
Same-Sex Relationships Across Borders

Martha Bailey*

The term “recognition” of marriage applies to both the status of marriage and the incidents flowing from that status. Recent developments in the law regarding same-sex couples in both Canada and the United States have raised important questions about the recognition of same-sex relationships across borders. This article introduces some of the private international law aspects of same-sex relationships in Canada. The province of Alberta’s promise to use the notwithstanding clause in order to block the federal government’s proposed recognition of same-sex marriages is offered as an example of the private international law issues that might arise.

The author also considers issues related to the recognition of cross-border same-sex civil unions, “ascribed spousal status”, and contracts within relationships. She asks whether civil unions that are distinguished from marriage under the law of their creation can be treated as marriage within the meaning of the forum law and concludes that the answer will likely depend on the type of civil union in question given the diversity of such arrangements. “Ascribed spousal status”—the state of those who are subject to the incidents of marriage—is deployed quite differently in different jurisdictions and therefore, the author points out, creates potential problems of forum shopping and evasion. Finally, contracts entered into by parties to a relationship may not be recognized by any jurisdiction other than the one where the contract was concluded.

The author concludes that in light of the great diversity of approaches to the recognition of same-sex relationships, it is time for Canada to give more attention to, and to work with other countries on, cross-border issues.

La notion de «reconnaissance» du mariage s’applique à la fois au statut du mariage lui-même et de ses effets incidents. Des développements juridiques récents concernant les couples de même sexe au Canada et aux États-Unis ont soulevé des questions importantes concernant la reconnaissance des relations de même sexe à travers les frontières. Cet article présente certains aspects de droit international privé (ou de «conflits de lois») des relations entre conjoints de même sexe au Canada. La promesse de l’Alberta de se servir de la clause nonobstant pour empêcher, dans la province, la reconnaissance des mariages entre personnes du même sexe proposée par le gouvernement fédéral est un exemple d’enjeu de droit international privé qui pourrait surgir.

L’auteure examine également les questions liées à la reconnaissance transfrontalière des unions civiles de même sexe, du «statut matrimonial attribué», et des contrats à l’intérieur de relations. Elle se demande si les unions civiles qui sont distinguées du mariage dans la juridiction de leur création peuvent être traitées comme des mariages selon l’acceptation de la loi du for. Elle conclut que la réponse dépendra probablement du type d’union civile en question, étant donné la diversité de ces arrangements. Le «statut matrimonial attribué» — à savoir l’état de ceux qui sont assujettis aux incidents du mariage — se déploie de façons différentes selon les juridictions, ce qui, constate l’auteure, crée des problèmes d’«élection de for» et d’évasion. Enfin, les contrats conclus entre les parties à une relation pourraient n’être reconnus que dans la juridiction où ils ont été rédigés.

L’auteure conclut qu’à la lumière de la grande diversité d’approche concernant la reconnaissance de relations entre partenaires de même sexe, il est temps que le Canada s’attarde aux problèmes transfrontaliers qui en découlent, et collabore avec d’autres pays sur la question.

* Associate Professor, Faculty of Law, Queen’s University. The author would like to thank Amy Kaufman, LL.B. 2004 and Lily Ng for their research assistance.

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Now there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom.

But it does not therefore follow, that, with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated.

Birtwhistle v. Vardill, [1839] 5 E.R. 1308 at 1322 (H.L.)

Introduction

This paper is about the recognition of same-sex relationships across borders. It is important to emphasize at the outset the distinction between “recognition” in the sense of a state extending status or legal rights and obligations to same-sex couples under its domestic laws, and “recognition” in the sense of a state giving effect to status or legal rights and obligations created by a foreign law.

In *Egan v. Canada*, L’Heureux-Dubé J., dissenting, referred to “recognition” in the former sense:

Official state recognition of the legitimacy and acceptance in society of a particular type of status or relationship may be of greater value and importance to those affected than any pecuniary gain flowing from that recognition. ...

Given the marginalized position of homosexuals in society, the metmessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex.¹

Justice L’Heureux-Dubé’s point that failure to assimilate the status of same-sex and opposite-sex couples violates the Charter’s guarantee of equality has now been accepted by courts and legislatures across Canada.² The issue of same-sex marriage is now before the Supreme Court of Canada pursuant to the federal government’s reference to the Court for an opinion on a draft bill to open up marriage to same-sex couples.³ If the Supreme Court of Canada affirms the constitutionality of the draft bill

¹ [1995] 2 S.C.R. 513 at paras. 86, 90, 124 D.L.R. (4th) 609.

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15. See *infra* notes 38 to 41 and accompanying text.

³ For a copy of the draft bill and the three questions originally put to the Supreme Court of Canada, see “Reference to the Supreme Court of Canada” (July 2003), online: Department of Justice Canada <http://canada.justice.gc.ca/en/news/nr/2003/doc_30946.html>. The government added a fourth question to the reference on 28 January 2004: “Fact Sheet: Reference to the Supreme Court of

and the discriminatory nature of the traditional definition of marriage, and if Parliament proceeds to enact the bill to open up civil marriage to same-sex couples, the assimilation of status will be largely complete.

The recent period of intense debate and rapid transformation of the law relating to same-sex couples has not included much consideration in Canada of cross-border issues.⁴ American legal scholars, in contrast, have generated a large body of literature on the recognition of foreign same-sex relationships in the past few years.⁵ And American legislators at the federal⁶ and state⁷ level have enacted laws on the issue over the past few years.

Canada on Civil Marriage and Recognition of Same-Sex Unions" (January 2004), online: Department of Justice Canada <http://canada.justice.gc.ca/en/news/fs/2004/doc_31110.html>.

⁴ But see Donald J. MacDougall, "Marriage Resolution and Recognition in Canada" (1995) 29 *Fam. L.Q.* 541; Wendy Adams, "Same-Sex Relationships and Anglo-Canadian Choice of Law: An Argument for Universal Validity" (1996) 34 *Can. Y.B. Int'l Law* 103; Martha Bailey, "How Will Canada Respond to Same-Sex Marriage?" (1998) 32 *Creighton L. Rev.* 105; Martha Bailey, "Hawaii's Same-Sex Marriage Initiatives: Implications for Canada" (1998) 15 *Can. J. Fam. L.* 153.

⁵ See e.g. Mark Strasser, "Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation" (2003) 3 *Hous. J. Health L. & Pol'y* 301; Scott Fruehwald, "Choice of Law and Same-Sex Marriage" (1999) 51 *Fla. L. Rev.* 799; Kaleen S. Hasegawa, "Re-Evaluating the Limits of the Full Faith and Credit Clause After *Baker v. General Motors Corporation*" (1999) 21 *Hawaii L. Rev.* 747; F. H. Buckley & Larry E. Ribstein, "Calling a Truce in the Marriage Wars" [2001] *U. Ill. L. Rev.* 561; Christopher D. Sawyer, "Practice What You Preach: California's Obligation to Give Full Faith and Credit to the Vermont Civil Union" (2003) 54 *Hastings L.J.* 727; Note, "In Sickness and in Health, in Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages" (1996) 109 *Harv. L. Rev.* 2038; Barbara J. Cox, "Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States Under the Full Faith and Credit Clause Despite Anti-marriage Statutes that Discriminate Against Same-Sex Couples" (2003) 31 *Cap. U. L. Rev.* 751; Barbara J. Cox, "Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?" (1994) *Wis. L. Rev.* 1033; Ken I. Kersch, "Full Faith and Credit for Same-Sex Marriages?" (1997) 112 *Pol. Sci. Q.* 117; Andrew Koppelman, "Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional" (1997) 83 *Iowa L. Rev.* 1; Andrew Koppelman, "Same-Sex Marriage, Choice of Law, and Public Policy" (1998) 76 *Tex. L. Rev.* 921; Christopher Rizzo, "Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska's Initiative 416" (2002) 11 *J. L. & Pol'y* 1; "Symposium on Interjurisdictional Marriage Recognition" (1998-1999) 32 *Creighton L. Rev.* (this volume was a special issue on cross-border same-sex relationship issues).

⁶ The United States enacted the *Defense of Marriage Act*, Pub. L. 104-199, 110 Stat 2419 (1996) [DOMA], subsection 3(a) of which defines marriage for purposes of federal law as "only a legal union between one man" and "spouse" as "a person of the opposite sex who is a husband or a wife." Subsection 2(a) provides that: "No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." This latter provision, which is constitutionally suspect and probably unnecessary, was intended to protect states from being forced by the full faith and credit clause of the American Constitution to recognize same-sex marriages. U.S. Const. art. IV §1 provides that "[f]ull

The relatively hectic level of activity south of the border is partly attributable to the larger size of the country and its legal academy. Differences in the constitutional division of powers and in the choice of law rules for marriage also play a role. In the US, marriage and divorce are matters of state, rather than federal, jurisdiction⁸ and each state has its own law regarding the validity of marriage. Choice of law rules for the essential validity of marriage in the US also vary by state, but the general rule is *lex loci celebrationis*, rather than *lex domicilii*.⁹ Finally, the opposition to same-sex marriage is more widespread and politically effective in the US. When legalization of same-sex marriage became a possibility in some states, tremendous attention was given to the possibility of having to recognize a same-sex marriage that took place in another state.¹⁰

In Canada, there is broad support for, or at least acceptance of, extending the incidents of marriage and, now, the status of marriage to same-sex couples. The federal government has exclusive legislative jurisdiction over the essential validity of marriage, and so marriage recognition across provinces is not a major issue.¹¹ But the recognition of truly foreign same-sex marriages and of sister province and truly foreign civil unions or incidents flowing from cohabitation or contract is an important and difficult issue that requires some attention. The aim of this paper is to introduce some of the problems and to generate further consideration of the private international law aspects of same-sex relationships in Canada.

faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.”

