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UN/RELATED: DISCRIMINATION IN POSTHUMOUS CONCEPTION FOR LGBTQ+ FAMILIES IN CANADA

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Thanks to assisted reproductive technologies, a child may now be conceived after the death of one of their intended parents. This article argues that the laws regulating the parentage of posthumously-conceived children include three requirements that adversely impact LGBTQ+ families and perpetuate historical disadvantages and stereotypes against them. Pursuant to an analysis of section 15 of the Canadian Charter of Rights and Freedoms, these requirements constitute prima facie discrimination on the grounds of sex, sexual orientation, gender modality, and family status. As only three provinces have legislated on this matter, this article calls on the others to implement more inclusive legislation.

Grâce aux technologies de reproduction assistée, il est désormais possible de concevoir un.e enfant après le décès de l'un de ses futurs parents. Dans cet article, l'autrice soutient que les lois encadrant la filiation de l'enfant conçu.e après le décès de l'un de ses parents comportent trois critères qui ont un effet préjudiciable sur les familles LGBTQ+ et perpétuent des désavantages et stéréotypes historiques à leur égard. Suivant une analyse fondée sur l'article

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15 de la Charte canadienne des droits et libertés, ces critères constituent de la discrimination prima facie fondée sur le sexe, l'orientation sexuelle, la modalité de genre et l'état familial. Puisque seulement trois provinces ont légiféré sur cette question, cet article appelle les autres à mettre en place des lois plus inclusives.

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1. Introduction

LGBTQ+ families have been forming long before family law considered regulating our structures. In Canada, before adoption was available to queer couples, many would raise children legally adopted by only one of them.

Many raised their partner's child or children from previous marriages, too. Artificial insemination brought a new kind of safety to lesbian couples who wanted one or both of them to bear a child, detached from the increased risk of AIDS in the 1980s and 1990s. Agreements brokered between lesbian and gay couples could facilitate each couple having a child if both lesbians carried a child and the gay men provided their sperm, with each couple raising one of the children thus conceived. The permutations of families thus created have long been multiple and implicate a variable number of parents in a child's life. Such family-making endeavours have also been accompanied by their fair share of fear, risk, and danger: fear of bringing a child into a world that refuses to recognize the legitimacy of their family; fear of facing an increased barrage of homophobia by amplifying the visibility of one's difference; fear of losing custody of the child had with a cisgender-heterosexual parent upon coming out as gay and/or transgender; and so on.

The attribution of legal rights and protections to LGBTQ+ individuals and couples has done much to legitimize LGBTQ+ families[1] who fit the otherwise identical mould of the cis-heteronormative family. Nonetheless, laws continue to be created on the presumption of the cis-heteronormative family. So long as such is the case, they will continue to further marginalize several segments of LGBTQ+ communities. This includes families counting more than two parents, families created outside of the conjugal structure, and families disproportionately having children with the aid of donor materials.

These considerations constitute the backdrop against which the present article analyzes legislation on posthumous conception. Posthumous conception was rendered possible decades ago, but has only become the subject of legislative frameworks in Canada since 2013. By now, three Canadian provinces have legislated the recognition of parentage between a deceased parent and their posthumously-conceived child: British Columbia, Ontario, and Saskatchewan. Two more have published legislative projects on the matter. In this article, I consider these statutes and reports from the lens of LGBTQ+ families and address the specific ways in which permutations of such families may be impacted by the legislators' choices. I center my criticisms of the legislation and legislative projects around three elements which I argue *prima facie* discriminate against LGBTQ+ families: (1) the requirement of a genetic connection between deceased parent and posthumously-conceived child in some provinces; (2) the requirement of a conjugal relationship between

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[1] For the purposes of this paper, the terms "LGBTQ+ families", "LGBTQ+ couples", or "LGBTQ+ parental units" comprise families where at least one intended parent identifies as LGBTQ+.

deceased and surviving parent; and (3) the statute-imposed maximum of two parents. The hopeful and ambitious objective of this article is to raise these issues while legislation is still being contemplated and constructed around posthumous conception, in an attempt to render the same more inclusive of LGBTQ+ realities.

Part 2 of this article lays out the statutory framework on posthumous conception by discussing, firstly, assisted reproduction, posthumous conception, and LGBTQ+ families, and, secondly, the legislation and legislative reports that govern posthumous conception in Canada. Part 3 summarizes the state of the law relating to adverse effect discrimination, then discusses the three exclusions that stem from legislation on posthumous conception and the section 15 grounds implicated. Part 4 argues that this adverse effect is discriminatory as it prevents children from benefitting from parentage and the benefits that flow therefrom, thus perpetuating the disadvantages historically visited upon LGBTQ+ individuals and children whose parentage is unrecognized by law, as well as perpetuating stereotypes for both of these groups.

2. Legislative Efforts on Posthumous Conception and Parentage

A) Assisted Reproduction, Posthumous Conception, and Diverse Family Structures

"Assisted Reproduction," as defined in most provincial statutes, refers to a method of conceiving a child other than by sexual intercourse.[2] Assisted Reproduction thus comprises techniques such as artificial insemination (whether conducted in a laboratory or not) and in-vitro fertilization, both of which can be used in conjunction with other assisted reproductive technologies ("ARTs"),[3] notably surrogacy.

Both artificial insemination and in-vitro fertilization may allow partners, in a couple where an individual produces or has produced sperm and the other produces or has produced ova, to conceive and give birth to a child genetically related to both of them.[4] Artificial insemination

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[2] See e.g. *Family Law Act*, SBC 2011, c 25, s 20(1), sub verbo "Assisted Reproduction" [BC *FLA*]; *Family Law Act*, SA 2003, c F-4.5, s 5.1(1), sub verbo "Assisted Reproduction"; *The Children's Law Act, 2020*, SS 2020, c 2, s 55(1), sub verbo "Assisted Reproduction" [Sask *CLA*].

[3] There is no legislated definition of ARTs, but they are generally understood to encompass a variety of clinical treatments and laboratory procedures to facilitate pregnancy through the handling of ova, sperm, and/or embryos.

[4] I purposefully avoid the use of the terms "man" to refer to an individual having produced sperm and "woman" to an individual possessing a uterus and/or having

and in-vitro fertilization are also used by individuals, couples, or a larger parental unit to conceive a child or children genetically related to only some or none of them. Medical techniques such as surrogacy and the use of donated ova or sperm in conjunction with artificial insemination or in-vitro fertilization allow for a panoply of such results.[5]

For the purposes of this article, "intended parent" refers to an individual who made a plan to become a parent through the use of ARTs. An intended parent will not always be a legally-recognized parent. "Genetically related" refers to someone whose gametic material[6] (i.e., sperm or ova) has been used to create an embryo and conceive a child. An individual genetically related to a child is, of course, not necessarily a parent nor intended parent to said child.

Since the gametic material of potential parents or donors can be used up to several decades after it is produced or retrieved, the embryo can be created (either in vitro or in utero) years after this material is obtained. An embryo created in vitro can also be frozen for decades and be implanted upon thawing, before or after the death of either donors or intended parents. For further clarity, the moment of conception of a child refers to the moment when an embryo is implanted. Therefore, a posthumously-conceived child is one whose birthing parent or carrier was inseminated or had the embryo implanted after the death of at least one of the intended parents.

Posthumous conception can arise from a variety of scenarios. For instance, in the case of a heterosexual couple of cisgender individuals trying to conceive with both persons' gametic materials, we might envisage a woman being inseminated with her deceased partner's sperm after his passing, and giving birth to their child. Conversely, if the husband survived his spouse, he might ask a gestational carrier to be implanted with an embryo created from his sperm and his deceased wife's ovum. In the case of a couple composed of two individuals with uteri, the surviving spouse may request to have an embryo implanted which is created from their deceased spouse's ovum, or with their own ovum or a third party's.

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produced ova because such individuals may identify with (a) different gender(s) than that which was assigned to them at birth, or no gender at all.

5 See Angela Campbell, "Conceiving Parents through Law" (2007) 21:2 Intl JL Pol'y & Fam 242 at 247 for a list of such arrangements, but note that the table presented therein leaves out families which are composed of more than two intended parents and assumes cisgender individuals.

6 The terms "gametic materials" and "reproductive material" are used to signify the same meaning throughout this article. The terms "reproductive material" is used when referencing legislation which uses it, whereas "gametic material" is used otherwise by this author.

A couple composed of sperm-producers may have frozen sperm when both were alive, and the survivor may seek a surrogate to carry their child after the deceased's passing, using either artificial insemination or in-vitro fertilization.[7]

B) Statutory Framework on Posthumous Conception in Canada

The matter of who should be recognized as the parents of a posthumously-conceived child raises a number of questions. Among these: whose consent is required when posthumous parentage is to be recognized? What value is to be attributed to the different relationships that went into giving life to the posthumously-conceived child? What makes the core of the parental relationship—genetics or intention? The answers to these questions determine whether the law recognizes the parentage between deceased intended parent and posthumously-conceived child.

