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THE WIDENING CONCEPT OF “PARENT” IN CANADA: STEP-PARENTS, SAME-SEX PARTNERS, & PARENTS BY ART

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INTRODUCTION—THE EVOLVING CONCEPT OF THE “FAMILY” IN CANADA

The social and legal concepts of “the family” in Canada have changed dramatically over the past half century. While opposite-sex married couples with children remain the most common family form, the 2006 Census revealed that these families are no longer the majority.¹ The divorce rate has risen dramatically over the past several decades, with more than one in three marriages now ending in divorce.² Consequently, single-parent families, blended families, and step-families are now common, and there has been a substantial increase in the number of lone-parent families, though most (approximately 80%) remain headed by women.³ Also, the number of unmarried opposite-sex couples has been growing rapidly, rising from about 6% of all Census families in 1981 to 16% in 2006, and Canada now gives extensive legal recognition to non-marital cohabitation.⁴ Finally, over the past two decades there has been increasing legal and social acceptance of same-sex relationships. As a result of litigation in the late 1990s under section 15 of the Canadian Charter of Rights and Freedoms (the equality rights provision),⁵ the federal Parliament and provincial legislatures enacted legislation to recognize same-sex relationships as similar to non-marital opposite-sex relationships, and in 2005, Canada became the third country in the world to legalize same-sex marriage. About one in six of the same-sex couples identified in the 2006 Census were married, with the rest living in non-marital relationships.⁶

Like “family” and “spouse,” the concept of “parenthood” has also been

1. See THE VANIER INST. OF THE FAMILY, *FAMILIES COUNT: PROFILING CANADA’S FAMILIES IV 26* (2010) [hereinafter VANIER] (according to the 1981 Census, 55% of all census families in Canada were married-couple families with children, but this number dropped below the 50% mark in 1991 and fell again to 38.7% of all families in 2006, with the result that this family type is “now less than the majority in all provinces and territories”).

2. *Id.* at 44.

3. *Id.* at 26.

4. See, e.g., *Kerr v. Baranow*, [2011] 1 S.C.R. 269, 279 (Can.) (reviewing and consolidating jurisprudence from the previous three decades that recognizes that property claims must be protected if parties have cohabited and have undertaken a “joint family venture”). Every Canadian jurisdiction except Quebec has legislation which recognizes “spousal support” rights of unmarried partners. In *Droit de la famille 102866*, [2010] Q.A.C. 1978, para. 169 (Can. Que. C.A.), the Quebec Court of Appeal held that the failure to enact such legislation in Quebec was a violation of section 15 of the Canadian Charter of Rights and Freedoms. The Supreme Court heard the appeal in this case on January 18, 2012.

5. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

6. See VANIER, *supra* note 1, at 26; see also 2006 Census: Family Portrait: Continuity and Change in Canadian Families and Households in 2006: National Portrait: Census Families, STATISTICS CANADA (Nov. 20, 2009) <http://www12.statcan.ca/census-recensement/2006/as-sa/97-553/p4-eng.cfm> (reporting that 16.2% of same-sex married couples had children and 7.5% of same-sex non-marital cohabitants had children).

transformed. In the latter part of the twentieth century, the legal concept of “illegitimacy” was abolished and Canada gave legal recognition to psychological parents, beginning with step-parents in traditional opposite-sex marriages. More recently, the concept of parenthood has been broadened to reflect the surge in the use of assisted reproductive technologies (ARTs) by both homosexual and heterosexual couples to conceive children.⁷ It is this changing definition of “parent” in Canada—with a particular focus on some of the issues raised by ARTs—that is the subject of this Article.

Our central theme is that, consistent with the relatively expansive concept of “spouse,” in comparison to many other countries, Canadian legislatures and courts have developed a relatively broad and child-focused approach to the concept of “parent,” one that recognizes the importance of social and psychological parents and now includes the same-sex partners of lesbian biological mothers. However, Canadian law has not fully kept pace with technological and social change, and there is a need for statutory reform to better address the issues that are raised by the growing use and sophistication of ARTs.⁸ Many questions related to ARTs have been left for judges to resolve, or for lawyers to attempt to provide advice to clients, in the absence of clear legislation or binding precedent. Further, present laws significantly restrict the use of surrogacy agreements and payments to gamete donors; while facially neutral, these laws have a disproportionate impact on same-sex partners, especially lesbians.

This Article surveys some of the salient issues and controversies related to the establishment of parent-child relationships in Canada, with a particular focus on questions related to ARTs and same-sex parenting. Given the complexity of these issues as well as space limitations, this Article does not provide a detailed review of all of the relevant Canadian

7. See *Introduction to Assisted Human Reproduction (AHR)*, HEALTH CANADA (Feb. 1, 2008), <http://www.hc-sc.gc.ca/hl-vs/reprod/hc-sc/index-eng.php> (estimating that up to one in eight Canadian couples experience infertility).

8. See Susan B. Boyd, *Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility*, 25 WINDSOR Y.B. ACCESS JUST. 63, 67 (2007); see also *Pratten v. British Columbia*, [2011] B.C.S.C. 656, para. 330 (Can. B.C. Sup. Ct.) (illustrating the law’s failure to keep pace with the new social realities created as a result of the increasing use of ARTs, where a woman who had been conceived using sperm from an anonymous donor successfully challenged various provisions of the provincial adoption legislation and its associated regulations). The court found that the impugned sections contravened section 15 of the Canadian Charter of Rights and Freedoms since they mandated that information regarding the family history and origins of adopted children be recorded and preserved, but did not extend these same rights to donor offspring. *Pratten*, [2011] B.C.S.C. 656, para. 330. The British Columbia Supreme Court also granted a permanent injunction to prevent the disposal or destruction of Gamete Donor Records in the province. *Id.* For further discussion of the issue of de-anonymization of sperm donors in Canada, see Angela Cameron, Vanessa Gruben & Fiona Kelly, *De-Anonymising Sperm Donors in Canada: Some Doubts and Directions*, 26 CAN. J. FAM. L. 95 (2010).

case law and statutes, but rather, identifies central themes and discusses particular jurisprudence and legislation that may serve as useful precedents for other countries.

Part I of this Article examines the traditional legal bases for establishing legal parentage, beginning with the historical legal presumptions which privileged “biology and marriage when ordering and sanctioning relationships.”⁹ Some of the current provincial legislation continues to rely on these presumptions, and thus does not adequately address the new familial models that arise out of reproductive technologies. Part I of the Article also considers the expansion of the definition of “parenthood” in Canada through the concepts of “standing in the place of a parent” and adoption, with a particular focus on the applicability of these concepts to cases where children are conceived by ARTs.¹⁰ Part II reviews the Canadian legislation that has been enacted to address issues related to ARTs, as well as the case law which has interpreted or constitutionally challenged some of that legislation. As we discuss, Quebec has Canada’s most comprehensive statutory regime, allowing for the use of informal agreements to facilitate a “parental project” involving ARTs, while Alberta has recently enacted a progressive statutory regime which explicitly gives parental status to same-sex partners if children are conceived by the use of ARTs. Part III examines Canadian cases where courts have had to address ART issues without a relevant legislative framework. Where the provincial governments have been slow to act, the courts have not infrequently filled the gap by taking child-focused approaches that recognize the equality of same-sex and opposite-sex partnerships, and have affirmed the possibility of a child having two lesbian mothers and a biological father identified on the child’s birth certificate.

The final section of the Article considers the desirability of change in the legal regulation and accessibility of ARTs in Canada. We argue that there is a clear need for better legislative direction, including clear statutory recognition of same-sex parental partnerships and surrogacy agreements. In order to provide greater certainty and to promote the welfare of children, Canadian jurisdictions need statutory reform to better address the issues being raised by the growing use of ARTs. For instance, the 2010 British Columbia discussion paper on family law reform provides a useful set of recommendations for that province and elsewhere.¹¹ We maintain that

9. Roxanne Mykitiuk, *Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies*, 39 OSGOODE HALL L.J. 771, 774 (2001).

10. See Nicholas Bala, *Who is a ‘Parent?’ ‘Standing in the Place of a Parent’ and Section 5 of the Child Support Guidelines*, in SPECIAL LECTURES 2006: FAMILY LAW 71, 76 (The Law Society of Upper Canada ed., 2007).

11. B.C., MINISTRY OF ATTORNEY GEN., JUSTICE SERV. BRANCH, CIVIL POLICY AND LEGISLATION OFFICE, WHITE PAPER ON FAMILY RELATIONS ACT REFORM: PROPOSALS

there must also be improved access to ARTs, by removing the prohibitions on payments for gamete and embryo donation in the federal Assisted Human Reproduction Act,¹² and greater support for access to ARTs under provincial health care plans.

By way of introduction, it is useful to briefly mention the complex division of constitutional responsibility for family law issues in Canada. The provinces have primary jurisdiction over most issues related to civil status, including family law and the definition of “parent.” However, pursuant to the Constitution Act, 1867,¹³ the federal Parliament has the exclusive jurisdiction to make laws in relation to “marriage and divorce,” including corollary relief provisions for support and custody under the Divorce Act.¹⁴ Further, the federal government has exclusive jurisdiction over criminal law, which includes the authority to restrict or prohibit a range of practices related to ARTs and surrogacy.

I. TRADITIONAL BASES FOR PARENTHOOD IN CANADA

A. *Historical Presumptions of Parentage Based on Birth and Marriage*

Historically, it was presumed that “the act of giving birth necessarily resulted in motherhood.”¹⁵ Prior to the development in the late twentieth century of highly reliable DNA testing, paternity could not be as easily—or conclusively—established as motherhood. As a result, the law developed a set of presumptions to assign biological fatherhood. These rules were premised on two ideas: first, that the “biological father of a child . . . [was] most likely the man having sexual intercourse with the mother” at the time of conception, and second, that “the man most likely to be having sexual intercourse with the mother . . . [was] her husband.”¹⁶ Paternity was thus largely determined according to a man’s relationship with the mother of the child: if he was her husband, he was presumed to be the father of her child. Though this presumption was rebuttable, prior to the advent of DNA testing, it was very difficult for a married man to overcome in the absence of any evidence that he had no sexual access to his wife around the likely

FOR A NEW FAMILY LAW ACT (2010). As discussed below, these proposals were reflected in the Family Law Act, S.B.C. 2011, c. 25 (Can.), which has been enacted but not proclaimed in force. *See infra* p. 558.

12. Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.).

13. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 § 91 (Can.).

14. Divorce Act, R.S.C. 1985, c. 3 (2d Supp.) (Can.).

15. Mykitiuk, *supra* note 9, at 778.

16. Fiona Kelly, *Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family*, 21 CAN. J. WOMEN & L. 315, 318 (2009) [hereinafter Kelly, *Producing Paternity*].

time of conception.¹⁷ If a child was born out of wedlock, there was historically no presumption of paternity.