⁷ After the passage of *DOMA*, *ibid.*, 38 US states passed “mini-*DOMA*” laws. The text of each state’s legislation is available at the Web site of the Family Research Council, which advocates against same-sex unions: Kristie Rutherford, “Marriage Laws: State by State”, online: Family Research Council <<http://www.frc.org/get.cfm?i=IF03I01>>. For example, the text of Alabama Stat. Sec. 30-1-19(e) provides: “The state of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”

⁸ U.S. Const. amend. X, provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [which powers include marriage and divorce] are reserved to the states respectively, or to the people.”

⁹ See *e.g. Bloch v. Bloch*, 473 F.2d 1067 (3d Cir.1973). The Restatement (Second) Conflict of Laws, art. 283(2) provides: “A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.” The *lex loci celebrationis* is the law of the legal unit where a marriage is celebrated. The *lex domicilii* is the law of the legal unit where a person is domiciled.

¹⁰ In “Developments in the Law: The Law of Marriage and Family” (2003) 116 Harvard L. Rev. 1996, the author writes: “The near-legalization of same-sex marriages in Hawaii in *Baehr v. Lewin* sparked an explosion of literature on interstate recognition of nontraditional marriages” (at 2082).

¹¹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3, s. 91(26) (giving exclusive jurisdiction over “marriage and divorce” to the federal government), s. 92 (12) (giving exclusive jurisdiction over “solemnization of marriage in the province” to provinces), reprinted in R.S.C. 1985, App. II, No. 5. Alberta has announced its unwillingness to recognize same-sex marriages; this will be discussed below.

I. Status Versus the Incidents of Status

Marriage confers both spousal status and the incidents of marriage. R.H. Graveson defined status as

a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern.¹²

The “incidents” are the “special rights, duties, privileges or incapacities”¹³ that flow from the status of marriage and include, for example, charges of bigamy,¹⁴ the lack of capacity of parties to valid, subsisting marriages to marry¹⁵ again, and the requirement that a person be married in order to obtain a divorce.¹⁶

Marital status is governed by a party’s “personal law”, which in Canada is the law of a party’s domicile.¹⁷ The rules governing capacity to marry vary from jurisdiction to jurisdiction, but the principle of “universality” is generally applied to status, that is, a status validly acquired under a party’s personal law will be recognized everywhere.¹⁸ It is theoretically possible to refuse recognition to a foreign marriage on the grounds of public policy, but this discretion is rarely exercised.¹⁹ If the parties had capacity to marry under their personal law, the marriage will usually be recognized in Canada, even if such a marriage would not have been permitted in Canada. Legal incidents flowing from marital status under Canadian law will apply to foreign marriages for any matters governed by Canadian law. Thus, for example, a party to a foreign marriage could be charged with bigamy for going through a form of marriage with a third party in Canada; would be denied a licence to marry in Canada unless and

¹² R.H. Graveson, *Status in the Common Law* (London: U of London, Athlone Press, 1953) at 2 [Graveson, *Status*].

¹³ *Canada (A.G.) v. Canard* (1975), [1976] 1 S.C.R. 170 at 205, 52 D.L.R. (3d) 548.

¹⁴ *Criminal Code*, R.S.C. 1985, c. C-46, s. 290.

¹⁵ *Bate v. Bate* (1978), 1 R.F.L. (2d) 298 (Ont. H.C.J.).

¹⁶ *Ibid.*; *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), ss. 2, 8.

¹⁷ *Brook v. Brook* (1861), [1861-73] All E.R. Rep. 493, 9 H.L. Cas. 193 [*Brook* cited to All E.R.]; art. 3083 C.C.Q. The meaning of domicile under the *Civil Code of Quebec* comes from the common-law definition. Art. 75 C.C.Q. provides that: “The domicile of a person, for the exercise of his civil rights, is at the place of his principal establishment.” J.-G. Castel and Janet Walker provide a helpful summary of the common law concept of domicile, the problems with the doctrine, proposals for reform, and statutory provisions governing domicile in Manitoba and Quebec in *Canadian Conflict of Laws*, 5th ed., looseleaf (Markham: Butterworths, 2002) at paras. 4.1-4.19g. Nationality rather than domicile is the relevant connecting factor in many civil law systems.

¹⁸ See Graveson, *Status*, *supra* note 12 at 118-19.

¹⁹ In *Cheni v. Cheni*, [1962] 3 All E.R. 873, [1963] 2 W.L.R. 17, the court ruled that an Egyptian marriage between an uncle and a niece that would have been within the prohibited degrees of consanguinity under English law would be recognized in England, saying that “it would be altogether too queasy a judicial conscience which would recoil from a marriage acceptable to many peoples of deep religious convictions, lofty ethical standards and high civilisation” (at 883).

until the foreign marriage was dissolved by divorce; could apply for a divorce in Canada; and could apply for, or be ordered to pay, spousal support.

Much of the jurisprudence on recognition of foreign marriages addresses the special problem of polygamy. This case law is helpful in the current discussion because it demonstrates the sturdiness of the principle of universality of status. Despite the fact that polygamy remains a criminal offence in Canada,²⁰ the universality principle has been applied even to polygamous marriages. “[P]olygamous marriages valid in the country where they were entered into and where the parties were domiciled would be recognized as valid by Canadian Courts.”²¹ While “acceptance of the principle of recognition of status does not of itself imply that all the incidents of that status will be recognized,”²² many incidents of marriage are extended to those in polygamous marriages. These include spousal support rights and obligations, succession rights, and, in some provinces, marital property division.²³ Indeed, it has been said that “[f]or almost all practical purposes under the law of Ontario, a spouse who contracted a valid polygamous marriage abroad has the same legal rights and obligations as a spouse who is party to a traditional monogamous marriage.”²⁴

Some incidents of marriage will *not* be extended to those in polygamous unions. For example, parties to a polygamous marriage have been denied permanent resident status in Canada because of the possibility that they would practice polygamy in this country in violation of the Criminal Code.²⁵ These parties also may not obtain a divorce under Canada’s *Divorce Act*.²⁶ This review of the case law shows that the principle of universality is applied even in the case of polygamy—despite the illegality of polygamous marriages in this country—and the incidents of marriage that do not rest on the monogamous nature of the relationship are given effect in the absence of any violation of public policy.

Another point that is important to our discussion is the reality that marriage is now longer a prerequisite for all the incidents of marriage.²⁷ These incidents are now

²⁰ *Criminal Code*, *supra* note 14, s. 293(1).

²¹ *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285 at para. 7 [*Ali*], applying *Tse v. Canada (Min. of Employment & Immigration)*, [1983] 2 F.C. 308, 144 D.L.R. (3d) 155 (F.C.A.).

²² Graveson, *Status*, *supra* note 12 at 103.

²³ The definition of “spouse” for all purposes of Ontario’s *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(2), includes a party to “a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.” Even in the absence of statutory reform, courts have given effect to polygamous marriages for various purposes. See *e.g. Re Hassan and Hassan* (1976), 12 O.R. (2d) 432, 69 D.L.R. (3d) 224 (H.C.J.).

²⁴ Julian D. Payne & Marilyn A. Payne, *Canadian Family Law* (Toronto: Irwin Law, 2001) at 30.

²⁵ *Ali*, *supra* note 21.

²⁶ *Divorce Act*, *supra* note 16, s. 2(1).

²⁷ For a helpful overview of the “unbundling” of the incidents of marriage from the status of marriage, see Winifred Holland, “Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?” (2000) 17 Can. J. Fam. L. 114.

attached to newly created institutions similar to marriage like the Vermont “civil union”²⁸ or the Danish “registered partnership”;²⁹ some are assigned to couples who cohabit outside of marriage;³⁰ and some flow from a status or private rights and obligations created by contract.³¹ The unbundling of the incidents of marriage from the status of marriage in Western countries has generated private international law problems,³² as has the recent opening of civil marriage to same-sex couples. There is a question as to whether status and incidents accorded under foreign law will be given effect under domestic laws.

