freedom to Marry*.
55. [Application for Divorce of V. M. and L. W.](#), as made available in Janyce McGregor, "[Same-sex divorce options explored by Harper government](#)," *CBC News*, 12 January 2012.
56. "Formal validity" relates to the formalities surrounding the marriage ceremony, including whether a religious ceremony is necessary or sufficient, and whether parental consent is required. Capacity and consent to marry are questions of "essential validity." See Janet Walker and Jean Gabriel Castel, *Canadian Conflict of Laws*, 6th ed., LexisNexis Canada Inc., 2005, chapter 16.
57. [Answer of the Attorney General of Canada to the Application for Divorce of V. M. and L. W.](#), paras. 4–6, as made available in McGregor (2012).

58. [Bill C-32: An Act to amend the Civil Marriage Act](#), 1st Session, 41st Parliament. For more discussion of Bill C-32, see Cynthia Kirkby, [Legislative Summary of Bill C-32: An Act to Amend the Civil Marriage Act](#), Publication no. 41-1-C32-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 9 March 2012. For further discussion, see Jean Gabriel Castel and Matthew E. Castel, “The Marriage and Divorce in Canada of Non-Domiciled and Non-Resident Persons,” *Canadian Family Law Quarterly*, Vol. 31, No. 3, 2012; and 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),” *Canadian Family Law Quarterly*, Vol. 32, No. 1, 2013.
59. [Order Fixing August 14, 2013 as the Day on which Section 4 of the Act Comes into Force](#), SI/2013-93.
60. [Hincks v. Gallardo](#), 2013 ONSC 129.
61. *Ibid.*, para. 3.
62. *Ibid.*, para. 5.
63. *Ibid.*, para. 37.
64. *Ibid.*, paras. 41 and 51.
65. *Ibid.*, para. 56.
66. *Ibid.*, para. 58.
67. *Ibid.*, paras. 81–84.
68. See Senate, Standing Committee on Legal and Constitutional Affairs, [Evidence](#), 1st Session, 41st Parliament, 20 June 2013 (Ms. Lisa Hitch, Senior Counsel, Family, Children and Youth Section, Justice Canada).