

1 The Gay Agenda: A Short History of Queer Rights in Canada (1969-2018)

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I. Introduction

The first time I read a gay¹ rights case, it was 1978 and I was studying family law as a second-year law student. The case was *Re North, Vogel and Matheson*,² a 1975 decision holding that the Manitoba Recorder of Vital Statistics was not required to register the marriage of Richard North and Chris Vogel. This gay couple had been married the previous year in a Unitarian church. I thought these two men were both brave and crazy. The case read like a science fiction story about a made-up world where gay people could marry each other—a not-in-my-lifetime fantasy. Yet almost 30 years after their marriage ceremony, Vogel and North agreed to be named as the lead litigants in the Manitoba equal marriage challenge. This time a court affirmed their right to marry each other.³

This chapter focuses the trajectory of queer rights evolution in Canada during the period, more or less, between the North and Vogel marriage challenges. I start with the 1969 amendments to the *Criminal Code*,⁴ which partially repealed gross indecency laws, and move on to consider some other criminal laws that have particular effects for queer people. I then turn to expressive rights and laws designed to protect against discrimination and support inclusion. I end with relationship recognition issues, including passage of the federal *Civil Marriage Act*⁵ in 2005. I have organized the chapter this way because certain early reforms were key to making other reforms possible. If there had been a “gay agenda,”⁶ it would have listed decriminalization first because, without

1 My preferred descriptor for people whose sexual, affective, or gender-expressive preferences are not conventionally heterosexual is “queer.” However, as “queer” was used pejoratively until as late as the 1990s, I use other terms such as “homosexual” or “lesbian and gay” or “same-sex” when they are more likely to have been used in the time period being examined (e.g. “same-sex marriage”) or when the term more accurately describes a narrower class of people (e.g. “lesbians” or “men who have sex with men”) or was used in legislation (e.g. “transsexual”).

2 (1975), 52 DLR (3d) 280 (Man CC).

3 *Vogel v Canada (Attorney General)*, [2004] MJ No 418 (QL) (QB) [*Vogel*]. North and Vogel are still fighting; they want to have their original 1974 marriage recognized by the Manitoba government. In January 2018, a human rights adjudicator denied their request. The Manitoba Human Rights Commission is seeking judicial review of this decision.

4 *Criminal Law Amendment Act, 1968-69*, SC 1968-69, c 38, s 7 (assented to 27 June 1969), amending RSC 1985, c C-46.

5 SC 2005, c 33.

6 Some American evangelical organizations used the terms “gay agenda” or “homosexual agenda” to encourage belief in pernicious myths such as that gay men demand the right to recruit children for sex and the right to spread disease intentionally. Justice Scalia of the Supreme Court of the United States stated in his dissenting opinion in *Lawrence v Texas*, 539 US 558 (2003) at 602 (on the constitutionality of the Texas sodomy law), that “today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted

this reform, coming out to work toward other reforms would be almost impossible. The next item on the agenda would have been to protect freedom of expression. Without this right, it is difficult to resist silencing, formulate and express demands, create communities, and find allies. Organizational capacity and growing safety in numbers resulted in the ability to make the next demand on the agenda: recognition of and redress for discrimination and social exclusion. These demands and the changes they wrought helped foster conditions where recognition, tolerance, inclusion, acceptance, and even celebration became possibilities, albeit for some more than for others.

My focus on law reform could leave readers thinking that law reform is the most important goal of social change movements or that lawyers (plus broad-minded judges and politicians) are largely responsible for the significant social change queer people achieved over the last five decades. Queer organizing has always worked and continues to work on multiple fronts. For example, Robin Metcalfe curated a 1997 art exhibit, “Queer Looking, Queer Acting: Lesbian and Gay Vernacular,” which documented vibrant contributions of artists to queer activism in Halifax.⁷ Valerie Joyce Korinek traces how small social organizations, in the 1970s and 1980s, when the risks of being out or outed were high, made it possible for queer people on the prairies to find community, acceptance, and support; gain voice and visibility; and engage in activism, including protest.⁸ Elise Chenier has noted,

[G]rassroots activism is [essential] in creating a robust, dynamic, and progressive society. Shouting down the police and marching against unjust laws is one kind of activism, but there is so much more that it takes to create change. There are people who answer the phones, people who support those struggling with familial, religious, or other conflicts, including depression. There are those who help others find housing and access services, and the artists who speak our truths and who challenge them at the same time, those who layout and type up newspapers, and those who archive it all.⁹

Many of the law reforms described in this chapter were necessary preconditions to living out and proud lives, but they are only one of the steps toward genuine social change.

by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.” Given its genesis, some queer activists eschew any reference to a “gay agenda,” while others, including me, embraced the term in parody or irony.

- 7 The exhibit, which was remounted and expanded in 2014, produced a multimedia catalogue: Robin Metcalfe, ed, *OUT: Queer Looking Queer Acting Revisited* (Halifax: Khyber Centre for the Arts, 2014).
- 8 Valerie Joyce Korinek, *Prairie Fairies: A History of Queer Communities and People in Western Canada, 1930-1985* (Toronto: University of Toronto Press, 2018).
- 9 Elise Chenier, “Foreword” in Manon Tremblay, ed, *Queer Mobilizations: Social Movement Activism and Canadian Public Policy* (Vancouver: UBC Press, 2015) ix.

In briefly describing how laws have affected queer people in Canada, how they were reformed, and some criticisms of these reforms, this short history aspires to lay the groundwork for a more nuanced and detailed analysis of factors that complicate the quest for justice and equality. What are some of these factors? First, there is a tension between queer liberation approaches and equality or human rights approaches to using law reform to improve the lives of queer people.¹⁰ This tension helps explain, for example, the divergent approaches taken on issues related to sexual representation and same-sex marriage and whether the struggles of queer people are seen to be bound up with and connected to other political forces such as anti-colonialism. Second, law reform campaigns have not always been and still often fail to be “attentive to multiple and overlapping dimensions of identity and experience [especially poverty, racism, sexism, age and dis/ability] and often fails to account for the ways in which queer identity intersects with other experiences and identities.”¹¹ For example, while many would describe the relationship between police forces and queer communities as strained, queer and Indigenous peoples of colour experience police harassment, brutality, enforcement, and investigations in ways that are qualitatively different from the interactions experienced by those protected by white privilege and economic security. Moreover, as Sarah Hunt and Cindy Holmes note, “there remains a disturbing lack of commitment by White settlers to challenging racism and colonialism in queer and trans communities (including within friendships and intimate relationships) and practicing a politics of accountability to Indigenous people and people of color.”¹² A more in-depth exploration of queer activism, intersectionality, and law reforms sought and achieved (as well as the operation of legal institutions, such as police forces) will be taken up more fully by others writing for this collection or elsewhere.

II. Criminal Law

A. Gross Indecency and Anal Penetration

More than 70 countries in the world still prohibit sexual relations between men, and 45 of these countries also prohibit such relations between women.¹³ In more than a dozen countries, offenders can receive a death sentence. Some countries criminalize

10 See e.g. Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999); Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002).

11 As stated by an anonymous reader. For thoughtful essays on some of these intersections, see Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (New York: Routledge, 2015).

12 Sarah Hunt & Cindy Holmes, “Everyday Decolonization: Living a Decolonizing Queer Politics” (2015) 19 J of Lesbian Studies 154 at 162.

13 International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State Sponsored Homophobia 2017: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, by Aengus Carroll and Lucas Ramón Mendos (Geneva: ILGA, May 2017) at 7, online (pdf): <ilga.org/sites/default/files/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf>.

advocacy aimed at reforming such laws, and others require everyone to report suspected homosexuals to the police. As long as criminal laws prohibit non-heteronormative sexual relations between consenting adults, there is little chance that any other law reforms will have much effect. For this reason, I start my survey with the partial repeal of Canadian criminal laws prohibiting gay sex.

In 1967, the Supreme Court of Canada (SCC) upheld the finding that Everett Klippert was a dangerous sexual offender who could be imprisoned indeterminately under preventative detention. No one had made a complaint against Klippert; rather, a gross indecency charge resulted after police happened to ask him about his sexual activities when conducting an arson investigation. Perhaps naively, he disclosed sexual liaisons with other men. There was no evidence of violence or coercion in those relationships, but the sexual activities he described were, at the time, criminal offences, and therefore he was convicted of gross indecency. Since Klippert had indicated that he intended to continue to pursue consensual sexual relationships with men, the SCC held that one of the dangerous sexual offender criterion, a likelihood of reoffending, was met. The *Klippert* majority (three of the five judges hearing the case) held that

whether the criminal law, with respect to sexual misconduct of the sort in which the appellant has indulged for nearly 25 years, should be changed to the extent to which it has been recently in England, by the *Sexual Offenses Act 1967*, c. 60, is obviously not for us to say; our jurisdiction is to interpret and apply laws validly enacted.¹⁴

The two dissenting judges, by contrast, suggested that the dangerous sexual offender designation should only be used if the Crown demonstrated that the convicted person could not control their criminalized sexual impulses and this failure rendered them dangerous. Calling this decision egregious, some members of Parliament called for decriminalization of sexual activity between consenting adults of the same sex. Although then federal Minister of Justice Pierre Trudeau famously exhorted shortly after the *Klippert* decision, “there’s no place for the state in the bedrooms of the nation,” the absolute prohibition against consensual sexual activity between adult men did not change until three years later, in 1969. Everett Klippert was not released from prison until 1971.