II. Marriage

Cross-border same-sex marriages are relatively easy to address, because the rules regarding recognition of foreign marriages are fairly clear. Common law Canada determines the validity of marriage according to the law of the domicile of each of the intended spouses at the time of the marriage (the “dual domicile rule”).³³ In Quebec, the rule is that “[m]arriage is governed with respect to its essential validity by the law applicable to the status of each of the intended spouses.”³⁴ There is also some support for the rule that the law of the parties’ intended domicile is the appropriate choice of law.³⁵ Formal validity of marriage is governed by the *lex loci celebrationis*.³⁶ In

²⁸ See *infra* note 75.

²⁹ *Registered Partnership Act*, Act No. 373, 1 June 1989 (Denmark).

³⁰ See *e.g.* *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

³¹ For example, in Alberta parties may become “adult interdependent partners” by contract: *Adult Interdependent Partners Act*, S.A. 2002, c. A-4.5, s. 3(1)(b). With the exception of sections 17, 23, 26, 52, 57, 59, 60, 71, and 72, the act was proclaimed in force 1 June 2003. Section 17 (effective 1 January 2001), section 23 (effective 1 January 2004), section 52 (effective 1 September 2004), section 57 (effective 1 January 2004), sections 60 and 71 (effective 18 October 2004). Parties in Ontario may enter into a cohabitation agreement: *Family Law Act*, *supra* note 23, s. 53.

³² The problems are discussed in a note drawn up by the Permanent Bureau of the Hague Conference on Private International Law, “Private International Law Aspects of Cohabitation Outside of Marriage and Registered Partnerships”, Prel. Doc. No 9 (May 2000).

³³ See *Schwebel v. Ungar* (1963), [1964] 1 O.R. 430, 42 D.L.R. (2d) 622 (C.A.), *aff’d* [1965] S.C.R. 148, 48 D.L.R. (2d) 644. The common law rule that the capacity to marry is governed by the *lex domicilii* was enunciated in *Brook*, *supra* note 17, where the House of Lords refused recognition of a marriage that was valid under the *lex loci celebrationis* but was void for being within the prohibited degrees under the law of the putative husband’s domicile (England). In *Brook*, Lord Campbell, L.C. stated: “It is quite obvious that no civilised state can allow its domiciled subject or citizens, by making a temporary visit to a foreign country, to enter into a contract, to be performed in the place of the [domicile] if the contract is forbidden by the law of the place of [domicile] as contrary to religion, morality, or any of its fundamental institutions” (at 497).

³⁴ Art. 3088 C.C.Q.

³⁵ See *e.g.* Adrian Briggs, *The Conflict of Laws* (Oxford: Oxford University Press, 2002) where the author, adopting a government interest analysis, writes that “there is much to be said for the view that the law of the society in which the spouses are going to live has the closest interest in whether they have capacity to live as husband and wife” (at 226). The Federal Court of Appeal has also supported this rule: *Canada v. Narwal* (1990), 26 R.F.L. (3d) 95 [Narwal].

Quebec, formal validity “is governed by the law of the place of its solemnization or by the law of the country of domicile or of nationality of one of the spouses.”³⁷

Same-sex marriages are now taking place in Massachusetts, pursuant to a ruling of that state’s highest court;³⁸ in the Netherlands and Belgium pursuant to statutory reforms;³⁹ and in the provinces of Ontario, British Columbia, and Quebec pursuant to rulings of their respective appellate courts.⁴⁰ Canada’s federal government has determined that it will not appeal the rulings and has referred a bill to open up civil marriage to same-sex couples to the Supreme Court of Canada for an opinion on its constitutionality.⁴¹ Because the essential validity of marriage is within the exclusive legislative competence of the federal government, a same-sex marriage that takes place in Ontario, British Columbia, or Quebec that is valid under each party’s domiciliary law and formally valid under the province’s marriage law should be recognized across the country. Refusal to recognize such a marriage within Canada could be challenged as a violation of section 15 of the Charter, just as the exclusion of same-sex marriages was successfully challenged in the courts of those three provinces.

Alberta has proactively used the “notwithstanding” clause of the Charter in its *Marriage Act*, subsection 1(c) of which provides that “‘marriage’ means a marriage of a man and a woman.”⁴² The extent to which the constitutional division of powers will permit Alberta to act on its opposition to same-sex marriage by refusing to solemnize such unions is a matter of debate.⁴³ For the purpose of this paper, the discussion will focus on the extent to which Alberta could refuse to give effect to a sister province or

³⁶ *Keddie v. Currie* (1991), 85 D.L.R. (4th) 342, [1992] 1 W.W.R. 340, 3 BCAC 291.

³⁷ Art. 3088 C.C.Q.

³⁸ *Goodrich v. Department of Public Health*, 440 Mass. 309, 798 N.E. 2d 941 (2003). See also *Re Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (2004), which rejects civil unions as a constitutional alternative to opening up civil marriage to same-sex couples.

³⁹ Same-sex marriages have been taking place in the Netherlands since 1 April 2001. Kees Waaldijk of Leiden University provides an unofficial translation of the Dutch law to open civil marriage to same-sex couples and statistics on the number of Dutch marriages of same-sex and opposite-sex couples since the change in the law online at <<http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=76&garb=0.5281238895009073&session=>>. Belgium’s law became effective on 1 June 2003 and the official version is available in French online at <http://www.moniteur.be/index_fr.htm>.

⁴⁰ *Halpern v. Canada* (2003), 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 [*Halpern*]; *EGALE Canada Inc. v. Canada (A.G.)* (2003), 225 D.L.R. (4th) 472, [2003] 7 W.W.R. 22; *La Ligue Catholique pour les Droits de l’Homme c. Hendricks*, [2004] J.Q. no 2593 (C.A.) (QL).

⁴¹ *Reference Re Legal Capacity for Marriage*, [2003] S.C.C.A. No. 325 (QL).

⁴² *Marriage Act*, R.S.A. 2000, c. M-5, ss. 1(c), 2. The preamble of the act includes the statements that marriage “is an institution the maintenance of which in its purity the public is deeply interested in” and “is the foundation of family and society, without which there would be neither civilization nor progress” and that “marriage between a man and a woman has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long standing philosophical and religious traditions.”

⁴³ See e.g. *Broddy v. Alberta (Director of Vital Statistics)* (1982), 41 A.R. 255, 142 D.L.R. (3d) 151 (C.A.).

foreign same-sex marriage. Through its focus on Alberta, the following discussion illustrates how private international law principles can undermine efforts to establish same-sex marriage.

The province of Alberta would not be able to override the federal definition of marriage for purposes outside its legislative competence. For example, flowing from marriage to one person is the incapacity to marry anyone else unless and until the first marriage is dissolved by death or divorce. This particular incident of marriage falls under the exclusive legislative competence of the federal government, that is, capacity to marry. Alberta would have to recognize this incident of a foreign or sister province same-sex marriage. It would be *ultra vires* the province to refuse to recognize the incapacity to marry by issuing a marriage licence to someone whose same-sex marriage has not been dissolved. In other words, the incapacity flowing from a status imposed by federal law could not be overridden by Alberta's rules regarding the solemnization of marriage.

This discussion of matters that are *ultra vires* the province leads to the question of whether Alberta could refuse to give effect to sister province or foreign same-sex marriages with regard to matters *within* its legislative competence. There are three distinct issues to consider. (1) Could Alberta legislators exclude parties to a same-sex marriage from the incidents of marriage created by Alberta law? (2) Could Alberta courts refuse to recognize and enforce a judgment relating to a same-sex marriage granted by a sister province or foreign court on the grounds that it violated Alberta's public policy? (3) If Alberta's choice-of-law rules required application of a foreign law relating to a same-sex marriage, could Alberta courts override the choice-of-law rule on public policy grounds?

For matters within its legislative competence (e.g., spousal support), Alberta could by statute explicitly provide that the rights and obligations created by that province's domestic spousal support law extend only to opposite-sex married couples and not to same-sex married couples, provided it used the "notwithstanding" clause to shelter the discriminatory law from Charter scrutiny. Such legislation would not purport to deny the essential validity of same-sex marriages but would refuse to extend equal treatment to such couples. The result would be incoherent. Parties to a same-sex marriage who had relocated to Alberta and then separated would not be entitled on the basis of their marital status to seek support, whereas parties to a same-sex "adult interdependent partnership" would be entitled to do so under Alberta's *Family Law Act*.⁴⁴ The members of the same-sex married couple might, in fact, qualify as "adult interdependent partners" if they had lived together in a relationship of interdependence for three years.⁴⁵

Another possibility is for a party who is resisting enforcement of a sister province or foreign judgment relating to a same-sex marriage to invoke the public policy

⁴⁴ S.A. 2003, c. F-4.5, s. 57 (not yet proclaimed in force).