B. Standing in the Place of a Parent—Recognizing Psychological Parenthood

For very limited purposes, such as allowing a survivor to make a tort claim, the common law recognized circumstances in which a legal parent-child relationship could be found to exist based on the assumption of a parental role. In other words, in very specific cases, the common law accepted that a person could be found to be standing *in loco parentis* (Latin for “in the place of a parent”) vis-à-vis a child. This legal recognition of psychological parenthood was considerably extended in Canada in the 1968 Divorce Act, where for purposes of post-separation child support, custody, and access, a “child of the marriage” was defined to include a child for whom a spouse had stood *in loco parentis*.¹⁸ Starting in the 1970s, Canadian courts also began to adopt a “best interests of the child” approach to custody law, allowing persons who had cared for a child for a significant period of time and whom the child had come to regard as parental figures—psychological parents—to have custody of the child in cases where an absent biological parent sought to regain custody of the child.¹⁹ When a new Divorce Act²⁰ was enacted in 1985, the Latin terminology was replaced, with subsection 2(2) now specifying that a “child of the marriage” refers to a child for whom a spouse “stands in the place of a parent.”²¹ Provincial legislation that recognizes the legal concept of psychological parenthood for such purposes as child support and dependents’ relief claims after death has also been enacted.²²

The Canadian courts have adopted a multi-factor approach to the determination of whether a person has “stood in the place of a parent.” The provision of economic support is necessary, but not sufficient; there must also be a significant degree of care provided, as evidenced by such conduct as “parent-like” participation in recreational, social, and familial activities,

17. Angela Campbell, *Conceiving Parents Through Law*, 21 INT’L J.L. POL’Y & FAM. 242, 250 (2007).

18. Divorce Act, S.C. 1968, c. 24 (Can.).

19. See, e.g., *Moore v. Feldstein*, [1973] 3 O.R. 921 (Can. Ont. C.A.); *King v. Low*, [1985] 1 S.C.R. 87 (Can.) (demonstrating that in terms of affording rights of custody and access to psychological parents, Canada has taken a child-focused approach).

20. Divorce Act, R.S.C. 1985, c. 3 (2d Supp.) § 2(2) (Can.).

21. See Bala, *supra* note 10, at 76 (noting that this new language has taken on a “considerably broader meaning” than its Latin antecedent and, consequently, social parents in Canada have been accorded “broader rights and obligations than in any other country in the world”).

22. See *id.*

as well as the provision of nurturance, discipline, or direction. The nature or existence of the child’s relationship with the absent biological parent is also a relevant factor. Once the relationship of standing in the place of a parent has been established, it cannot be terminated by the unilateral acts or attitudes of the step-parent after separation.²³

A finding that a psychological parent has “stood in the place of a parent” may result in a child having three (or more) persons with significant parental rights and obligations. While Canada’s Child Support Guidelines (Guidelines) make clear that the child support obligations of a psychological parent may be reduced if the biological parents are able to adequately support the child, it is not uncommon after having divorced from the biological parent for a step-parent—especially a step-father—to be liable for the full amount of support under the Guidelines.²⁴ Almost all of the reported cases which have determined whether or not a person “stood in the place of a parent” have involved opposite-sex partners, typically with a step-father arguing that he did not have a child support obligation after separation. However, despite its prevalence in the cases of heterosexual families, the concept is also significant for same-sex partners. For example, by the mid-1990s, it was accepted that after separation, the lesbian partner of a child’s biological mother could have “parental” rights and support obligations.²⁵

The 2007 Alberta case of *H. (D.W.) v. R. (D.J.)* is illustrative of the recent cases involving children conceived by ARTs to same-sex partners and the significance given to the legal status of psychological parents.²⁶ Two men who had been involved in a long-term relationship decided to have children with a lesbian couple.²⁷ It was agreed amongst the four of them that one of the women would be impregnated with the sperm of one of the men, and that a child would be conceived for each couple. The first baby was given to the biological father and his partner and was raised in their household.²⁸ Thereafter, the men had primary custody of the child, though the biological mother enjoyed regular visits.²⁹ When the biological

23. *E.g.*, *Chartier v. Chartier*, [1999] 1 S.C.R. 242 (Can.).

24. Federal Child Support Guidelines, SOR/1997-175, § 5 (Can.).

25. *See* *Buist v. Greaves*, [1997] O.J. No. 2646, para. 27 (Can. Ont. Ct. J.) (QL) (ordering the non-biological mother to pay spousal support).

26. *D.W.H. v. D.J.R.*, 2007 ABCA 57, para. 16 (Can. Alta. C.A.); *see also* *D.W.H. v. D.J.R.*, 2009 ABQB 438, para. 107 (Can. Alta. Q.B.) (affirming the appellant’s application for access); *D.W.H. v. D.J.R.*, 2011 ABQB 608, para. 1 (Can. Alta. Q.B.) (invoking section 15 of the Charter to grant the partner of the biological father the status of a “parent”). As of August 2011, the Alberta legislation was amended to deal with this type of situation in a more child-focused way, but that legislation was not retroactive; hence, this litigation occurred.

27. *D.W.H.*, 2007 ABCA. 57, at para. 3.

28. *Id.*

29. *Id.* at para. 4.

father and his partner eventually separated, the biological parents refused to allow him to see the child.³⁰ The former partner of the biological father made an application for access, but the chambers judge refused to make the order, giving effect to the wishes of the biological parents.³¹ The Alberta Court of Appeal reversed the lower court's decision on the basis that it gave insufficient weight to the role of the former partner in the child's life; indeed, the Court noted that he had helped plan the conception, prepared the home for the child's birth, was present in the delivery room, and after the child was born had participated in her care for three years.³² The Court also found much evidence to indicate that he had "stood in the place of a parent"—he had been in a relationship of some permanence with the biological father at the time of the child's birth and throughout most of her life, and his actions had demonstrated a settled intention to act as a parent.³³ The former partner's HIV-positive status and his alleged poor choices in his intimate relationships were not sufficient to conclude that his continued relationship with the child was contrary to her best interests and thus, were not enough to defeat his claim for access.³⁴

C. Modern Statutory Presumptions of Paternity

Historically, children born out of wedlock in Canada—"illegitimate children"—were subject to many forms of social and legal discrimination, such as restrictions on their right to inherit property from their fathers. In the 1970s and early 1980s, legislation and Charter-based litigation resulted in the abolition of the concept of "illegitimacy" in Canadian law.³⁵ Children are thus now entitled to the same legal treatment regardless of whether their parents are married, cohabiting, living separate or never cohabited. However, for the purposes of establishing a parent-child relationship, the historical presumptions of maternity and paternity,³⁶

30. *Id.* at para. 6.

31. *See id.*

32. *Id.* at para. 18.

33. *Id.*

34. *Id.* at para. 19.

35. *See, e.g.,* SHEILA KIERAN, *Farewell Filius Nullius*, in *THE FAMILY MATTERS: TWO CENTURIES OF FAMILY LAW AND LIFE IN ONTARIO* 131, 139 (1986).

36. For example, section 4 of the Nova Scotia Birth Registration Regulations provides that "a woman who gives birth to a child must be recorded as the mother of the child." *See* Birth Registration Regulations, N.S. Reg. 390/2007, § 4 (Can.). The presumptions related to paternity feature more frequently in the enabling legislation. *See, e.g.,* Family Relations Act, R.S.B.C. 1996, c. 128, § 95 (Can.); Family Law Act, S.A. 2003, c. F-4.5, § 8(1) (Can.); Children's Law Act, S.S. 1997, c. C-8.2, § 45(1) (Can.); Family Maintenance Act, S.M. c. F20, § 23 (Can.); Children's Law Reform Act, R.S.O. 1990, c. C.12, § 8 (Can.); Civil Code of Quebec, S.Q. 1991, c. 64, art. 525 (Can.); Family Services Act, S.N.B. 1980, c. F-2.2, § 103(1) (Can.); Child Status Act, R.S.P.E.I. 1988, c. C-6, § 9(4) (Can.); Children's Law Act, R.S.N.L. 1990, c. C-13, § 10(1) (Can.); Children's Act, R.S.Y. 2002, c. 31, § 12(1) (Can.).

modified to take account of non-marital cohabitation, have been incorporated in some form into most provincial family law and birth registration statutes. For example, in Ontario, the Children’s Law Reform Act provides that a “male person” is presumed to be the “father” of a child where:

- he was married to the mother of the child at the time of birth;
- he was married to the mother of the child but the marriage was terminated within 300 days before the birth of the child by reason of death, nullity or divorce;
- he married the mother of the child following the child’s birth and acknowledged that he is the child’s natural father;
- he was cohabitating with the mother of the child “in a relationship of some permanence” at the time the child was born, or the child was born within 300 days after the parties had ceased cohabitation;
- he has certified the child’s birth, as the child’s father, under the Vital Statistics Act or equivalent legislation in another jurisdiction; or,
- he was found by a “court of competent jurisdiction in Canada” to be the child’s father.³⁷

While these presumptions do serve some social and legal functions, the increased use of ARTs and the legalization of same-sex relationships mean that “presumptions about parenthood can no longer be drawn from the facts of either birth or marriage.”³⁸ Further, the development of DNA testing has meant that a particular man’s biological paternity can now be proved—or disproved—with a high degree of certainty, rendering “presumptions” of paternity less significant.

With regards to motherhood, a woman who gives birth to a child should not irrefutably be accepted as the child’s mother, since artificial reproduction has enabled the distribution of the “female biological contribution among several women”,³⁹ indeed, a child may have separate genetic, gestational, and child-rearing mothers. In ART cases, the historical presumption that assigns motherhood based solely on the fact of having given birth may thus run contrary to the parties’ stated intentions in arranging for conception, potentially burdening one woman with responsibilities that she had not contemplated and denying another the parental rights she had expected to receive.