These questions also show that many facets of the law are implicated in the regulation of posthumous conception. The matter of donor consent is of federal jurisdiction, whereas the storage and freezing of genetic material are provincial matters. Whether a posthumously-conceived child's parentage to the deceased is recognized is a matter of family law and thus determined under provincial laws, as are the obligations and rights that stem from such parentage. Each of the statutes and law commission reports published on this last matter will be examined below, after a brief overview of the federal legislation on consent.

i) Federal Legislation

The *Assisted Human Reproduction Act* ("*AHRA*") provides that embryos can only be created with the written consent of the donor(s) of the reproductive material used to create them.[8] Written consent is also necessary to use an in-vitro embryo for the purpose consented to and to remove materials from a donor's body after their death.[9] This consent falls within federal jurisdiction as a result of the Supreme Court of Canada decision in the *Reference re Assisted Human Reproduction Act*, which deemed section 8 of the *AHRA* to have a criminal purpose and effect.[10] As long as this consent is obtained, the use of reproductive material after

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7 I have made reference to couples in these scenarios for ease of comprehension, but more parents may be implicated and further vary and enrich these examples—see *below*, Part 3-B-1.

8 SC 2004, c 2, s 8(1) [*AHRA*].

9 See *ibid*, s 8(2)–(3).

10 See *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras 90, 122, 156 (Chief Justice McLachlin) & paras 289, 291 (Justice Cromwell).

a donor's death is expressly authorized.[11] There is no time limit within which the materials need to be used after their retrieval, such that a child could be born long after the provider of the reproductive materials used to conceive them has died.

To be clear, the consent at issue in federal legislation is the donor's or provider's consent to a specific use of the reproductive materials. This is distinct from the same individual's consent to parentage, which is a matter of family law and therefore falls within the realm of provincial legislation.

ii) Provincial Legislation and Recommendations

Across Canada, only three provinces have legislated on the parentage of posthumously-conceived children: British Columbia was the first province to do so in 2013,[12] followed by Ontario in 2016,[13] and Saskatchewan in 2020.[14] The Manitoba Law Reform Commission and the Alberta Law Reform Institute have both tackled this question in publications dated 2008[15] and 2015,[16] respectively.

The provisions enacted to date and the law commissions' recommendations are broadly similar, with one exception: the requirement of a genetic link between deceased parent and posthumously-conceived child. The below separates the discussion of the legislation and recommendations along that fault line.

a. Genetic Connection Requirement: British Columbia, Manitoba, and Alberta

British Columbia was the first province in Canada to propose legislation accounting for posthumous conception. The *Family Law Act* ("*FLA*") passed unanimously in 2011, with section 28 raising minimal and uneventful discussion.

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11 See *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, ss 3(a)(ii)–(iii), 3(b)(i), 4(b)–(c), 7(a)(i), 8, 12(a)(i)–(ii), 13(1)(a)(b).

12 See BC *FLA*, *supra* note 2, ss 27–30.

13 See *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, SO 2016, c 23 [*AFAEA*], amending the *Children's Law Reform Act*, RSO 1990, c C.12 [Ont *CLRA*].

14 See Sask *CLA*, *supra* note 2.

15 See Manitoba Law Reform Commission, "Posthumously Conceived Children: Intestate Succession and Dependants Relief" Report 118 (Winnipeg: MLRC, 2008) [*MLRC Report*].

16 See Alberta Law Reform Institute, "Assisted Reproduction After Death: Parentage and Implications" Final Report 106 (Edmonton: ALRI, 2015) [*ALRI Report*].

The *FLA* finds that the parentage of a posthumously-conceived child can be established in the following circumstances:

> 28(1) This section applies if
>
> (a) a child is conceived through assisted reproduction,
>
> (b) the person who provided the human reproductive material or embryo used in the child's conception
>
> (i) did so for that person's own reproductive use, and
>
> (ii) died before the child's conception, and
>
> (c) there is proof that the person
>
> (i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died,
>
> (ii) gave written consent to be the parent of a child conceived after the person's death, and
>
> (iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death.
>
> (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are
>
> (a) the deceased person, and
>
> (b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.[17]

Paragraph 28(1)(c)'s first and third provisions on consent mirror the demands of the federal *AHRA*, whereas subparagraph 28(c)(ii) requires the deceased's consent to parentage. Paragraph 28(1)(b) introduces an additional criterion: the deceased's genetic material must be used for parentage to be established. This introduction of a genetic requirement is in keeping with the *FLA*'s utilization of the sexual family as premise,

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17 BC *FLA*, *supra* note 2, s 28 [emphasis added].

its favouring of "gestation over intention," and its consecration of the importance of genetic parenthood even in the context of multiple parenthood.[18]

The integration of posthumously-conceived children's parentage into family law is reflected in succession legislation through section 8 of British Columbia's *Wills, Estates and Succession Act*[19] ("*WESA*"), also overhauled in the 2000s. Sections 21 and 60 of the *WESA* respectively allow the children whose parentage is recognized to bring a claim upon their deceased parent's intestacy or in variation of that same parent's will.

In 2008, Manitoba's Law Reform Commission published the report "Posthumously Conceived Children: Intestate Succession and Dependants Relief," proposing provisions to the same effect as those implemented in British Columbia and therefore raising the same issues.[20] Notably, the proposal imports the same requirement for a genetic connection, stemming from the Commission's belief that family—or blood—relations with a posthumously-conceived child can only be based on a genetic link.[21] The Manitoban government was unable to bring its intended reforms to fruition following a change in government in 2016.[22]

Similarly, the Alberta Law Reform Institute's 2015 report, "Assisted Reproduction After Death: Parentage and Implications," recommends that the law be modified so that the genetic parent who is deceased have their parentage recognized.[23] The Institute makes very clear that the Alberta *Family Law Act* "favours parentage established through genetic relationships when assisted reproduction is used,"[24] and its proposals do not deviate from this preference. The recommendations have not yet been passed into law.

b. No Mention of Genetics: Ontario and Saskatchewan

Ontario's legislation is also the product of an overhaul of legislation on families, resulting from a constitutional challenge by LGBTQ+ parents and intended parents of "different family configurations and personal

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18 See Susan B Boyd, "Equality: An Uncomfortable Fit in Parenting Law" in Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (London: Routledge, 2015), 42 at 47–49 [Boyd, "Equality"].

19 SBC 2009, c 13 [*WESA*].

20 See *MLRC Report*, *supra* note 15 at 31–32.

21 See *ibid* at 16, 19–20.

22 See Law Reform Commission of Saskatchewan, "Assisted Reproduction & Parentage" Final Report (Saskatoon: LRCS, 2018) at 28 [*LRCS Report*].

23 See *ALRI Report*, *supra* note 16 at 8.

24 *Ibid* at 8. See also *ibid* at 12–13.

circumstances,"[25] and the Ontario government's declaration that the law had "failed to assure 'equal recognition and the equal benefit and protection of the law to all children, without regard to their parents' sexual orientation, gender identity, use of assisted reproduction or family composition.'"[26] Ontario's *Children's Law Reform Act*, as amended by the *All Families Are Equal Act*[27] holds that:

> 12. (1) A person who, at the time of a deceased person's death, was his or her spouse, may apply to the court for a declaration that the deceased person is a parent of a child conceived after his or her death through assisted reproduction.
>
> …
>
> (3) The court may grant the declaration if the following conditions are met:
>
> 1. The deceased person consented in writing to be, together with the applicant, the parents of a child conceived posthumously through assisted reproduction, and did not withdraw the consent before his or her death.
>
> 2. If the child was born to a surrogate, the applicant is a parent of the child under section 10, and there is no other parent of the child.[28]

Ontario's *Succession Law Reform Act* integrates the recognition of the posthumously-conceived child's parentage for purposes of intestate succession and support for dependants.[29]

Saskatchewan's very recent *Children's Law Act* is the latest to legislate on posthumous conception, in terms that clearly mirror Ontario's legislation:

> 63(1) A person who, at the time of a deceased person's death, was the deceased person's spouse, may apply to the court for a declaratory order that the deceased person is a parent of a child conceived after the deceased person's death through assisted reproduction.
>
> …

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25 *Grand v Ontario (AG)*, 2016 ONSC 3434 at para 2.

26 *Grand et al v Ontario*, Minutes of Settlement (17 June 2016), reproduced at (2018) 31:8 OFLR 101, [1].

27 *AFAEA*, *supra* note 13; Ont *CLRA*, *supra* note 13.

28 Ont *CLRA*, *supra* note 13, s 12 (1), (3) [emphasis added].

29 See *Succession Law Reform Act*, RSO 1990, c s-26, s 1.1, sub verbo "child", s 47(10) (intestate succession for children), ss 57(2), 59(2) (support for children) [Ont *SLRA*].

> (3) The court may grant the declaratory order if the following conditions are met:
>
> (a) the deceased person consented in writing to be, together with the applicant, the parents of a child conceived posthumously through assisted reproduction, and did not withdraw the consent before dying;
>
> (b) if the child was born to a surrogate, the applicant is a parent of the child pursuant to section 62, and there is no other parent of the child.[30]

Saskatchewan legislation on succession law has not yet been amended to allow for posthumously-conceived children to inherit from their deceased parent's estate.[31]

Clearly, Ontario and Saskatchewan grant genetics no weight in determining parentage. The legislators' decision whether to require a genetic connection between posthumously-conceived child(ren) and deceased parent is one that carries heavy consequences, particularly for groups more likely to use assisted reproduction to procreate, and thus more likely not to fulfill said requirement. The next part sets out how LGBTQ+ communities are one such group.