⁴⁵ See *Adult Interdependent Partners Act*, *supra* note 31, s. 3(1)(a)(i).

defence. At common law there is a limited judicial discretion to refuse to recognize a foreign judgment⁴⁶ on public policy grounds. It would be difficult, however, to make out a case that enforcement of a judgment relating to a same-sex marriage violated Alberta's public policy as this term is understood in private international law. Canadian courts have defined the public policy defence very narrowly, taking the view that it should be reserved for rare cases in which recognition of a foreign judgment would undermine the essential public or moral interest.⁴⁷ In light of the fact that Alberta extends some incidents of marriage to same-sex couples by devices such as "adult interdependent partnerships", it would be difficult to show that enforcing a judgment relating to the same or similar incidents flowing from a same-sex marriage would offend Alberta's public policy.

Another reason that public policy would be hard to invoke is that there may be no such defence as regards other provinces. Although seemingly preserved in the reciprocal enforcement statutes in force across Canada,⁴⁸ the public policy defence to enforcement of sister province judgments probably has not survived the Supreme Court of Canada's decisions of the early 1990s. In *Morguard Investments Ltd. v. De Savoye*, La Forest J. stated that Canada's constitutional arrangements make unnecessary an explicit "full faith and credit" clause and that "a regime of mutual recognition of judgments across the country is inherent in a federation."⁴⁹ The implicit requirement to give "full faith and credit" to sister province judgments was "constitutionalized" in *Hunt v. T&N Plc.*⁵⁰ Assuming that the other requirements for enforcement were met, it is doubtful that an Alberta court could refuse on public policy grounds to recognize and enforce, say, a judgment for damages for the wrongful death of a same-sex spouse granted to the surviving spouse pursuant to the dependents' relief provisions of Ontario's *Family Law Act*.⁵¹ In the context of an explicit full faith and credit clause, the US Supreme Court has long since ruled that the public policy defence cannot be invoked to refuse enforcement of a sister state judgment, even when "the cause of action upon which the judgment was based is against the law and public policy of the state ... in which enforcement is sought."⁵² In

⁴⁶ See *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737, 88 D.L.R. (4th) 612 (C.A.).

⁴⁷ In *Beals v. Saldanha*, [2003] 3 S.C.R. 416 at paras. 71, 75, 234 D.L.R. (4th) 1, 2003 SCC 72 [*Beals*], Major J., noting that the public policy defence "prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice," stated that it "is not a remedy to be used lightly" and that it "should continue to have a narrow application."

⁴⁸ See e.g. *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(6)(f).

⁴⁹ [1990] 3 S.C.R. 1077 at paras. 38, 39, 76 D.L.R. (4th) 256 [*Morguard*].

⁵⁰ [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16.

⁵¹ *Supra* note 23, s. 61. Although the definition of "spouse" in Ontario's *Family Law Act* has not yet been amended to include parties to a same-sex marriage, presumably it will have to be in light of the decision in *Halpern*, *supra* note 40.

⁵² *Fauntleroy v. Lum*, 28 S.Ct. 641 at 643, 210 U.S. 230 (1908). Note, however, that the constitutionally suspect *DOMA*, *supra* note 6, purports to empower states to refuse to recognize sister-state judgments "respecting a relationship between persons of the same sex that is treated as a

the absence of an explicit “DOMA”-type statute prohibiting the recognition and enforcement of extra-provincial judgments relating to the incidents of same-sex marriages,⁵³ Alberta courts will almost certainly recognize such judgments.

Alberta’s options as regards the incidents of marriage are also clear in respect of enforcement of spousal support orders since there is no public policy defence for sister province orders in the relevant reciprocal enforcement legislation. Although the public policy defence is preserved for support orders made by foreign reciprocating states,⁵⁴ it is unlikely that a party resisting enforcement could meet the stringent test for the “public policy” defence simply because the foreign order was made in the context of a same-sex marriage. This is particularly so because Alberta would be required by its statute to register sister province support orders in favour of one party to a same-sex marriage and because Alberta extends support rights and obligations to same-sex couples under its own legislation.

A final question is whether a party could successfully argue that an Alberta court should refuse to apply a foreign or sister province law dictated by Alberta’s choice-of-law rules on the grounds that the law is related to same-sex marriage and thus violates Alberta’s public policy. For example, if an Alberta court had jurisdiction to hear a claim for damages arising from the death of the plaintiff’s same-sex spouse negligently caused by a defendant in Ontario, could the court refuse to apply the *lex*

marriage,” and some states have enacted “mini-DOMA” laws that attempt to block such judgments. For example, the Tex. Fam. Code tit. 1 § 6.204 (2003) (Lexis) provides:

Recognition of Same-Sex Marriage or Civil Union

- (a) In this section, “civil union” means any relationship status other than marriage that:
 - (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
 - (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
- (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.
- (c) The state or an agency or political subdivision of the state may not give effect to a:
 - (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or
 - (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

⁵³ See e.g. Tex. Fam. Code, *ibid*.

⁵⁴ See e.g. *Interjurisdictional Support Orders Act*, S.A. 2002, c. 1-3.5, s. 19(3)(b)(ii). Note that all provinces and territories of Canada and many foreign states are reciprocating states under the act. See Alta. Reg. 4/2003, s. 18, Schedule of Reciprocating Jurisdictions.

loci delicti on the grounds of public policy?⁵⁵ The public policy exception to the *lex causae* is narrowly construed.⁵⁶ In regard to the tort example given here, the Supreme Court of Canada has suggested in *Tolofson* that the public policy exception has no application in cases of torts occurring in a sister province. Pursuant to *Tolofson*, courts retain a limited discretion to apply the *lex fori* in international cases in order to avoid injustice, but only in exceptional circumstances.⁵⁷ Thus, even if the *lex causae* is a truly foreign law, it is unlikely that a party could successfully invoke the public policy exception. In the absence of an explicit “mini-DOMA” statute that provided for application of the *lex fori* in place of the *lex causae*,⁵⁸ an Alberta court would almost certainly apply the *lex causae*.

In regard to spousal support, the matter is clear. The choice-of-law provision in Alberta’s *Interjurisdictional Support Orders Act* does not include a public policy exception and would require Alberta courts to apply extra-provincial laws for the support of same-sex spouses. For example, a party to a Massachusetts same-sex marriage may separate from his or her spouse and relocate to Alberta. The party may then seek a support order in Alberta against the spouse still resident in Massachusetts. Pursuant to the act, the Alberta court would first look to the law of Alberta, but if the claimant was not entitled to support under Alberta law (i.e., if Alberta had enacted discriminatory support legislation using the “notwithstanding” clause), the act provides that “the Alberta court must apply the law of the jurisdiction in which the claimant and the respondent last maintained a common habitual residence.”⁵⁹

What, then, of Alberta’s proclaimed intention to resist the opening up of civil marriage to same-sex couples? The province would have to give effect to the incidents of a same-sex couple’s marital status for matters outside its legislative competence. It is probably not possible for an Alberta court to refuse recognition of a sister province judgment relating to the incidents of a same-sex marriage on public policy grounds, and unlikely that the stringent public policy test would be met even in the case of truly foreign judgments. It is also improbable that an Alberta court would refuse to apply the *lex causae* dictated by the province’s choice-of-law rules on public policy grounds. It is theoretically possible for Alberta to enact discriminatory legislation for matters within its legislative competence, to withdraw from the reciprocal enforcement of a spousal support scheme, and to enact a “mini-DOMA”

⁵⁵ In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 the Supreme Court of Canada ruled that the *lex loci delicti* should apply to tort claims. The *lex loci delicti* is the law of the legal unit where a wrong is committed.

⁵⁶ In *Boardwalk Regency v. Maalouf*, *supra* note 46 at 616, Lacourcière J.A. stated that “where foreign law is applicable, Canadian courts will generally apply that law even if the result may be contrary to domestic law.” The *lex causae* is the system of law that is applicable to a given question pursuant to a choice-of-law rule of the forum.

⁵⁷ *Somers v. Fournier* (2002), 60 O.R. (3d) 225, 214 D.L.R. (4th) 611 (C.A.). The *lex fori* is the local or domestic law of the legal unit to which the court where an action is brought belongs.

⁵⁸ See e.g. Tex. Fam. Code, *supra* note 52.

⁵⁹ *Interjurisdictional Support Orders Act*, *supra* note 54, s. 12(3).

law. Given that the only discernible benefit of taking these extreme measures would be to signal opposition to the use of “marriage” in regard to same-sex relationships, one hopes that Alberta will instead accept the likely introduction of federal legislation and the general national acceptance of same-sex marriage.