The statutory presumptions of paternity can create difficulties for families who have children through assisted reproduction. Consider the situation of a lesbian couple who has conceived a child by means of

37. Children’s Law Reform Act, R.S.O. 1990, c. 12, § 8(1) (Can.).

38. Boyd, *supra* note 8, at 66.

39. Mykitiuk, *supra* note 9, at 793.

artificial insemination. Although the women may have intended that the non-biological partner be a co-parent to the child, the traditional presumptions of paternity, unmodified in some of the current provincial legislation, make no allowance for a woman's female partner; rather, the text of the provisions generally refer to "a male person" as being the child's other parent or "father." The lack of gender-neutral language denies a woman's same-sex spouse the right to be regarded as a co-parent to the child she helped plan and, indeed, meant to parent. Thus, the traditional assumptions related to paternity offer such lesbian couples who are attempting to start a family no basis on which "to establish a bond of filiation between [the non-biological mother] and the child."⁴⁰

As will be discussed in more detail below, Canadian legislation and jurisprudence have begun to address some of the issues that arise from ARTs. It should be noted that the partner of a biological parent who is not within the statutory definition of "parent" can still claim significant rights as a parent by "standing in the place of a parent." Thus, in the case of a lesbian family, although the child will already have a biological mother and father (perhaps a known sperm donor), if the mother's same-sex partner has assumed a parental role by financially supporting and caring for the child, she may well be found to be "standing in the place of a parent." Although this would not give her full parental rights, were she to separate from her partner she might be able to gain custody of or access to the child.⁴¹ Using this approach, however, is not wholly satisfactory: relegating one intended parent to a "parent-like status" rather than a fully recognized legal status of parent may be considered unacceptable for partners who have together embarked on the journey to parenthood even before conception.⁴²

D. Adoption—An Evolving Institution and a Changing Concept of Parenthood

Although the concept of adoption was not recognized at common law,⁴³ by the nineteenth century legal arrangements were often made for the care of children whose parents had died: wealthy orphans were typically

40. Robert Leckey, *The Practices of Lesbian Mothers and Quebec's Reforms*, 23 CAN. J. WOMEN & L. 579, 585 (2011).

41. See Bala, *supra* note 10, at 56; see also, e.g., *Buist v. Greaves*, [1997] O.J. no. 2646, para. 23 (Can. Ont. Ct. J.) (noting how even before the acceptance of same-sex marriage, Canadian courts recognized that the lesbian partner of a woman who conceived a child through artificial insemination "should have parental status, including the right to seek access or custody, and an obligation of child support" and stating that the rationale for such recognition lay in the fact that the woman had "clearly 'demonstrated a settled intent' to parent by providing consent to the insemination").

42. See generally Leckey, *supra* note 40.

43. THEODORE G. GIESBRECHT, *Adoption*, in CANADIAN CHILD WELFARE LAW: CHILDREN, FAMILIES AND THE STATE 155, 155 (Nicholas Bala et al. eds., 2004).

assigned a guardian to manage their assets and provide for their care, while children of lesser means were placed in religious orphanages or were "apprenticed out" to families who had them work from a young age on farms or in family businesses.⁴⁴ In Canada, provincial adoption laws were enacted to find parents for "illegitimate children" (those born out of wedlock) during and immediately after World War I when there was a significant increase in the number of births to single women. Traditionally, such adoptions were usually "shrouded in secrecy" as for the unwed mother there was the harsh stigma associated with having borne a child out of wedlock and, for the adoptive parents, there was shame attached to the inability to produce biological children.⁴⁵ Early adoptions resulted in the complete severance of all ties to the biological relatives and the "rebirth" of the child to the adoptive parents.⁴⁶ To accomplish this, adoption records were often sealed, and a new birth certificate was issued that identified the adoptive parents as the biological parents.⁴⁷ As a result, adult adoptees who wanted to locate their biological relatives had no legal recourse, and they faced many practical obstacles when they tried to do so by searching old newspaper records, yearbooks, and other sources.⁴⁸

Adoption in Canada has changed significantly over the past half century. With the advent of improved birth control and relatively easy access to abortion, as well the provision of social assistance to the mothers of children born out of wedlock, since about 1970 there have been fewer healthy newborn infants available for adoption in Canada than parents willing to adopt them.⁴⁹ This has given rise to changes in adoption patterns in Canada, including the introduction of international adoption. With this greater "demand" for children to adopt has come a willingness to give greater rights to birth parents—indeed, it is now common to give birth parents a role in the selection of adoptive parents, generally on an anonymized basis. There is also a recognition that in some cases biological parents can have a role in the lives of their children after adoption, thus changing the concept of "parenthood" for both biological and adoptive parents, as well as for adopted children. There has been a growing acceptance of "open adoptions," where the full legal rights and obligations of parenthood are transferred to the adoptive parents, but there remains

44. *Id.*

45. *Id.* at 156.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 162 (noting that child welfare agencies often experience considerable difficulty in finding adoptive parents for older or special needs children and so may be "more willing to consider single persons and gay or lesbian partners for these 'hard-to-place' children," since many of the "traditional adoptive parents" are loath to take such children).

some degree of contact with the birth parents,⁵⁰ ranging from the provision of an annual letter to fairly regular visits. While there is a clear need for more research into the extent and effects of open adoption in Canada, the practice appears to be fairly widespread within the realm of domestic adoptions.⁵¹ Although there is great variation in the extent of post-adoption contact with biological parents, there appear to be few problems with open adoptions, with the arrangements giving the adoptive parents full legal rights and responsibilities, and children having their psychological bonds rooted in their adoptive families, but some contact with the biological parents continuing.

A number of issues have arisen in the specific context of ARTs and adoption. For instance, one problem that has had pronounced effects for gay and lesbian couples who use ARTs is step-parent adoption. Canadian statutes generally relax the requirements that govern the adoption of children by relatives of a biological parent (like grandparents) or by the “spouse” of a biological parent (traditionally, a step-father). Thus, although ordinarily home studies, probationary periods, and the involvement of a child welfare agency or licensee are necessary to screen a potential adoptive parent, these requirements are generally waived in the case of an adoption by a step-parent.⁵² Most step-parent adoptions occur in situations where a biological father has had little to no involvement in a child’s life, and consequently, the child has developed a close relationship with his or her mother’s new husband.⁵³

Until relatively recently, the definition of “spouse” contained in most Canadian adoption legislation made it very difficult for same-sex partners to adopt their spouses’ biological children. Typically, such cases involved a child who had been conceived through the use of artificial insemination and had lived with the biological mother and her partner since birth. The inability of a woman to adopt the biological child of her partner was addressed in the 1995 Ontario case of *Re K*.⁵⁴ A group of lesbian partners challenged the under-inclusiveness of the definition of “spouse” contained in the Child and Family Services Act, which precluded them from using the step-parent provisions to adopt their partners’ biological children.⁵⁵ Nevins J. deemed the exclusion to be an unconstitutional violation of section 15 of the Canadian Charter of Rights and Freedoms since it discriminated against

50. Child and Family Services Act, R.S.O. 1990, c. C-11, §§ 153.1–153.6 (Can.).

51. See Charlene E. Miali & Karen March, *Open Adoption as a Family Form: Community Assessments and Social Support*, 26 J. FAM. ISSUES 380 (2005), for one of the few Canadian research articles on this subject.

52. GIESBRECHT, *supra* note 43, at 165.

53. *Id.* at 166.

54. *Re K*. (1995), 23 O.R. 3d 679 (Can. Ont. Ct. J.).

55. *Id.*

the petitioners on the basis of their sexual orientation.⁵⁶ The definition was also found to be contrary to the best interests of the children.⁵⁷ Legislation in a number of provinces has now been amended to explicitly allow for same-sex partners to have "relative" adoptions, and in other provinces this has become an accepted practice based on the ruling in *Re K*.⁵⁸

In light of the fact that it is now possible for the spouse of a biological parent to adopt a child conceived through ARTs in order to assume full parental status, another significant issue which has had ramifications for same-sex couples and others who use these technologies relates to the consent of the biological parent to an adoption. In all Canadian provinces, the consent of every legal "parent" is required for a valid adoption, unless there are strong reasons that would justify a court dispensing with consent.⁵⁹ However, in no Canadian jurisdiction does the definition of "parent" for the purposes of consent to an adoption include a semen donor who has provided no care for a child after birth.

The question of dispensing with the consent of a biological father who acted as a semen donor may arise even where there was an intent to include him in parenting the child, as occurred in the 2009 Ontario case of *C (M.A.) v. K (M.)*.⁶⁰ The child at issue had been conceived through artificial insemination with the sperm of a homosexual donor who was known by the mother and her partner.⁶¹ After the child's birth, the parties entered into a written agreement respecting the care and support of the child.⁶² The father, who had his own same-sex spouse, enjoyed regular access.⁶³ As the child grew, the father sought more access and consequently, relations between the lesbian couple and the father deteriorated.⁶⁴ When the child was six years of age, the women decided that the biological mother's partner should adopt the child, so that she could enjoy the same rights as a biological parent.⁶⁵ The father refused to consent to the adoption.⁶⁶ The couple responded with an application to dispense with his consent, arguing that their social position as lesbian parents rendered their need to have the partner pronounced a legal parent more urgent than it would be for a

56. *Id.*

57. *Id.*

58. *Id.*

59. GIESBRECHT, *supra* note 43, at 176.

60. *M.A.C. v. M.K.*, 2009 ONCJ 18 (Can. Ont. Ct. J.).

61. *Id.* at para. 9.

62. *Id.* at para. 14.

63. *Id.* at para. 12.

64. *Id.* at para. 17.

65. *Id.* at para. 3.

66. *Id.* at para. 6.

heterosexual couple.⁶⁷ The father claimed that if the court allowed the order, the applicants would marginalize him from his child's life, and that he would in effect be reduced to "little more than a friendly uncle."⁶⁸

The court denied the applicants' request to dispense with the need for the father's consent, and hence refused the adoption. The judge found the father to be a "loving, involved" parent, and noted that the agreement specified that it had been the parties' common intention that he would remain an active participant in the child's life.⁶⁹ Cohen J. ruled that adoption was not necessary to reinforce the non-biological mother's position as a parent, as the parties' agreement already made clear that she was a custodial parent.⁷⁰ Finally, the judge determined that allowing the adoption to proceed would be contrary to the child's best interests: "the effect would be to undermine [the child]'s sense of her place in the world, her confidence in her experience of the world and her understanding of who her family is."⁷¹

II. RESPONDING TO ART—THE CHANGING DEFINITION OF "PARENT"

A. Provincial Legislative Reforms

1. Assisted Conception

A number of Canadian provinces have enacted legislation that directly addresses some of the issues created by ARTs. While these statutes represent important steps forward in recognizing the new parental relationships that have developed as a result of these technologies, some Canadian jurisdictions have yet to introduce such laws. Further, there are significant deficiencies in much of the existing legislation, leaving lawyers and judges to deal with these complex issues without adequate legislative guidance.

In 1988, Newfoundland became the first province to enact family legislation that directly addressed ARTs, with section 12 of the Children's Law Act outlining presumptions of parenthood where a child was

67. *Id.* at para. 7.

68. *Id.* at para. 6.

69. *Id.* This common intention was reflected not only in the parties' written agreement, but also in the couple's decision to opt for a known sperm donor rather than an anonymous one.

70. *Id.* at para. 29.