The 1969 amendments were partial. Gross indecency charges could be laid if two men or two women engaged in, for example, consensual anal penetration, oral sex, or hand-genital contact, and either if the sexual act was not conducted “in private” or if one of the participants was under 21 and the participants were not married to each other. The *Criminal Code* provided that an act of gross indecency was “deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present.” Thus, the “public place” provisions allowed criminal charges against two men touching each other in the bushes of a park, the back of a car,

¹⁴ *R v Klippert*, [1967] SCR 822 at 836.

or a bar. The “two persons ... present” provision gave police the power to charge those who engage in “gross indecency” at house parties or in bathhouses.¹⁵ Such charges and convictions were not uncommon. According to one 2016 media story,

over 6,000 people are still in Canadian police databases because they were convicted of the now-extinct crimes of gross indecency and buggery, RCMP data shows. The oldest conviction in the data was in October 1939, but there were over 200 a year until 1988, the year consensual anal sex was legalized and the offence of buggery removed from the Criminal Code.¹⁶

In 1988, “anal penetration” was substituted for “gross indecency” and the age of consent was reduced to 18. The age of consent for most other sexual activity is now 16, having been raised from 14 in 2008. Courts in five provinces (Ontario, Quebec, British Columbia, Alberta, and Nova Scotia)¹⁷ have found that the age differential between anal penetration and other sexual activity unjustifiably discriminates on the ground of sexual orientation, age, and marital status and therefore is not in compliance with the equality rights section of the *Canadian Charter of Rights and Freedoms*.¹⁸ However, as no part of the *Criminal Code* provision has been formally amended since these cases, the differential age-related provision remains “on the books.” To this day, it also remains an offence to engage in anal penetration in a public place, which could include a bathhouse, or a car, or if more than two people are present, which could include a private house party. As a report by Egale Canada notes,

Anal intercourse remains in the Criminal Code and [this prohibition] is in effect in five provinces and three territories. The pernicious effects of the law should concern all Canadians. To this day, there remains considerable confusion about its application. As usual, police have taken advantage of ambiguity in the law. Even after Ontario struck down the law in 1995, police continued to charge people with anal intercourse. Between 2008 and 2014 in Ontario, 22 people were charged with anal intercourse under Section 159. Two of those were youth. More than half of those charged in Québec were youth.¹⁹

15 Thomas Hooper, “‘More Than Two Is a Crowd’: Mononormativity and Gross Indecency in the Criminal Code, 1981-82” (2014) 48 J Can Studies 53.

16 Patrick Cain, “6,000 Canadians Would Be Covered by Gay Pardon Decision,” *Global News* (19 February 2016), online: <globalnews.ca/news/2547609/6000-canadians-would-be-covered-by-gay-pardon-decision/>.

17 *R v CM* (1995), 41 CR (4th) 134 (Ont CA); *R v Roy* (1998), 125 CCC (4th) 442 (Qc CA); *R v Blake*, 2003 BCCA 525; *R v Roth*, 2004 ABQB 305; *R v TCF*, 2006 NSCA 42.

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

19 Egale Canada Human Rights Trust, *The Just Society Report: Grossly Indecent Confronting the Legacy of State Sponsored Discrimination Against Canada’s LGBTQ2SI Communities* (2016) at 40, online (pdf): <egale.ca/wp-content/uploads/2016/06/FINAL_REPORT_EGALE.pdf> (offline as of February 2019) [Egale].

In March 2018, the federal government introduced Bill C-75. If passed, this bill will repeal the anal-penetration-specific “public place” and “people present” provisions, make 16 the age of consent for anal penetration, and treat non-consensual anal penetration in the same way as other sexual assaults. The bill is currently (March 2019) before the senate and, in all likelihood, will be enacted before the next federal election, which likely will be held in the fall of 2019. Shortly before Bill 32—a predecessor to Bill C-75—was introduced, numerous men were charged with engaging in public sex and other forms of allegedly lewd behaviour following a six-week police stakeout at a park in Etobicoke, Ontario.²⁰ Between 1969 and the date on which this bill becomes law, men who have sex with men faced a real possibility of gross indecency charges for consensual sexual activity.

B. Criminal Prohibitions on Lesbian Sex

Constance Backhouse writes about the first case in Canada where a woman, Willimae Moore, was charged with indecently assaulting another woman. When that woman told a friend that Moore had tried to kiss her (after sending her a love letter), the friend made a police report and indecent assault charges ensued.²¹ Moore was convicted at trial but the conviction was overturned on appeal in 1955. Nonetheless, Moore, an African American woman, and the woman she lived with in Yellowknife both lost their jobs. Other than Backhouse’s work on the *Moore* case, little research has been done on criminal charges against women for engaging in sexual activities with each other within Canada. One report notes, “media records [from the 1950s] reveal that lesbians and persons of colour were targeted under the gross indecency charge”²² without further elaboration. Karen Pearlston observes that “lesbians were almost never subject to criminal regulation, even after the offense of gross indecency was rendered gender neutral in 1954.” She also notes that “although the amendments to the law of gross indecency formally applied to women, it was not until the 1980s that prosecutions of lesbians for gross indecency began to be reported.”²³

There are only a few other research references to other forms of criminal or quasi-criminal control over lesbian sex. Backhouse notes that the “police used nuisance

20 Cynthia Reason, “Toronto Police Cracking Down on Public Sex in Etobicoke Park,” *Etobicoke Guardian* (13 November 2016), online: <www.thestar.com/news/gta/2016/11/13/toronto-police-cracking-down-on-public-sex-in-etobicoke-park.html>.

21 *R v Moore*, [1955] AJ No 1 (QL) (SC (AD)). See Constance Backhouse, “Canada’s First Capital ‘L’ Lesbian Sexual Assault: Yellowknife, 1955” in Constance Backhouse, *Carnal Crimes Sexual Assault Law in Canada, 1900-1975* (Toronto: Osgoode Society, 2008) 193.

22 Egale, *supra* note 19 at 12.

23 Karen Pearlston, “Avoiding the Vulva: Judicial Interpretations of Lesbian Sex” (2017) 32:1 CJLS 37 at 44. The only citation she gives for a case where a woman was prosecuted for gross indecency is *R v Clancey*, [1982] NJ No 1 (QL) (Nfld CA).

by-laws and vagrancy charges to harass women cross-dressing as men for years.”²⁴ Other than this reference, I have not found any other research on charges related to lesbians and cross-dressing or vagrancy in Canada. In 2000, lesbian sexual activity was targeted by law enforcement for liquor law violations in the Pussy Palace case and in an obscenity prosecution against the queer Glad Day Bookshop in 1993 for carrying a lesbian sado-masochism magazine.²⁵

C. Bawdy-House Laws and Police Harassment

The *Criminal Code* defines a common bawdy-house as a place that is kept for “the practice of acts of indecency.” It is an offence to be an inmate or a “found-in” at a common bawdy-house or to be an “owner, landlord, lessor, tenant, [or] occupier ... [who] knowingly permits the place ... to be ... used for the purposes of a common bawdy-house.” Given the broad meaning of “acts of indecency,” gay bathhouses, bars and even private homes across Canada could be under threat of police raids leading to gross indecency or common bawdy-house/indecency charges. (Note that until 2014 the *Criminal Code* also prohibited keeping a common bawdy-house for the purpose of engaging in prostitution. In other words, a common bawdy-house/indecency charge is different from a common bawdy-house/prostitution charge.) Establishments that serve alcohol are also vulnerable to police raids under the guise of inspections for liquor licence breaches such as serving minors and permitting disorderly conduct.²⁶

In early 1981, more than 150 Toronto police officers raided four Toronto bathhouses. About 300 men were arrested and charged with bawdy-house/indecency or gross indecency offences. While these raids were the largest raids on queer establishments ever conducted in Canada and catalyzed massive street protests, they were not the first nor the last police raids on these places. Large-scale raids had occurred in Montreal and Ottawa in the mid-1970s. Particularly notable were the 1977 raids in Montreal on two gay clubs, where the police carried machine guns and charged almost 150 men with various offences. Two thousand protesters hit the streets the next day. While almost two decades of détente followed the 1981 Toronto protests, police raids were renewed as a strategy in the early 2000s. Some notable raids included the Toronto Pussy Palace raid in 2000 and the Calgary Goliath’s Bathhouse raid in 2002.²⁷ In 2003, the Taboo

24 Backhouse, *supra* note 21 at 193.

25 *R v Scythes*, [1993] OJ No 537 (QL) (Prov Div). See also Shannon Bell et al, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997).