Beyond the requirement of a genetic connection, two additional elements present in all the above-mentioned statutes and proposals are adverse to the recognition of family forms more common in LGBTQ+ communities: the requirement of a conjugal relationship between deceased and surviving parent, and the statute-imposed maximum of two parents. They stem from the fact that LGBTQ+ families are more likely to be constituted outside the bounds of the cis-heteronormative family model—i.e., they are more likely to have children with individuals whom they are not married to or in a spousal relationship with and/or to constitute families composed of more than two parents. The next part will detail these realities and the impact of the legislation on these communities.

3. Adverse Exclusion of LGBTQ+ Families

A) Of Adverse Effects

Three exclusions created by the current provisions on posthumous conception are discriminatory towards LGBTQ+ families: the exclusion of intended parents who are not genetically related to the posthumously-conceived child, of intended parents who are not married or in a marriage-

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30 Sask *CLA*, *supra* note 2, s 63(1), (3) [emphasis added].

31 See *The Intestate Succession Act, 2019*, SS 2019, c I-13.2.

like relationship with each other, and of groups of intended parents composed of more than two individuals who want to parent the same child(ren). Both parents and children could raise claims under section 15 of the *Canadian Charter of Rights and Freedoms*.[32] Subsection 15(1) of the *Charter* provides that:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Over the past three and a half decades since the enactment of the *Charter*, the Supreme Court of Canada has developed a two-step test to evaluate whether a law or action constitutes *prima facie* discrimination:

> To prove a prima facie violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:
>
> • on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
>
> • imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[33]

As established by *Charter* jurisprudence, section 15's focus on substantive rather than formal equality entails that the effects of the impugned legislation—rather than its intent—are at the heart of the analysis of a claim for discrimination: "Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground."[34]

Examples of distinctions created through disparate impact are scattered across discrimination jurisprudence. In *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, for instance, the same physical test was imposed on all firefighters, regardless of their sex or gender. The results of the tests showed a much higher rate of success for men than women, attributable to physiological differences.

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32 *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

33 *Fraser v Canada (AG)*, 2020 SCC 28 at para 27 [*Fraser*].

34 *Ibid* at para 30.

Both the first instance tribunal and the Supreme Court of Canada found that the disparate impact of the test upon women was indicative of the discriminatory nature of the impugned rule.[35]

In its recently-released judgment on adverse-effect discrimination, *Fraser v Canada (AG)*, the Supreme Court of Canada explained that indirect discrimination arises as a result of an absence of accommodation or the presence of "built-in headwinds" that operate to prevent members of certain groups from accruing the same benefits under the law that are available to others.[36] The Court also addressed the type of evidence that needs to be submitted to prove a case of adverse-effect discrimination, namely evidence about the situation of the claimant group and evidence about the consequences of the law.[37] While both of these "may demonstrate disproportionate impact," Justice Abella's majority held that "neither is mandatory and their significance will vary depending on the case."[38] Moreover, Justice Abella warned courts to "be mindful of the fact that issues which predominantly affect certain populations may be under-documented."[39]

The creation of legislation on posthumous conception was a helpful and welcome development that served to address a legal vacuum created by the ever-faster progress of technology. As will be shown, LGBTQ+ parents are more likely to resort to ARTs and donor materials compared to heterosexual couples composed of cisgender individuals because ARTs are often the only reasonably-available option for LGBTQ+ parents to conceive. Yet, because such legislation was created on the premise of heterosexual, cisgender couples, it fails to give the same benefit to families with different needs and lifestyles. The next part thus discusses three exclusionary aspects of the legislation that build headwinds affecting LGBTQ+ families at a higher rate (the genetic requirement, the requirement of a marriage-like relationship, and the two-parent maximum)—thus causing a disproportionate impact on our communities. Importantly, *Fraser* also teaches us that the distinction that sets the discriminated group apart does not need to be physiological, nor does it need to be immutable and it may even result from a consciously-made choice.[40] In the case of the marriage-like relationship and two-parent limit requirements, it is the higher propensity of LGBTQ+ families to create families in non-traditional

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35 See *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1996] BCCAAA No 441, at paras 171–72, 58 LAC (4th) 159, aff'd [1999] 3 SCR 3, 176 DLR (4th) 1.

36 See *Fraser*, *supra* note 33 at paras 53–54.

37 See *ibid* at paras 56–58.

38 *Ibid* at para 67.

39 *Ibid* at para 57.

40 See *ibid* at paras 86–92.

ways that sets them apart from the dominant groups and causes them to be excluded from the legislation's effect at a higher rate.

B) Three Exclusionary Aspects of Legislative Efforts on Posthumous Conception

i) The Genetic Requirement

The notion that genetics form the basis of a family is deeply entrenched in family law.[41] Such focus on genetics as determinative of kinship is steeped in cisnormative and heteronormative ideologies[42] and, today, mainly excludes LGBTQ+ people. Many LGBTQ+ couples cannot conceive a child that is genetically related to both partners. Multiple-parent families cannot conceive a child genetically related to more than two of them. Yet, such families have been found in law and in fact to provide households just as full and caring as nuclear, heterosexual, and cisnormative ones.[43]

For illustrative purposes, the table below lists different types of couples/families and how each intended parent may be genetically related to a posthumously-conceived child in each scenario. The next-to-last column indicates whether, in each scenario, the deceased individual's parentage would be recognized under British Columbia's legislation and that proposed in Alberta and Manitoba.

The table refers to couples and labels them as gay, lesbian, or different-sex to draw examples that may be more familiar to the reader, but in the full understanding that the couples may label themselves differently, that they may be composed of more intended parents, or not be couples at all. For the same reason, the table refers to cisgender men and women, and transgender men and women, whereas individuals may in reality identify in a myriad of different ways and hold gender modalities,[44] or none at all. More specifically, the reader should not read the absence of non-binary

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41 See e.g. *ALRI Report*, *supra* note 16 at v. See also Nicholas Bala & Christine Ashbourne, "The Widening Concept of Parent in Canada: Step-Parents, Same-Sex Partners, & Parents by ART" (2012) 20:3 Am UJ Gender Soc Pol'y & L 525 at 529.

42 See Boyd, "Equality", *supra* note 18 at 46–49.

43 See e.g. *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 68 [*Chamberlain*].

44 "Gender modality refers to how a person's gender identity stands in relation to their gender assigned at birth. It is an open-ended category which includes being trans and being cis and welcomes the elaboration of further terms which speak to the diverse experiences people may have of the relationship between their gender identity and gender assigned at birth" (Florence Ashley, "'Trans' is my Gender Modality: A Modest Terminological Proposal" in Laura Erikson-Schroth, ed, *Trans Bodies, Trans Selves*, 2nd ed (Oxford University Press, 2021 [forthcoming]).

individuals from the below table as invalidating their distinctive existence and experiences.

Couple	Deceased parent	Surviving Parent	Material used	Whether both parents recognized	Row
Gay couple	Cisgender man	Cisgender/ transgender man	Sperm of deceased spouse	Yes	1
			Sperm of surviving spouse or donor	***No***	2
	Transgender man	Cisgender/ transgender man	Ova of deceased spouse	Yes	3
			Ova of surviving spouse or donor	***No***	4
Different-sex couple	Cisgender man	Cisgender/ transgender woman	Sperm of deceased spouse	Yes	5
			Sperm of surviving spouse or donor	***No***	6
	Transgender man	Cisgender/ transgender woman	Ova of deceased spouse	Yes	7
			Ova of surviving spouse or donor	***No***	8
	Cisgender woman	Cisgender/ transgender man	Ova of deceased spouse	Yes	9
			Ova of surviving spouse or donor	***No***	10
	Transgender woman	Cisgender/ transgender man	Sperm of deceased spouse	Yes	11
			Sperm of surviving spouse or donor	***No***	12
Lesbian couple	Cisgender woman	Cisgender/ transgender woman	Ova of deceased spouse	Yes	13
			Ova of surviving spouse or donor	***No***	14
	Transgender woman	Cisgender/ transgender woman	Sperm of deceased spouse	Yes	15
			Sperm of surviving spouse or donor	***No***	16

As the table illustrates, heterosexual couples composed of cisgender individuals can also see the parentage between deceased parent and posthumously-conceived child not recognized if, for instance: they use

donor sperm and the intended father dies (row 6); they use donor ova and the intended mother dies (row 10); they use donor embryos. However, a study of "Canadian childless men and women's childbearing intentions" found that they were "not positively predisposed to the use of third-party treatment options (e.g. donor egg, surrogacy, etc.) irrespective of their stated desire to have children."[45] Additionally, annual pan-Canadian surveys of fertility clinics corroborate that in the large majority of cases, IVF and FET procedures are done using the carrier's ova, rather than a donor's.[46] This leads to the observation that the cases contemplated by rows 6 and 10 will be few for heterosexual couples composed of cisgender individuals.

Conversely, some queer couples and transgender individuals will be included in the legislation: the lesbian couple using the deceased intended parent's ova (row 13); the heterosexual couple using the deceased's transgender father's ova to conceive the child posthumously (row 7); the gay couple using the deceased intended parent's sperm and a surrogate (row 1); etc. Which intended parent's gametic material is used, however, will depend on the decisions made by a couple/family who might have had no intimation of one of the intended parents' impending death nor of the impact of their decision on posthumous parentage. While the percentage of heterosexual couples wishing to use donor materials is low, we know that the LGBTQ+ population must resort to its use in high proportion[47]—indeed, it appears that lesbians are the biggest users of donor sperm.[48]

Meanwhile, a quantitative analysis of the trans population in Ontario found that barely more than 20% of trans people were asked by their health care provider about fertility preservation before medical transition—thus making it likely that trans people were underinformed about fertility

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45 Judith C Daniluk & Emily Koert, "Childless Canadian Men's and Women's Childbearing Intentions, Attitudes Towards and Willingness to Use Assisted Human Reproduction" (2012) 27:8 Human Reproduction 2405 at 2410.

