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How queer!?
Canadian approaches to recognizing queer families in the law

Abstract: Canada is at the global forefront in providing legal recognition to queer parents. To date, three of its ten provinces (British Columbia, Ontario and Saskatchewan) will grant parental status to three or more intentional parents and enable their identification on birth registration. All provinces and territories permit the registration of an "other parent" on birth registration, and all jurisdictions enable queer couples to adopt. Notably, these legislative accomplishments have not attracted a great deal of political resistance. The relatively slow process of reforming parentage law to adapt to same-sex marriage and common law relationships, favourable court rulings and the combination of the need to address parentage in situations involving both assisted reproduction and queer families have been significant factors in the Canadian story. Moreover, the terms of the legal provisions continue to rely largely on conjugality and biology as the basis of parentage claims. These developments have clearly been important for some queer families, but they exist within fairly conventional parameters, begging the question as to how queer Canada's parentage recognition really is.

Keywords: Family law; LGBT studies; social theory; Canada.

Canada is at the global forefront in providing legal recognition to queer parents.[1] To date, three of its ten provinces (British Columbia, Ontario and Saskatchewan) will grant parental status to three or more intentional parents and enable their identification on birth registration. All provinces and territories permit the registration of an "other parent" on birth registration (in addition to the birth parent; or in cases of surrogacy, in place of the birth parent). And all jurisdictions enable queer couples to adopt. Nonetheless,

[1] Australia, the Netherlands, New Zealand, the United Kingdom and the United States all have provisions for a non-biological same-sex partner to be named a parent. Australia, New Zealand and the UK maintain a two-parent limit (on Australia see Budimski & Nioloudakis 2020; Law Commission of New Zealand 2005; UK *Human Fertilisation and Embryology Act* 2008). Some US jurisdictions have recognized three parents, but, to date, these determinations have not been part of a pre-conception agreement, or by operation of law (Jacobs 2016). Further, the Netherlands has legislation recognizing up to four parents, but they are differentiated, with biological parents having greater parental rights than 'custodial' parents (Dixon 2019; Trachman 2019).

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there are a number of inconsistencies and contradictions in the Canadian queer parentage landscape that complicate this rosy glow of progressiveness. Tellingly, these legislative accomplishments are *not* especially marked by the scars of bitter divisiveness, pitting homophobic and transphobic resistance and ardent fathers' rights advocates against queer families. Rather, the laws recognizing multiple parents have, in fact, encountered relatively little overt political resistance (Kelly 2014: 580; Snow 2017: 341). Does the fact that Canadians are so blasé about multiple parents indicate an especially queer-inclusive political zeitgeist? Or, by contrast, does this lack of political ardour suggest that multiple parentage, as currently articulated in the law, isn't really so radical – so queer – after all?

Legal recognition of queer relationships and families is a quintessential paradox. Queer identities are queer precisely because they resist definition, challenging normative conceptions of how people are expected to represent themselves and relate to others. Queerness is an ongoing critical engagement with social intelligibility. It is unfixed. As Judith Butler has so captivatingly argued, if the term "queer" is to be a site of collective contestation… it will have to remain that which is, in the present, never fully owned but always and only redeployed, twisted, queered from a prior usage and in the direction of urgent and expanding political purposes" (1993: 312). Yet such fluidity is antithetical to law and to legal recognition; domains in which clear definition is regarded as essential for effective adjudication. Moreover, in the absence of clarity, judges work to insert it, constraining language and rules in the service of order, as much (or more) as justice. Meanwhile, queer families who seek the protection that legal recognition affords – people who "desire the state's desire" – are also pursuing a certain solidity and security (Butler 2004: 111). They desire "to vacate the lonely particularity of the nonratified relation and, perhaps above all, to gain both place and sanctification in that imagined relation to the state" (Butler 2004: 111). This is a difficult political space to inhabit, and, undoubtedly, queer parents and families inhabit it differently depending on their values and the conditions that enable and constrain their capacity for family life. Moreover, as the temporal qualification that opened this essay suggests, the contours of queer familial political space change over time, even within bounded national and sub-national jurisdictions.

In this paper, I examine the legal regimes that govern queer family recognition in Canada, arguing that despite the progressiveness (or

permissiveness) of Canadian approaches to recognizing non-normative families, legal parentage remains significantly circumscribed by genetics, biology and conjugality.[2] The fight for legal recognition of queer families has had some significant effects, obliging governments and legal challengers to reveal the taken-for-granted assumptions that have undergirded family law for centuries. These revelations have been fundamental to broadening the legal landscape of queer inclusion. Yet, to the extent that queer inclusion derives from liberal, privatized norms of familial relationality (whether biological or conjugal) and intentionality, the Canadian regime is less transgressive than it might first appear. Of course, this is a relative claim, and I do not wish to diminish the very real gains that queer parents have enjoyed, nor the distance they still have to travel in many Canadian provinces and territories. Yet the fact that many, indeed, the majority, of queer families, do not find their dynamic family forms represented in the law, reveals the degree to which legal recognition is still insufficiently inclusive in certain contexts, at least for those who seek or would benefit from such recognition. By contrast, for queer families who are politically disinclined to seek legal sanctification, these emerging regimes may be increasingly constraining and normalizing.