71. *Id.* at para. 64. Elaine Craig has argued that this case should be regarded as an excellent example of the fact that the feminist and queer legal theories—often portrayed as hostile and incompatible—can be reconciled, with the result that both schools of thought can advance their respective projects and values. See Elaine Craig, *Converging Feminist and Queer Legal Theories, Family Feuds and Family Ties*, 28 WINDSOR Y.B. ACCESS JUST. 209, 216-19 (2010).

conceived by means of artificial insemination.⁷² The Children’s Law Act only dealt with the issue of the insemination of a man’s female partner with another man’s semen. It specifies that “a man” is to be “considered in law” to be the “father” of a child that results from his wife or cohabiting partner’s artificial insemination if he “consents in advance” to the insemination.⁷³ The Children’s Law Act also provides that a semen donor who is not married to or cohabiting with a woman who is artificially inseminated with his semen “is not in law the father of the resulting child.”⁷⁴

Legislation enacted in Prince Edward Island in 2008 also addressed ARTs⁷⁵ in a somewhat more progressive way than the earlier enacted law in Newfoundland. Section 9(5) of the Child Status Act⁷⁶ provides that “a person” will be “presumed” to be the parent of a child born by means of assisted conception if, at the time the mother was inseminated, he or she was the spouse of, or was cohabitating in a conjugal relationship with the mother.⁷⁷ This presumption can be rebutted if it is shown that the person did not consent in advance to the insemination and did not demonstrate a settled intention to treat the child as his or her own after birth,⁷⁸ or if the person did not know that the child was created through assisted conception.⁷⁹ It is important to note that the Prince Edward Island statute uses gender-inclusive language, enabling a birth mother’s male or female partner to gain status as the child’s parent. However, the Child Status Act fails to address situations where a genetic mother is intended to be the parent of a child conceived through assisted conception, and the woman who gives birth to the child is meant only to act as the gestational, or surrogate, carrier. This legislation also only allows a child to have two parents from the time of birth, thus failing to address situations that commonly arise within the gay and lesbian community⁸⁰—situations where a child has two mothers (the biological mother and her spouse, who acts as a co-parent) as well as a father (the known sperm donor).

In Alberta, the Family Law Act, which first came into force in 2005, (the 2005 Alberta Family Law Act), addressed artificial reproduction by means

72. Children’s Law Act, S. Nfld. 1988, c. 61, § 12 (Can.).

73. *Id.* § 12(3).

74. Children’s Law Act, R.S.N.L. 1990, c. C-13, § 12(6) (Can.).

75. *See* Child Status Act, R.S.P.E.I. 1988, c. C-6 (Can.).

76. *Id.*

77. *Id.* § 9(5).

78. *Id.* § 9(5)(a).

79. *Id.* § 9(5)(b).

80. Fiona Kelly, *Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law*, 21 CAN. J. FAM. L. 133, 161 (2004).

of a surrogate or gestational carrier, as well as artificial insemination. In its earlier form, the statute was written in gender-specific terms, and without reference to the possibility of same-sex partners becoming parents.

Thus, for example, section 13 of the 2005 Alberta Family Law Act governed instances of “assisted conception,” defined as “the fertilization by a male person’s sperm of a female person’s egg by means other than sexual intercourse,” and included “fertilization of a female person’s egg outside of her uterus and subsequent implantation of the fertilized egg into her uterus.”⁸¹ Subsection 13(2) provided that a “male person” was deemed the father of a child if, at the time of the assisted conception, he was the spouse of, or was in “a relationship of interdependence of some permanence” with the woman who was inseminated, and his sperm was used in the process.⁸² Where the man’s sperm was not used in the assisted conception, he was the child’s legal father where it could be shown that he agreed in advance of the conception to act as a parent to the ensuing child.⁸³ The problem with this provision was that if the biological mother was in a same-sex relationship, her partner, although she may have consented in advance to becoming a parent, was effectively excluded from attaining parental status since the section applied only to a “male person.”⁸⁴ The gender-specific language of this provision was the subject of a constitutional challenge in *Fraess v. Alberta*.⁸⁵ The petitioner’s same-sex spouse had been artificially inseminated with the sperm of an anonymous donor.⁸⁶ She argued that the impugned section conferred a “significant benefit” on heterosexual couples while it forced lesbian spouses to “engage in a separate and protracted process” of adoption in order to achieve parental status.⁸⁷ Clarke J. determined that the legislation violated the equality guarantee contained in section 15 of the *Charter*.⁸⁸ The court observed that this provision “makes available the benefit of parental status only to male persons”—that is, a person “married or partnered in [a] relationship of the opposite sex to the biological mother.”⁸⁹ The court declared that subsection 13(2) should be read to provide that:

A *person* is the parent of the resulting child if at the time of an assisted conception the *person* was the spouse of [or] in a relationship of

81. Child Status Act, R.S.P.E.I. 1988, c. C-6, § 13(1) (Can.).

82. *See id.* § 13(2)(a) (maintaining that this remains the case even where the man’s sperm was mixed with that of another male person).

83. *Id.* § 13(2)(b).

84. *Id.*

85. 2005 ABQB 889 (Can. Alta. Q.B.).

86. *Id.* at para. 2.

87. *Id.* at para. 3.

88. *Id.* at para. 6.

89. *Id.* at para. 5.

interdependence of some permanence with the female person and . . . the person consented in advance of the conception to being a parent of the resulting child.⁹⁰

In response to this litigation and the development of new concepts, in 2011 the Alberta legislature enacted new legislation governing parental relationships that arise from ARTs, using gender-neutral language and recognizing both same and opposite-sex partners of parents who provide embryos or human reproductive material.⁹¹ Section 5.1 of the new Family Law Act provides that “‘assisted reproduction’ means a method of conceiving other than by sexual intercourse” and further specifies that, for the purposes of the Act “if a child is born as a result of assisted reproduction, the child’s conception is deemed to have occurred at the time the procedure that resulted in the implantation of the human reproductive material or embryo was performed.” With respect to the determination of parentage, there is a presumption that, unless “the contrary is proven,” a person who is “married to or in a conjugal relationship of interdependence of some permanence with the birth mother at the time of the child’s conception” has consented to the conception and is a legal parent of that child.⁹² While this new legislation allows for voluntary surrogacy agreements and uses concepts and terminology that recognize same-sex parenting, it limits a child to having two legal parents (though it also recognizes the possibility of non-parental guardianship with a more restricted set of rights).

Like Alberta, Quebec has also enacted a comprehensive statutory regime to govern ARTs. This legislation is generally respectful of familial diversity, especially with regards to lesbian partners. This is not wholly surprising since Quebec is, in many ways, North America’s most progressive jurisdiction (and also has the highest tax rates); for example, in 1977 it was the first jurisdiction to prohibit discrimination based on sexual orientation,⁹³ and it has the widest access to public subsidized daycare on this continent. In 2002, the Quebec Civil Code was amended⁹⁴ to establish Canada’s most comprehensive regime regarding ARTs, with Articles 538 through 542 now governing the filiation of children born through assisted conception. Article 538 provides that a “parental project involving assisted

90. *Id.* at para. 16 (emphasis added).

91. Family Law Act, S.A. 2003, c. F-4.5, §§ 8.1, 8.2. For an explanation of the new provisions, see Government of Alberta, Justice and Attorney General, Amendments to the *Family Law Act – What’s New?* (Jan. 26, 2011), http://justice.alberta.ca/programs_services/families/Documents/familyLawActAmendments.pdf.

92. Family Law Act, § 8.1(6).

93. See generally Civil Code of Quebec, S.Q. 1977, c. 6 (Can.) (amending the Canadian Charter of Rights and Freedoms).

94. Civil Code of Quebec, S.Q. 2002, c. 6, § 30 (Can.).

procreation exists from the moment a person alone decides or spouses by mutual consent decide . . . to resort to the genetic material of a person who is not party to the parental project” in order to have a child.⁹⁵ While parties may have a written agreement, oral arrangements may also be made and given legal effect.⁹⁶ A person who contributes their genetic material for the purpose of realizing a “third-party parental project does not create any bond of filiation” with the resulting child;⁹⁷ thus donors of semen and ova do not become parents if they do not intend to have that status.

The Quebec regime gives clear parental status to a non-biological intended parent. Article 539.1 specifically addresses the situation of lesbian partners, providing that 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.”⁹⁸ The Quebec statute does not permit three persons to be legal parents, so that a lesbian couple who chooses to have a child by a known donor must decide whether the donor or the biological parent’s partner will be the other parent.⁹⁹ A man may contribute to a “parental project” for a couple who wishes to have a child either by providing semen for artificial insemination, or by means of sexual intercourse.¹⁰⁰ However, if sexual intercourse is used for the “parental project,” the man may seek a declaration of filiation (parentage) from a court during the first year of the child’s life based on his biological paternity; in this situation, the biological father will displace the biological mother’s partner as the child’s other legal parent.¹⁰¹

The legislative framework in Quebec thus generally defers to the intent of the parents involved at the time of conception when determining parentage.¹⁰² However, Article 541 prohibits surrogacy agreements, stipulating that “any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null.”¹⁰³ This provision has created problems for children who are the products of a surrogacy agreement. In one Quebec case, an infertile couple found a woman willing

95. See Leckey, *supra* note 40, at 584, 591 (arguing that the lack of formality necessary to give rise to a parental project finds “little support” in the practices of lesbian parents, who are likely to carefully plan for the conception of a child and will generally want a clear written agreement that sets out the expectations of a known donor); see also Robert Leckey, *Where the Parents Are of the Same Sex: Quebec’s Reforms to Filiation*, 23 INT’L J.L. POL’Y & FAM. 62 (2009).

96. *Id.*

97. Civil Code of Quebec, S.Q. 1991, c. 64, art. 538.2 (Can.).

98. *Id.* art. 539.1.

99. *Id.* art. 538.2.

100. *Id.*

101. *Id.*

102. Campbell, *supra* note 17, at 242, 260.

103. Civil Code of Quebec, S.Q. 1991, c. 64, art. 541 (Can.).

to act as a surrogate in exchange for \$20,000. She was subsequently artificially inseminated with the man’s semen, and after the birth gave the child up to the couple and surrendered all her legal rights regarding the child. However, in the uncontested adoption proceeding, the judge refused to allow the man’s wife to adopt the child, effectively leaving the child with only one legal parent.¹⁰⁴

Thus, while the Quebec regime is generally sensitive to the interests of lesbian partners who wish to use ARTs, the prohibition on surrogacy agreements may have a discriminatory effect on gay partners who want to forge an agreement with a woman to have a child of which one of the men is the biological father and which the same-sex partners plan to parent together.

2. Birth Registration

A number of provinces have amended their vital statistics legislation to enable persons other than the biological mother and father to be registered as parents if the child was conceived through ART. Although the information listed on a child’s birth certificate does not definitively establish legal parentage, “[birth] certificates nevertheless provide presumptive proof of parent-child relationships and are required for numerous legal and social activities.”¹⁰⁵ It is thus practically and legally valuable for any person who intends to be a parent to be listed on the child’s birth certificate.