Turning from the issue of the extent to which extra-provincial same-sex marriages *must* be recognized, the next question is whether all same-sex marriages *can* be recognized under existing choice-of-law rules. The problem most likely to arise is lack of essential validity under the domiciliary law of one or both parties. For example, a same-sex couple domiciled in Alabama, a state that does not permit or recognize same-sex marriage, may get married in Ontario. Ontario permits “tourist” marriages between parties unconnected to the province without any inquiry into whether the parties have capacity to marry under their domiciliary law.⁶⁰ Because the marriage would be essentially invalid under the *lex domicilii*, it would not be recognized pursuant to Canada’s choice-of-law rules, unless, perhaps, the parties intended to acquire a matrimonial domicile in Canada and did, in fact, do so after their marriage.⁶¹ The same result would follow if the parties married in the Netherlands or Belgium (unless the intended matrimonial domicile rule could be applied). Although the Netherlands and Belgium require that at least one of the parties be a citizen or habitual resident (domiciliary) of the country,⁶² it would be possible for a party domiciled in, say, the Netherlands to marry a party domiciled in, say, Alabama. Under the dual domicile rule, the marriage would not be recognized in Canada because one of the parties would lack capacity under the *lex domicilii*.

An argument can be made, however, that if a party’s personal law denies capacity to enter into a same-sex marriage, that incapacity should be ignored on public policy grounds.⁶³ There is some precedent for this approach. In *Sottomayer v. De Barros (No. 2)*,⁶⁴ an English court refused to give effect to the incapacity of a Portuguese domiciliary to marry in England her first cousin, an English domiciliary, without dispensation from the Pope. The court stated that “[n]umerous examples may be suggested of the injustice which might be caused to our own subjects if a marriage were declared invalid, on the grounds that it was forbidden by the law of the domicile of one of the parties.”⁶⁵ Examples cited by the court were US anti-miscegenation laws and laws imposing incapacity to marry at all on members of religious orders.⁶⁶ In cases of marriages celebrated in England, English courts have also refused to give

⁶⁰ The rules regarding solemnization of marriages in Ontario are set out in the province’s *Marriage Act*, R.S.O. 1990, c. M.3.

⁶¹ *Narwal*, *supra* note 35.

⁶² Kees Waaldijk, “Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries” (2004) 38 *New Eng. L. Rev.* 569 at 576-77, 582-83.

⁶³ See Briggs, *supra* note 35 at 231.

⁶⁴ [1879] L.R. 5 P.D. 94 [*Sottomayer*].

⁶⁵ *Ibid.* at 104.

⁶⁶ *Ibid.* at 104.

effect to an incapacity to remarry imposed on an adulterous wife under the law of Natal⁶⁷ and to an incapacity imposed on a Hindu man to marry outside his religion.⁶⁸ The exception to the generally applicable dual domicile rule expressed in these cases has been criticized, but Graveson points out that the exception is limited in scope—it applies only to marriages that take place in England—and has a very specific purpose, that is, “to protect domiciled Englishmen and Englishwomen on entering into marriages with persons domiciled abroad ... ”⁶⁹ This established exception to the dual domicile rule could be applied to marriages that took place in Canada between a Canadian domiciliary and a party domiciled in a state that prohibits same-sex marriage. But it would not apply to marriages celebrated abroad.

It may be possible to build on the *Sottomayer* line of cases and to argue for a broader exception to the dual domicile rule in regard to same-sex marriages celebrated abroad or where neither party is a Canadian domiciliary. In light of the values enshrined in international human rights documents and the Charter, it is at least arguable that giving effect to a foreign law prohibiting same-sex marriage would be discriminatory, an unjustifiable interference with the freedom to marry, and contrary to public policy. Belgium has determined that “any foreign legal prohibition on same-sex marriage must be considered discriminatory and contrary to Belgian public order,” and, as an exception to its general rule, will permit same-sex marriages to be celebrated in the country even if prohibited by the national law of one of the parties (at least one must be a citizen or habitual resident of Belgium).⁷⁰ Belgium’s invocation of the public order exception is in the context of issuing marriage licences, not recognizing foreign marriages, but the principle that a foreign prohibition on same-sex marriage is contrary to public policy and will not be given effect may perhaps be applied more generally.

III. Civil Unions

Various names are applied to schemes under which couples may register their partnerships with the state and thereby acquire most of the incidents of marriage, but I will use the term “civil union” here. The first civil union law was enacted in Denmark in 1989⁷¹ in order to address the discriminatory exclusion of same-sex couples from the incidents of marriage and to extend formal state recognition of, and support for, lasting and stable same-sex relationships.⁷² Civil union laws have now been enacted in many European countries.⁷³ In the US, Vermont enacted a civil union law⁷⁴ in

⁶⁷ *Scott. v. Her Majesty’s Attorney General*, [1886] L.R. 11 P.D. 128.

⁶⁸ *Chetti v. Chetti* (1908), [1909] P. 67.

⁶⁹ R.H. Graveson, *The Conflict of Laws*, 5th ed. (London: Sweet & Maxwell, 1965) at 222.

⁷⁰ Waaldijk, *supra* note 62 at 582-83.

⁷¹ *Registered Partnership Act*, Act No. 373, 1 June 1989 (Denmark).

⁷² See Linda Nielsen, “Family Rights and ‘Registered Partnership’ in Denmark” (1990) 4 Int’l J. L. Fam. 297 at 298.

⁷³ See Waaldijk, *supra* note 62.

response to a decision of the Vermont Supreme Court that exclusion of same-sex couples from the incidents of marriage violated the common benefits clause of the state constitution.⁷⁵ Other US states and municipalities have extended various rights and obligations to same-sex couples,⁷⁶ but Vermont has been the first US state to extend all of the incidents of marriage within the state's legislative competence to same-sex couples by means of a civil union law.

Canada's first civil union law was enacted in the province of Nova Scotia, in response to the decision of the provincial appellate court in *Walsh v. Bona*.⁷⁷ Nova Scotia's legislation permits cohabiting couples of the same or opposite sex to register as "domestic partners" and thereby become entitled to many of the rights and obligations of married couples, including those contained in Nova Scotia's family property statute.⁷⁸

Quebec's similar but broader civil union law came into force a year after Nova Scotia's.⁷⁹ Quebec had not previously extended private family law rights to unmarried couples on the basis of cohabitation, as had the common law provinces, because of a reluctance to thrust the rights and obligations of marriage on those who had not

⁷⁴ *An Act Relating to Civil Unions*, 2000 VT, H.847, in force in relevant part 1 July 2000 (the insurance provisions came into force 1 January 2001).

⁷⁵ *Baker v. Vermont*, 744 A.2d 864, 170 Vt. 194 (1999). The "common benefits clause" of the Vermont Constitution (Vt. Const. art. 7) provides: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community ..."

⁷⁶ See e.g. Hawaii's "reciprocal beneficiaries" law, U.S., H.B. 118, *An Act Relating to Unmarried Couples*, 1997, Reg. Sess., Hawaii (in force 1 July 1997).

⁷⁷ (2000), 183 N.S.R. (2d) 74, 5 R.F.L. (5th) 188 (C.A.), rev'd by S.C.C. in *Nova Scotia (A.G.) v. Walsh*, [2002] 4 S.C.R. 325, 221 D.L.R. (4th) 1 [*Walsh*]. Nova Scotia's Minister of Justice, Michael Baker, on introducing the second reading of the domestic partnership bill (Bill 75, 1st Sess., 58th Leg., Nova Scotia, 2000 (*Law Reform (2000) Act*, S.N.S., c. 29), stated:

The second decision which has prompted legislative change is known as *Walsh and Bona*. In this case the Nova Scotia Court of Appeal found that the Nova Scotia *Matrimonial Property Act*, which defines a spouse as a married individual, discriminates against common-law spouses and therefore contravenes the *Canadian Charter of Rights and Freedoms*. The court gave the Province of Nova Scotia 12 months to enact legislative change. We are complying with this decision by amending the *Vital Statistics Act*. The new section allows individuals to register as domestic partners. Essentially, they can file a domestic partnership statutory declaration. Once filed, the declaration means that the legal rights and obligations under several Statutes would apply to the partners (Nova Scotia, 58th General Assembly, *Hansard*, 99/00-96 (14 November 2000) at 8705 (Michael Baker)).

⁷⁸ *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, S.N.S. 2000, c. 29, ss. 32-45 (in force 4 June 2001).

⁷⁹ *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6 (in force 8 June 2002).

chosen to marry.⁸⁰ Quebec's civil union law respects the autonomy of the parties by extending private family law rights and obligations only to couples of the same or opposite sex who register their union, but it also expands the rights of unregistered cohabiting couples of the same or opposite sex in such matters as consent to health care for an incapacitated partner. Quebec's reforms are distinct from Nova Scotia's in that they are broader and include rules relating to filiation and adoption.⁸¹

Compared to other forms of unmarried cohabitation, it may be relatively easy to develop private international law rules in regard to civil unions because they are analogous to marriages "and consideration can be given to applying familiar techniques to the establishment, effects and dissolution of a partnership."⁸² On the other hand, there are challenges dealing with a status unknown in domestic law that require careful consideration.⁸³

If the choice-of-law rules regarding validity of marriage were applied to civil unions, the dual domicile rule would apply to essential validity and *lex loci celebrationis* to formal validity. Application of the dual domicile rule, however, would create a problem if the domicile of the parties has no domestic counterpart to civil unions and nothing to say about capacity to enter into a civil union. In Vermont, for example, the large majority of civil unions have been formed by out-of-state couples, most of whom are domiciled in other states with no provisions regarding civil unions.⁸⁴ Vermont has "anti-evasion" provisions in regard to marriage and deems void any marriage by out-of-staters who try to evade the marriage prohibitions of their

⁸⁰ In 1998, then Minister of Justice, Serge Ménard, stated: "Lorsque le législateur a révisé le droit de la famille, tant en 1980 qu'en 1991, il s'est interrogé sur l'opportunité de prévoir des conséquences civiles aux unions de fait. S'il s'est abstenu de le faire, c'est par respect pour la volonté des conjoints: quand ils ne se marient pas, c'est qu'ils ne veulent pas se soumettre au régime légal du mariage": Quebec, National Assembly (18 June 1998), online: Assemblée nationale du Québec <<http://www.assnat.qc.ca/archives-35leg2se/fra/Publications/debats/JOURNAL/CH/980618.htm#980618004>>.