The paper proceeds by providing a broad outline of the development of parental status recognition in Canada, with particular emphasis on legal developments concerning reproductive technologies and queer parents. After outlining the historical context for parentage recognition and its recent developments in Canada, I turn to two illustrative cases in which courts in Ontario and Newfoundland and Labrador have seen fit to recognize three parents – a lesbian couple and their known donor; and a polyamorous heterosexual threesome. I then turn to legislative efforts in BC, Ontario and Saskatchewan to recognize three or more parents. The child's best interests, the functional dimensions of care-giving, and the need to

[2] Comparative scholarship on reproductive technologies, parentage and queer inclusion describes legal and political regimes along a permissive-restrictive continuum, apparently, according to Snow, to avoid the normative claims associated with the language of conservative/liberal, traditional/non-traditional, and natural/unnatural (Snow 2016: 7). Leibetseder and Griffin (2020), however, seem to eschew this concern to "avoid normative trappings" (Snow 2016), mobilizing their comparative framework to reveal the various normative assumptions that underlie laws in Estonia, Austria and the UK with regard to queer access to parentage recognition and reproductive technologies. Since I argue from an openly normative position, I do not feel beholden to these terms of art, though I mobilize them when they are helpfully illuminating.

address parentage issues that arise from assisted reproduction have been critical to the political and legal traction of these reforms, suggesting that the state's interest in both recognizing the dynamics of contemporary family formation and facilitating privatized support may outweigh the symbolism of traditional, moral arguments about the monogamous, reproductive family.

Parentage law in Canada

The state's interests in regulating the status of parents are articulated in the rights that flow from guardianship, inheritance and citizenship laws. These interests include:

a. Assigning responsibility for care (emotional and physical nurturance; necessaries of life; health care; education etc.)
b. Conferring decision-making authority on behalf of a child
c. Conferring support obligations in the event of divorce or relationship breakdown
d. Granting the capacity to act in legal proceedings on behalf of the child
e. Determining rights of inheritance
f. Determining citizenship

While none of these activities inherently rely on a biological relationship to be fulfilled, families – based around presumptive biological relationships underpinned by the legal framework of marriage – provide the foundation from which these obligations flow. Thus, the state's interests in ensuring the care of children align with the state's governance of kinship – or who constitutes a family.

As alluded to above, in Canada, parentage determinations fall under provincial authority, while marriage and divorce are a federal jurisdiction. When Canada passed the *Civil Marriage Act* in 2005, marriage between same-sex partners became legal across the country. Provinces and territories were much slower, however, to adapt their parentage laws to this new reality. This disconnection is interesting for what it reveals about the relationship between marriage and parentage. Historically, of course, legal definitions of parents tracked marriage very closely.

In the English common law tradition and the French Civil Code – structures of legal ordering that, predictably, take heterosexism and gender binarism as a given – men are understood to maintain a paternal presumption

in which a husband is the father to any children of his marriage: *pater est quem nuptia demonstrant* (Freeman & Richards 2006: 72; Mykitiuk 2001: 779). This presumption finds its origins in the indeterminacy of paternity and the certainty of birth from the mother. Since paternal certainty through DNA testing is a very recent development, the law's paternal presumption via marriage did the work of securing the relationship between father and children. Thus, a child born within the context of a marriage, but whose biological inheritance came from someone other than the husband, nonetheless was understood to be a son or daughter to the mother's husband. And while a man might attempt to rebut his paternity in such circumstances, such efforts were rare and courts were largely unpersuaded (Bala & Ashbourne 2012: 529-30).

Historically, the paternal presumption also distinguished between legitimate children, defined as those of the marriage, and illegitimate children, those produced outside of marital relations. A child born out of wedlock was rendered *filius nullius* (child of no one). Illegitimacy meant that an actually existing, living being could not command the status of a legal person nor could that non-person claim rights to lineage, to inherit or pass on their own wealth (Mykitiuk 2001: 782). While mothers could create bare life, only husband-fathers could confer full humanity and full entry into the social realm.

Today, most of Canada's various provincial and territorial family law (or child status) acts define fathers as, in the first instance, biological fathers.[3] That declaration of parenthood is subsequently qualified by numerous provisions describing paternal/parental presumptions, provisions that have become considerably more extensive given the demise of the status of illegitimacy, the prevalence of cohabitation, and, slowly and unevenly, the recognition of same-sex partners as non-biological parents by virtue of a child being born within the context of the relationship and with their consent. These presumptions include (male) persons who were the spouses of, or cohabited with, women (persons) who gave birth during the course of the relationship, within 300 days of the relationship's end, or who married or

3 See, for example, Alberta Family Law Act S.A. 2003, c. F-4.5 [Alberta FLA], s. 8; British Columbia Family Law Act S.B.C. 2011, c.25 [BC FLA] s. 26; Manitoba Family Maintenance Act CCSM c F20 s. 23 [Manitoba FMA]; Ontario Children's Law Reform Act R.S.O. 1990, c. C. 12 [Ontario CLRA] s. 7; Art 525 Civil Code of Québec [CCQ]; Newfoundland and Labrador Children's Law Act RSNL 1990, c C-13 [NLCLA], s.10.

began cohabiting with the mother (birth parent) and acknowledge that they are the father (parent) of the child.[4] These laws do not mandate DNA testing to ensure paternity within a family headed by a heterosexual couple. Rather, the admissibility of DNA tests is only contemplated when paternity is contested. Moreover, if paternity (parental status) is successfully contested, Canadian law declares that no person shall be presumed to be the child's father (parent).[5] Fatherhood then, may be defined as biological, but that is the work of the law, rather than nature itself. More specifically, legal fatherhood is determined by the relative formality of the connection between men and mothers. In more updated legislation, this formal connection is expected between the birth parent and their spouse or conjugal partner.

Scientific advances have also troubled the certainty of maternity. Reproductive technologies have made it possible for three people to claim motherhood: the person who intends to care for a child, the person who contributes the genetic material, and the person who gestates the embryo and gives birth (Boyd 2007: 69; Mykitiuk 2001: 791). In Canadian jurisdictions, this complicated field of potential maternal claims has been resolved by identifying the gestational parent as the mother, or birth parent, in the first instance. In those provinces that include provisions for surrogacy and intentional parents, the birth parent is able to waive their parental rights in a relatively straightforward and expeditious process after the birth of the child, if the intended parent(s) and the birth parent have fulfilled various formalities in advance of the conception.[6]

4 See, for example, AB FLA, s. 8; BC FLA, s. 26; Manitoba FMA, s. 23; ON CLRA s. 7; Art 525 CCQ; NLCLA, s. 10. Since only Ontario and Saskatchewan use trans-inclusive language, and several other provinces rely on the heterosexual norm with exceptions framed as "other parent" in situations involving assisted reproduction, I have attempted to represent the range of language that appears in these statutes.