26 For a deeper analysis of the complex layers of private formal and informal policing that uneasily coexist with the actions of the public police and of regulatory officials, see Mariana Valverde and Miomir Cirak, “Governing Bodies, Creating Gay Spaces: Police and Security Issues in Toronto’s Gay Village” (2003) 43:1 Brit J Crim 102.

27 See Chapter 12, Criminal Law and Public Health, for more detail on these two raids.

Strip Club in Montreal was raided by 40 police officers under suspicion that the club employed underage dancers and that indecent acts were occurring in a backroom. Twenty-three dancers, seven managers, and four patrons were arrested and charged with bawdy-house/indecency offences. While 15 of the dancers pleaded guilty, all charges against the patrons were eventually withdrawn. According to one reporter, the dancers “pleaded guilty as a way to avoid taking the stand where they would have to talk about their sex work in front of a generally unsympathetic public. They could not afford to be outed.”²⁸

Then, in 2005, the SCC radically reformed the common bawdy-house/indecency law in the companion cases of *Kouri* and *Labaye*.²⁹ The owners of two heterosexual sex clubs in Montreal were charged with common bawdy-house/indecency. The court found that, among other things, in order to convict someone of permitting indecent acts in a bawdy-house, the Crown must prove that

the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by ... (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty, ... (b) predisposing others to anti-social behaviour, or (c) physically or psychologically harming persons involved in the conduct.³⁰

Moreover, the Crown would now have to prove these harms objectively having regard to the facts of each case and on the basis of evidence rather than conjecture and common sense. Charter arguments were not made in this case; rather, the judges simply interpreted the language of the *Criminal Code* provision. Acquittals were entered in both cases because the court found no objective evidence of harm. As Elaine Craig has noted,

Labaye represents a shift in the relationship between law and sexuality, and it illuminates the possible emergence of a new approach by the Supreme Court of Canada to the regulation of sex—an approach which allows for the legal recognition of pleasure behind, beyond, or outside of legal claims regarding identity, antisubordination, relationship equality, and conventional privacy rights.³¹

28 Maria-Belen Ordonez, “Strippers Need Not Apologize; It’s Time to Make the Cops Defend Themselves,” *Xtra* (29 March 2006), online: <www.dailyxtra.com/strippers-need-not-apologize-21982>.

29 *R v Kouri*, 2005 SCC 81 [*Kouri*]; *R v Labaye*, 2005 SCC 80 [*Labaye*]. While both the British Columbia Civil Liberties Association and Egale Canada applied for intervener status to file a brief and make arguments before the court in these cases, the court turned down both applications. No other public interest group appeared before the court.

30 *Labaye*, *supra* note 29 at para 62.

31 Elaine Craig, “Laws of Desire: The Political Morality of Public Sex” (2009) 54 McGill LJ 355 at 359.

Since *Kouri* and *Labaye*, charges related to common bawdy-houses/indecency are not being laid, and police have stopped raiding gay bathhouses and bars. However, this law remains in the *Criminal Code* and, therefore, the spectre of police raids and criminal charges still looms.

III. Expressive Rights

A. Suppression of Expression

The right to free expression has special importance to queer people. Until recently, few people were born into queer families, and most young queer people did not have queer role models. As part of coming out and coping in a homophobic world, queer people searched for other ways to find and understand their new identities and to join supportive communities.³² Especially in the pre-Internet age, queer newspapers (such as *The Body Politic* in Toronto and *Gay Tide* in Vancouver) and other writing by queer writers and activists (such as Jane Rule and Michael Lynch) helped facilitate the emergence and development of queer identities. Queer and other progressive bookstores were a lifeline for many people. Given that the ability to express oneself is essential to the development of queer politics, it is perhaps not surprising that queer expression was suppressed by private actors and government agents. Here are some examples of interference with queer expression:

- The Ontario Court of Appeal upheld the conviction of a bookseller for distributing obscene materials in 1954 because it offered for sale four books telling stories about lesbians. The court rejected the defence’s argument that the novels were not intended to titillate but rather “tended to repel or disgust the reader and act as a warning against the dangers of lesbianism.”³³
- A quartet sang a parody of “I Enjoy Being a Girl” (substituting “dyke” for “girl”) at an open mike night at the Brunswick Tavern in Toronto in 1974. The owner asked them to leave and, when they refused, he called the police. Some of the women—who became known as the Brunswick Four—were charged with assault and causing a disturbance, and some of the arresting officers were charged with assault.³⁴
- The *Vancouver Sun* refused to publish a classified advertisement promoting subscriptions to a gay newspaper in 1974. A majority of the SCC affirmed dismissal

32 This analysis is better developed in the factum filed by the Women’s Legal and Education Fund (LEAF) as an intervener in the *Little Sisters* case. I was LEAF’s counsel in that case. The factum can be found online: <www.leaf.ca/wp-content/uploads/2000/2000-little-sisters.pdf>. See also Bruce MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (Vancouver: UBC Press, 2000), especially chapter 3, “Silence in the Classroom.”

33 *R v National News Company Limited*, 1953 CanLII 123 (Ont CA).

34 For more detail, see Warner, *supra* note 10 at 40-45, and *supra* note 27.

of this complaint, holding that the *Human Rights Code*³⁵ of British Columbia did not interfere with the principle that the newspaper has the right to control the content of its advertising.³⁶

- Little Sister's, a Vancouver-based queer bookstore, was firebombed in 1987 and 1988 and hit with a grenade in 1992. No one was ever charged in connection with these attacks.
- A lesbian high school teacher in Winnipeg sought permission in 1995 to disclose to students that she was a lesbian in situations where such a disclosure would be useful to students. Her principal forbade her from making such disclosures under any circumstances. She filed a grievance, but its resolution became bogged down in jurisdictional issues.³⁷ The final outcome in this case is not on the public record.
- James Chamberlain, a Vancouver school teacher, asked his school board in 1996 to approve for library use a few children's books with queer characters. The school board refused, expressing concern that the books would engender controversy among parents with religious objections to the morality of same-sex relationships and that K-1 children were too young to learn about same-sex-parented families. The SCC found that the school board's decision was unreasonable, especially given that the school board's decision-making was to be informed by principles of secularism and non-discrimination.³⁸
- A Toronto printer refused in 1996 to accept an order to print stationery for a gay and lesbian archive, stating that taking such work conflicted with his religious beliefs. A board of inquiry appointed under the Ontario *Human Rights Code*³⁹ held that this refusal was discriminatory and unjustified. This decision was upheld on review in 2002.⁴⁰

Throughout the 1980s and 1990s, many people, especially feminists,⁴¹ debated whether some expressions of sexual desire should be suppressed because they were harmful. In 1985, *The Body Politic* editorial collective and broader queer community

35 RSBC 1996, c 210.

36 *Gay Alliance Toward Equality v Vancouver Sun*, [1979] 2 SCR 435 aff'g (1977) 37 DLR (3d) 487 (BCCA).

37 *Assiniboine South Teachers' Association of the Manitoba Teachers' Society v Assiniboine South School Division No 3*, 1997 CanLII 22661 (Man LA); *Assiniboine South Teachers' Association of the Manitoba Teachers' Society v Assiniboine South School Division No 3*, 1999 CanLII 14064 (Man QB).

38 *Chamberlain v Surrey School Division No 36*, 2002 SCC 86.

39 RSO 1990, c H.19.

40 *Brillinger v Imaging Excellence*, 2000 CanLII 20856 (Ont HRT); *Brookie v Brillinger (No 2)*, 2002 CanLII 63866 (Ont Sup Ct J (Div Ct)).

41 See e.g. Bell et al, *supra* note 25 and references cited in Janine Benedet, "The Paper Tigress: Canadian Obscenity Law 20 Years After R v Butler" (2015) 93 Can Bar Rev 1.

was deeply divided over the decision to publish an ad seeking “a young well-built BM [black man] for houseboy.” Some argued that desire was desire and therefore fantasies such as this one ought not to be subject to critical analysis or censorship. After the ad was published, others expressed regret and disappointment that the magazine could not be a site of resistance to racist ideologies.⁴² According to many speakers at a 2016 symposium on the magazine’s impact (it ceased publication in 1986), the decision to publish the ad was emblematic of “the exclusions of black people, indigenous people and people of colour from *The Body Politic*.”⁴³ David Churchill observes that

[t]he great tragedy of the entire controversy was that [*The Body Politic*] for all its great strengths, its activist members, and its intellectual force, was unable to transform itself into a site of such resistance, a place where racism and the operation of racial ideologies were understood not merely as a counterpart to sexism and sexual regulation but as an inexorable part of heteronormativity, the very matter of an activist newspaper dedicated to the cause of sexual liberation.⁴⁴

B. Canada Customs Harassment

The Vancouver-based Little Sister’s Book and Art Emporium, which caters to the queer community, started an action in 1984 against the federal government alleging that Charter rights to free expression and equality were being violated. Almost every shipment of books and magazines to the store was detained for inspection by Canada Customs, now Canada Border Services Agency. Some shipments to Little Sister’s were detained for up to a year before being sent to the bookstore—by which time they often were damaged and had become commercially unusable. The agency purported to be looking for obscene materials, since Canada Customs had the power to seize materials at the border if it suspected that the materials may be “obscene” under the *Criminal Code*. During the rise of the HIV pandemic, Canada Customs would not permit any materials into the country that described or depicted anal penetration, thereby inhibiting access to information on HIV transmission prevention. The agency also revealed at the 1994 trial that it had a policy of detaining all shipments to the four Canadian queer bookstores but did not routinely vet any other shippers, even purveyors of heterosexual pornography.