⁸¹ In regard to filiation, see art. 538.3 C.C.Q.: "If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or the civil union or within three hundred days after its dissolution or annulment, the spouse of the woman who gave birth to the child is presumed to be the child's other parent. ..." And art. 539.1 C.C.Q.: "If both parents are women, the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child." In regard to adoption, see art. 578.1 C.C.Q.: "If the parents of an adopted child are of the same sex and where different rights and obligations are assigned by law to the father and to the mother, the parent who is biologically related to the child has the rights and obligations assigned to the father in the case of a male couple and those assigned to the mother in the case of a female couple. The adoptive parent has the rights and obligations assigned by law to the other parent. If neither parent is biologically related to the child, the rights and obligations of each parent are determined in the adoption judgment."

⁸² Permanent Bureau of the Hague Conference on Private International Law, *supra* note 32 at 5.

⁸³ For a general discussion of the problems relating to foreign forms of status, see Graveson, *Status*, *supra* note 12 at 102-10.

⁸⁴ See Report of the Vermont Civil Union Review Commission, Office of the Legislative Council, Montpelier, Vermont (January 2003) at Appendix B.

domicile by holding their wedding in Vermont.⁸⁵ But there is no equivalent rule for civil unions. Quebec provides that the *lex loci celebrationis* governs both the essential and formal validity of a civil union,⁸⁶ thus eliminating the potential problem of applying the dual domicile rule to determine essential validity when the civil law status may be unknown under the domiciliary law. Nova Scotia has no choice-of-law provision regarding the validity of civil unions.

The issue of choice-of-law rules for validity of civil unions seems to have been largely ignored in the few cross-border cases that have arisen. Instead, the focus has been on whether the incidents of marriage under forum law should be applied to those with a foreign-acquired status that has no counterpart in forum law. In response to arguments that a foreign civil union should be treated as a marriage under forum law, some courts have adopted the two-pronged analysis used in the early polygamy cases. The court in *Hyde v. Hyde and Woodmansee* took the view, first, that a polygamous marriage was not a marriage within the meaning of the English divorce statute and, second, that, in any case, to treat it as such would violate the public policy of England.⁸⁷ Similarly, some courts have concluded that foreign civil unions are not marriages within the definition of a particular forum law.⁸⁸ In states that prohibit same-sex marriage, courts have also said that treating a foreign same-sex civil union as a marriage within the meaning of forum law would violate public policy.⁸⁹

A Texas court took a different position in an uncontested action to dissolve the Vermont civil union of two Texas residents under the Texas divorce statute.⁹⁰ The judge reportedly determined that the full faith and credit clause of the US constitution obliged Texas to recognize the civil union law of Vermont, and ruled that, despite the prohibition against same-sex unions in Texas, there was no prohibition against dissolving such a union.⁹¹ The case is, however, not a reliable authority for those seeking to have civil unions recognized because it has long been established that the full faith and credit clause does not require that courts give effect to the statutes of sister states that violate forum public policy.⁹² One result of this decision may be the enactment of more explicit “mini-DOMA” laws in states opposed to the recognition of same-sex unions. The decision also does not address the problem identified in both

⁸⁵ Vt. Stat. Ann. tit. 15 §6 (2003) (Lexis).

⁸⁶ Art. 3090.1 C.C.Q.

⁸⁷ (1866) L.R. 1 P.D. 130, [1861-73] All E.R. 175 [*Hyde v. Hyde* cited to L.R.P.D.].

⁸⁸ See e.g. *Rosengarten v. Downes*, 71 Conn.App. 372, 802 A.2d 170 (2002) [*Rosengarten*], appeal dismissed as moot, 261 Conn. 936, 806 A.2d 1066 (2002); *D. and Kingdom of Sweden v. Council of European Union*, 2001 E.C.R. I-4319.

⁸⁹ See e.g. *Burns v. Burns*, 253 Ga.App. 600, 560 S.E. 2d 47 (2002).

⁹⁰ *In the matter of the marriage of R.S. and J.A.*, Texas No. F-185,063 (279th Dist. Ct. Tex., 2 March 2003) (unreported).

⁹¹ Molly McDonough, “Court Oks Divorce Without Recognizing ‘Marriage’: Gay Couple’s Civil Union, Created in Vermont, Is Dissolved in Texas” (21 March 2003) 2 No. 11 A.B.A. J. E.-Report 2 (Westlaw).

⁹² See *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (C.A. 1918).

Burns and *Rosengarten* that Vermont itself distinguishes between marriages and civil unions. By applying a Texas law available only to those who are married, the judge was, in effect, extending to the couple a status they did not enjoy under Vermont law.

One could argue, however, that the Texas judge was taking a common sense approach. After all, Vermont law provides that its divorce laws apply, *mutatis mutandis*, to the dissolution of civil unions. And if the Texas court had not dissolved the civil union, one member of the couple would have had to acquire residency in Vermont for a year in order to obtain a dissolution in that state.⁹³ But why bother dissolving the civil union if it would have no legal effect outside of Vermont? Perhaps the judge was implicitly recognizing the possibility that the civil union could be given legal effect for some purposes outside Vermont.

The most carefully reasoned of the US civil union recognition cases is *Langan v. St. Vincent's Hospital*, which is currently on appeal.⁹⁴ There is no public policy against same-sex unions in New York, it is one of only twelve states that have not enacted a “mini-DOMA” law, and the state and city of New York extend many incidents of marriage to same-sex couples.⁹⁵ The issue was whether the plaintiff, who had entered into a Vermont civil union with his partner, was a “spouse” within the meaning of the New York wrongful death statute. The court ruled in favour of the plaintiff, entitling him to assert a claim for pecuniary losses resulting from the death of his partner at the defendant hospital.

The court cited New York’s choice-of-law rule applicable to marriages—“marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes”⁹⁶—and applied this rule to the Vermont civil union. This was appropriate, reasoned the court, in light of the fact that the Vermont civil union is like marriage in that it is “a civil contract regulated by the state in its conduct and its dissolution.”⁹⁷

Under Vermont’s law, the court noted, a party to a civil union is subject to all of the incidents of marriage under state law and “is included in the definition of the term spouse, family, immediate family, dependent, next of kin and ‘other terms that denote the spousal relationship as those terms are used throughout the law.’”⁹⁸ The application of the term “spouse” to parties to a civil union under Vermont law was important to the decision of the court, which stressed that it was not applying a

⁹³ This problem, which was also identified in *Rosengarten* (*supra* note 88), does not arise in regard to Dutch civil unions because, pursuant to article 33.1 of the *Registered Partnership Act*, a Dutch court always has jurisdiction to dissolve a civil union that was entered into in the Netherlands.

⁹⁴ 765 N.Y.S.2d 411, 196 Misc. 2d 440 (Sup. Ct. 2003) [*Langan* cited to N.Y.S. 2d].

⁹⁵ *Ibid.* at 414-15.

⁹⁶ *Ibid.* at 414, citing *Shea v. Shea*, 294 N.Y. 909, 63 N.E.2d 113 (C.A. 1945).

⁹⁷ *Ibid.* at 418.

⁹⁸ *Ibid.* at 417, citing Vt. Stat. Ann., *supra* note 85, §1204(b).

“functional” definition of spouse, but rather giving full faith and credit to Vermont law under which the plaintiff was literally a “spouse”.⁹⁹

In an inversion of the reasoning adopted in *Hyde v. Hyde*, where the court took the view that a polygamous union might be called a marriage but is not a marriage,¹⁰⁰ the New York court concluded that a Vermont civil union, though not labelled a marriage, is, in effect, a marriage: “A civil union under Vermont law is distinguishable from marriage only in title ... ” and “conforms in all respects to the requirements for a marriage.”¹⁰¹

The court reasoned that giving effect to the civil union was supported by the principles of full faith and credit and comity. It held that the term “spouse” in the wrongful death statute could fairly be interpreted to include civil union spouses and that the statute ought to be construed in conformity with constitutional requirements if possible. The court considered that the only difference for state purposes between a marriage and Vermont civil union was the sexual orientation of its partners.¹⁰² The sexual orientation of the partners was irrelevant to the purpose of the wrongful death statute, which was to compensate the victim’s dependents. It would therefore violate the constitutional guarantee of equal protection to exclude a party to a legally sanctioned same-sex union from the definition of “spouse” for the purpose of the wrongful death statute.