5 See, for example, Manitoba FMA s. 34; ON CLRA s.7(3). This rebuttable presumption also applies to same-sex partners who wish to dispute their consent to parent, or to clarify their lack of intention to be a parent. Yet while rebutting the presumption may block parental designation, it is less clear that it blocks "parent-like" obligation. In the case of *Doe v. Alberta* 2007 ABCA 50 (CanLII), for example, a woman in a heterosexual couple desired a child, while her male partner did not. They attempted to establish an agreement through which the male partner would be explicitly excluded from any responsibilities for the child. The judge held that such a contract was invalid, and that while the male partner could not be understood as a parent (the child was conceived with the assistance of an anonymous sperm donor and he clearly did not consent to be a parent), their shared residence and the relationship between the adults would necessarily create bonds between the man and the child.

6 In BC, this process is administrative (BC FLA s. 29, 31). In Alberta, Ontario, Nova Scotia and Saskatchewan, the process requires a declaration from the court. AB FLA 2003, s .8.2 ON CLRA

Most recently, Ontario and Saskatchewan have adopted trans inclusive language for their parentage provisions, dispensing with the designation of mother and father altogether. For example, both provinces declare the "birth parent of a child…to be a parent of the child", and that if a child was conceived through sexual intercourse, "the person's sperm [that] resulted in the conception of the child", holds a rebuttable presumption of parenthood.[7] As I discuss below, it was this removal of the status markers of "mother" and "father" that led to the most significant political contestation in the Ontario legislative reform process. The objection here was not about trans inclusion or multiple parent provisions, but rather the affront to the cultural meanings of these kinship designations (Cross 2016).

Despite these technological developments and the extension of relationship recognition to include same-sex marriage, as well as cohabiting relationships for different and same-sex partners (presumptively monogamous), most Canadian provinces have, as noted, been remarkably slow to respond to their implications for parental status determination (Rogerson 2017 9192). The extension of a parental presumption to the same-sex partner of a birth parent has been hard fought and remains unavailable in child status law (even if it is possible to be registered as a child's "other parent" on the birth registry) in four provinces and two territories.[8] And, in the uneven recognition of surrogacy arrangements, gay male couples have also struggled to have their parenthood recognized. As Robert Leckey observes, the prohibition against surrogacy in Quebec means that gay men are required to use the adoption process to create families, regardless of genetic contribution (2009: 267). Further, situations in which people want to co-parent outside the dyadic model, involving various biological, genetic or otherwise interested parties, have only been addressed in British Columbia (2013), Ontario (2016) and Saskatchewan (2020), and largely constrained by

s. 10 (7); Nova Scotia, Birth Registration Regulations, NS Reg 390/2007, s. 3; Saskatchewan Children's Law Act S.S. 2020, c. 2, s. 62(7) [SK CLA].

7 See Ontario, *Children's Law Reform Act,* RSO 1990, c C.12,[Ontario CLRA] s. 6,7; Saskatchewan, *Children's Law Act,* 2020, C-2. [Saskatchewan CLA] s. 58, 59.

8 Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador, NWT, and Nunavut. Note, however, that the Newfoundland and Labrador Supreme Court has recently used its *parens patriae* powers to recognize three parents to a child born within the context of a polyamorous relationship. *CC (Re),* 2018 NLSC 71 (discussed below), and that the Manitoba court has held that the *Family Maintenance Act* is in violation of the equality protections of the *Charter of Rights and Freedoms,* and that the legislation must be in compliance by November 2021. See: *JAS and CMM et al v. (Manitoba) Attorney General* MBQB, 20-01-24769.

the bounds of conjugality and biological/genetic contribution. Otherwise, a two parent limit prevails in Canadian jurisdictions.[9] How do we understand this hesitancy to recognize more varieties of parentage, how does that hesitancy relate to the purposes of parentage, and what happened in those jurisdictions that have, in fact, gone beyond the parental dyad? The remainder of the paper considers these questions, first, in the context of the family of liberal democracy and then turning to case law and legislation, demonstrating the possibilities and inferring the limits of queer inclusion within the laws of parental recognition.

The liberal democratic state and family status

In many respects, the relationship between the liberal rights that underpin contemporary democracy and the institution of the family has been extremely awkward. The family has long been understood as a site of privacy; a space beyond the reach of the state (qua: "the state has no place in the bedrooms of the nation," as former Canadian Prime Minister Pierre Trudeau famously stated). In its historical formulation, the monogamous, heterosexual family supported the emotional needs of men under the model of *paterfamilias* and the doctrine of coverture, in which, through marriage, two would become one, and that one would be the husband (Cott 2000: 11-12). The sanctity of the hearth and home supported men's rational deliberation and action in the public sphere of politics and commerce (Ferguson 2012: 14, 22-24; Pateman 1988). Despite the clear power imbalances that such an arrangement relies upon, the family has, nonetheless, been understood as, "pre-political" or a space in which claims of rights and appeals to equality clash with intimate bonds of love and care (Stevens 1999: 55-56).

As we know, from our current vantage, this tension between family privacy and democratic equality has been steadily challenged. Over the last 150 years, for example, women have fought to realize democracy's promise of equality and freedom that this conception of family privacy had denied them. These triumphs have included married women's property rights, the right to vote, the ability of married women to enter into contracts on their

9 Notably however, multiple parties may be designated as "standing in place of a parent" or as "guardians". The first of these has arisen from situations of separation and divorce, in which a step-parent may desire a continued relationship with a child, or the state may impose support obligations on the basis of a finding of a "parent-like" relationship (*Chartier v. Chartier* 1999 1 SCR 242). Guardians have considerably more legal responsibilities, but their status generally ends when the child reaches the age of majority.

own behalf, and to divorce without fault. Technological developments such as contraception have enabled women to exercise control over their reproductive lives, the spacing of their children and the size of their families.