46 See Better Outcomes Registry & Network Ontario, "Canadian Assisted Reproductive Technologies Registry (CARTR Plus)" (Presentation delivered at the Canadian Fertility and Andrology Society, Ottawa, 19–21 September 2019) at 15, online (pdf): <cfas.ca> [Better Outcomes Registry & Network Ontario].

47 See Dave Snow, "Litigating Parentage: Equality Rights, LGBTQ Mobilization and Ontario's All Families Are Equal Act" (2017) 32:3 CJLS 329 at 345. See also Rachel Epstein, "The *Assisted Human Reproduction Act* and LGBTQ Communities" (March 2008) [Paper submitted by the AHRA / LGBTQ Working Group] (reporting estimates that LGBTQ+ families form 30% or more of client traffic in some clinics).

48 See Stewart Marvel, *Tracking Queer Kinships: Assisted Reproduction, Family Law and the Infertility Trap* (PhD Thesis, York University Osgoode Hall Law School, 2015) at 297 [unpublished] [Marvel] (the study suggests that 55% of users of third-party donor sperm are lesbians).

preservation prior to medical transition, even where over 30% of them wanted to have children after their transition.[49] This also increases the likelihood that their ability to have a genetic connection with their child was jeopardized. These statistics all translate into a higher likelihood that, compared to a cisgender intended parent in a heterosexual couple, an LGBTQ+ intended parent will not be genetically related to their child(ren), and not recognized as a legal parent if a child is posthumously conceived.

ii) A Marriage-Like Relationship

All legislative efforts on posthumous conception have required that a marital or marriage-like relationship exist between two individuals for parentage to be recognized. By requiring that the deceased and the intended parent be "spouses," the statutes limit the use of these provisions to individuals who were married to or in a conjugal relationship with the deceased, generally for a duration of at least two years.[50]

This evidently excludes any unmarried couple who has not lived together for two years at least. For instance, two gay men who planned to start a family and made arrangements—perhaps even signed a surrogacy or parentage agreement—with a surrogate, having cohabitated together for one year only prior to the death of one of them, would not be considered "spouses." If the surviving man used the deceased's sperm to have the intended child, with the help of the selected surrogate, the child's parentage to the deceased intended parent would not be recognized. Had both men been alive at the time of the birth, they may both have been considered the fathers of the child.[51] Similarly, if two friends decide to co-parent a child conceived with the first's ova and the second's sperm, but they are not in a conjugal relationship and the second one dies after signing a parentage agreement and the necessary forms for the first to use her frozen sperm, the law will not recognize her as a parent despite the agreement. Had she been alive at the time of conception, she would have been recognized as a parent to the child.[52]

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[49] Jake Pyne, Greta Bauer & Kaitlin Bradley, "Transphobia and Other Stressors Impacting Trans Parents" (2015) 11 J GLBT Family Studies 107 at 119 [Pyne et al]. See also Katrien Wierckx et al, "Reproductive Wish in Transsexual Men" (2012) 27:2 Human Reproduction 483.

[50] See e.g. BC *FLA*, *supra* note 2, s 1, sub verbo "spouse"; Sask *CLA*, *supra* note 2, s 55, sub verbo "spouse"; Ont *CLRA*, *supra* note 13, s 1.

[51] See e.g. Ont *CLRA*, *supra* note 13, s 10; Sask *CLA*, *supra* note 2, ss 61–62. Note that in British Columbia, the fathers would not be recognized as such, due to not being in a marriage-like relationship: see BC *FLA*, *supra* note 2, ss 20(1), sub verbo "intended parent".

[52] See e.g. Ont *CLRA*, *supra* note 13, s 9; Sask *CLA*, *supra* note 2, s 61; BC *FLA*, *supra* note 2, s 30.

Canadian censuses show that same-sex couples are less likely to be married than opposite-sex couples.[53] In 2016, about one half of same-sex couples with children were married.[54] Similarly, a study of trans parents in Ontario found that trans parents were as likely to never have been married as they were to be married.[55] Both of these figures fall far below the 82% estimate for married parents in Canada.[56] Moreover, LGBTQ+ families have a long history not only of exclusion from traditional family institutions, such as marriage, but also of responding to this exclusion by embracing the realities of chosen family and the creation of non-traditional (and at times unrecognized) forms of family,[57] which includes co-parenting[58] with donors.

Queer families have long been a site of resistance against cis-heteronormative family structures. In the past few decades and across jurisdictions, queer scholarship has opposed the biological construct of family to the queer realities of "families we choose."[59] Chosen families can be composed of friends, former romantic partners, caretakers, etc. In this context, co-parenting with a friend has long been a practice among queer communities and may involve two or more intended parents. These intended parents may not live together and/or they may not be in a romantic relationship; both criteria which are preconditions to meeting

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53 In 2016, approximately 33% of same-sex couples were married, compared to 79% of opposite-sex couples (see Statistics Canada, "Same-Sex Couples in Canada in 2016: Census of Population, 2016" at 3, online (pdf): *Statistics Canada* <www12.statcan.gc.ca> [Statistics Canada, "Same-Sex Couples"]; Statistics Canada, "Marital status and opposite- and same-sex status by sex for persons aged 15 and over living in private households for both sexes, total, presence and age of children, 2016 counts, Canada, provinces and territories, 2016 Census—100% Data", online: *Statistics Canada* <www12.statcan.gc.ca>).

54 See Statistics Canada, "Same-Sex Couples", *supra* note 53 at 5.

55 See Pyne et al, *supra* note 49 at table 1.

56 See Statistics Canada, "Census Family Structure (7B) and Presence and Ages of Children (15) for Census Families in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 and 2011 Censuses - 100% Data", online: *Statistics Canada* <www12.statcan.gc.ca>.

57 See e.g. Rachel Epstein, "Queer Parenting in the New Millennium: Resisting Normal" (2005) 24:2/3 Can Women Studies 7 at 10–13 [Epstein, "Resisting Normal"].

58 "Co-parenting", in this article, is used to describe a parenting agreement between individuals who have no romantic or sexual involvement with one another.

59 See e.g. Kath Weston, *Families We Choose : Lesbians, Gays, Kinship* (New York: Columbia University Press, 1991) at 38, 107–116; Sue Westwood, "'My Friends Are My Family': An Argument about the Limitations of Contemporary Law's Recognition of Relationships in Later Life" (2013) 35:3 J Soc Welfare & Fam L 347; Nina Jackson Levin et al, "'We Just Take Care of Each Other': Navigating 'Chosen Family' in the Context of Health, Illness, and the Mutual Provision of Care amongst Queer and Transgender Young Adults" (2020) 17:9 Int'l J Environmental Research & Public Health 7346.

the "marriage-like" requirement. Co-parenting friends, and parents who are not in a marriage-like relationship, have not been the subject of studies in Canada. The parenting arrangements of uncoupled queer parents, similarly, have not attracted much scholarly attention. Therefore, while there is good reason to infer that individuals who co-parent non-conjugally are more likely to be LGBTQ+, there are no numbers that can be ascribed to this trend. As *Fraser* points out, however, one should not hold against an understudied group the absence of evidence as to the situation of this group or how it is impacted by the impugned law.[60] LGBTQ+ communities are such an understudied group, as are individuals who resist cis-heteronormative family models while wanting children. Based on the available literature and jurisprudence, such individuals are more likely to be LGBTQ+ and more likely not to meet the conjugal requirement.

Overall, if LGBTQ+ couples are less likely to be married than cisgender-heterosexual couples and more likely to co-parent non-conjugally, they are more likely to be excluded from the legislation's ambit on the grounds that they have not been in a "marriage-like relationship" for at least two years.

iii) No Multiple Parentage

Starting with British Columbia's newest iteration of the *FLA*, a growing number of Canadian provinces recognize more than two parents through legislation. This change mirrors a pre-existing parenting practice, more common among LGBTQ+ families.[61]

The provisions allowing for the recognition of parentage of the deceased parent of a posthumously-conceived child, however, all limit the number of parents who may be recognized to two in situations where, if the deceased were still alive, multiple parents could be recognized. For

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60 See *Fraser*, *supra* note 33 at paras 57, 67.