In 2000, almost two decades after Little Sister’s first experienced a Canada Customs seizure, the SCC declared that the procedures used by Canada Customs agents had

42 See David Churchill, “Personal Ad Politics: Race, Sexuality and Power at the Body Politic” (2003) 8:3 *Left History: An Interdisciplinary J of Historical Inquiry and Debate* 114.

43 Arshy Mann, “The Body Politic Failed Black LGBT People, Symposium Hears,” *Xtra* (9 June 2012), online: <www.dailyxtra.com/the-body-politic-failed-black-lgbt-people-symposium-hears-71205>.

44 Churchill, *supra* note 42 at 128.

denied the Charter-protected expressive and equality rights of queer people.⁴⁵ The court also reinterpreted Canadian obscenity laws, declaring that rather than embodying a homophobic standard, the “community standard of tolerance of harm is a broad church that embraces respect for minority expression.”⁴⁶ The majority of the court expressed confidence that better training for customs officials had already remedied the deficiencies in the application of the law. If such confidence was misplaced, the court noted, its findings provided the bookstore “with a solid platform from which to launch any further action in the Supreme Court of British Columbia.”⁴⁷ But it was the dissenting opinion on remedy that proved more prescient. Justice Iacobucci stated:

[T]here are “grave systemic” flaws in the enforcement of the Customs legislation. But I cannot agree that the remedy is simply to issue a declaration and take it on faith that Canada Customs—an agency which, it bears repeating, has a long and ignominious record of excessive censorship throughout this century—will reform its ways.⁴⁸

The bookstore was soon back in court arguing that Canada Customs had not reformed its practices and was still subjecting Little Sister’s shipments to discriminatory seizures. The case again went to the SCC on a motion for advanced costs.⁴⁹ Little Sister’s lost the motion in 2007. Soon after this decision, the bookstore’s owners announced that they and their staff no longer had the wherewithal to continue the courtroom battle and withdrew the action.

The Canada Border Services Agency still has robust seizure policies⁵⁰ and releases quarterly lists of all the titles confiscated at the border—anyone can receive this list just by signing up.⁵¹ Most of the confiscated items are queer-themed pornography.⁵² However, police forces have, more or less, stopped laying obscenity charges regarding any adult materials.⁵³ We can only speculate about why police investigations relating

45 *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69.

46 *Ibid* at para 119.

47 *Ibid* at para 158.

48 *Ibid* at para 282.

49 2007 SCC 2.

50 Canada Border Services Agency, *Memorandum D9-1-1: Canada Border Services Agency’s Policy on the Classification of Obscene Material*, (Ottawa: 7 June 2017), online (pdf): <www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-1-eng.html>; *Memorandum D9-1-17: Canada Border Services Agency’s Determination Procedures for Obscenity and Hate Propaganda*, (Ottawa: 20 September 2018), online (pdf): <www.cbsa-asfc.gc.ca/publications/dm-md/d9/d9-1-17-eng.html>.

51 Canada Border Services Agency, *Obscenity and Hate Propaganda—Quarterly List* (Email Alert Service), online: <www.cbsa-asfc.gc.ca/alert-avis/piu-uip-eng.html>.

52 Brenda Cossman, “Censor, Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada” (2013) 21 *Duke J Gender L & Pol’y* 45 at 51.

53 For more information and sharply contrasting views, see Cossman, *ibid* and Benedet, *supra* note 41.

to adult materials seem to have ended. Perhaps police believe that such prosecutions are futile, given the rising tide of Internet access to sexually explicit materials. Or perhaps justice authorities have concluded that criminal convictions are unlikely. Another plausible explanation for the change is that state agents have come to see queer sexual expression as non-threatening and realized that their resources would better be deployed elsewhere.

IV. Protective and Inclusive Laws

A. Human Rights Codes

Starting in the 1940s, provinces passed legislation to prohibit some forms of anti-Semitism and racism in private contracts, such as voiding covenants attached to land titles that prohibited the sale of a property to anyone other than a Christian Euro-Canadian. In 1960, the law requiring Indigenous peoples to renounce their “Indian” status if they wanted to have the right to vote in federal elections was repealed. In the 1950s and 1960s, legislation designed to address some forms of sexism, such as different minimum wages for men and women, become common across the country. In the 1960s and 1970s, provinces started to codify these early anti-discrimination laws under one statute, a human rights code, and made it procedurally easier to pursue a complaint. Eventually, these human rights codes prevented both government and private actors—such as private-sector employers, retail businesses, and landlords—from engaging in discrimination and harassment on enumerated grounds such as sex, race, or religion. However, sexual orientation was not one of the prohibited grounds of discrimination in early versions of these codes.

Early in the Cold War, a pervasive belief about homosexuals spread: they were a threat to national security because they were vulnerable to blackmail and intimidation by communists. Gary Kinsman and Patrizia Gentile have documented how thousands of federal public servants were purged in the 1950s, 1960s, and 1970s under the suspicion that they were queer.⁵⁴ RCMP and military personnel were also affected. Without human rights code protection, queer people in any line of employment could be, and were, fired simply because they were queer or suspected of being queer.

In the mid-1970s, two gay men—John Damien in Ontario, who worked in horse-racing, and educator Doug Wilson in Saskatchewan—filed human rights complaints after losing their jobs simply because they were gay. Human rights commissions in both provinces agreed that these complaints could not be adjudicated because the applicable provincial human rights codes did not prevent discrimination on the basis

54 Gary Kinsman and Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press, 2009).

of sexual orientation. While Damien died before he could challenge this refusal in court, a Saskatchewan court upheld the commission's decision in the *Wilson* case.⁵⁵

In 1977, Quebec was the first province to amend its human rights code to prohibit discrimination on the basis of sexual orientation. The other provinces, the territories, and the federal government slowly followed suit over the next two decades. Some governments responded only when forced to do so by courts on the ground that under-inclusive human rights legislation violated the Charter's equality rights provisions. The Ontario Court of Appeal declared in the 1992 *Haig* case that the *Canadian Human Rights Act* should be interpreted as though it contained "sexual orientation" as a prohibited ground of discrimination.⁵⁶ Haig wanted to challenge the Canadian Armed Forces policy that rendered identified homosexuals ineligible for promotions, postings, or further military career training. Similarly, Alberta's legislation was effectively amended by judicial fiat in the 1998 *Vriend* decision from the SCC.⁵⁷ Vriend had attempted to file a complaint after he was fired from his position as a lab instructor at a Christian college when his employers realized that he was gay. It was not until 2010 that Alberta finally amended its human rights legislation to include sexual orientation as a prohibited ground. In March 2017, a class action lawsuit seeking damages and other remedies was filed on behalf of those who were purged out of jobs with the federal government, the military, and the RCMP.⁵⁸

Most Canadian jurisdictions have more recently changed their human rights legislation to include gender identity and expression as a prohibited ground of discrimination. Law reform on issues of particular and ongoing concern for trans people include identity documents (discussed below), funding for transition treatments, census inclusion,⁵⁹ washroom accommodation at workplaces and schools, and where and how trans people who are imprisoned should be housed.

55 See *Re Damien and Ontario Human Rights Commission* (1976), 12 OR (2d) 262 (Div Ct); *University of Saskatchewan v Saskatchewan Human Rights Commission*, [1976] 3 WWR 385 (Sask QB).

56 *Haig v Canada*, 1992 CanLII 2787 (Ont CA); RSC 1985, c H-6.

57 *Vriend v Alberta*, [1998] 1 SCR 493.

58 *Ross v Canada*, Court File No T-370-17 (Statement of Claim), 3 March 2017 (FC), online (pdf): <lgbtpurge.com/wp-content/uploads/2017/03/LGBT-Purge-FC-statement-of-claim-issued-17-03-15.pdf>. For more information on the LGBT Purge litigation, see "LGBT Purge Class Action," online: <lgbtpurge.com/>.

59 See Karen Busby, "Who Counts? Transparency and Inclusion in the 2016 Census" (2016) Can Law, online: <www.canadianlawyermag.com/author/karen-busby/who-counts-transparency-and-inclusion-in-the-2016-census-3278/>.