These struggles for equality within the family have extended to the concept of equality among families, and the fight by LGBTQ+ folks to have their families recognized in the law. From the decriminalization of homosexuality to protection against discrimination on the basis of sexual orientation and gender identity, to legal status for same-sex cohabiting and married couples, access to reproductive technologies and adoption for same-sex partners, parental registration and, increasingly, parental status designations by operation of law, LGBTQ+ Canadians have seen a steady improvement in their ability to form families under conditions of their choosing and to have them appropriately recognized.

One might note, here, that the efforts of women and sexual minorities to have their autonomous personhood and close personal relationships recognized has required a refashioning of the state's governance of the private realm, rather than an unprecedented incursion of the public into the private, as some conservative commentators have suggested (Cere & Farrow 2004). It is not a "natural fact" that a man should be the head of the household, or that households are "naturally" formed by monogamous heterosexual couples and their offspring. Instead, this family form was achieved through law and politics and actively reinforced through prohibitions on alternative family forms and on autonomy within the family. Efforts to redefine family roles and structures do require political will and legal reform, but it is inaccurate to define these efforts as an inappropriate incursion of the public into the private. Instead, the demand for equality within and between families is a desire for an extended access both to the benefits that accrued to the family patriarch as well as the dignity and autonomy that family status itself, conveys (Boyd 2013: 268).

Democratic values have also impacted families with regard to the status of children. The demise of illegitimacy, as already observed, was an important development in ensuring fundamental equality regardless of the circumstances of one's birth. Further, the advent of children's rights, notably in the *UN Convention on the Rights of the Child*, and the emergence of "child's best interests" as the appropriate standard for adjudicating issues of custody, adoption, support and access have established children as subjects with inherent rights, rather than subordinating them to the rights and

interests of parents.[10] Of course, the question of how to determine a child's best interests presents its own set of challenges, often deeply entwined with normative conceptions of the functional family. The recognition that a child's best interests can be assured by loving parents, regardless of their gender identity, or the mode of the child's conception, has been fundamental to the ability of same-sex and queer parents to form families (Kelly 2009a). Yet, the inconsistency and difficulty of parentage determinations in situations involving conception through reproductive technologies, and especially when those situations involve queer partners undermines Canadians' access to equality in the realm of sexual orientation and family status. Moreover, children may face unequal treatment with regard to the security of their parentage and the obligations that flow from that status, depending on their mode of conception. In *Caron,* for example Canada's Ministry of Immigration, Refugees and Citizenship denied citizenship to an infant on grounds that he was not genetically or gestationally related to his Canadian mother.[11] Born abroad with the assistance of reproductive technologies and in the context of a same-sex relationship, he was nonetheless denied Canadian citizenship because of a failure of the Canadian *Citizenship Act* to contemplate either queer parentage or the implications of reproductive technologies. In the summer of 2020, however, the parents succeeded in having this assessment overturned, and the Minister for Immigration, Refugees and Citizenship indicated his enthusiasm for expanding the definition of parent in the *Citizenship Act* to include queer couples, stating that "Canada is grateful to them for the courage and strength they have shown in righting this wrong" (Mendocino cited in Burns 2020).

Hesitancy and the slow train of recognition

I began this article with the observation that there has been relatively little overt, organized resistance to extending parental status to same-sex partners, and yet it has also been very slow in coming. Certainly, this lack of alacrity might be read as a kind of resistance in itself. However, as the complicated parental claims that emerge from the assisted reproduction scenarios combine with a desire for queer parenting, it is also evident that the task of legal codification is challenging. Canadian jurisdictions have

10 The Supreme Court's decision in *King v. Low* [1985] 1 S.C.R. definitively established child's best interests as the appropriate judicial standard.

11 *Caron c. Attorney General of Canada* 2020 QCCS 2700 (CanLII)

landed on the determination that the person who gives birth is a parent in the first instance, regardless of their genetic relationship to the child or their conjugal relationship to the person who provided the sperm (Wiegers 2012/13: 192-93). The birth parent can sign away their parentage – as in a surrogacy arrangement, but the surrogacy agreement is not recognized as a valid contract in any Canadian jurisdiction, and thus does not provide intentional parents with a legal claim to the child in the case of a dispute.[12] By now, most provinces have clarified the law surrounding the parentage claims of genetic donors. People are not considered parents by virtue of donation alone (Wiegers 2012/13: 185-90).[13] On one reading, considering the heterosexual context, this provision can be understood as a protection of the sanctity of the procreative family. Despite the use of donor sperm, the husband or male partner of the birth mother thus maintains his claim to paternity – at least so long as he agrees to the arrangement. In a more queer-friendly interpretation – if also a homonormative one – such provisions can be seen to protect lesbian couples from the unwanted intervention of a known donor into the familial scene (Kelly 2013: 3-4). As we have seen, the non-biological partner of a birth mother is increasingly recognized as the child's other parent, creating increased security for lesbian partners. Yet when it comes to the parentage of gay men, people without a dyadic conjugal connection to a birth parent, and people desiring to parent beyond the two parent framework, Canadian parentage provisions are much more diffuse, uneven and unhelpful.

As this brief summary indicates, the expansion of parentage recognition has been most readily achieved when the reforms have been fairly easily accommodated within the terms of existing legal regimes. Since many legal reforms have emerged from case law and legal arguments are constructed around analogies to existing practices, the echo of heterosexist practice in contemporary parentage norms is unsurprising. It is also true that queer

12 The Canadian legal framework governing reproductive technologies is framed around the recommendations of a Royal Commission on Reproductive Technologies that reported in 1993. Since reproductive technologies were a new phenomenon at the time, the Commission was extremely concerned that women be protected from exploitation. And while they did not recommend a complete prohibition of surrogacy, their distaste for the practice was strongly articulated. It is also true that surrogates very rarely renege on their agreements (Nelson 2018: 188 and 194).