61 See e.g. *DWH v DJR*, 2007 ABCA 57; *AA v BB*, 2007 ONCA 2 [*AA v BB*]; *ML v JC*, 2017 ONSC 7179; *Susan Doe v Canada (AG)*, 2007 ONCA 11; Rachel Epstein, "The Law Both Protects and Constrains Us" in Joanna Radbord, ed, *LGBTQ2+ Law* (Toronto: Emond, 2020) 313 at 314; Tracy Whitfield, "Co-Parenting Triad: Breaking Down Walls to Build a Family" in Joanna Radbord, ed, *LGBTQ2+ Law* (Toronto: Emond, 2020) 315; Fiona Kelly, "Multiple-Parent Families under British Columbia's New *Family Law Act*: A Challenge to the Supremacy of Nuclear Family or Method to Preserve Biological Ties and Opposite-Sex Parenting?" (2014) 47:2 UBC L Rev 565 at 569ff, 583–87; Fiona Kelly, "Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and their Children into Canadian Family Law" (2004) 21:1 Can J Fam L 133 at 154, 158; Malcom Dort, "Unheard Voices: Adoption Narratives of Same-Sex Male Couples" (2010) 26:2 Can J Fam L 289 at 313 [Dort].

instance, if a lesbian couple enters into a parental agreement with a male friend whose sperm they wish to use and they are all alive at the time of their child(ren)'s birth, all three will be deemed parents.[62] If, however, one of the intended mothers were to pass before the child(ren) are conceived and her partner uses the deceased's frozen ova to create embryos and carries the child(ren) thus created, the parents recognized will depend on the lesbians' spousal status. If they were married or in a marital-like relationship, both will be recognized as parents under the provisions, but the male friend will not. If they were not married, the deceased's parentage to the child(ren) will not be recognized, though the male friend's will.

By way of another example, should a couple of gay men and another couple enter into a parental agreement for all four to co-parent a child or children, such would be recognized by law in Saskatchewan and Ontario.[63] But if one of the gay men dies and his sperm is used to posthumously conceive a child who is carried by one of the two intended parents whom he was not in a conjugal relationship with, two things might happen. If the gay men were not spouses, the deceased's parentage to the child will not be recognized and the three other parents will be recognized as the child's parents. Alternatively, if the gay men were deemed spouses under the law, the second gay man and the deceased will be recognized as the child's parents if the carrier agrees to act as a surrogate and not seek parental status. One can only imagine the difficult conversations that would result from having to make a decision on whose parentage ought to be given priority and recognition in this impossible situation.

Posthumously-conceived children are denied the multiple parentage that children conceived by parents during their lifetimes are allowed. Because LGBTQ+ families are more likely to comprise more than two parents than families composed solely of cisgender-heterosexual intended parents, this exclusion will be more likely to affect LGBTQ+ intended parents.

C) The Adverse Effects of Legislation on Posthumous Conception

Most facets of a person's identity that fall within the label LGBTQ+ have been deemed comprised within the protected grounds of sex, sexual orientation, gender identity/modality, or family status. Of these, only sex is enumerated in the *Canadian Charter of Rights and Freedoms* and only sexual orientation has been recognized as an analogous ground by

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62 See e.g. BC *FLA*, *supra* note 2, s 30, Sask *CLA*, *supra* note 2, s 61; Ont *CLRA*, *supra* note 13, ss 6, 8, 9.

63 See Sask *CLA*, *supra* note 2, s 61; Ont *CLRA*, *supra* note 13, ss 6, 8, 9.

the Supreme Court of Canada.[64] Gender modality and family status have been integrated in most human rights codes in Canada.[65] The grounds of sex, sexual orientation, and gender modality each encompass all the facets of our argument against the three exclusions, such that a challenge to all these aspects can be made on any one of these grounds. Family status is implicated by this article's argument because non-traditional, non-nuclear families are adversely affected by the third exclusion.

In relation to the discrimination discussed in this article, claims may be brought forward by an intended parent or on behalf of posthumously-conceived child(ren). While the children of LGBTQ+ couples may not form part of the analogous groups of sexual orientation or gender modality, they have standing because their own rights are affected by the discriminatory treatment.[66]

The new legislative provisions surrounding the use of ARTs reflects the technology's increasing popularity with the Canadian population.[67] Within these users, LGBTQ+ families form a major subset. Because members of LGBTQ+ communities are more likely than heterosexual couples to use donors' genetic material when conceiving a child, they are at higher risk of being excluded from legislation on posthumous conception that imposes a genetic requirement. While it is true that cisgender-heterosexual couples may also use donor reproductive materials, the proportion of such couples for whom this need materializes is smaller than the proportion of non-cisgender-heterosexual couples. The impact of the genetic requirement is thus disproportionately high for the LGBTQ+ population, as compared to the general population. Per *Fraser*, for the purposes of a section 15 analysis, "the relevant impact [is] the higher rate" at which LGBTQ+ families are excluded.[68] Moreover, the fact that not all LGBTQ+ families are excluded from the legislation does not negate its adverse impact, as: "heterogeneity within a claimant group does not defeat

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64 See *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609. See also *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.

65 See e.g. *Human Rights Code*, RSBC 1996, c 210; *Human Rights Code*, RSO 1990, c H.19; *Canadian Human Rights Act*, RSC 1985, c H-6. Gender modality has also been recognized as an analogous ground under the *Charter* by lower courts: see e.g. *Centre for Gender Advocacy c Quebec (AG)*, 2021 QCCS 191 at para 111 [*Centre for Gender Advocacy*]; *CF v Alberta (Vital Statistics)*, 2014 ABQB 237.

66 See *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 at 397, 143 DLR (4th) 577; *Caron c Canada (AG)*, 2020 QCCS 2700 at para 31 [*Caron*].

67 See Tracey Bushnik et al, "Estimating the prevalence of infertility in Canada" (2012) 27:3 Human Reproduction 738 at 740; Better Outcomes Registry & Network Ontario, *supra* note 46.

68 *Fraser*, *supra* note 33 at para 55.

a claim of discrimination."[69] For these reasons, the exclusion on the basis of a genetic requirement has an adverse effect on LGBTQ+ families that meets this first step of the section 15 analysis.[70]

Moreover, because LGBTQ+ persons are less likely to be married than opposite-sex couples and LGBTQ+ individuals are more likely to co-parent, the conjugal requirement will also disproportionately affect LGBTQ+ families. The same is true on the basis that LGBTQ+ parental units are more likely to be composed of more than two intended parents than are cisgender-heterosexual parental units. If taken specifically on the ground of family status, these families composed of more than two intended parents, as well as families where the co-parents are not romantically involved or the parents have not been living together for two years or more, are the victims of direct—rather than adverse effect—discrimination. This is because their specific situation is targeted by the exclusion, not adversely, but completely.

LGBTQ+ families, whether considered under the angle of non-cisgender, non-heterosexual parents, of same-sex couples or polyamorous families, chosen families, or families composed of multiple parents whose relationship may or may not be conjugal, or on the basis of any other aspect of their lives which intersects with their sexual orientation or gender modality and the choices that flow therefrom, have not been the subject of many statistical analyses in Canada—comparatively to the cisgender and heterosexual population—therefore making it hard to quantify the extent of the exclusions perpetrated by the requirements discussed in this article. Nonetheless, what can be determined is that such an impact exists, even though the extent of the disproportion may not be ascertainable. This disproportionate impact on members of recognized and analogous grounds, in turn, is sufficient to establish a breach of the first step of section 15.

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69 *Quebec (AG) v A*, 2013 SCC 5 at para 354 [*Quebec v A*]. See also *Fraser*, *supra* note 33 at paras 72, 75.

70 Recent jurisprudence across Canada has similarly recognized the adverse impact on LGBTQ+ families of distinctions on the basis of genetics: see e.g. *Caron*, *supra* note 66 at paras 21–22, 26 (government's interpretation of *Citizenship Act* discriminatory because requiring a biological link between a foreign-born child and their Canadian parent for the child's Canadian citizenship to be recognized); *JAS v Manitoba (AG)* (17-Dec-2020), Winnipeg FD20-01-24769 (Man QB) (*Family Maintenance Act* discriminatory on the basis of sexual orientation for forcing non-biological parents who used ARTs to go through court processes to be legally recognized as parents); Rachel Bergen, "Manitoba Parental Rights Law Discriminates Against LGBTQ Families, Judge Finds" (10 November 2020), online: *CBC News* <www.cbc.ca>.

4. Denying Parentage and Perpetuating Disadvantage Upon LGBTQ+ Communities

A) The Harmful Impact of the Three Exclusions: Parentage and Inheritance Denied

When a child's parentage is not recognized, they are legal strangers to the deceased and their family: they are not considered part of the deceased intended parent's family and have no legally-recognized connection with any member of that family.[71] There is no way for the surviving parent, the child, or any member of the deceased's family to establish this missing parentage, as an adoption to provide this missing link becomes impossible after the intended parent's death. This lack of parentage also entails that the child will be unable to inherit or seek support not only from the deceased's estate, but also from the intestate estate of any of the deceased's parents and relatives. If the deceased had other children with (one of) the posthumously-conceived child's other intended parent(s), the posthumously-conceived child will not have the same parentage or financial advantages as them—and perhaps not the same surname either.

The importance of a legally-recognized parental bond with a child has been at issue under section 15 in the past and was acknowledged by the Supreme Court of Canada in *Trociuk v British Columbia (AG)*.[72] This case recognized the subjective and objective importance of parentage. Subjective, because of its value to the individual: the Court recognized that "[p]arents have a significant interest in meaningfully participating in the lives of their children"[73] and that "[i]ncluding one's particulars on a birth registration is an important means of participating in the life of a child."[74] There is a symbolic value to parentage that survives death: the transmission of a name and of a family tree, all contributing to the creation of a connection between parent and child. Such connection takes a renewed importance when the parent is deprived of most other means of participating in the child's life, as would be the case of the deceased parent of a posthumously-conceived child if any of the exclusions are present. The interest of parentage, which is jeopardized by the three exclusions, is fundamental and fundamentally intertwined with an individual's sense of dignity—itself an "essential value underlying the s. 15 guarantee."[75]

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71 With the exception of the intended parent's partner, spouse, or co-parent who is recognized as the posthumously-conceived child's parent, and any other children of this recognized parent.