B. Identity Documents for Trans People

In 1970 an English court held in *Corbett v Corbett*⁶⁰ that a marriage between a man and a trans woman who had undergone gender confirmation surgery was not a valid marriage. The court ruled that under common law, sexual identity is immutable and therefore a person born with sex-typical genitalia and chromosomes who undergoes gender confirmation surgery does not change their sex for legal purposes and, in particular, that person does not acquire the capacity to marry a person whose birth sex designation is the same as their original birth sex designation. Canadian provinces were among the first jurisdictions in the world to reverse this decision through statutory changes.⁶¹ Three provinces (Alberta, British Columbia, and Nova Scotia) amended vital statistics legislation in 1973 and, within a decade, most other provinces followed suit. These amendments permitted a person to apply for a birth certificate that reflected their post-operative sex designation rather than the one assigned at birth. The Manitoba Act, for example, provided that

[t]he director may upon application by any person who has undergone transsexual surgery verified by statutory declaration and upon payment of the prescribed fee make a notation on the registration of birth of that person changing the designation of sex of that person so that it will be consistent with the results of the surgery.⁶²

An application to change a sex designation in Manitoba required that two medical doctors certify that the applicant had undergone “transsexual surgery.” Once birth certificates were changed, other documents, including drivers’ licences and passports, could be issued to reflect the holder’s experienced identity. The Manitoba Act also provided that “every birth or marriage certificate issued after the making of a notation under this section, shall be issued as if the original registration had been made with the sex as changed.” While this section lacks clarity, it does suggest that a person who has had their birth registration altered can now marry a person whose birth sex registration is not the same as theirs. (In other words, *Corbett* is reversed by this legislation.) However, the words “or marriage” were removed from this section in 2001,⁶³ throwing into question again the issue of who a post-operative trans person could marry.

60 [1970] 2 All ER 33 (Eng).

61 Law Reform Commission of Manitoba, *Report on the Revision of Birth Certificates of Trans-Sexual Persons Report #26* (1976) at 6, online (pdf): <www.manitobalawreform.ca/pubs/pdf/archives/26-full_report.pdf>. This is the only contemporaneous Canadian secondary source I could find related to the amendments made in the 1970 and 1980s. For a report that recommended against allowing such amendments, see Committee on Public Health, The New York Academy of Medicine, “Change of Sex on Birth Certificates for Transsexuals” (1966) 42 Bulletin of the New York Academy of Medicine 721.

62 *The Vital Statistics Act*, CCSM, c V60, s 25(1), as it appeared 18 August 1983 to 4 March 2016.

63 *The Vital Statistics Amendment and Consequential Amendments Act*, SM 2001, c 5, s 20.

In the last decade, pressure has mounted to permit the reissue of birth certificates to reflect experienced rather than assigned-at-birth sex identity using criteria that are less onerous than genital surgery. The model adopted by many provinces in response to this lobby is to permit reissuance if both the applicant and one medical professional attest that the revision better reflects the applicant's lived identity. Many people find the requirement of a third-party attestation objectionable. Another option available in some jurisdictions is to issue birth certificates without any reference to sex—an option that may limit the ability to rely on birth certificates to get other documents such as passports. Since late 2017, the Canadian government will also issue passports in which holders can be described as “female,” “male,” or “X.” A Canadian government website advises that “you must have a sex designation on your passport or travel document to comply with International Civil Aviation Organization (ICAO) standards. It can't be removed or left blank.”⁶⁴ The website points out that some countries may choose not to permit entry if a passport holder's sex is designated as “X.”

C. Immigration

The federal *Immigration Act* was amended in 1952 to address the perceived security threat posed by homosexuals. “Homosexuals” and “transsexuals” along with “prostitutes, pimps, or persons coming to Canada for these or any other immoral purposes” were prohibited entry into Canada. If any of these people managed to enter Canada, they could be deported if they were found to have “practice[d], assiste[d] in the practice of or share[d] in the avails of ... homosexuality.”⁶⁵ These provisions remained in force until 1976.

Even after repeal of this blanket prohibition against homosexuals and transsexuals, Canadian immigration law continued for more than a decade to allow only heterosexual, married Canadians to sponsor their spouses as family-class immigrants. From 1991 to 2002, same-sex partners could apply for entry into Canada if they could persuade immigration authorities that “compassionate and humanitarian considerations” supported the request. During and since that period, unmarried couples must establish that they are in a monogamous, conjugal relationship. Since the passage of the federal *Civil Marriage Act*⁶⁶ in 2005, the easiest track to entry is to marry a same-sex partner. This poses unique barriers for some unmarried queer couples who still find it difficult to prove a conjugal relationship if they have been forced to hide their sexuality or

64 Government of Canada, “Change the Sex on Your Passport or Travel Document” (30 August 2017), online: <www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/change-sex.html>.

65 RSC 1952, c 325, s 5(e).

66 SC 2005, c 33.

relationship because the non-resident partner lives in a country where homosexuality is not accepted.⁶⁷

D. Refugees

In 1993, the SCC held that members of persecuted groups defined by an innate or unchangeable characteristic such as sexual orientation are members of a “social group” capable of claiming refugee status.⁶⁸ That ruling opened the way for queer refugees to seek protection in Canada. In recent years, about 30 percent of refugee claims based on sexual orientation and gender identity persecution have been rejected by Canada’s Immigration and Refugee Board (IRB). Most rejected refugee claims did not include enough evidence to satisfy IRB members on a balance of probabilities that the claimant is both queer and faces persecution because of this status.⁶⁹ Some IRB members wanted evidence of same-sex sexual relationships, even though emails, texts, or homemade sex videos were unlikely to exist. Given the risks, it is unlikely that queer refugees would be “out” to their parents and siblings, even if they otherwise have close and loving relationships with family members. But there is also an evidentiary paradox: if evidence of the relationship is available—say, a love letter—that evidence can undermine the claim of risk of persecution. Other IRB members had relied on the stereotype that gay men are promiscuous and rejected claims on the ground that the claimant cannot be gay if he has not engaged in casual sex since coming to Canada.

In mid-2017, the IRB chair issued a more inclusive guideline acknowledging the significant evidentiary challenges presented by refugee claims involving sexual orientation and gender identity. The guideline, which is not binding, asks members to be wary of relying on discredited thinking.⁷⁰

67 For a more detailed analysis of immigration law and queer people, see Nicole Laviolette, “Coming Out to Canada: the Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act” (2004) 49 McGill LJ 969.

68 *Canada (Attorney General) v Ward*, [1993] 2 SCR 689.

69 For more detail on issues and problems with queer refugee determinations, see Nicole Laviolette, “Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada” (2014) 4 J Research in Gender Studies 68; Jamie Chai Yun Liew, “Denying Refugee Protection to LGBTQ and Marginalized Persons: A Retrospective Look at State Protection in Canadian Refugee Law” (2017) 29 CJWL 290; and Sean Rehaag, “Sexual Orientation in Canada’s Revised Refugee Determination System: An Empirical Snapshot” (2017) 29 CJWL 259.

70 Karen Busby, “Queering Refugee Claims: IRB Gets Rid of Problematic Stereotypes and Impossible Paradoxes” (25 May 2017) Can Law, online: <www.canadianlawyermag.com/author/karen-busby/queering-refugee-claims-irb-gets-rid-of-problematic-stereotypes-and-impossible-paradoxes-3628/>.

In the early 2000s, some judicial decisions on homophobia and discrimination in education generated widespread controversy. In 2001, the SCC ruled that the British Columbia College of Teachers could not refuse to recognize degrees from faith-based Trinity Western University.⁷¹ The university required all students to abide by a covenant or code of conduct that included the possibility of being expelled for engaging in homosexual sex. However, the court found that such a policy would not encourage its graduates to treat queer students in a discriminatory way once they became teachers. The college therefore must recognize a Trinity Western degree. But in 2018, the court seemed to step back from its 2001 decision when it upheld a decision by the Law Society of British Columbia not to accredit law degrees issues by Trinity Western. A majority of the court found that

the effect of the mandatory Covenant is to restrict the conduct of others. The LSBC's decision prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school. These individuals would have to deny who they are for three years to receive a legal education. Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful.⁷²

In light of the 2018 decision, it is doubtful whether the 2001 Trinity Western decision is still good law.

When Ontario high school student Marc Hall told the authorities at his Catholic school that he was bringing his boyfriend to his graduation party in 2002, they advised him that his boyfriend was unwelcome. The boyfriend's presence was not consistent with the teachings of the Catholic Church. The Ontario Superior Court issued an injunction requiring that Mr. Hall's boyfriend be permitted to attend, ruling that the factors governing injunctions favoured the teenager's position. The main issue, whether a Catholic school could prohibit a student from bringing a same-sex date to a graduation party, was never fully argued or decided.⁷³ Thus, it remained, at least until recently, unclear just how far schools with a faith mandate could rely on their right to religious freedom to adopt policies that create disadvantages for their queer students. But the reasoning used in *Law Society of British Columbia v Trinity Western University* strongly suggests that even religiously mandated schools cannot force their students to behave contrary to their sexual identity.

Azmi Jubran attended a school in North Vancouver from 1993 to 1997. There he was taunted with homophobic epithets and physically assaulted, including being spat upon,

71 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31.

72 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 99, 101, 103 as summarized in the headnote.