13 At the time that Wiegers' article was published, this claim was true in 5 of 10 provinces. Subsequently Ontario and Saskatchewan have added such provisions to their legislation and Manitoba seems set to act similarly.

folks who desire legal recognition are more likely to hew to the dyadic norm. Thus, parentage reforms have been most readily achieved when the demand aligns with the contemporary limits of the legal imagination.

Child's best interests, parens patriae, and three-parent decisions in Ontario and Newfoundland and Labrador

Another important element in the response to demands for recognition of expanded family forms is the normatively freighted assessment of a child's best interest. Canada's first foray into the prospect of a three parent family is instructive here. In the Ontario case of *AA v BB*, [2007] ONCA 2 [*AA v BB* 2007], a lesbian couple conceived with the help of a friend and all three parties to the arrangement felt that it would be in the child's best interests that they all be declared parents. According to Ontario law at the time, however, only the birth mother and the father were permitted to be parents. The non-biological co-mother would only be permitted to be recognized as a parent if one of the other parents reneged their parental status and she was permitted to adopt (*AA v BB* 2007, par 13]. Importantly, the child's care was primarily conducted by her mothers, while the father, who was in a heterosexual relationship, had less frequent engagement with the child. Yet despite the functional operation of the family, the law placed primacy on the biological parents and wrote the non-biological mother out of the script entirely. While the trial judge was sympathetic to the claimants' argument, he ultimately felt constrained by the use of the definitive article "the" in the legislation, finding that the law "contemplates only one mother of a child… the use of the words 'the father' and 'the mother'…connoting a single father and a single mother" (*AA v BB* 2007, par 18). Moreover, the trial judge held that the limit of two parents was the express intent of the legislation, and thus, that he could not use the *parens patriae* jurisdiction to fill a gap in the legislation (*AA v BB* 2007, par 28).[14] By contrast, the appeal court judge held that there was a gap in the legislation; that it would not have occurred to legislators at the time the act was passed that three parents were a possibility, and thus that he would indeed use the court's *parens patriae* jurisdiction to recognize three parents (*AA v BB* 2007, par 38). Since the motivation for the act had been to redress the harms of the status of illegitimacy and

14 *Parens patriae* refers to the court's inherent jurisdiction to protect a child from danger or to bridge a legislative gap (*AA v BB*, par 27).

to ensure the equality of children regardless of the circumstances of their birth, that logic could be extended to the child whose parentage was under consideration in this case (*AA v BB* 2007, par. 38).

AA v BB thus represents a very specific set of circumstances and was determined by a judge prepared to foreground the needs of the child and the actual operation of the family over more traditional, putatively biological, configurations of the family. Certainly, the traditional view made an appearance in the case, both in the form of the intervenor status of the Alliance for Marriage and Family, and in the two person, heterosexual limit on parentage inferred in the legislation by the trial court judge. This very specific ruling then, had limited applicability to future cases. Legislation would be required if queer families were to have more secure access to parentage recognition.

The issue of the "child's best interests" is crucially important and much debated. In Canada, the "child's best interests" is now the definitive standard for adjudicating issues of custody, adoption, support and access (*King v Low* [1985] 1 S.C.R. [*King*]).[15] As Wanda Wiegers explains, the Supreme Court's decision in *King* held that "although parental claims were entitled to serious consideration, they could be outweighed by an assessment of which party would best secure the 'healthy growth, development and education of the child'" (2009: 23, citing *King*, par, f). Children were not to be regarded as chattel, but as "citizens in becoming" (Dobrowolsky & Jenson 2004) whose interests did not necessarily align with the beliefs and commitments of their parents – at least insofar as those beliefs and commitments might undermine their future capacity to be productive contributors to society.

Understanding children as autonomous beings is all well and good, of course, but the work of interpreting their best interests is hardly an objective exercise. Infants are obviously unable to articulate their own wishes with regard to the architecture of their families, and thus judges, parents and various interested parties necessarily fill the void. Fiona Kelly's research has demonstrated, for example, that fathers' rights activists have had impressive success in persuading judges that paternal presence is essential to a child's best interests (Kelly 2011: 30-42; 2009). The Canadian judicial

[15] The child's best interest is referenced with regard to parentage determination, for example in Ontario's CLRA 13(5) and Saskatchewan's CLA 11, which state that the court shall not make a declaration of parentage unless that declaration is in the best interests of the child.

record is redolent with examples of judges "finding fathers" for lesbian and sole mother families over the express wishes of the mothers and their originary agreements with known donors (Kelly 2009b; Boyd & Arnup 1995). Thus, arguably, the fact that the parties to *AA v BB* were actively seeking a way to include both the co-mother and the father as legally recognized parents made their argument especially persuasive. Undoubtedly, it was also helpful that the family was as queerly proximate to the normative ideal as it is possible to be. The co-mothers were in a long-term monogamous relationship celebrated in a public ceremony and the father was involved in a long-term relationship with another woman (*AA v BB* [2003] CanLII 2139 ONSC [*AA v BB* 2003], par 2). They were all professionally successful and financially secure (*AA v BB* 2003, par 3-4). Tellingly, the lower court judge expressed his concerns about the precedent he might be setting by recognizing three parents for children "not before this court." For one thing, he opined, this would open the door to stepparents and extended family who might be making their claims in "less harmonious circumstances" (*AA v BB* 2003, par 41). Furthermore, he queried, "if a child can have three parents, why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect?" (*AA v BB* 2003, par 41). His concern with this proliferation of parents was, however, more about social policy issues and the havoc that such an arrangement would wreak for custody and access litigation, than for the child's well-being (*AA v BB* 2003, par 41). The appeal court judge was less concerned about these implications, finding, as already noted, that contemporary developments in family form (same-sex parents) and reproductive technologies had outstripped that capacity of the legislation to provide the equal status for children that was its aim (*AA v BB* 2007).