The *Langan* decision was expressly limited to interpretation of the word “spouse” in a wrongful death statute, which did not itself include a definition of the term. And it was an “easy” case in the sense that Vermont civil unions are identical to marriage under state law except in name; the term “spouse” is applied to a member of a civil union under Vermont law. In *Langan* the problem of the diversity of the incidents of civil unions and of the terms used for parties to a civil union did not arise. Nevertheless, certain principles can be gleaned from the case that are more broadly applicable. Entering into a civil union creates a status that is regulated in its conduct and dissolution by the state. Applying the principle of universality, this status should be recognized everywhere unless contrary to the public policy or statutes of the forum. Although a civil union may not be a “marriage” for all purposes and parties to a civil union may not be “spouses” for all purposes under forum law, effect should be given to the foreign status to the extent possible. If the only significant difference

⁹⁹ *Ibid.* at 422.

¹⁰⁰ *Supra* note 87. The court said: “But there is no magic in a name; and, if the relation there existing between men and women is not the relation which in Christendom we recognise and intend by the words ‘husband’ or ‘wife,’ but another and altogether different relation, the use of a common term to express these two separate relations will not make them one and the same, though it may tend to confuse them to a superficial observer” (at 134).

¹⁰¹ *Langan*, *supra* note 94 at 417, 418.

¹⁰² Although the judge considered the issue one of sexual orientation, it should be noted that the real difference between the Vermont civil union and a marriage is the sex of the partners.

between a civil union and a marriage is the sex of the partners, it may be discriminatory to refuse to give effect to a civil union status.

The *Langan* decision is important not just in regard to recognition of foreign civil unions but also to recognition of foreign same-sex marriages. Eliot Spitzer, the Attorney General of New York, cited *Langan* as the most relevant New York case when he issued an opinion that foreign same-sex marriages validly performed must be recognized in New York. Although New York law does not permit parties to enter into a same-sex marriage within the state, Spitzer stated that “New York common law requires recognizing as valid a marriage, or its legal equivalent, if it was validly executed in another state, regardless of whether the union at issue would be permitted under New York’s Domestic Relations Law.”¹⁰³

There is no issue of same-sex civil unions violating public policy in Canada. Even Alberta has no policy against extending the incidents of marriage to same-sex couples, provided the word “marriage” is not used. But there is an issue of whether a civil union that is distinguished from marriage under the law of its creation can be treated as a marriage within the meaning of forum law.

Where the law of the state that created the civil union is the *lex causae*, there should be little difficulty. For example, parties to a Vermont civil union may not get married under Vermont law unless and until their civil union is first dissolved.¹⁰⁴ A party domiciled in Vermont and with civil union status in that state would lack the capacity to marry. If that party subsequently married, say in Ontario, without first having the civil union dissolved, the Ontario marriage would be considered essentially invalid in Canada pursuant to the *lex domicilii*. Another example would be of a civil union partner who wants to bring an action for wrongful death in Ontario in relation to an accident that took place in Nova Scotia. Nova Scotia law would be the *lex causae* pursuant to *Tolofson*,¹⁰⁵ and under Nova Scotia law a civil union partner may bring such an action.¹⁰⁶ Thus, giving effect to the incidents of a civil union created under a foreign law that is also the *lex causae* is not problematic.

But what if forum law applies? For example, a party to a Nova Scotia civil union may apply for a division of family property in Ontario. Ontario’s *Family Law Act* provides that:

The property rights of spouses arising out of the marital relationship are governed by the internal law of the place where both spouses had their last common habitual residence or, if there is no place where the spouses had a common habitual residence, by the law of Ontario.¹⁰⁷

¹⁰³ Marc Santora, “Same-Sex Marriage: The Law; Spitzer’s Opinion Mixed on Status of Gay Marriage” *New York Times* (4 March 2004) A1.

¹⁰⁴ Vt. Stat. Ann., *supra* note 85, § 1204(d).

¹⁰⁵ *Tolofson*, *supra* note 56.

¹⁰⁶ *Vital Statistics Act*, R.S.N.S. 1989, c. 494, s. 54(2)(a); *Fatal Injuries Act*, R.S.N.S. 1989, c. 163.

¹⁰⁷ *Supra* note 23, s. 15.

If the parties' last common habitual residence was Nova Scotia, the law of that province will apply. Under Nova Scotia law a civil union partner may apply for division of matrimonial property.¹⁰⁸ But if the parties' last common habitual residence was Ontario, then Ontario law will apply.¹⁰⁹ Only "spouses" as defined in the *Family Law Act* are entitled to apply for division of the matrimonial property. The act provides that:

- (1) ... "spouse" means either of a man and woman who,
 - (a) are married to each other, or
 - (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.
- (2) In the definition of "spouse", a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.¹¹⁰

Could the term "spouse" in the act be interpreted to include parties to a civil union, assuming that the words "either of a man and woman" are replaced with "two persons"—in compliance with the *Halpern* decision¹¹¹—but that no other amendments are made?

Borrowing from the reasoning in *Langan*, it may be possible to interpret the term "spouse" to include a party to a civil union. The universality principle would support giving effect to a sister province status. Parties to a civil union are included in the definition of "spouse" for the purpose of matrimonial property division in Nova Scotia. But *Langan* did not involve a statutory definition of "spouse". Interpreting "spouse" to include a party to a civil union might be possible in the absence of a clear statutory definition, but the *Family Law Act* defines "spouse" in an unambiguous way that does not include parties to a civil union.

It may be possible to challenge the constitutionality of the act's definition of "spouse" on the grounds that it discriminates on the basis of marital status contrary to section 15 of the Charter. The Supreme Court of Canada has ruled that exclusion of unmarried cohabiting persons of the opposite sex from a statutory matrimonial property regime is not discriminatory within the meaning of subsection 15(1) of the

¹⁰⁸ *Vital Statistics Act*, *supra* note 106, s. 54(2)(g); *Matrimonial Property Act*, R.S.N.S. 1989, c. 275.

¹⁰⁹ Although Nova Scotia's civil union law is limited to parties who are residents of or own property in Nova Scotia, it would certainly be possible for residents of the province to enter into a civil union and subsequently move or for couples residing elsewhere but who own property in the province to enter into a civil union there.

¹¹⁰ *Supra* note 23, ss. 1(1), (2). The limitation of the definition to "either of a man and woman" has not yet been changed to reflect the opening up of civil marriage to same-sex couples.

¹¹¹ See *supra* note 40.

Charter.¹¹² But the Court's decision was based largely on respect for the autonomy of the parties. The majority stated that those who marry can be said to freely accept the rights and obligations of marriage, and that the decision not to marry should be respected. Justice Gonthier, in a concurring opinion, described matrimonial property regimes as contractual in nature and stated that such laws are aimed at dividing assets according to the regime chosen by parties, either explicitly or implicitly by getting married. Parties to a Nova Scotia civil union, however, *have* chosen to take on some of the rights and obligations of marriage, including matrimonial property rights and obligations, by registering their partnership. Much of the reasoning behind the *Walsh* decision would thus not apply.

Another possibility would be to uphold one party's claim for matrimonial property division on the basis of contract. As Gonthier J. pointed out in *Walsh*, matrimonial property regimes are contractual in nature. In *Rosengarten*, the Connecticut court left open the possibility that a claim could be made in contract or equity by a party to a Vermont civil union for property division or support, although no express or implied contract was alleged by the petitioner in that case.¹¹³ Parties to a Nova Scotia civil union, then, might argue that they have effectively contracted for division of their property in accordance with the Nova Scotia matrimonial property statute. The contract device may well be effective in regard to private law rights and obligations between the parties to a civil union, but it would not assist in claims against third parties based on civil union status.

Matrimonial property rights and obligations are among the few incidents of marriage that have not been extended to unmarried couples in most provinces. Because most incidents of marriage have been extended to unmarried couples, it will not always be necessary to address the civil union recognition issue. For example, under Ontario's *Family Law Act*, support rights and obligations are extended to same-sex partners, defined as those who have cohabited for three years or who have cohabited in a relationship of some permanence if they are the natural or adoptive parents of a child.¹¹⁴ Parties to a civil union who meet the definition of "same-sex partner" will have support rights and obligations on that basis. For some purposes, there is no required period of cohabitation. For example, under the *Compensation for Victims of Crime Act*, a dependent same-sex partner who was "living with the deceased victim in a conjugal relationship outside marriage immediately before the death of the deceased victim" is eligible for compensation.¹¹⁵ To the extent that the parties qualify for the incidents of marriage based on cohabitation, whether or not they are married or parties to a civil union, there is no difficulty.