73 *Hall (Litigation Guardian of) v Powers*, [2002] OJ No 1803 (QL) (Sup Ct J); *Hall v Durham Catholic District School Board*, 2005 CanLII 23121 (Ont Sup Ct J).

kicked, and punched by other students because of his perceived sexual orientation. His shirt was set on fire and a fellow student urinated on his tent during a school camp-out. The school board knew about the other students' behaviour but did next to nothing to provide Jubran with a safe learning environment. In 2005, the British Columbia Court of Appeal upheld the 2002 Human Rights Tribunal's finding that the school board failed Mr. Jubran in many ways.⁷⁴ In particular, its disciplinary approach was not effective and it should have adopted a broader educative approach to deal with the difficult issues of harassment, homophobia, and discrimination. The *Jubran* complaint served as a wake-up call to school boards across the country: they needed to be much more proactive in dealing with homophobia in schools or they could face administrative sanctions.

In response to public pressure and decisions such as *Hall* and *Jubran*, school boards across the country have adopted safe(r) school policies that are intended to further anti-discrimination goals. Some provincial governments have passed legislation requiring all schools, including schools operating under a religious mandate, to permit gay-straight alliances (GSAs) to form and meet on their premises. Donn Short's research demonstrates that while GSAs are an important initiative, they are only an initial step in reducing the homophobic climate that queer students endure. He observes that "current conceptions of safety are insufficiently robust and must be reconceptualized so that safety comes to be viewed as incorporating a pursuit of equity and social justice." He notes that queer realities could be better reflected in course content and school culture and that regimes of silence, invisibility, and oppression could be more effectively challenged.⁷⁵

V. Legal Recognition of Relationships

A. Being a Parent

Until the 1970s, most lesbians and gay men would not even think of fighting for custody of their children if their (former) spouse did not agree. The low likelihood of winning combined with the risks of losing a job were just too great. When these parents did start contesting custody in the 1970s and 1980s, judges often denied or restricted queer parents' custody or access to their children, relying on discriminatory beliefs about lesbian mothers and gay fathers. These beliefs included: that queer people were mentally disordered or immoral; that the stigma of having a queer parent would harm the children; that a queer parent's sexual orientation would somehow be transmitted to the

⁷⁴ *School District No 44 (North Vancouver) v Jubran*, 2005 BCCA 201.

⁷⁵ Donn Short, "*Don't Be So Gay!*" *Queers, Bullying and Making Schools Safe* (Vancouver: UBC Press, 2013) 12-13. See also Tracey Peter, Catherine Taylor & Line Chamberland, "A Queer Day in Canada: Examining Canadian High School Students' Experiences with School-Based Homophobia in Two Large-Scale Studies" (2015) 62 *J Homosexuality* 186.

children; and that children were harmed if their parents were involved in queer political activities.⁷⁶ The stories recounted in a 1995 collection edited by Katherine Arnup attest to the courage and perseverance of many lesbian mothers during this period.⁷⁷

Generally speaking, provincial adoption statutes restricted or prohibited queer people from adopting children until the late 1990s. Adoption laws started changing in the mid-1990s, including through administrative reinterpretations of adoption legislation to permit a single queer person to adopt a child and Charter-based judicial decisions to allow lesbian partners to adopt children born to their partners.⁷⁸ By the mid-2000s, adoption legislation in all Canadian jurisdictions permitted same-sex couples to adopt. These amendments are the logical evolution of the *M v H* case described in the next section.

Some assisted reproduction clinics refused to work with lesbians in the 1990s until human rights complaints forced them to provide this service.⁷⁹ Gay men seeking to become fathers by working with surrogate mothers still face a range of barriers.⁸⁰ The federal *Assisted Human Reproduction Act* prohibits discrimination on the basis of sexual orientation against persons who seek to undergo assisted reproduction procedures, yet the regulations on semen donation are highly restrictive if the donor has ever had sex with a man.⁸¹ (In October 2018, the federal government published proposed regulations that, if adopted, would ease these restrictions.⁸²) The legislative regimes in Ontario and British Columbia now permit more than two parents to be recognized as a child's legal parents simply by filing a birth registration listing the names of all parents.⁸³ (It remains, however, that in most provinces a non-biological parent, even if listed on a birth certificate, needs to obtain a formal declaration of parentage or formally adopt a child if the person wants to be fully recognized as a legal parent.) Additionally, judges have

76 See Wendy Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1986) 1 CJWL 505; Harvey Brownstone, "The Homosexual Parent in Custody Disputes" (1980) 5 Queen's LJ 199; Pearlston, *supra* note 23.

77 Katherine Arnup, ed, *Lesbian Parenting: Living with Pride and Prejudice* (Charlottetown: Gynergy Books, 1995).

78 See e.g. *Re K Adoption*, 1995 CanLII 10080 (Ont Ct (Prov Div)).

79 See e.g. *Potter v Korn* (1996), 134 DLR (4th) 437 (BCSC).

80 Sophia Fantus, *The Path to Parenthood Isn't Always Straight: A Qualitative Exploration of the Experiences of Gestational Surrogacy for Gay Men in Canada—Perspectives of Gay Fathers and Surrogates* (PhD, University of Toronto, 2017) [unpublished], online: <tspace.library.utoronto.ca/handle/1807/80680>.

81 SC 2004, c 2, s 2(e).

82 Department of Health, (2018), C Gaz I, 152:43, Regulatory Impact Analysis Statement, Safety of Sperm and Ova Regulations, online: <<http://www.gazette.gc.ca/rp-pr/p1/2018/2018-10-27/html/reg2-eng.html>>.

83 See e.g. ss 20-33 on parentage in the *Family Law Act*, SBC 2011, c 25.

issued orders recognizing that children could have more than two legal parents.⁸⁴ This legislative and judicial recognition demonstrates a profound shift away from normative thinking about parentage. However, as Fiona Kelly has noted, judicial recognition of multi-parent families is not a given, and legislative amendments in Alberta have gone in the opposite direction by expressly prohibiting judges from finding that a child has more than two legal parents.⁸⁵

B. Access to Spousal Benefits

In *Egan v Canada* (1995), the SCC held that sexual orientation was analogous to the grounds of discrimination enumerated in section 15 of the Charter and therefore could found a denial of an equality claim. Nonetheless, in the early Charter cases, the court was reluctant to give the Charter a robust interpretation that would provide queer people with state or private benefits that could be shared within a family. In *Egan*, for example, some members of the court found that public pension legislation that benefited only heterosexual married and common law spouses was not discriminatory. It stated that

[the] ultimate *raison d'être*... [is] the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense marriage is by nature heterosexual.⁸⁶

In other words, queer people were not being discriminated against because of their sexuality; rather, they did not fit into the procreative social unit that Parliament sought to support. Other members of the court found that the provisions were a reasonable limit in a free and democratic society.

But in 1999, the court did an about-face from its reasoning in *Egan*. In *M v H*,⁸⁷ the court held that Ontario's *Family Law Act*,⁸⁸ by excluding homosexual partners from spousal support on the breakdown of a relationship, discriminated without justification on the basis of sexual orientation. The legislation perpetuated historic prejudices about the worthiness of queer relationships and failed to take into account the needs of queer families, therefore violating the Charter-protected right to equality.

84 *AA v BB*, 2007 ONCA 2. When the government decided not to appeal this decision, a public interest group unsuccessfully sought the right to lead a challenge to have the decision reversed; see *Alliance for Marriage and Family v AA*, 2007 SCC 40.

85 Fiona Kelly, "One of These Families Is Not Like the Others': The Legal Response to Non-Normative Queer Parenting in Canada" (2013) 51:1 *Alta L Rev* 20.

86 *Egan v Canada*, [1995] 2 SCR 513 at 563.

87 *M v H*, [1999] 2 SCR 3.

88 RSO 1990, c F.3.

Following *M v H*, all provinces and the federal government conducted legislative audits and amended most statutes that touched on relationship obligations and benefits, to ensure conformity with equality rights. In Manitoba, for example, three omnibus acts—*An Act to Comply with the SCC Decision in M v H*, *The Charter Compliance Act*, and *The Common Law Partners Property and Related Amendments Act*—amended some 70 acts ranging from *The Anatomy Act* (defining the “preferred claimant” of a deceased’s remains) to *The Vital Statistics Act* (effectively permitting two lesbian mothers to be named on a birth certificate).

Some commentators have been critical of perpetuating the economic effects of relationship recognition laws by extending their applicability to a new group: queer couples who have higher than average incomes.⁸⁹ Relationship recognition laws often have the effect of making the rich richer since tax and other benefits that can be shared with partners, such as extended health care benefits, private pensions, RRSP accumulation, and income splitting, overwhelmingly benefit upper-middle-class and wealthy people. Partner recognition laws can also have the effect of making the poor poorer—whether they are queer or heterosexual. For example, the ability to claim a child as a dependent spouse equivalent and GST rebates are often lost when someone mates. Tax policy analysts, such as Kathleen Lahey, have forcefully argued that the use of couple-based tax and benefit provisions are simply bad public policy because they benefit the wealthy and disadvantage lower-income people.⁹⁰

C. Same-Sex Marriage⁹¹

As noted in the opening paragraph of this chapter, Chris Vogel and Richard North launched an early but unsuccessful challenge to marriage laws in 1975. The relevant Manitoba legislation used the language of “persons” rather than gendered terms like “woman” or “groom.” A county court judge ruled that marriage was known throughout Christendom to be the union of a man and a woman; he held that this conclusion was so obvious that it could not be set aside through clever semantic arguments.