An (arguably) more radical use of the court's *parens patriae* jurisdiction to ensure a child's best interests by recognizing three parents, played out in the recognition of a polyamorous family in Newfoundland and Labrador in 2018.[16] In *Re CC* [2018] NLSC 71 Carswell Nfld 110 [*Re CC*], Justice Fowler relied heavily on the reasoning in *AA v BB* 2007 to find that the child's best interests would be best served by recognizing all three parents

[16] Polygamy is a criminal offence in Canada. One important distinguishing feature of polygamy is a formal celebration of the marriage. By contrast, polyamory is not illegal, but neither is it recognized in law. Marriage and legally recognized cohabiting relationships are limited to two people.

in a situation involving a biological mother and her two male partners, both of whom had equal likelihood of being the child's father (*Re CC,* par 37). Indeed, as Justice Fowler noted, "the fact that the biological certainty of parentage is unknown seems to be the adhesive force which lends the paternal identity of both men as the fathers of A" (*Re CC,* par 34). In this familial arrangement, the mother had sexual relationships with both men, but the men did not have a sexual relationship with each other. As with *AA v BB,* provincial authorities opposed the recognition of a third parent on grounds that the *Children's Law Act* implied a two parent limit on families, as evident in the paternal presumption, provisions relating to paternity in cases involving artificial insemination, birth registration under the *Vital Statistics Act,* and definitions of parent and child in the *Family Law Act* (*Re CC* par 12-16). Justice Fowler held, however, that the law would not have contemplated the situation of a polyamorous family when it was originally drafted, three decades previous (*Re CC* par 30), that the best interests of the child were well served by recognizing as parents all three of the adults in his household, and that Justice Fowler had the authority to use the court's *parens patriae* jurisdiction to fill the gap in the law with regard to recognizing contemporary family forms and realizing the law's objective of ensuring the equality of children regardless of the circumstances of their birth (*Re CC,* par 33).

As noted in the earlier discussion of the traditional workings of paternal presumptions, in a case of disputed paternity, most provincial statutes provide that no party shall be presumed to be the child's father, creating a situation in which someone can petition the court to be named as the father (or parent).[17] Given this situation, and reflecting Kelly's observations regarding the tendency of the court to "find fathers" for both sole mothers and lesbian partners, Justice Fowler's "best interests" argument for recognizing both of CC's fathers is telling. He stated: "I have no reason to believe that this relationship detracts from the best interests of the child. On the contrary, to deny the recognition of fatherhood (parentage) by the Applicants would deprive the child of having a legal paternal heritage with all the rights and privileges associated with that designation" (*Re CC,* par 35). Despite the abolishment of the status of illegitimacy, its shadow is evident in Fowler's observation, as is its patriarchal subtext.

17 See, for example, Newfoundland and Labrador's *Children's Law Act,* s. 10(2).

Legislative responses: British Columbia, Ontario and Saskatchewan

As both *AA v BB* and *Re: CC* indicate, the courts can provide some relief for specific families in the presence of a sympathetic judge. Yet legal challenges are expensive, and their precedential impact is not assured. Moreover, as the legal concept of *parens patriae* itself indicates, these decisions were aimed at filling a legislative gap; to address social developments that were not contemplated by law makers at the time of a statute's initial passage, for example. It is hardly a stretch to infer from the court's use of *parens patriae,* the strong suggestion that the legislature take definitive action to fill the void. Nonetheless, it would take the Ontario legislature almost a decade after *AA v BB,* and the threat of a new *Charter of Rights* challenge, to reform the laws governing parental status. The province of Newfoundland and Labrador has yet to act. Elsewhere, however, Canada's most western province of British Columbia opted to recognize three (or possibly four) parents in its 2011 reform of the *Family Law Act.*[18]

Under the terms of the BC FLA, a child may have three (or possibly four) parents when conceived through assisted reproduction and with a written agreement involving all of the intended parents, prior to conception.[19] Furthermore, the people who can be named parents include the birth mother, her partner and a donor or the intended parent or parents and the birth mother (BC FLA s. 30(1)(b)). As Kelly notes, "the scenario commonly envisaged…is one in which a couple conceives a child with the assistance of a sperm donor or surrogate with the shared pre-conception intention that the donor or surrogate be the child's third legal parent" (Kelly 2014: 567). She goes on to note that the legislative commentary "around the section clearly anticipated it being used primarily by lesbian and gay couples and their donors and surrogates" (Kelly 2014: 567). The law defines intended parents as people in a conjugal relationship with each other, but there is also an association between conjugality and parentage in the provisions relating to a person who is married or in a marriage-like relationship to the birth mother (BC FLA, s. 30). Thus, the BC law is quite conventional, envisaging the three parent model in situations

18 Although passed in 2011, the Act did not come into effect until 2013.

19 BC FLA, s. 30. The conjugal partner of a donor may also be a parent, hence the possibility of a fourth parent.

of a monogamous relationship plus a donor or surrogate (Kelly 2014: 567; Kolinsky 2015: 829).

Given the intensity of the debate surrounding LGBTQ rights in many parts of the world, and in Canada in various quarters as well, the fact that there was virtually no political resistance to the introduction of the three parent provisions is remarkable. In Kelly's analysis of the public consultation process that led to the legislative reforms – a process that unfolded over several years and that was designed to comprehensively overhaul the province's family law legislation – she also notes the curiosity of this lack of contention. Ultimately, she concludes,

> One can only presume that the provisions were considered uncontroversial – simply a reflection of "the changing reality" of Canadian families – though it is also possible that they were overshadowed by the other substantial changes to BC family law that the FLA introduced. (Kelly 2014: 580)[20]

While certainly path-breaking in both an historical and comparative sense, British Columbia's *Family Law Act* is in many ways, quite constrained, and potentially double-edged. Because the model continues to privilege biological parentage, its queer-inclusiveness is subtended, and may even assert a conservative understanding of the significance of gender binarism for a child's best interests. That said, it should also be noted that LGBTQ individuals and partners are not obliged to make use of the three parent provisions. And given the plethora of means for constituting families, the particular strictures of the BC FLA may not be especially helpful in any event. A more creative response would eventually emerge from Ontario.