In Ontario, subsection 2(2)2 of the Regulations to the Vital Statistics Act, proclaimed in 2006, allows, in the context of assisted conception, a child’s mother and “the other parent” of the child to certify the child’s birth.¹⁰⁶ This gender-neutral language was inserted as a result of a constitutional challenge launched by four lesbian couples to the previous version of the Regulations, which enabled only “the mother and the father” to be registered as the parents of the child.¹⁰⁷ In *Rutherford v. Ontario*

104. In the Matter of X - Adoption – 091, 2009 QCCQ 628, [2009] R.J.Q. 445 (Can. Que. Youth Ct.); see also *Born to Surrogate, Child Has No Legal Mother, Quebec Judge Rules*, CBC NEWS, Mar. 11, 2009, <http://www.cbc.ca/news/canada/montreal/story/2009/03/11/mtl-surrogate-baby-quebec-0311.html>. However, for an example of cases where judges were more sympathetic to the interests of children, see In the Matter of X - Adoption – 09184, 2009 QCCQ 9058, [2009] R.J.Q. 2694 (Can. Que. Youth Ct.) (allowing an uncontested adoption to proceed involving an altruistic surrogate who was the aunt of the woman seeking to adopt); In the Matter of X - Adoption – 09367, (2009) [2010] R.D.F. 387 (Can. Que. Youth Ct.) (noting that the surrogacy agreement was entered into in California, where such agreements are legal).

105. Boyd, *supra* note 8, at 74.

106. R.R.O. 1990, Reg. 1094, § 2(2).2 (Can.); see, e.g., *McDonagh v. Mahallati*, [2010] ONSC 4986, para. 13 (Can.) (listing the same-sex partner of the biological mother as the child’s “other parent” on the registered Statement of Live Birth).

107. Vital Statistics Act, R.S.O. 1990, c. V.4 (Can.).

(*Deputy Registrar General*),¹⁰⁸ Rivard J. determined that this legislative scheme discriminated against “lesbian co-mothers”—who could not be registered on their children’s statement of live birth—on the basis of both sex and sexual orientation, contrary to section 15 of the Canadian Charter of Rights and Freedoms.¹⁰⁹ He contrasted their situation with that of a non-biological father whose spouse had conceived using artificial insemination: the legislation enabled such a man to be registered as a parent on the statement of live birth, whereas the applicants could not.¹¹⁰ Rivard J. remarked that in light of the growing use of reproductive technologies, the Vital Statistics Act was “clearly outdated,”¹¹¹ as well as unconstitutional. As noted above, the government of Ontario responded by amending the birth registration regulations.

Nova Scotia also modified its Birth Registration Regulations in 2007 to address issues raised by children “conceived as the result of assisted conception.”¹¹² If a biological mother is married, the registration of birth “must indicate the mother’s spouse” as the child’s other parent, though this includes a same-sex spouse.¹¹³ If the biological mother is not married, but she acknowledges another “person” as the child’s parent and that “person” files a declaration of intent “to assume the role of parent of the child,” the birth certificate is to be registered indicating that other person as the child’s other parent.¹¹⁴ This provision, phrased in gender-neutral terms, represents a positive step forward:¹¹⁵ it enables a woman who has given birth to list her same-sex partner on the child’s birth certificate as a co-parent. Section 5 of the Nova Scotia Birth Regulations governs situations of assisted conception through surrogacy. Subsection 5(2) enables the “intended parents” in a “surrogacy arrangement” to apply to a court for a “declaratory order of parentage” if all of the following conditions are met: the surrogacy arrangement was initiated by the intended parents; it was planned before conception; the woman acting as the surrogate has no intention of acting as the child’s parent; the intended parents intend to be the child’s parents; and one of the intended parents has a genetic link to the child.¹¹⁶ This section can be used by either a heterosexual or homosexual couple who have

108. *Rutherford v. Ontario* (2006), 81 O.R. 3d 81, para. 123 (Can. Ont. Sup. Ct. J.).

109. *Id.* at para. 104.

110. *Id.* at para. 113.

111. *Id.* at para. 31.

112. Birth Registration Regulations, N.S. Reg. 390/2007 (Can.).

113. *Id.* § 3(1).

114. *Id.* § 3(2).

115. See Mykitiuk, *supra* note 9, at 790 (arguing that the use of gender-neutral terms should not be regarded as a positive reform; rather, that such language “treats parents as fungible and risks marginalizing the gendered aspects of legal norms that continue to influence legal reasoning”).

116. Birth Registration Regulations, N.S. Reg. 390/2007, § 5(2) (Can.).

conceived by means of a surrogate mother.¹¹⁷

A number of other provinces, such as Manitoba¹¹⁸ and British Columbia,¹¹⁹ amended their vital statistics laws to specifically acknowledge that the “spouse” or unmarried cohabitant of the mother of a child who was conceived as a result of artificial insemination with the consent of that person is a parent. Although these laws now allow the lesbian partner of a biological mother to be registered as a parent, they do not deal with more complex issues related to ARTs.

*B. Federal Legislation: The Assisted Human Reproduction Act*¹²⁰

By the late 1980s, there was great controversy in Canada about a range of issues associated with ARTs and the fact that there was no legislation to address them. The federal government responded by establishing the Royal Commission on New Reproductive Technologies to address a range of interrelated contentious issues.¹²¹ The analysis of the Royal Commission, at least in part, “reflected most popular and academic feminist thinking in Canada and the United States in the 1980s and early 1990s,”¹²² as well as deep moral concerns about the commercialization of gamete donation, and thus recommended a prohibition on payments to semen and ova donors. The Commission’s Report was released in 1993 and eventually led to the enactment of the federal Assisted Human Reproduction Act (AHR Act) in 2004.¹²³ While the AHR Act does not purport to define who is to be regarded as a legal parent of a child (since this is a matter of provincial jurisdiction), it closely regulates some important aspects of ARTs, and so warrants some consideration here. Overall, the AHR Act has had a significant negative impact on those seeking to use ARTs in Canada, and a disproportionate effect on lesbians who want to use artificial insemination.

117. *Compare* Family Law Act, S.A. 2003, c. F-4.5, § 12(5) (providing that a genetic donor—defined as a woman who provides her eggs for fertilization—can apply for an order declaring her to be the parent of the child; however, this cannot be said to apply to a same-sex male couple, since regardless of which partner provided the genetic material, neither could supply an egg for fertilization), *with* Birth Registration Regulations, N.S. Reg. 390/2007, § 5(2) (Can.) (stipulating that the “intended parents,” without reference to their sex or gametes, can apply for an order declaring them to be the parents).

118. The Vital Statistics Act, R.S.M. 1987, c. V60, § 3(6) (Can.).

119. Vital Statistics Act, R.S.B.C. 1996, c. 479, § 4, *amended by* S.B.C. 2002, c. 15 (Can.).

120. Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.).

121. ROYAL COMMISSION ON NEW REPRODUCTIVE TECH., PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, Vol. 2 (1993).

122. Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 16–17 (2010).

123. Assisted Human Reproduction Act, S.C. 2004, c. 2 (Can.).

The AHR Act opens with a set of declarations, including the statement that “persons” who seek to make use of assisted reproductive technologies are not to be discriminated against, including on the basis of sexual orientation or marital status.¹²⁴ Section 6 bans certain acts in relation to surrogacy arrangements, including paying a female person to act as a gestational carrier,¹²⁵ accepting any form of payment or consideration for arranging the services of a surrogate,¹²⁶ and counseling or inducing a female person to act as a surrogate mother where there is reason to believe she is under twenty-one-years of age.¹²⁷ The sale of gametes, embryos and other reproductive material is prohibited for all purposes.¹²⁸ Section 12 provides that donors of semen or ova can only be reimbursed for “reasonable expenses” incurred as a result of their donation and specifies that these amounts are to be governed by the regulations.¹²⁹ No such regulations have ever been proclaimed, making any payments to a donor at best a questionable practice, but more likely illegal.

In 2007, the Attorney General of Quebec challenged the constitutionality of much of the Reproduction Act, arguing that it trespassed on provincial jurisdiction as set out in section 92 of the Constitution Act, 1867.¹³⁰ The Quebec Court of Appeal ruled in 2008 that most of the Reproduction Act was *ultra vires* the jurisdiction of the federal government, since its primary effect was the regulation of medical practice and research, matters that come under the provincial heads of power.¹³¹ In December 2010, a badly divided Supreme Court of Canada allowed the appeal of the Attorney General of Canada in part,¹³² ruling that important portions of the Reproduction Act were valid federal law. While a majority of the Court accepted that some parts of the law were unconstitutional infringements on the provincial power over health care, most importantly for present purposes, it was also accepted that the prohibitions on payment were a valid exercise of the federal power over the criminal law.¹³³ Chief Justice Beverley McLachlin wrote:

Parliament has a strong interest in ensuring that basic moral standards govern the creation and destruction of life, as well as their impact on

124. *Id.* § 2(e).

125. *Id.* § 6(1).

126. *Id.* § 6(2)-(3).

127. *Id.* § 6(4).

128. *Id.* § 7.

129. *Id.* § 12.

130. Québec (Procureur général) c. Canada (Procureur général) (2008), 298 D.L.R. (4th) 712 (Can. Que. C.A.).

131. *Id.*

132. *See generally* Assisted Human Reproduction Act, [2010] 3 S.C.R. 457 (Can.).

133. *Id.*

persons like donors and mothers. Taken as a whole, the Act seeks to divert serious damage to the fabric of our society by prohibiting practices that tend to devalue human life and degrade participants.¹³⁴

While the stated commitment to the health and well-being of women and children,¹³⁵ as well as the preservation of “the integrity of the human genome,”¹³⁶ are important and worthy objectives, there are very significant concerns about the effects this statute has for those seeking to use ARTs—particularly, the disproportionate effect it has on lesbians seeking artificial insemination in Canada. In this vein, Canadian law professor Angela Cameron has argued that the Reproduction Act has restricted “some of the most prevalent forms of queer families.”¹³⁷ Indeed, a central concern is that the Reproduction Act appears to prohibit “at home self-insemination,” which lesbian couples often choose to undertake using fresh semen from a known donor.¹³⁸ Like many scholars, Cameron also criticizes the restrictions on surrogacy: the legislation specifies that those who need to use the services of a surrogate mother can only provide her with those “reasonable expenses” related to her pregnancy, which are to be more precisely defined in the yet-to-be-proclaimed regulations.¹³⁹ Consequently, apart from relatively rare cases of altruistic surrogacy, Canadians who need a surrogate are either forced to go to the United States or to other jurisdictions where compensation is permitted, or are making payments to surrogates in Canada that are leading to a “grey (or black) market.” These agreements for payment are usually honored, but certainly are unenforceable, and could in theory result in sanction if their existence became known to the authorities.¹⁴⁰ However, there are no reported cases of prosecutions.

The prohibition on payments for semen has led to a severe shortage of semen donors in Canada. A recent report prepared by an infertility doctor for the federal agency responsible for artificial reproduction issues in Canada estimated that there is a need for more than 5,500 donor sperm inseminations a year—approximately 3,000 for lesbian couples, 1,300 for single women and 1,200 for heterosexual couples.¹⁴¹ “Altruistic” Canadian

134. *Id.* at para. 61.