89 See the essays collected in Leckey, *supra* note 11 and Claire F Young & Susan B Boyd, “Challenging Heteronormativity? Reaction and Resistance to the Legal Recognition of Same-Sex Partnerships” in Hester Lessard, Dorothy E Chunn & Susan B Boyd, eds, *In Reaction and Resistance: Feminism, Law, and Social Change* (Vancouver: UBC Press, 2007).

90 Kathleen A Lahey, “Uncovering Women in Taxation: The Gender Impact of Detaxation, Tax Expenditures, and Joint Tax/Benefit Units” (2015) 52:2 Osgoode Hall LJ 427.

91 While organizations like Egale Canada tried to reframe the debate as being about “equal marriage” rather than “same-sex marriage,” these efforts were not successful and therefore I use the common parlance term “same-sex marriage” in this chapter. Reframing the issue as “equal marriage” would have made it clearer that the changes sought would take gender out of the marriage equation and permit any two people to marry regardless of their sexual orientation or gender identity.

The arguments for same-sex marriage generally follow two lines of thinking. First, queer people, like heterosexual people, have diverse reasons for wanting to marry, “including romance, strengthening family support, social recognition, ensuring legal protection, financial and emotional security, religious or spiritual fulfillment, providing a supportive environment for children, and strengthening their commitment to their relationship.”⁹² These reasons should be respected. Second, while not all queer couples want to marry, “they should enjoy the inherent dignity of having the freedom to make their own choices over [this] fundamental personal decision.”⁹³

In addition to criticisms related to the economic effects of partner recognition laws noted above, some queer and allied commentators have a longer list of reasons to be critical of using law to reinforce an ideal of the monogamous dyadic relationship—especially the institution of marriage. They assert that vying for marriage privileges the institution and therefore limits the acceptable ways in which people can choose to organize their affective lives. Extending the right to marry might reinforce (or subvert) the inequalities that heterosexual marriages give rise to for women and allow the state to off-load caring responsibilities on families.

Almost 20 years passed after the *North, Vogel* case before another Canadian court was called upon to rule on the status of a queer marriage. In 1992, the Ontario Superior Court granted a declaration that a marriage between a cis woman and a trans man (who had not had bottom surgery) was a nullity because, according to the judge, both parties were women at the time of the purported marriage.⁹⁴ In another case at about the same time, *Re Layland and Beaulne*, two men, one of whom was a non-Canadian, sought to marry. The Ontario Superior Court again found that the common law definition of marriage (that is, union of a man and a woman) did not violate the constitutionally protected right to equality because “homosexuals” were allowed to marry, just as long as the person was of the opposite sex.⁹⁵ Todd Layland and Pierre Beaulne were discouraged from appealing this decision, as a loss on appeal would create a hard-to-displace precedent.

It was not until about 2001 that a win in a same-sex marriage case seemed possible. The *M v H* precedent established that laws that treated same-sex couples differently from heterosexual couples were unconstitutional. Claims asserting that laws prohibiting same-sex marriages violated Charter-protected equality rights were filed by same-sex couples and public interest organizations in British Columbia, Ontario, and Quebec. While the British Columbia couples lost at the trial level, the British Columbia Court

92 *Barbeau v British Columbia (Attorney General)*, 2003 BCCA 406 (Factum of the Appellant, Egale Canada at para 3). Factum on file with author.

93 *Ibid* at para 4.

94 *C (L) v C (C)*, 1992 CanLII 7651 (Ont Sup Ct J).

95 *Layland v Ontario (Minister of Consumer & Commercial Relations)*, 1993 CanLII 8676 (Ont Sup Ct J).

of Appeal declared the marriage law invalid.⁹⁶ The Ontario and Quebec couples won invalidity declarations at trial and on appeal.⁹⁷ But the Ontario Court of Appeal, unlike the other courts, did not suspend the effect of its June 2003 declaration and therefore same-sex couples were free to marry in Ontario as of the day of the decision.

No government appealed the appellate decisions; instead, the federal government made a reference to the SCC requesting an opinion on the constitutionality of draft legislation permitting same-sex marriages. Before the reference was heard, the British Columbia and Quebec courts lifted the suspension on their declarations, and lawsuits challenging marriage laws in four more provinces were successful.⁹⁸ The SCC's reference opinion, issued in late 2004, supported adoption of an inclusive marriage law.⁹⁹ When the federal *Civil Marriage Act* became law in July 2005, queer couples from coast to coast to coast had the choice to marry.

VI. Conclusion

For the last five decades, law reform has played an important role in creating the conditions that allow increasing numbers of queer people to live out and proud lives. Reforms occurred in a somewhat linear trajectory that moved from partial decriminalization to obtaining expressive rights that facilitated organizing to challenging discrimination and then onto recognition of the myriad ways queer people choose to live their lives. But the work is not yet complete. As the other chapters in this collection describe in more detail, some of the law reforms may not have had the desired result, they may not have been as effective as originally hoped, or they may have been under-inclusive. So we need to ask: what is next on the gay agenda?

96 *Barbeau v British Columbia (Attorney General)*, 2003 BCCA 251.

97 *Halpern v Canada (Attorney General)*, 2003 CanLII 26403 (Ont CA); *Hendricks c Québec (Procureur général)*, 2002 CanLII 23808 (Qc CS).

98 *Dunbar & Edge v Yukon (Government of) & Canada (AG)*, 2004 YKSC 54; *Vogel*, *supra* note 3; *Boutilier v Nova Scotia (Attorney General)*, [2004] NSJ No 357 (QL) (SC); *NW v Canada (Attorney General)*, 2004 SKQB 434.

99 *Reference re Same-Sex Marriage*, 2004 SCC 79.

PERSONAL REFLECTION

HOMO IMPROVEMENT: UNFORGETTABLE MEMORIES FROM CANADA'S FIRST OPENLY GAY JUDGE

Harvey Brownstone

When I was appointed a provincial judge in March 1995, no one was more surprised than me. All of my colleagues and friends had told me that my judicial application was a waste of time because no openly LGBTQ2+ person had ever been appointed to the bench in Canada. I was extremely proud and grateful to have this opportunity to add to the diversity of our bench because I firmly believed (and still do) that an effective, responsive, empathetic, and inclusive judiciary should reflect the community it serves. That being said, back in 1995, I would never have predicted that during my judicial career, I would have a front-row seat to the monumental evolution of LGBTQ2+ rights in this country and to the coming-of-age of LGBTQ2+ lawyers and judges as they've taken their rightful place in our society and in our profession.

Shortly after I was appointed, the *Re K* decision,¹⁰⁰ granting same-sex couples the right to adopt children, was released by my colleague and good friend Justice James Nevins. When I called to congratulate him on his brilliant Charter analysis and insightful application of equality principles to same-sex couples, he said, "Well Harvey, getting to know and becoming friends with a gay colleague like you helped me to understand the implications of the legal issue I was required to resolve." That comment made me realize in a very profound way the importance for judges themselves of having diversity on the bench.

Numerous colleagues told me that prior to my appointment, they didn't know any openly LGBTQ2+ people (that actually amazed me) and that their comfort level increased after getting to know my partner and myself. I always made a point of taking my partner to every judges' conference and to all social events with my colleagues, so that they'd see for themselves that same-sex couples are no different than any other couple. And, as you might expect, I was called upon by many colleagues to help them and their spouses adjust and respond appropriately when their children "came out." In those days I was happy to be known as the "gay judge" within the bench—giving personal advice, speaking on panels, and organizing a judicial education program on same-sex rights—because I considered it my privilege and responsibility to serve as a positive ambassador for the LGBTQ2+ community.

100 *Supra* note 78.

On June 10, 2003, equal marriage became legal in Ontario. My life changed in a big way that day. Several prominent community members called me to ask if I would be willing to officiate at same-sex weddings because many couples were interested in getting married and were wanting a civil ceremony, not a religious one. I immediately answered, “sure, just give people my email address and I’ll make arrangements for them to come to the courthouse and get married in my chambers.” These were the early days of the Internet and I was obviously naive about the impact of giving out my email address. Suddenly my email address was on every website advising same-sex couples about how to get married in Toronto. In two weeks I received 8,000 emails, and the server at my courthouse crashed!

The next few years of my life revolved around my commitment to make myself available to conduct wedding ceremonies for as many couples as needed me. Until same-sex marriage became widely available in the United States, thousands of couples were flocking to Toronto from all over the world to get married. In addition to presiding in court full-time, I was conducting five wedding ceremonies per day in my chambers: one before court started, one during morning recess, one during lunch hour, one during afternoon recess, and one after court ended. In addition to the many couples from all over North America, I was particularly touched by the dozens of courageous couples who made their way to Toronto from such places as Afghanistan, Turkey, Iran, Russia, Singapore, and other countries where homosexuality was illegal and punishable by lengthy terms of imprisonment and, in some cases, death. I was so proud to show these couples how progressive, compassionate, and inclusive we are in Canada. Tears still come to my eyes when I think of how many couples told me they could hardly believe they were getting married by a judge, which for many people is a symbol of the “establishment” that for so many years has shut our people out.