Although the Ontario legislature was very slow to respond to the changing family dynamics that its courts were prepared to recognize, with the passage of the *All Families are Equal Act* – a set of reforms to the *Children's Law Reform Act,* the province implemented likely the world's most queer friendly legislation recognizing multi-parent families. Moreover, this legislation has become a model for other Canadian jurisdictions, with its multi-parent and trans inclusive language recently adopted by a socially conservative government in Saskatchewan, and with some potential to

[20] Those changes included the division of matrimonial property, the extension of property rights to common law couples, and the addition of "family violence" to the best interests of the child test (Kelly 2014: 580 fn 75).

be adopted in Manitoba as well.[21] Ontario was eventually compelled to act when its Liberal government, headed by a openly queer Premier, was confronted by a constitutional challenge to both its parentage provisions and the *Vital Statistics Act* in the form of *Grand v (Ontario) Attorney General* [2016] ONSC 3434 [Grand]. The judgement in this decision primarily focuses on the provincial government's inability to sort out how to respond to the applicants' demands that their parentage be recognized in law. The case involved nine families, with seven children amongst them, of different family configurations, but all LGBTQ parents or intended parents (*Grand* par, 2). The case was resolved when the government agreed that it would amend at least some elements of its legislation to be compliant with the equality provisions of the *Charter of Rights and Freedoms* (*Grand* par, 15).

The *All Families are Equal Act* extends the presumption of parentage to the partner of the birth parent, and makes specific provisions for parentage in cases of surrogacy, including opportunities for "up to four intended parents". Donors are not parents simply by virtue of donation alone, and variations in family form that involve parents beyond the birth parent and their conjugal partner require carefully stipulated pre-conception agreements (ON CLRA, s.8 (2); 9). Biological parents and conjugal partners are clearly foregrounded here, but it is also possible for intentional parents to engage a surrogate and use donated gametes and thus have no biological relationship to the child or conjugal relationship to the birth parent.

The legislation attracted attention from conservative religious groups, media commentators and transphobic members of both the social conservative and gay community. Notably, however, the legislation passed unanimously, when the leader of the Progressive Conservative party (PCs), Patrick Brown, demanded that party members who did not support the bill absent themselves from the vote (Canadian Press 2016). He even went so far as to postpone the swearing into office of a recently elected PC member until after the vote on the legislation, in order to prevent the new Member of the Provincial Parliament from voicing his considerable objections to the reforms (Canadian Press 2016). In an attempt to embarrass the PCs

[21] Manitoba was poised to overhaul its parentage legislation in 2015, however a new Progressive Conservative government was elected before its passage (Snow 2016: 15). In the Fall of 2020, however, a Manitoba superior court judge held that portions of the *Family Maintenance Act* that limited parentage to biological parents was unconstitutional and required the legislature to revise the legislation within one year (*JAS et al., v Attorney General* (Manitoba) File 20-01-24769).

for the homophobic and transphobic views of some of their members, the governing Liberals were willing to delay the vote in order to ensure that the new member could be in the legislature, but this tactic was unsuccessful (Canadian Press 2016).

The fact that all parties supported the reforms to the legislation meant that the bill's opponents had a very limited platform to air their views, although some sense of their objections can be gleaned from committee testimony and opinion pieces in the press. In an editorial in the *National Post,* for example, a lawyer for a group opposing the legislation voiced concerns about the lines of affiliation created between parents and children brought into relation through a pre-conception agreement (Sikkema 2016). He asked, "what is it that makes a child 'contemplated' by a 'pre-conception parentage agreement' or surrogacy agreement the intended parents' 'own kid', other than their signatures?" (Sikkema 2016). Given the degree of planning, coordination, negotiation and rationality required to form families through pre-conception agreements and, possibly, multiple-parent families, this is a rather curious position. If the law is prepared to designate hapless heterosexuals as parents by virtue of birth and their relationship to each other, and without resort to home visits and tests of suitability, as adoption requires, it is difficult to understand why planful, intentional parents should not also be granted parental status immediately upon the birth of their child. Indeed, the contrast in intention between these planful parents and any number of heterosexual couples who are suddenly surprised by a pregnancy cannot be overstated.

As noted earlier, the primary focus of objection, interestingly, was not the expansion of parental recognition beyond two people, but the replacement of the terms: "mother" and "father" with "parent". Familiar arguments opposing "social engineering", invoking the policies of totalitarian regimes, and the absent electoral mandate to deny biological sex made an appearance, as did the trivialization of the identities of "mother" and "father" (Kay 2016; Cross 2016). And while the PCs did attempt to amend the legislation by permitting parents to choose "mother", "father", or "parent" when registering their child's birth, their motion was not supported by the Liberals or the New Democratic Party. The legislation now refers to "parents" generally and identifies their various roles in terms of birth parent, biological parent, person whose sperm is used to conceive a child, surrogate, birth parent's spouse, a person living in a conjugal relationship with a birth

parent and intended parent (CLRA s. 6-11). These are, of course, legal definitions that pertain in the context of birth registration and for other vital statistics purposes. How people represent themselves to the world and to their children remains very much a function of their own desires, social norms and perceived need for social intelligibility.