72 *Trociuk v British Columbia (AG)*, 2003 SCC 34 [*Trociuk*].

73 *Ibid* at para 15.

74 *Ibid* at para 16. See also *Rutherford v Ontario (Deputy Registrar General)*, 81 OR (3d) 81, 2006 CarswellOnt 3463 (WL Can) at para 232 [*Rutherford*].

75 *R v Kapp*, 2008 SCC 41 at para 21.

In a recent section 15 challenge to several articles of the *Civil Code of Québec*, the Superior Court of Quebec thus held that "[e]xcluding non-binary parents from being properly identified on their children's act of birth undermines the respect they are owed and deprives them of the full recognition of the roles they play in their children's lives."[76] A person's interest in dignity does not end at the moment of their death.[77] When a parent is absent from a child's act of birth, they are effectively erased from the child's "foundation identity"[78]—at a symbolic level, the parent does not exist in the government records that register the child's personal information.

The objective element of parentage is reflected in the instrumental role that status plays in obtaining rights under other statutes.[79] In *AA v BB*, the court listed several practical aspects of parentage, including inheritance rights on intestacy and citizenship.[80] These objective elements in turn cement the status of a parent in their child's life. In *Caron c Canada (AG)*, one of the plaintiffs described the symbolic impact of her inability to pass her citizenship to her child as follows:

> [H]ere I was with a letter from my government, telling me I was not a 'real' mother because I did not physically give birth to my son; that I was not worthy of dignity and respect, that I did not have the same rights as other Canadians to pass citizenship on to my child; that my son, Benjamin, was not worthy of dignity, and respect, and did not have the same rights as other children of Canadian parents.[81]

For posthumously-conceived children, the objective importance of parentage is found in its significance in family and succession law, in addition to the inability to obtain citizenship if the child is born abroad.

Across Canadian succession law, parentage grants a child an automatic entitlement to their parents' estate. If the parent has written a will and the child is excluded, a claim against the estate can be brought on their behalf, so that their needs are met from that estate. Minor children who have lost a parent are also entitled to benefits from the government. Presumably, if parentage to the deceased is not recognized, the posthumously-conceived child would not be granted these benefits.[82] In the longer term, a

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76 *Centre for Gender Advocacy*, *supra* note 65 at para 170.

77 See e.g. *ibid* at para 326.

78 *Ibid* at para 32.

79 See *Trociuk*, *supra* note 72 at para 16.

80 See *AA v BB*, *supra* note 61 at para 14.

81 *Caron*, *supra* note 66 at para 36.

82 These benefits are referred to as "orphan's benefits" (*Canada Pension Plan Act*, RSC 1980, c C-8). It is as of yet uncertain whether posthumously-conceived children could obtain these benefits (see *ALRI Report*, *supra* note 16 at para 105).

posthumously-conceived child whose parentage to their deceased parent is not established would not be able to inherit from that parent's family members either should they die intestate.

A posthumously-conceived child may also have older siblings whose relationships with the deceased parent were established prior to the latter's demise. The recognition of the deceased's parentage to the posthumously-conceived child allows the latter to feel as integrated into their family as their siblings and to obtain the same financial benefits. Conversely, courts have pointed to the unfairness created by inequities between siblings as a result of arbitrary legislative distinctions.[83] Where no parentage between the deceased parent and the posthumously-conceived child is recognized, it is clear that such child is in a position inferior to that of their peers or siblings born from two (or more) parents who were all alive at the time of conception, a distinction due to one of the three exceptions and the timing of their unrecognized parent's death.

This distinction comes at a particularly high cost to posthumously-conceived children due to its permanence. Compare to *Caron*, where the law's significant and disproportionately negative impact was the fact that the child's path to citizenship was rendered more complex, uncertain, and time-consuming as a result of the Minister's interpretation. In the case of posthumously-conceived children, the law's impact is all the more negative in that it is irremediable.

B) Historical Exclusion of LGBTQ+ People from the Legal Family

There are myriad ways, big and small, in which LGBTQ+ community-members have been and continue to be excluded from the institutions which regulate and bound the legal family, such as the illegality of non-heterosexual couple adoptions until 1996[84] and of same-sex marriage until 2003.[85] In 2014, Rachel Epstein commented:

> LGBTQ people in North America have historically been categorized as what Thompson calls "disfavoured reproducers." Through various legal, social, and political means we have had children taken away from us and have been disentitled from becoming parents. In the everyday world of reproduction the heterosexual

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83 See *Caron*, *supra* note 66 at para 2; *Michel v Graydon*, 2020 SCC 24 at para 75. See also *Centre for Gender Advocacy*, *supra* note 65 at para 14.

84 See *Adoption Act*, RSBC 1996, c 5.

85 See *Halpern v Canada (AG)*, 65 OR (3d) 161, 2003 CanLII 26403 (CA) [*Halpern* cited to CanLII]. Same-sex marriage was legalized across Canada in 2005: *Civil Marriage Act*, SC 2005, c 33.

> nuclear couple (who can produce "naturally," and who are therefore, "normal") is privileged, while lesbian, gay, bisexual, transgender, and queer (LGBTQ) parenthood (among others) has historically been discouraged, denigrated, and, in many cases, denied.[86]

Queer and gender non-conforming behaviour and expression itself has historically been criminalized, in ways both overt[87] and more subtle or indirect.[88] Government benefits have been withheld from those who did not correspond to cis-heteronormative mores. Government policies have been deployed in homophobic and transphobic ways to harm queer and trans communities,[89] whereas legislation has erected or omitted to take down barriers to prevent queer and trans people from having easy access to the same benefits as cisgender and heterosexual individuals.[90] Even as laws criminalizing queerness and transness begin and continue to fall, minority sexual orientations and gender modalities remain marginalized

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86 Rachel Epstein, *"Married, Single, or Gay?" Queerying and Trans-Forming the Practices of Assisted Human Reproduction Services* (PhD Thesis, York University Faculty of Graduate Studies, 2014) at 6 [reference omitted] [Epstein, *Married, Single, or Gay?*].

87 Such as criminal provisions on the offences of buggery and gross indecency (the latter was only repealed in 2019). Such provisions were used, e.g., in the 1960s to find an accused to be a dangerous sexual offender simply for being a gay man (*R v Klippert*, [1967] SCR 822, 65 DLR (2d) 698). Once allowed, the difference in the age of consent required for anal penetration versus other sexual activity continued to target queer people (see e.g. *R v CM*, 23 OR (3d) 629, 1995 CanLII 8924 (CA)).

88 For instance, criminal provisions on obscenity and assault were used to interfere with queer expression (Karen Busby, "The Gay Agenda: A Short History of Queer Rights in Canada (1969–2018)" in Joanna Radbord, ed, *LGBTQ2+ Law* (Toronto: Emond, 2020) 1 at 10–11); the offences of nuisance and vagrancy were used to target women cross-dressing as men (Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900–1975* (Toronto: Irwin Law Inc, 2008) at 193)); the defence of "provocation", turned into the "gay panic defence", could be used to justify the brutal killing of homosexuals who dared to have shown interest in straight acquaintances (Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005) at 130–57).

89 See e.g. Canada Customs' confiscations of queer-themed pornography in much higher rates than heterosexual pornography at the border (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69; Brenda Cossman, "Censor, Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada" (2013) 21:1 Duke J Gender L & Pol'y 45); the purge of LGBTQ+ members of the Canadian Armed Forces and Royal Canadian Mounted Police and employees of the Federal Public Service (*Ross et al v Her Majesty The Queen* (18 June 2018), FC T-370-17, online: Federal Court (Final Settlement Agreement)).

90 For instance, identity documents that correspond to one's gender modality, which for trans persons were once impossible to obtain, then subject to gender-reassignment surgery, and still today demand jumping through a series of procedural hoops.

and continue to be treated as undesirable,[91] and legislative changes, much like the partial decriminalization of homosexual acts in 1969, continue to serve as "a promise of measured tolerance, not equality."[92]

Thus, where members of LGBTQ+ communities have created families, they have justifiably often been fearful of having recourse to courts that were more likely to strip them of their rights than to enforce them: in 1986, a study reported that 88% of mothers who were lesbians lost custody in court hearings;[93] in 1996, that number still rose to 50%;[94] as recently as five years ago, a study of trans parents in Ontario showed 18.1% of them having no legal access to their child(ren) and another 17.7% having lost custody or had custody reduced because they were trans.[95]

It is harder for queer and trans people to access family planning services than for cisgender and heterosexual people, both historically and now: in 1993, 19 of 33 assisted insemination programs surveyed by the Royal Commission on New Reproductive Technologies stated that lesbians would be refused treatment at their clinic;[96] in the mid-1990s, lesbians and gays would be placed at the bottom of adoption eligibility lists out of the expectation that any potential adoptive child's birthparent would not pick them;[97] in 2009, Ontario's Expert Panel on Infertility and Adoption published a report discussing the stigma and social barriers that

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91 For instance, it was not until late 2020 that a bill was passed that would criminalize the practice of forcing children or adults to undergo conversion therapy. A 2020 study of racialized trans and non-binary people reported that 73% worried about being stopped or harassed by the police, with a previous study having reported one quarter of racialized trans people had been harassed by police (C Chih et al, "Health and well-being among racialized trans and non-binary people in Canada" (2020) Trans PULSE Canada Report No 2, online: <transpulsecanada.ca>).