The highlight of my “equal marriage experience” was officiating at the wedding of Edith Windsor and Thea Spyer, the New York couple whose marriage in Toronto led to the United States Supreme Court decision striking down the *Defense of Marriage Act*¹⁰¹ and opening the doors to equal marriage throughout the US. I am proud of the fact that Canada had an important role to play in the development of equal marriage rights in the US.

I will always be grateful that I got to be a judge during this incredibly significant period in our evolution as a community. In the years since my judicial appointment, I’ve seen a dozen other LGBTQ2+ lawyers appointed to the bench, and I glow with pride at the many superb LGBTQ2+ lawyers who are making a positive difference in the lives of their clients and enhancing the reputation of the legal profession and the administration of justice in this

101 *United States v Windsor*, 570 US 744 (2013).

country. I'm also grateful to our straight allies such as Martha McCarthy, who took on the Supreme Court equal marriage litigation at great personal expense and with enormous enthusiasm.

As I approach my senior years, I'm filled with gratitude, pride, and humility for the small role I was able to play in opening doors for the next generation of law students and lawyers.

PERSONAL REFLECTION

IN PRAISE OF LAWYERS

R Douglas Elliott

"Imagine having to fight for the basic rights that your peers enjoy, over and over again."

These were the words of Prime Minister Justin Trudeau in his powerful apology to Canada's LGBTQ2+ communities in 2017. As luck would have it, I was one of the many teary-eyed activists who had been invited to the galleries of the House of Commons that day. In his speech, the prime minister took no credit on behalf of his or previous governments for our progress, and rightly so. The heroes of our movement are not politicians, but lawyers.

Canada's LGBTQ2+ communities have every right to be angry about the role of the law in our country's history. A low point in this history arrived with the infamous case of *Klippert v The Queen*.¹⁰² Klippert's lawyer, Brian Crane, who was part of an early generation of criminal lawyers who came to the defence of our community, pointed to the absurdity of the law deeming a harmless gay man "dangerous." Unfortunately, he was only able to persuade two of the five justices.

The ruling had a silver lining. The media and Klippert's member of parliament took up the cause. Canada had a new minister of justice, Pierre Elliott Trudeau. A gifted lawyer himself, Trudeau responded to media queries with his famous remark that in his opinion, "the state has no place in the bedrooms of the nation." It was an idea that captured the public imagination. Not long afterward, Trudeau became prime minister. His minister of justice, John Turner, would follow through with the famous partial decriminalization of same-sex acts in 1969. The reforms offered a promise of measured tolerance, not equality. They did not end our community's need for lawyers.

Many in Canada's police services continued to view our community as criminals. The RCMP and other police services made it clear that LGBTQ2+ people were not welcome to serve as police officers. Montreal's police raided

¹⁰² *Supra* note 14.

many gay establishments to “clean up” the city for the 1976 Olympics. The murder of a young shoeshine boy in Toronto triggered a backlash that would include police raids on *The Body Politic* newspaper, the Glad Day Bookshop, and bathhouses, culminating in the massive bathhouse raids of 1981. Members of the criminal defence bar were critical to our community's ability to endure the police onslaught.

The next blow to our community came not from the police, but from a microscopic virus. During the AIDS epidemic, many of us shifted the focus from fighting for our rights to caring for our dying brothers. I felt my recently acquired legal skills were needed. I could not treat the ill but I could help ensure that their affairs were arranged so that they could protect their surviving partners, and at least have the dignity of the funeral they wanted. It was necessary but inglorious work. No precedents were set, but we offered a little comfort, control, and quality of life to people in terrible circumstances.

In 1985, the *Canadian Charter of Rights and Freedoms*¹⁰³ equality guarantee came into effect. I was one of many who were not optimistic that the Charter would make any difference in our lives. The politicians had refused to expressly add sexual orientation to the enumerated grounds. We would have to take our chances with the judiciary—the same judiciary that had given us the *Klippert* decision.

Remarkably, judges accepted that sexual orientation was an analogous ground under section 15(1), the equality guarantee of the Charter. Since the initial rulings were from lower courts, this did not mean that much at first. Except that they were all in agreement.

The Charter had created a revolution for lawyers keen to defend the LGBTQ2+ community. Before that time, we were offered a shield. We could only resist the attacks of the state. Now lawyers could use the Charter as a sword, to attack unjust laws and unjust government conduct. Lawyers took up that challenge. And Canadian judges were open to their arguments.

There were many cases of significance at the tribunal and lower court levels. Despite our best efforts to coordinate among the lawyers and the clients we served, we were reactive more frequently than we were proactive. Then, there were a series of cases at the Supreme Court of Canada (SCC) that proceeded in a sequence that we lawyers had tried to shape as we planned to develop the jurisprudence.

The case of *Egan v Canada*¹⁰⁴ was a planned attack argued by my former constitutional law professor, Joe Arvay. While many saw *Egan* as a loss, I saw things quite differently. The analysis of L'Heureux-Dubé J in her dissent in

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

104 *Supra* note 86.

*Canada (Attorney General) v Mossop*¹⁰⁵ now had gained real traction on the court. Cory and Iacobucci JJ were emerging as the consensus builders. The case exemplified how interveners could deploy a small army of lawyers to great effect. Although we lost on section 1 again, even the negative reasons of Sopinka J made it clear that it was only going to be a matter of time before we were going to win. The strategic message of Sopinka J to the lawyers for the LGBTQ2+ community was loud and clear: next time bring us a case that is not going to cost the government any money, and you have a good chance of winning. We certainly knew how to take a hint.

The next case I will highlight was not planned at all. Delwin Vriend was an accidental activist, a man fired from his teaching job because he was gay. When I met Delwin, he had had won his case at the trial level. However, his lawyer had left Alberta and he was having trouble finding one willing to take on the powerful Progressive Conservative government in Alberta, on appeal. Fortunately, I was able to connect him to Sheila Greckol. Sheila was vital in seeing things through to the SCC. She put in a winning performance in Ottawa, ably supported by a remarkable chorus of lawyers for a variety of interveners.¹⁰⁶ I was proud to be part of that impressive team of lawyers, appearing as counsel for the Canadian AIDS Society.

In *M v H*,¹⁰⁷ Martha McCarthy, who was then a junior lawyer, bravely took on a case that would make history. I will never forget Martha's courage in standing up to a withering line of questions from the Court of Appeal for Ontario. She won in that court. Then there was a whole team of intervening lawyers, including me, who supported Martha in her victory in the SCC.

In the wake of *M v H*, I soon realized that surviving partners in same-sex couples were still having difficulty recovering Canada Pension Plan (CPP) survivor's pensions. I was able to reach out to a group of lawyers I had come to know from my work on the Krever Inquiry to build the national legal team needed to address this problem. In my youth, I had come to know a pioneering Canadian activist named George Hislop. I reached out to George to see if he was willing to act as representative plaintiff in a class action I thought might solve the problem, and he quickly agreed. We had to fight the Government of Canada all the way to the SCC. However, the case, that George liked to call "the Queen versus the Queen," resulted in Canada's first successful constitutional class action. Elderly bereaved Canadian gays and lesbians finally had their relationships recognized and were given some well-deserved financial equality too.

105 [1993] 1 SCR 554.

106 *Vriend v Alberta*, *supra* note 57.

107 *Supra* note 87.

Through volunteer work I had done for Egale, I had learned that my long-time friend Todd Ross was a survivor of the “LGBT Purge” that had taken place in the Canadian Armed Forces from the early 1950s to 1993. I was shocked to learn of his experience. That same day, I met Martine Roy for the first time. She was also a survivor of the Purge, and for years had been looking for a lawyer who would be willing to take on her case. After many years of hard work, the class actions brought on their behalf by an amazing national team of lawyers produced the largest financial settlement in the world for LGBTQ2+ discrimination.

Sometimes I speak to young lawyers who know a little bit about this history but feel there is nothing left for them to do. How wrong they are! The people of the rainbow flag are a diverse lot, and the court victories we have won at great cost have not benefited everyone equally, and certainly have not addressed the wide range of challenges before us. I would urge new lawyers to “take up our quarrel with the foe,” and to continue to fight the good fight.

I have considered it a great privilege to be able to use my legal skills to help our community advance toward equality. However, I am conscious of the fact that our advances are the work of many hands. All of us in Canada’s LGBTQ2+ community enjoy an enviable level of equality compared to those in other countries in the world. And that happy state of affairs is largely the work of Canadian lawyers. Let us never shy away from singing their praises and the praises of LGBTQ2+ families who have had to fight their own government for the right to benefits and equality, including the freedom to marry, often at great personal cost.

To all the trailblazers who have struggled, and to all those who have fought so hard to get us to this better place: thank you for your courage, and thank you for lending us your voices. I hope that you look back on all you have done with pride. And not least among you, our lawyers.