135. Assisted Human Reproduction Act, S.C. 2004, c. 2, § 2(a), (c) (Can.).

136. *Id.* § 2(g).

137. Angela Cameron, *Regulating the Queer Family: The Assisted Human Reproduction Act*, 24 CAN. J. FAM. L. 101, 101 (2008).

138. *Id.*; see also Fiona Kelly, *An Alternative Conception: The Legality of Home Insemination under Canada’s Assisted Human Reproduction Act*, 26 CAN. J. FAM. L. 149 (2010).

139. See Cameron, *supra* note 137, at 116.

140. See, e.g., *Paid Surrogacy Driven Underground in Canada*, CBC NEWS (May 2, 2007), <http://www.cbc.ca/news/health/story/2007/05/01/surrogates-pay.html>.

141. Tom Blackwell, *Too Few Men Willing to Give Away Sperm: Study*, THE NAT’L POST, Mar. 1, 2011.

donors are providing less than 10% of the required semen, leaving fertility clinics to import (and of course pay for) frozen semen from the United States to meet the needs of the vast majority of women seeking insemination. While this type of purchase may not directly violate the prohibition in the Reproduction Act that bans compensation to semen donors in Canada, it does make a mockery of the concept of altruistic donation and increases the cost and inconvenience for women seeking artificial insemination. It also denies women access to fresh semen.

III. ARTS, PARENTHOOD AND THE COURTS

The existing Canadian statutory frameworks—even those that have been recently amended—do not adequately address all of the issues related to children conceived using ARTs. The ambiguity and incompleteness of these legislative schemes has created challenges for lawyers advising clients and for judges dealing with cases and who attempt to make reasoned, fair judgments that take account not only of the parties' intentions, but also the best interests of the child. The following survey of Canadian cases on parenthood and ARTs examines how the courts, lacking a proper legislative compass, have grappled with some of the difficult questions that have been posed to them.

A. Opposite-Sex Partners as Parents

1. Single Mothers

The first reported Canadian cases that dealt with ART issues involved opposite-sex parents where the woman was artificially inseminated. These decisions illustrate a judicial reluctance to allow heterosexual women who have conceived through artificial insemination while cohabiting with a male partner to parent on their own, even if that was their original intent.¹⁴² Indeed, in some cases where there was no clear legislation governing situations of assisted reproduction, the courts proved resistant to a woman's plans to parent independently, often resorting to the traditional presumptions of paternity and related provisions to 'find' a father for the child.

In the 1995 Ontario case of *Zegota v. Zegota-Rzegocinski*,¹⁴³ a husband and wife initially tried to conceive a child naturally, and then later through artificial insemination with the husband's sperm. After four years of

142. Kelly, *Producing Paternity*, *supra* note 16.

143. (1995), 10 R.F.L. 4th 384, paras. 2-3 (Can. Ont. Ct. J.). For a similar case, see *Low v. Low* (1994), 114 D.L.R. 4th 709 (Can. Ont. Ct. J.) (holding that the husband of a woman who conceived via artificial insemination through an anonymous sperm donor is the legal father of the child even though the couple separated the day they brought the baby home from the hospital).

marriage, the woman eventually resorted to artificial insemination with donor sperm, and after three years of trying, became pregnant.¹⁴⁴ Although the husband had consented to the procedures, there was evidence to suggest that throughout the process he was less than supportive, at one point even acknowledging that he “needed time to consider the fact that his wife would be impregnated by the sperm of another man.”¹⁴⁵ There was clearly considerable tension in the relationship by the time of conception, due at least in part to the stress of infertility, and the woman claimed that the “marriage had failed and they were in fact separated” by the time of conception.¹⁴⁶ Indeed, the parties had been living in separate residences for four months before the birth of the child.¹⁴⁷ After the birth, the husband visited the woman in the hospital and by the time the child was one year of age, he was exercising regular access and paying child support pursuant to an interim court order.¹⁴⁸ In the divorce proceedings, the woman sought to terminate her former husband’s access rights on the grounds that he was not the child’s biological or legal parent.¹⁴⁹ Relying on the traditional presumptions of paternity contained in Ontario’s Children’s Law Reform Act—legislation that does not have specific provisions dealing with the use of ARTs—the court held that the man should be recognized as the child’s legal father for all purposes.¹⁵⁰ This outcome was contrary to the pre-natal expectations and desires of the biological mother,¹⁵¹ and suggests that, in the absence of legislation dealing with ARTs, the courts are likely to operate on the presumption that a male partner who consents to the insemination of a woman with whom he was residing at the time of conception will be the legal father.

The 2007 Alberta Court of Appeal decision in *Doe v. Alberta*¹⁵² also dealt with a woman who had conceived a child using ART and wanted to

144. See *Zegota*, 10 R.F.L. 4th 384 (explaining that the couple married in 1984, entered an Artificial Insemination Programme in 1988, and the woman became pregnant in 1991).

145. *Id.* at para. 14.

146. *Id.*

147. See *id.* at paras. 7, 16 (relating that the couple has separated in December 1991, and the child was born in March 1992).

148. See *id.* at paras. 17, 24, 28 (describing the hospital visit by the husband along with a Court Order granting him access to the child each Wednesday and noting that monthly support payments began in October 1993).

149. See *id.* at paras. 10, 12 (noting that the wife took “the position that [the husband] does not qualify as a “parent” as a matter of law).

150. See *id.* at paras. 36, 37 (ordering that the man be declared the father of the child based on the statute which allows the court to do so where it finds a relationship between the father and child exists).

151. See *id.* at para. 13 (relating that the husband did not sign the consent form for the final procedure which resulted in the pregnancy).

152. See 2007 ABCA 50, Alta. L.R. 4th 14 (Can.) (stating that the woman lived with a long-term lover who did not share her wish to have a baby).

be a single parent. The woman had become pregnant through artificial insemination with sperm from an anonymous donor.¹⁵³ Her common-law partner, though supportive of her goal of having children, did not want to be a parent himself.¹⁵⁴ Thus, the parties drafted a written agreement pursuant to which the man was to be absolved of all parental responsibilities and waived all parental rights; it was agreed that he would not stand in the place of a parent, nor would he provide financially for the child or assume any role as guardian.¹⁵⁵ The Alberta Court of Appeal held that the parties' agreement was not enforceable, as it was not open to the parties to waive the establishment of a parent-child relationship if the man was living with the child and assumed the role of a person standing in the place of a parent.¹⁵⁶ Indeed, if the man demonstrated a "settled intention" to treat the child as his own, he would become a person "standing in the place of a parent," and would thus assume the rights and responsibilities of a father under provincial law.¹⁵⁷ The Court made this ruling in spite of the 2005 Alberta Family Law Act's parentage rules in situations of assisted conception, under which the male partner of a woman who became pregnant by artificial insemination by the semen of another man was deemed the father only if he has "a relationship of interdependence with the mother *and* a settled intention to parent" the child.¹⁵⁸

The Canadian feminist commentator Fiona Kelly has contended that the "thread" which connects the "seemingly contradictory" trends in the governing statutes and cases is the courts' desire to avoid fatherless families.¹⁵⁹ Judges will resort to the type of paternity—be it biological or social—that can be made to fit the particular circumstances of a case in order to impose a father on what would otherwise be a family headed by a single mother, and thus "reduce the number of circumstances in which children can become fatherless."¹⁶⁰ It should, however, be appreciated that

153. *Id.*

154. *See id.* (suggesting that if the man wished to continue the relationship, even though he did not want to have a baby, he was still in support of the woman's decision).

155. *Id.*

156. *See id.* at para. 9 (upholding the lower court decision that the parent-child relationship "cannot be ousted by even the most carefully drafted contract" (citation omitted)).

157. *See id.* at para. 13 (implying that the partner's position of permanence with the mother could be interpreted as a "settled intention" to treat the child as his own).

158. Kelly, *Producing Paternity*, *supra* note 16, at 323-24. As discussed above, the new Alberta Family Law Act, S.A. c F-4.5 came into effect on August 11, 2011. The effect of the legislation has not changed in regards to this issue.

159. *See id.* at 317 (arguing that the courts do not express a clear preference for biological or social fathers and inferring that that indicates a desire not to have fatherless families).

160. *Id.* at 321 (suggesting that determining fatherhood is more difficult for courts when there are competing social and biological fathers).

Canadian courts have not forced women—particularly, lesbians—to have fathers for their children. Rather, women who arrange artificial insemination by an anonymous donor or a known donor who is not registered on the child’s birth certificate, and who do not cohabit with a man who plays a parental role in the planning for conception or raising of the child, are able to have fatherless children. While the courts will not allow a woman who has in fact involved a man in planning for conception or raising a child to exclude him from having a parental role, in coming to this conclusion the courts focus on the interests of children, in terms of both potential payors of child support and caregivers for children.

2. Surrogacy Agreements

Beyond the legal problems discussed above that are created by the Canadian legislative prohibitions on payment for participation in ARTs or surrogacy, Canadian couples who resort to surrogacy agreements to have a child face significant difficulties in achieving legal recognition of these arrangements. However, in the absence of clear legislative prohibitions on surrogacy, as in Quebec, Canadian courts have been prepared to take a child-focused approach to recognizing parentage in the context of surrogacy agreements, at least where there is no evidence before the court of any payment or other compensation.

In the 2003 British Columbia case of *Rypkema v. British Columbia*,¹⁶¹ the applicants were a married couple who had a child conceived *in vitro* with the embryo implanted into a woman who had agreed to act as a gestational carrier without any compensation. The couple signed an agreement with the woman and her husband, making clear that it was intended that the couple would have care of the child from birth and would be the sole legal parents.¹⁶² However, the Director of Vital Statistics refused to register the couple as the child’s birth parents as the female applicant was not the birth mother.¹⁶³ The intended parents brought an application for an order declaring them to be the child’s parents, and sought

161. 2003 BCSC 1784 at paras. 6-7 233 D.L.R. 4th 760 (Can.). Compare *J.C. v. Manitoba*, 2000 MBQB 173, 151 Man. R. 2d 268 (Can.) (dismissing an application to presumptively declare that a woman who had her eggs implanted in a surrogate is the biological mother of the child prior to the birth of the child), with *J.R. v. L.H.*, [2002] O.T.C. 764 (Can. Ont. Sup. Ct. J.) (holding that where the surrogate was just the gestational mother and did not contribute genetic material the intended mother, though not the birth mother, is entitled to be declared the biological mother of the child), and *W.J.A. Q. v. A.M.A.*, 2011 SKQB 317, [2011] S.J. No. 528 (Can. Sk. Q.B.) (holding that two gay men should be recognized and registered as the parents of a child who was born to a woman pursuant to a confidential “gestational carrier agreement”).

162. See *Rypkema*, 2003 BCSC 1784, at para. 6 (recounting the agreement between the two couples where the surrogate “expressly consented to terminating and renouncing any and all parental rights” and “further agreed to voluntarily recognize the petitioners as the custodial parents of the child”).