92 R Douglas Elliott, "In Praise of Lawyers" in Joanna Radbord, ed, *LGBTQ2+ Law* (Toronto: Emond, 2020) 28 at 28.

93 See Phyllis Chesler, *Mothers on Trial: The Battle for Children and Custody* (New York: McGraw-Hill, 1986). See also Katherine Arnup & Susan Boyd, "Familial Disputes? Sperm Donors, Lesbian Mothers and Legal Parenthood" in Didi Herman & Carl F Stychin, eds, *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (Philadelphia: Temple University Press, 1995) 83.

94 See Jennifer Schulenberg, "Same-Sex Rights for Lesbian Mothers: Child Custody and Adoption" (1999) 19:1/2 Can Woman Studies 45 at 45.

95 See Pyne et al, *supra* note 49 at 120.

96 See *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) (Patricia Baird) at 454.

97 See Martha A McCarthy & Joanna L Radbord, "Family Law for Same Sex Couples: Chart(er)ing the Course" (1998) 15:2 Can J Fam L 101 at 127–28. See also Dort, *supra* note 61 at 316–19.

still face same-sex families seeking reproductive assistance;[98] over the past decade, multiple studies have found discrimination against trans people in family planning policy and practice.[99]

It is harder for queer and trans people to see their families recognized in law, both historically and now: before 1995, across Canada a parent in a same-sex couple who was not biologically related to their child had no way to obtain recognition in law;[100] as recently as 2002, across Canada this same parent would have to undergo a costly and lengthy process to adopt their own child;[101] although multiple-parentage has been a reality for LGBTQ+ families for decades, legislation in most Canadian provinces still does not accommodate this reality;[102] and still today, studies and cases document discrimination against trans parents in the legal birth registration process.[103]

Protocols on the use of ARTs themselves have been framed by requirements based on the default of the cis-heteronormative family, resulting in prohibitive regulations such as the requirement to make a special application to the government if one wishes to conceive using a gay man's sperm as donor sperm—requirements which have threatened to "regulate [queer families] out of existence."[104]

Isolating the claims of LGBTQ+ families and the disproportionate impact of the legislation upon our communities makes clear that the three exclusions result in the perpetuation of the non-recognition of parental bonds in LGBTQ+ families. This exclusion perpetuates a "hierarchy of

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98 See Ontario, Canada, *Raising Expectations: Recommendations of the Expert Panel on Infertility and Adoption* (Toronto: Ministry of Children and Youth Services, 2009) (David Johnston) at 133. See also Marvel, *supra* note 48 at 185ff.

99 See Epstein, *Married, Single, or Gay?*, *supra* note 86; Jake Pyne, *Transforming Family: The Struggles, Strategies and Strengths of Trans Parents* (Toronto: Sherbourne Health Centre, 2012); Lori E. Ross et al, "Policy, Practice and Personal Narratives: Experiences of LGBTQ People with Adoption in Ontario" (2009) 12:3/4 Adoption Q 272.

100 See *Re K Adoption*, 23 OR (3d) 679, 1995 CanLII 10080 (Ct J (Prov Div)).

101 See *An Act instituting civil unions and establishing new rules of filiation*, SQ 2002, c 6. Only a few months ago, Manitoba's legislation was found unconstitutional for requiring same-sex parents to go to court to have their parentage recognized: see *supra*, note 70.

102 See generally Fiona Kelly, *Transforming Law's Family: The Legal Recognition of Planned Lesbian Motherhood* (Vancouver: UBC Press, 2011) at 150ff, 207; Róisín Ryan-Flood, *Lesbian Motherhood: Gender, Families and Sexual Citizenship* (Basingstoke, UK: Palgrave Macmillan, 2009) at 191; Valory Mitchell & Robert-Jay Green, "Different Storks for Different Folks" (2007) 3:2/3 J GLBT Family Studies 81.

103 See Pyne et al, *supra* note 49 at 17–18.

104 Angela Cameron, "Regulating the Queer Family: The *Assisted Human Reproduction Act*" (2008) 24:1 Can J Fam L 101 at 102, 110–11.

difference"[105] that serves to paint LGBTQ+ families as other, different, and outside the norm—just as we were painted as other, different, outside the norm, mentally disordered, immoral, and dangerous to our own children just a few decades ago.[106]

Canadian studies of LGBTQ+ families and individuals have historically been few (although they are growing); studies that take into account the intersections of different forms of marginalization visited upon LGBTQ+ individuals are fewer still. This absence of documentation presents a blind spot in the picture painted here, but not one that should go unnamed. There is no doubt that should statistics and historical data be available that accounted for the multiple forms of exclusion, criminalization, and discriminatory treatment visited upon LGBTQ+ people who are also disabled, racialized, homeless, living under the poverty line, and non-citizens, *inter alia*, the picture would grow starker still.

C) Historical Exclusion of Children with Different or No Parentage

Discrimination law's holistic approach and the principles of substantive equality require that we account for the "full context of the claimant group's situation",[107] which would be incomplete without an analysis of the history of distinctive treatment of children whose parentage has historically been denied or considered inferior. This group has included adoptive and illegitimate children at different points in time. Until relatively recently, children born to LGBTQ+ couples were "born 'out of wedlock,' were 'illegitimate,' and were 'bastards' in the eyes of the law."[108] The three exclusions clearly perpetuate that distinction when the child is posthumously conceived.

Until 1958, across Canada, adopted children although they would take their adoptive parents' surname, did not benefit from the same legal advantages they would receive if they had been born to the adoptive parents.

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105 See Dianne Pothier, "*Eaton v. Brant County Board of Education*" (2006) 18:1 CJWL 121 at 124.

106 See Wendy Gross, "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent" (1986) 1:2 CJWL 505; Harvey Brownstone, "The Homosexual Parent in Custody Disputes" (1980) 5:2 Queen's LJ 199; Karen Pearlston, "Avoiding the Vulva: Judicial Interpretations of Lesbian Sex Under the Divorce Act, 1968" (2017) 32:1 CJLS 37. See also Raquel Grand, "The Fight for All Families to Be Equal" in Joanna Radbord, ed, *LGBTQ2+ Law* (Toronto: Emond, 2020) 276 at 276.

107 *Fraser*, *supra* note 33 at para 42 citing *Withler v Canada (AG)*, 2011 SCC 12 at para 43; *Lovelace v Ontario (AG)*, 2000 SCC 37 at paras 59, 103.

108 Katherine Arnup, "Judging Lesbian Mothers" in Joanna Radbord, ed, *LGBTQ2+ Law* (Toronto: Emond, 2020) 272 at 274.

Adopted children could only inherit from their adoptive parents and these parents' other children. As one commentator noted, "It is likely that this limitation on inheritance was due to the persistence of the importance of primogeniture and blood ties to inheritance."[109] Maintaining a quasi-equivalent distinction today in the case of posthumously-conceived children who are not genetically related to the deceased revives the rejected stereotype that non-genetically-related children are unworthy of being integrated fully into the family that chose them[110] and that "adoptive families [are] … unnatural and inevitably troubled."[111]

Historically, illegitimate children in the common law "had no legal relations and few rights":[112] they could not inherit from their parents nor could they establish a lineage and leave an inheritance, they had no surname, and they were owed no maintenance or support by their biological father.[113] Wanda Wiegers and Gail Reekie have suggested that "illegitimacy functions culturally 'as a metaphor for socially undesirable reproduction' and 'covertly as support for its binary opposite—legitimacy,'" with "most of the shame and ignominy of illegitimacy … heaped upon mothers and their children."[114] Thus, illegitimate children were seen as "threatening pretender[s] to the legal family's property" and "very bad people."[115] Adoption eventually came to be seen as a salvation for illegitimate children whose "[b]irth parents were clearly regarded as, at best, unfortunate and all too likely to be criminal or incompetent."[116] Alberta was the last province to abolish the legal status of illegitimacy, in 1991.[117] By then, an increasing number of children were born outside of marriage and subject to a different set of rules than legitimate children.

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109 Katryna Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interest of the Child" (1997) 35:4 Alta L Rev 1035 at 1040.

110 See generally Laura Cárdenas, "Lines Drawn in Blood: A Comparative Perspective on the Accommodation of Blended Families in Succession Law" (2020) 65:4 McGill LJ 573.

111 Wanda Wiegers, "Assisted Conception and Equality of Familial Status in Parentage Law" (2012–2013) 28:2 Can J Fam L 147 at 214 [Wiegers].

112 Courtney Retter, "Introducing the Next Class of Bastard: An Assessment of the Definitional Implications of the Succession Law Reform Act for After-Born Children" (2011) 27:2 Can J Fam L 147 at 178 [Retter].

113 See *ibid* at 178–85.

114 Wiegers, *supra* note 111 at 162, 158 citing to Gail Reekie, *Measuring Immorality: Social Inquiry & the Problem of Illegitimacy* (Cambridge: Cambridge University Press, 1998) at 178, 181.

115 Retter, *supra* note 112 at 148–49 citing to Lisa Zunshine, *Bastards and Foundlings: Illegitimacy in Eighteenth-Century England* (Columbus: Ohio University Press, 2005).

116 Veronica Jane Strong-Boag, *Finding Families, Finding Ourselves: English Canada Encounters Adoption from the Nineteenth Century to the 1990s* (Don Mills, Ont.: Oxford University Press, 2006) at 30.