The most recent Canadian legislative development on queer parentage is that of amendments to the *Children's Law Act* of Saskatchewan. As noted above, the province effectively transposed the Ontario law to the Saskatchewan Act, clarifying parental standing for people forming families with the assistance of reproductive technologies and surrogacy, extending the paternal presumption to the spouse of a birth parent, and enabling up to four people to become parents on the basis of a pre-conception agreement.[22] The act also used gender neutral terms for parents. This act passed with virtually no objection from either within the governing Saskatchewan Party – a conservative party that has been in power since 2007, nor, unsurprisingly, from the New Democratic Party – its social democratic opposition.[23] The passivity of this response is notable, not least because, unlike many other provinces, Saskatchewan has had a long-standing resistance even to the extension of the paternal presumption to the same-sex partner of a birth mother.

The case of record on this score was *PC v. SL* [2005] SKQB 502, (CanLII) [*PC v SL*]. The dispute involved the determination of parentage for a child born within a lesbian relationship. The parties disagreed as to whether the child was the product of a parental project or rather, as the biological mother argued, was the unintended result of casual sexual relations with a male friend. But both the province and the judge in this case cleaved to the association of biological relationship with paternal presumption. The Attorney General argued, and ultimately the judge held, that the Charter claim regarding the sex discrimination of paternal presumption caused no harm to the dignity of lesbian co-mothers. The presumption was rebuttable and evidentiary, thus conferring no parental rights (*PC v SL* par, 17). Moreover, the paternal presumption arose from the gender specificity of paternity; parentage was a matter of fact. A woman plainly could not have provided the seed (*PC v SL* par, 17). The court was willing to acknowledge

22 Sask CLA 2020 s. 58-62.

23 See the record of legislative debate and committee consideration on the *Children's Law Act* in Saskatchewan, *Hansard,* 29th Legislature 2016-2020.

that parental rights were about more than biological connection (*PC v SL* par, 21), but nonetheless, paternal presumption was the issue at hand, and it was simply impossible for the court to "aspire to affect the fundamentals of biology that underlie the presumption purely in the interests of equal treatment before the law" (*PC v SL* par 20). The "fact" that paternal presumptions had created the legal fiction of a biologically related father was beside the point. A child was the issue of a mother and a father, even if not exactly that specific father (Harder & Thomarat 2012: 76-77).

In 2009, Saskatchewan did revise its vital statistics legislation to allow an "other parent" to be listed on a child's birth certificate. However, birth registration in itself only establishes a rebuttable presumption of parentage rather than conferring the legal status of parent in itself (Rogerson 2017: 96). Thus, while other provinces slowly worked to address the inequities of parentage legislation, and the judicial record increasingly amassed victories for sexual orientation equality rights that stood in sharp contrast to the dignity claim in *PC v SL,* Saskatchewan's legal regime fell further and further behind.

Ultimately, this situation could not hold. In 2018, upon the request of an academic and a lawyer, the Saskatchewan Law Reform Commission undertook a consultation process on the province's laws governing assisted reproduction and parentage. Certainly, queer families were understood to be included in its ambit, but the emphasis on assisted reproduction more broadly, meant that the specific recognition of queer parents was downplayed. The Commission's report and, of course, Ontario's example would become the basis for the revised *Children's Law Act.* And while legislative debate did mention the advocacy of a queer couple as a central motivating force – indeed, one member of the couple, Nicole White, was a leading activist for same-sex marriage and ran, unsuccessfully, for the New Democratic party in the province's 2016 election – the breadth of applicability to both straight and queer families, and its championing by the governing party, were likely the key factors in explaining the lack of conservative political resistance.

Conclusion

This paper has focused on the extent to which Canada's approach to parentage recognition is, in fact, especially inclusive: especially queer. Comparatively speaking, this analysis is located in a space of impressive privilege.

Canadian jurisdictions offer real examples of positive recognition and continued development that justify the country's positive reputation for queer inclusion. Yet on closer inspection, it is also true that parentage law operates within some strong normative constraints. Perhaps the most preeminent of these limits of queer parentage recognition is the legal form itself. Codification and widespread applicability are the lifeblood of legislation, civil and common law. This foundation in generalizability is constitutively at odds with the creative and fluid forms of queer families. "If the expression *queer* is a proud form of manifesting difference, inasmuch as it can cause inversions in the chain of repetition that confers power to preexisting authoritarian practices," then Canada's emerging parentage regime qualifies (Pereira 2019: 418). But queer is a relative term. To the extent that queer families desire legal recognition, there is a required sacrifice to legal norms, even as those families push against established boundaries.

Canada's slow and piecemeal development of laws governing queer parentage offer some interesting points of comparison and strategic lessons for legal reformers both within and beyond provincial and national borders. The evidence suggests that legislatures may eventually be compelled to act if there are judicial decisions that are likely to cause constitutional and/or political difficulties for the governing party. On the basis of a "child's best interests", judges may be willing to use the court's *parens patriae* jurisdiction to address gaps in the law and extend recognition to a growing array of family forms.[24] That may be especially true when the terms of family law have fallen so far behind both evolving family forms and technological change that the injustice of the governing statutes can no longer be countenanced. And when the need for reform has reached such a state, resistance to change may be quite limited. In Canada, the combination of the need to respond to the parentage needs of legally recognized same-sex partners and the increasing use of reproductive technologies has created at least three situations in which provincial governments could extend recognition to queer families with virtually no political consequences for the governing party. In contemplating up to four (or possibly more) parents, these legislative

[24] Robert Leckey (2019) argues that, with the passage of parentage legislation, courts may be less inclined to use their *parens patriae* powers, since the legislature has recently had an opportunity to consider how it would address various situations and made its determinations. That said, he also notes examples in which, despite recent legislation, the court did feel prepared to identify a gap in the legislation.

developments certainly go well beyond the dyadic, heterosexual model. Yet they also demand considerable resources, the use of reproductive technologies, and a great deal of planning, and they trade on conjugality and biological relationship to a considerable extent. Such arrangements can certainly assist some categories of queer families, but there are many more that will continue to form and persist outside of these strictures. It is these queerer forms of non-normative family life where innovation and dynamism offer the next horizon for the creative potential of supportive intimate life.

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