163. *Id.* at para. 2.

to have this reflected on the registration of birth.¹⁶⁴ In granting the requested order, Gray J. observed that including the applicants' names on the child's birth registration was important in order to guarantee them a meaningful and active role in the child's life.¹⁶⁵ Such a declaration would provide them with "presumptive proof of their relationship to the child" and would enable them to do such things as register the child in school and obtain airline tickets and passports for him.¹⁶⁶ The court noted that it was significant that the case was not one in which it was asked "to determine which of two or more claimants [was] the parent,"¹⁶⁷ since both couples had intended from the outset that the genetic parents would act as the child's legal parents, and the surrogate had agreed to relinquish the child upon birth.

In contrast, the 2005 British Columbia case of *H.L.W. v. J.C.T.*¹⁶⁸ dealt with a surrogacy arrangement that resulted in contested litigation. A couple without children advertised for a surrogate mother.¹⁶⁹ A married woman with four children answered the ad, and it was agreed by the couple, the surrogate, and her husband that the woman would act as a surrogate, and that the intended parents would cover all of the woman's pregnancy-related expenses, though no other compensation was to be paid.¹⁷⁰ The agreement was oral, and there were later disputes about the exact terms, in particular about whether there was to be regular contact between the surrogate and the child, or only an annual report.¹⁷¹ However, in spite of these disagreements, it was anticipated that the surrogate would consent to the adoption of the child by the intended parents.

The woman was artificially inseminated at her home with the intended father's semen. During the pregnancy, the intended parents gave the woman several thousand dollars for what were claimed to be pregnancy-related expenses.¹⁷² A few days before the expected birth, the surrogate and her husband told the intended parents that they would need an additional \$8,500 for "post-partum expenses," which caused a rift between

164. *See id.* at para. 3 (noting that a parent's name on the birth certificate is presumptive proof that the parents can use to avoid the adoption process).

165. *Id.* at para. 31

166. *Id.*

167. *Id.* at para. 30.

168. 2005 BCSC 1679 (Can.).

169. *See id.* at para. 4 (explaining that the surrogate contacted the couple after finding the advertisement).

170. *Id.* at paras. 4-5.

171. *See id.* at paras. 4, 6 (detailing that the couples had exchanged a few e-mails prior to meeting but aside from that correspondence, they could not remember the terms of the agreement).

172. *Id.* at para. 9

the two couples.¹⁷³ Following the birth, the intended parents took the child home from the hospital, and the genetic father and "surrogate" mother (who was both the gestational and genetic mother) were listed as the child's parents on the registration of birth.¹⁷⁴ Thereafter, the surrogate refused to consent to the adoption, and brought an application for custody.¹⁷⁵

At an interim hearing the judge implicitly determined that it was the "best interests of the child" that should govern.¹⁷⁶ While in British Columbia there is a statutory presumption that a child born outside of marriage will be placed in the guardianship of "the mother," the court eventually awarded sole interim custody to the intended parents and denied the surrogate mother interim access.¹⁷⁷ The judge placed particular weight on the "pre-birth intentions regarding who would assume parental responsibilities."¹⁷⁸ The fact that the intended parents had cared for the child since birth was also important, since the court wanted to minimize the number of disruptions in the child's care pending trial.¹⁷⁹ There is no reported trial decision in this case, but it seems likely that after the interim decision the parties settled the case on terms that would see the child living with the intended parents, as they would have a strong continuity of care argument by the time the case finally made it to trial. This case makes clear that greater certainty and stability will be afforded for children if the courts presumptively give effect to the intent of the parties at the time of conception, even if the parties' arrangement is one that violates the provisions of the federal Reproduction Act. In a similar vein, all of the above cases illustrate the difficulties created by not having legislation that addresses the rights of parties involved in the conception of a child through the use of ARTs. While statutes might not address every possible situation that may arise, they can provide assistance to judges and lawyers dealing with these difficult cases.

B. Same-Sex Partners as Parents

Until relatively recently, Canadian courts did not recognize some of the special issues faced by lesbian couples.¹⁸⁰ An example of this lack of

173. *Id.* at para. 10.

174. *Id.* at para. 2.

175. *See id.* at para. 17 (quoting the affidavit of the birth mother that "[she] will not consent to the adoption by the defendant, J.T. My husband and I want to raise A.C.T. ourselves").

176. *Id.* at para. 20.

177. *Id.* at para. 40.

178. Boyd, *supra* note 8, at 79.

179. *See H.L.W.*, 2005 BCSC 1679, at paras. 45-46 (explaining that it would be better for the child if his caretakers were not changed before the trial so that if custody was awarded to the surrogate mother, he would only have to be moved once).

180. This failure on the part of the courts to adequately acknowledge the unique

acknowledgment was the 2005 Saskatchewan case of *C. (P.) v. L. (S.)*,¹⁸¹ where a lesbian challenged the failure to afford lesbian partners of biological mothers the same presumptive parental rights as male heterosexual partners of biological mothers. The petitioner had been in a committed same-sex relationship for six years with her partner, who had two children from a previous heterosexual relationship.¹⁸² During the course of their relationship, the petitioner's partner had engaged in an act of sexual intercourse with a male friend, and she had a third child as a result.¹⁸³ The two partners and the three children lived together for more than two years after the birth of the child and then separated.¹⁸⁴ The petitioner sought a declaration of parentage for the third child and rights of access to all of the children.¹⁸⁵ The petitioner asserted that the child's conception and birth were the result of a deliberate plan of action to have a child in their relationship, though by the time of the court application the biological mother contended that the child was conceived as the result of an "accidental and unplanned product of casual intimacy."¹⁸⁶

The petitioner launched a challenge to the presumptions of paternity contained in section 45(1)(a) of the Saskatchewan Children's Law Act, which provides that a man is presumed to be the father of a child if he was cohabitating with the mother at the time of birth or conception.¹⁸⁷ The petitioner argued that the failure to extend this presumption to a woman who was cohabitating with a biological mother at the relevant time constituted a violation of section 15 of the Canadian Charter of Rights and Freedoms.¹⁸⁸ In denying the petitioner's challenge, Wilkinson J. held that the presumption of paternity was not "based on societal stereotypes in the ordinary sense," but rather, was rooted simply in the assumption that "a man and a woman cohabitating at a child's conception or birth were

circumstances faced by planned lesbian families is likely the result of their non-inclusion in the provincial legislation that governs the assignment of legal parentage. For an empirical survey of these legal and social problems currently confronting such family forms, see Fiona Kelly, *Re(Forming) Parenthood: The Assignment of Legal Parentage within Planned Lesbian Families*, 40 OTTAWA L. REV. 185 (2008-2009) and FIONA KELLY, *TRANSFORMING LAW'S FAMILY: THE LEGAL RECOGNITION OF PLANNED LESBIAN MOTHERHOOD* (2011).

181. See 2005 SKQB 502, paras. 2, 24, 73 Sask. R. 127 (Can.) (explaining that the law provides that a male living with a woman is presumed to be the father of the child, but a lesbian partner is not).

182. See *id.* at para. 1 (stating that the couple had been together from December 1999 through January 2005).

183. *Id.*

184. See *id.* (noting that the third child was born in 2002).

185. *Id.* at paras. 2-3.

186. *Id.* at para. 1.

187. Children's Law Act, S.S. 1997, c. C-8.2, § 45(1) (Can.).

188. *C. (P.)*, 2005 SKQB 502 at para. 2.

engaging in sexual intercourse.”¹⁸⁹ Wilkinson J. also noted that the petitioner’s application assumed that the legislation could enable a court to find that a child (or children) had more than one mother, “an assumption that is flawed.”¹⁹⁰

This 2005 decision illustrates a judicial unwillingness to recognize the evolving definitions of “family” and “parenthood.” Despite the fact that a man in the same situation as the petitioner would have been presumptively deemed the child’s father, the court ruled that it could not “aspire to affect the fundamentals of biology that underlie the presumption purely in the interests of equal treatment before the law.”¹⁹¹ At a time when more and more same-sex couples are choosing to become parents, legislation which continues to rely on “old legal assumptions that . . . parenthood is congruent with birth or the fact that a man is married to or in a relationship with a birth mother” remains untenable.¹⁹²

Some more recent Canadian decisions have begun to acknowledge the new realities created by lesbian and gay parenting and ARTs.¹⁹³ As discussed above, the court in the 2006 Ontario decision in *Rutherford v. Ontario (Deputy Registrar General)*¹⁹⁴ took a very different approach than that in *C. (P.) v. L. (S.)*, holding that a legislative scheme which did not allow “lesbian co-mothers” to be registered on their children’s statement of live birth discriminated on the basis of both sex and sexual orientation, contrary to section 15 of the Canadian Charter of Rights and Freedoms.

Perhaps the most significant illustration of the wider recognition of gay and lesbian parenting issues is the 2007 Ontario Court of Appeal decision in *A. (A.) v. B. (B.)*.¹⁹⁵ When a lesbian couple who had been in a committed relationship for over a decade decided to have a child, they turned to one of their gay male friends, who agreed to act as a sperm donor.¹⁹⁶ One woman and the man became the biological parents of the child—who was born as a result of artificial insemination in 2001—and were identified as such on the

189. *Id.* at para. 20.

190. *See id.* at para. 24 (observing that the petitioner assumed the statute would allow a child to have more than one mother instead of challenging the statute for failing to allow more than one mother).

191. *Id.* at para. 20.

192. Boyd, *supra* note 8, at 65.

193. *See* Donna Bouchard, *The Three-Parent Decision: A Case Commentary on A.A. v. B.B.*, 70 SASK. L. REV. 459, 474 (2007) (“*A.A. v. B.B.* stretches the notions of family and of parent.”).

194. *See* (2006), 81 O.R. 3d 81, paras. 232-33 (Can. Ont. Sup. Ct. J.) (finding that there is a pre-existing disadvantage for lesbian mothers and that registration on a child’s birth certificate is a core dignity).

195. 2007 ONCA 2, 83 O.R. 3d 561 (Can.).