117 See *Family and Domestic Relations Statutes Amendments Act*, c 11, SA 1991.

Taken together, the disadvantages and stereotypes revived by the differential treatment visited upon posthumously-conceived children of a deceased unrecognized parent serve to stigmatize these children and renders their financial situation more precarious. The exclusions built into legislation on posthumous conception therefore carve out a new class of "bastards" just as it closes another.[118]

D) Stereotypes and Disadvantage Perpetuated by the Three Exclusions

The disproportionate impact of the three exclusions on LGBTQ+ families specifically perpetuates negative stereotypes about LGBTQ+ people's ability to found or be part of a family. Stereotyping has been defined by the Supreme Court of Canada as "a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities."[119] The stereotypes at play here are heteronormative: they take the model of the heterosexual couple as the norm and do not account for non-heterosexual couples in envisaging a model for the standard family. They are also cisnormative: they assume that the typical parent is cisgender, leaving out any thought of transgender parents and their realities from their conception of family life and family formation in Canada. They have served to feed a myriad of arguments that paint LGBTQ+ people as unfit to parent, such as "concerns about sexual immorality, promiscuity, and abuse; that children will be confused about gender and/or develop a homosexual orientation themselves; that children will lack properly gendered 'role models'; that children will be subjected to stigma and hostility from their peers" and arguments that "focus particularly on the 'anti-social' and 'aberrant' behavior of trans people, the instability of trans people, particularly trans women, and the recommendation that trans people have 'completed' a transition before becoming parents."[120]

In *Fraser*, Justice Abella noted that social prejudices or stereotyping "may assist in showing that a law has negative effects on a particular group."[121] Previous *Charter* jurisprudence had indicated, moreover, that "[a]ttitudes of prejudice and stereotyping can undoubtedly lead to discriminatory conduct, and discriminatory conduct in turn can reinforce these negative attitudes, since 'the very exclusion of the disadvantaged group … fosters the belief, both within and outside the group, that the

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118 By analogy, see generally Retter, *supra* note 112 (Retter argues that the complete exclusion of posthumously-conceived children from intestate regimes is discriminatory on the basis of these children's manner of conception).

119 *Quebec v A*, *supra* note 69 at para 326.

120 Epstein, *Married, Single, or Gay?*, *supra* note 86 at 8 [references omitted].

121 *Fraser*, *supra* note 33 at para 78.

exclusion is the result of 'natural' forces."[122] This vicious cycle continues to plague LGBTQ+ communities.

The first exclusion implies that the genetic bonds of parentage are the only ones strong enough to survive death. This, in turn, perpetuates the perception that a genetic relationship has more value than a parental relationship devoid of genetic connections, and—more importantly—effectively perpetuates a hierarchy of differential treatment, preferring families where all members are genetically connected (the great majority of which are founded by heterosexual couples) over families where not all members are genetically related (disproportionately, LGBTQ+ families). The second and third exclusions perpetuate the notion that, even when intentions clearly indicate otherwise, the romantic, sexual, heteronormative model of the married couple or its equivalent is the default foundation of the family in Canada and the only one whose interests should be safeguarded in the face of death.

The growing recognition of the value of LGBTQ+ families and our capacity to parent children with the same ability and care as heterosexual parents underscores the arbitrariness of the disadvantages imposed upon us and of the demeaning stereotypes discussed above. Stereotypes that depict LGBTQ+ families and individuals as incapable of forming the same types of relationships as heterosexual couples, of caring for our children to the same extent as heterosexual and cisgender parents, have time and again been cast aside by Canadian courts.[123] Such heteronormative and cisnormative stereotypes minimize the contribution of parents because of our sexual orientation and gender modality, confusing gender performance and rearing capacity. The disproportionate exclusion of LGBTQ+ couples from provisions acknowledging the parentage of posthumously-conceived children constitutes a case of *prima facie* discrimination. The finality of the non-recognition of the deceased parent, which cannot be bypassed through adoption or contract, and the extent of the harm produced to both parents' and children's dignity and financial interests, speak to the magnitude of the impairment caused by the exclusions. All these elements underscore our need to reconceptualize the institutions of parentage and family.[124]

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122 *Quebec v A*, *supra* note 69 at para 326, citing *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139, 40 DLR (4th) 193 [emphasis added].

123 See e.g. *Chamberlain*, *supra* note 43 at para 68; *M v H*, [1999] 2 SCR 3 at 26–27, 43 OR (3d) 254; *Halpern*, *supra* note 85 at para 107; *Forrester v Saliba* (2000), 2000 CanLII 28722 at para 19, [2000] OJ No 3018 (QL) (Ct J).

124 See also *Rutherford*, *supra* note 74 at para 195.

5. Conclusion

ARTs have been altering the way families can be formed for decades. Long before this and throughout history, LGBTQ+ individuals have been forming families, whether recognized in law or not. The law slowly started granting equal legal status to our families in adoption as of 1996 and in marriage in 2003. But the law has often failed to look further than formal equality.

Defaults remains heteronormative and cisnormative, and still today, debates that may not be so blatantly homophobic or transphobic focus on seemingly-neutral distinctions that often continue to exclude LGBTQ+ families from their structures and legal protections and obscure the particularities and richness of our communities. This article has focused on three such seemingly-neutral distinctions—on the basis of genetics, conjugal, and dyadic relationships—and the way they impact our right to form families in specific circumstances.

By requiring a genetic connection between a deceased parent and their posthumously-conceived child, the parentage of a posthumously-conceived child of an LGBTQ+ parental unit will be denied at a higher rate than the parentage of a posthumously-conceived child of a heterosexual and cisgender couple. By requiring parents of a posthumously-conceived child to have been married or in a marriage-like relationship, legislation on posthumous conception disparately excludes LGBTQ+ families from the protections and benefits accorded through legally-recognized parentage and denies them any type of multiple parentage that could include the deceased intended parent.

The exclusions are *prima facie* discriminatory on the grounds of sex, sexual orientation, gender modality, and family status. The denial of parentage to the deceased intended parent results in symbolic, legal, and financial disadvantages for the children and their intended parents, thus perpetuating disadvantages historically visited upon LGBTQ+ individuals (which have traditionally prevented them from forming families protected by law) and children whose parentage is unrecognized by law (which have traditionally relegated them to a second-class status and decreased the financial benefits available to them), as well as perpetuating demeaning stereotypes on both of these groups.

Given the growing focus and willingness to reform the recognition of parentage to posthumously-conceived children, the inequalities posed by the requirement of a genetic link, a marital relationship, and a two-parent limit need to be raised and discussed as soon as possible. Proceeding

with the best of intentions but on the basis of heteronormative and cisnormative assumptions that are unknowingly informed by homophobic and transphobic stereotypes, leads to laws that leave aside "second-class children."[125] The results—visible in the three exclusions—point to a need not only for reform, but for more inclusive thinking and research in order to produce laws that cater to our society as it exists on the ground today and that treat our children equitably.

In 1995, as LGBTQ+ families were still fighting to gain equal access to ARTs, two authors and lesbian mothers made the following plea:

> How do we begin to unravel the stereotypes and social norms our children must confront as they try to make sense of a world that condemns everything they find familiar and comforting? As we strive to gain equal access to alternative forms of insemination, we must strive even more fervently to ensure the lives created through our efforts, and the alternative families they join, will be equally well received.[126]

Ten years later, another lesbian mother, reflecting on the progress made thus far, wrote:

> As queer parents we have historically faced many pressures; many of us gave up our sense of entitlement to have children when we "came out," gays and lesbians have had children taken away from them, some of us have not been able to be out to our children, some of us have been disowned by our families when we had children. And our children continue to feel the social stigma attached to our sexualities. They suffer because of the ways our identities have been squashed, shamed, and delegitimized.[127]

Scientific advances have developed ARTs, our laws and jurisprudence have evolved and become fairer, but they have not caught up to our society. Today as in 1995, as in 2005, we owe it to the children of LGBTQ+ families to ensure they are treated equitably with their peers, no matter the circumstances of their birth. Today, this lesbian mother says that our families still do not feel safe, that we do not feel secure in our rights, that we still fear and feel and live disparate treatment from our laws—your laws—and the agencies that enforce them; that this disparate, violent, and sometimes hateful treatment treats some of us worse than others—

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125 Kathleen Lahey, "Heteronormativity, Equality, and the Family: Beyond the Freedom to Marry" (2005) 4:1 JL & Equality 117 at 144.

126 Jane Bernstein & Laura Stephenson, "Dykes, Donors & Dry Ice: Alternative Insemination" in Katherine Arnup, ed, *Lesbian Parenting: Living with Pride & Prejudice* (Charlottetown, PEI: Gynergy Books, 1995) 3 at 15.

127 Epstein, "Resisting Normal", *supra* note 57 at 7.

especially those whose LGBTQ+ identity or identities intersect(s) with other grounds of disparate and disparaging treatment.

Legal challenges to advance equality are a long, expensive, and tortuous path for those who have to walk it so the rest of us may benefit—and for those who have to defend against them. This article has had the ambitious objective of making a difference when a difference can still be made at the outset: only three provinces in Canada have legislated on posthumous conception for the moment. If only the concerns of LGBTQ+ families, in their rich diversity, can be heard, considered, and accounted for in legislation, we might yet ensure our children are better received tomorrow than we are today.