196. *See id.* at para. 1 (explaining that the couple had been together since 1990 and decided to have a baby in 1999).

child's birth certificate.¹⁹⁷ It had been agreed from the outset by all three parties that the women would serve as the child's primary caregivers, but that the man would remain an active participant in the child's life.¹⁹⁸ With the support of the biological parents, when the child was two years old the partner of the biological mother made an application to the court for a declaration that, in addition to the biological parents, she was also a full legal parent.¹⁹⁹ She chose to pursue her parental rights via the route of a court declaration of parentage because if she had sought instead to adopt the child, this would have required the father to forfeit his parental rights as the child's father, something none of the parties wanted or intended.²⁰⁰

Although the trial judge recognized that making the declaration would be in the child's best interests, he felt constrained by the legislation.²⁰¹ Subsection 4(1) of the Ontario Children's Law Reform Act specified that any person having an interest in a child could apply for a declaration that they be recognized in law as "*the* father" or "*the* mother" of a child.²⁰² The use of the definite article "*the*" was held by Aston J. to be indicative of the legislature's intent—that is, that a child was to have only two parents, one mother and one father: "When the legislation uses a word such as '*the*,' it is presumed to do so precisely and for a purpose. It represents a choice of the definite article over the indefinite article. Considerable weight must be given to its clear and ordinary meaning."²⁰³

This conclusion illustrates the deficiencies in much of the current Canadian legislation: this restrictive language denied parental status to a mother who participated in planning the child's conception, and provided primary care from the moment of birth. The Ontario Court of Appeal overturned the trial judge's decision, holding that it was contrary to the child's best interests to deprive him of the "legal recognition of parentage of one of his mothers."²⁰⁴ Writing for the Court, Rosenberg J.A. stressed

197. *A.A. v. B.B.* (2003) 38 R.F.L. 5th 1, paras. 1, 4-5 (Can. Ont. Sup. Ct. J.).

198. *Id.* at para. 4.

199. *See id.* at para. 1 (noting that the applicant asked specifically to be declared a "mother" of the child).

200. *See id.* at para. 14 (explaining that adoption procedures require the court to terminate the rights of one parent in order to declare another person the parent).

201. *See id.* at para. 40 (stating that "the court is unable to repair any legislative shortcoming through *parens patriae*").

202. Children's Law Reform Act, R.S.O. 1990, c. C.12, § 4(1) (Can.) (emphasis added).

203. *A.A.*, 38 R.F.L. 5th 1, at para. 34.

204. *A.A. v. B.B.*, 2007 ONCA 2, para. 37, 83 O.R. 3d 561 (Can.). As discussed in this decision, superior courts in Canada, the United Kingdom, and some other Commonwealth countries have an inherent *parens patriae*—Latin for "parent of the country"—jurisdiction to make orders that advance the best interests of children in situations where there is a "legislative gap." Unlike those situations where there is a constitutional challenge, when exercising its *parens patriae* power a court clearly cannot override an explicit legislative provision, but only has a narrow power to "fill in

the existence of a “gap” in the legislation and noted that the provision no longer accorded with modern social and familial realities:

Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or “natural” parents. The *CLRA*, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.²⁰⁵

The Court allowed the appeal and issued a declaration, pursuant to its *parens patriae* jurisdiction, that the partner of the biological mother was also the child's legal mother, thus recognizing three legal parents for the child.²⁰⁶ The decision of the Court of Appeal is indicative of a progressive, child-focused judicial response to issues related to parenthood and ARTs; the Court developed a creative solution to address the limitations of outdated legislation in an effort to ensure that non-traditional families are accorded the same rights as traditional, heterosexual families.

CONCLUSION: ARTS—IMPROVING REGULATION AND ACCESS

Canada has always had diverse family forms, but until relatively recently only the traditional, heterosexual marriage was considered worthy of social or legal recognition. Today, there is an increasing diversity of family forms as well as greater visibility for those such as same-sex partners who may have previously been more secretive about their relationships. Canadian law has extended its legal recognition of adult relationships to include same-sex marriage and non-marital cohabitation, and has recognized psychological parentage. There is also a growing acceptance of the legal significance of same-sex parental partners and the use of ARTs to assist in procreation. However, the law has not kept pace with changes in social behavior and the changing nature of ARTs. Consequently, all jurisdictions in Canada should undertake a review of their legislation governing parentage and children conceived by ARTs.

Parents and children should not be put to the expense of having to litigate to establish recognition of their relationships. Rather, there should be a legal structure that reflects the psychological realities of children's lives and takes adequate account of the intentions of those individuals who

the gaps” of legislation.

205. *Id.* at para. 35.

206. *See id.* at para. 37 (explaining that because it is not in the best interests of the child to have one of the women raising him not recognized as his legal mother, the court may fix the discrepancy though *parens patriae* jurisdiction).

are using ARTs to conceive such children. The availability of appropriate legislative guidance is vitally important for those using ARTs, the children who are conceived in this manner, and the medical and legal professionals who work with these families.

In response to these concerns, in July 2010 the government of British Columbia released its *White Paper on Family Relations Act Reform (White Paper)*.²⁰⁷ This document has provided important guidance for reform in that province, as well as useful guidance for reform elsewhere in Canada. The recommendations set out in the *White Paper* provide that where assisted conception is used—with the exception of surrogacy—the birth mother’s opposite-sex or same-sex spouse, whether or not they are married, is presumed to be the child’s other parent, a presumption that may be rebutted if the partner did not consent to insemination.²⁰⁸ The *White Paper* also provides that third-party donors of eggs, sperm, or an embryo are not to be considered parents solely by virtue of their donation.²⁰⁹ However, where assisted conception is used, a child may have more than two legal parents if the parties involved all agree and set out their intentions in writing prior to the assisted conception.²¹⁰ Further, surrogacy agreements are to be given legal recognition, though they are not to be fully enforceable.²¹¹ For example, while a birth mother who has agreed to act as a surrogate is not to be required to relinquish her status as the child’s parent to the intended parent(s) based only on an agreement made prior to the birth of the child, if after birth she provides the intended parent(s) with her written consent, effectively turning over parentage of the child to the intended parent(s), and the intended parent(s) take the child into their care, then the parentage of the intended parents will be established. In November 2011, the proposals in the *White Paper* were enacted by the legislature in British Columbia,²¹² though the new law has not been proclaimed in force, and at the time of writing, no date had been set for the legislation to come into effect.

While this Article has focused on legal issues related to parentage and the regulation of ARTs, often the most significant issues facing individuals who wish to conceive children using ARTs concern access to services and to the human gametes and embryos needed for ARTs. Indeed, in Canada,

207. B.C., MINISTRY OF ATTORNEY GEN., JUSTICE SERV. BRANCH, CIVIL POLICY AND LEGISLATION OFFICE, *WHITE PAPER ON FAMILY RELATIONS ACT REFORM: PROPOSALS FOR A NEW FAMILY LAW ACT (2010)* at 10.

208. *Id.* at 36.

209. *Id.* at 86.

210. *See id.* at 55 (explaining that one of the problems with presuming that donors are also parents could mean that they would be required to pay child support when it was never intended by the terms of the agreement for them to do so).

211. *Id.* at 86.

212. British Columbia Family Law Act, S.B.C. 2011, c. 25. §§ 23-33.

the greatest legal impediment to accessing ARTs is the prohibition in the Reproduction Act on payments to gamete donors, which has the effect of dramatically reducing domestic supply. As mentioned above, this has resulted in the importation of frozen semen (at considerable cost) as well as the denial of ready access to fresh semen, which some believe is preferable for artificial insemination.²¹³ Wealthy couples and individuals seeking to use ARTs or surrogacy can overcome these impediments by engaging in ‘reproductive tourism’—that is, going to other countries, such as the United States, where surrogacy and other practices are legal and available, for a price.

Assisted reproductive technology needs to be regulated to ensure that high quality services are being provided, and to prevent exploitation and protect the interests of children. However, Canada’s current ban on payments does not meet the needs of either those wishing to use ARTs or those who may be willing to act as donors albeit with suitable compensation. Canada should adopt a system that allows for payments to gamete and embryo donors, particularly for ova donors who must endure considerable inconvenience, as well as some medical risk and discomfort upon donation. The arguments in favor of permitting some form of payment are even stronger in the case of surrogate mothers who experience more serious risks, discomfort and income loss. The examples offered by other jurisdictions—like some American states—that allow for payments clearly indicate that it is possible to balance concerns about preventing exploitation while at the same time encouraging donations by providing for reasonable compensation.²¹⁴

Finally, although all residents of Canada have access to government funded “medically necessary” health treatment without charge, until recently ARTs have not been regarded as “medically necessary” anywhere in Canada, and in most provinces individuals are still required to pay the considerable costs associated with ARTs. However, beginning in August 2010 in Quebec, the provincial government began to cover the costs to enable infertile Quebec couples to have up to three IVF treatment cycles including egg harvesting, in-vitro fertilization, pre-implant genetic testing, embryo transfer and sperm sample collection.²¹⁵ Additionally, single

213. There is some lingering controversy over whether impregnation rates are higher and birth defects lower with fresh semen. See, e.g., H. Yavetz et al., *The Efficiency of Cryopreserved Semen versus Fresh Semen for In Vitro Fertilization/Embryo Transfer*, 8 J. ASSISTED REPROD. & GENETICS 145 (1990).

214. For a review of some experiences involving payments to surrogate mothers and a detailed argument in favor of allowing this in Canada, see Busby & Vun, *supra* note 122.

215. Robin Hilborn, *Provincial Help for the Infertile in Canada—Free IVF in Québec; Tax Help in Manitoba; Ontario Balks*, FERTILITY HELPER (Sept. 16, 2010), <http://www.familyhelper.net/iy/news/100917quebecivf.html>.

women and lesbian couples in that province can now get sperm insemination fully paid for by the government.²¹⁶ Most other Canadian provinces, by contrast, do not typically cover the costs associated with most assisted reproduction treatments.²¹⁷ For example, in Ontario the government will pay for three in-vitro fertilization cycles only if a woman has both fallopian tubes blocked.²¹⁸ Although in 2009 a government-appointed panel called for increased government support for ARTs, Ontario has yet to act on these recommendations.²¹⁹ While in some places in Canada there are charitable organizations that provide some limited assistance to infertile couples seeking medical treatment, too often costly ART treatments are unaffordable.²²⁰ Canada's publicly-funded health care system is under considerable financial stress, and so there should be limits on government funding for ART for infertile couples where there is a low probability of a successful birth. However, Canadian provincial governments should at least provide some financial support and improve accessibility for those seeking medical involvement to conceive a child, especially for the relatively inexpensive processes involved in the artificial insemination of women without male partners, which involve lower cost and risk than other ART processes such as *in vitro* fertilization and embryo transfers.

216. *Id.*

217. *See id.* (noting that other provinces do not have the funding to provide services for the infertile).

218. *Id.*

219. ONT., MINISTRY OF CHILDREN & YOUTH SERVS., RAISING EXPECTATIONS: RECOMMENDATIONS OF THE EXPERT PANEL ON INFERTILITY AND ADOPTION (2009).

220. A controversial recent Canadian response to the high cost of infertility treatment in Canada was a "win-a-baby" contest, sponsored by an Ottawa radio station, which offered \$35,000 worth of treatment to five couples, who were required to write letters explaining why they wanted the treatment. *See, e.g.*, Paul Townsend, *Contest Offers Life Altering Medical Procedure*, OTTAWA CITIZEN, Oct. 17, 2011, <http://www.ottawacitizen.com/health/Contest+offers+life+altering+medical+procedure/5560852/story.html>.