¹¹² *Walsh*, *supra* note 77.

¹¹³ *Supra* note 88 at 394.

¹¹⁴ *Supra* note 23, ss. 29, 30.

¹¹⁵ R.S.O. 1990, c. C.24, ss. 1, 5.

But if parties to a foreign civil union do *not* meet the statutory test to qualify for a particular incident of marriage, there will be a problem. Creative statutory interpretation might be possible, at least in regard to ambiguous provisions. Charter challenges to provisions that discriminate on the basis of marital status may be successful. And contract claims on private rights and obligations between the couple may be advanced. Perhaps the best solution would be statutory reform to extend incidents of marriage to those who are parties to a civil union. The diversity in the terminology used and the incidents connected to civil unions will, however, pose a challenge to legislators. Some civil unions, like those in the Netherlands, are virtually identical to marriage. Others, like those performed under the Hawaiian scheme, are very limited in nature and not analogous to marriage. Still others, including most European models, are analogous to marriage except in regard to filiation and adoption rules. In the case of foreign marriages, those that meet the forum test for validity are subject to all of the applicable incidents of marriage under forum law (except that polygamous marriages are not given effect for all purposes), and no inquiry is made as to the incidents of marriage under the law governing validity. Given the diversity of civil unions, recognition for the purpose of applying forum law will probably have to depend on an examination of the incidents flowing from the particular civil union that is the basis for the claim.

IV. "Ascribed Spousal Status"

Commentators have used the term "ascription" to describe the extension of the incidents of marriage to unmarried parties who cohabit in a conjugal relationship,¹¹⁶ and the term "ascribed spousal status" to describe the state of those who are thus subject to the incidents of marriage.¹¹⁷ But statutes extending the incidents of marriage to cohabiting couples do not create a portable status, unlike marriage. It has been pointed out that "[w]here legal consequences are attached to cohabitation on an *ad hoc* basis, with varying definitions of cohabitation applying for different purposes, the questions surrounding status do not assume the same significance."¹¹⁸ The issue is not whether a status resulting from "ascription" is essentially and formally a valid application of the principle of universality to unmarried cohabitation but is rather whether to give effect to rights and obligations established under the *lex causae*.

As far as giving effect to rights and obligations created under a foreign law is concerned, there would be no public policy reason to refuse to apply the *lex causae*. For example, a party may sue for the wrongful death of a "same-sex partner" within the meaning of Ontario's *Family Law Act*.¹¹⁹ If the tort giving rise to the action

¹¹⁶ See e.g. Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Minister of Public Works and Government Services, 2001).

¹¹⁷ See e.g. Brenda Cossman & Bruce Ryder, "What is Marriage-Like Like?: The Irrelevance of Conjuality" (2001) 18 Can. J. Fam. L. 269.

¹¹⁸ Permanent Bureau of the Hague Conference on Private International Law, *supra* note 32 at 5.

¹¹⁹ *Supra* note 23, ss. 29, 61.

occurred in Ontario, other provinces would apply the law of Ontario pursuant to the *Tolofson* decision. Similarly, there would be no public policy reason to refuse recognition of foreign money judgments based on rights and obligations of cohabiting couples under foreign law. Provided the recognition rules outlined in *Morguard* and *Beals* were met, the foreign judgment would be enforced.¹²⁰ The problems would arise in regard to the application of forum law to parties who had cohabited elsewhere.

With the increase in unmarried cohabitation, many states have enacted laws to extend certain incidents of marriage on the basis of qualifying cohabitation. Statutory definitions of qualifying cohabitation vary between and within states according to the purpose of the legislation. And some states do not extend incidents of marriage to unmarried cohabitants in any significant way because of a policy of maintaining marriage as a privileged status.¹²¹ Thus, a party who has a right to claim support based on the statutory definition of cohabitation in one jurisdiction, may not meet the test for support in another. This diversity of approaches to unmarried cohabitation creates the potential problems of forum shopping and evasion.

Statutory definitions of cohabitation do not include requirements that the cohabitation take place within the forum. Thus, it is possible for parties who cohabit in a state that extends no incidents of marriage to unmarried partners to subsequently move to, or be temporarily present in, a state that does and to immediately qualify for the incidents of marriage based on a period of cohabitation which took place in the other state. Conversely, parties who cohabit in a state that extends incidents of marriage to unmarried partners may not have access to those incidents of marriage if they subsequently move to, or are temporarily present in, a state that does not.

Within Canada, marital property laws provide an example of the diversity of laws relating to cohabitation. In most provinces, unmarried cohabitation does not give rise to statutory marital property rights and obligations. Saskatchewan's statute, however, extends such rights and obligations to those who have cohabited continuously for two years.¹²² Parties who cohabit in Saskatchewan for two years may subsequently move to, say, Ontario, where cohabitants do not have statutory marital property rights and obligations. If the parties later separated, it is possible that the Ontario law would apply as the law of the parties' "last common habitual residence",¹²³ and the claimant would not have a statutory right to apply for a division of the parties' property.¹²⁴

¹²⁰ *Morguard*, *supra* note 49; *Beals*, *supra* note 47.

¹²¹ Permanent Bureau of the Hague Conference on Private International Law, *supra* note 32 at 3.

¹²² *Family Property Act*, S.S. 1997, c. F-6.3, s. 2(1).

¹²³ *Family Law Act*, *supra* note 23, s. 15.

¹²⁴ An unmarried partner may be able to claim a share of the other's property under the common law doctrines of unjust enrichment or contract or under the *Civil Code of Quebec* provisions on partnership, contract, or unjust enrichment: *Peter v. Beblow*, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621; *De L'Isle v. Carton*, [1997] A.Q. no 2057 (Q.C.A.) (QL), application for leave to appeal dismissed with costs 4 December 1997, [1997] S.C.C.A. No. 451 (QL).

Statutory requirements for support claims are similarly diverse, and the problem of forum shopping for the purpose of such claims was raised in *Toope v. Syvertson*.¹²⁵ The parties initially cohabited in Alberta and later in British Columbia where they subsequently separated. The claimant then moved to Ontario and applied for spousal support in that province. She qualified for support in Ontario, but was out of time to bring a claim in British Columbia. The issue was whether the provisional support order made in Ontario should be confirmed in British Columbia. Based on the explicit wording of the reciprocal enforcement legislation then in place, the British Columbia court was required to take notice of, and apply, Ontario law. The Ontario support order was therefore confirmed despite the fact that the respondent had never lived in Ontario and that the claimant did not qualify under the law of the parties' last common habitual residence.

Pursuant to the new reciprocal enforcement legislation, which does away with the old system of provisional and confirmation orders, a court determining entitlement to support first applies forum law, but if the claimant is not entitled to support under forum law, the court must apply the law of the parties' last common habitual residence.¹²⁶ The new legislation, which gives the claimant the benefit of the most favourable law, does not address the potential problem of forum shopping. Although the claimant must be a resident of the province in order for the court to have adjudicatory jurisdiction,¹²⁷ the favourable choice-of-law rule may encourage relocation from a jurisdiction where the statutory requirements of support are not met to one where the claimant does qualify. Conversely, the choice-of-law rule alleviates the problem of evasion, because a resident of, say, Ontario could avoid a statutory support obligation imposed under Ontario law only by moving to a non-reciprocating jurisdiction.

V. Status Versus Contract

Choice of law rules for contracts are different from those governing personal status. Generally, contracts are governed by "the proper law of the contract", that is, the law chosen by the parties or, in the absence of a choice, the law of the state most closely connected with the transaction.¹²⁸ Personal status, on the other hand, is governed by the *lex domicilii*. For same-sex relationships governed by contract, then, the first step is to determine whether the issue is simply the enforcement of a foreign contract or if there is either a status, or at least a framework of rights and obligations underlying the contract, that must be considered.

¹²⁵ (1995), 5 B.C.L.R. (3d) 174, 11 R.F.L. (4th) 69 (S.C.).

¹²⁶ *Interjurisdictional Support Orders Act*, S.O. 2002, c. 13, s. 13(2).

¹²⁷ See *Emerson v. Emerson*, [1972] 3 O.R. 5, 27 D.L.R. (3d) 278 (H.C.J.). Art. 3143 C.C.Q. provides: "A Quebec authority has jurisdiction to decide cases of support or applications for review of a foreign judgment which may be recognized in Quebec respecting support when one of the parties has his domicile or residence in Quebec."

¹²⁸ See *New Holland (Canada) Credit Co. v. MacPherson*, [2003] O.T.C. 366 (Sup. Ct. J.).

Same-sex partners may by agreement confer on themselves *private* rights and obligations in the absence of any statutory regime conferring status or governing such contracts. Although at one time common-law cohabitation agreements were viewed as contrary to public policy and unenforceable, this has long since ceased to be the case.¹²⁹ In *M. v. H.*, Iacobucci J., for the majority, assumed the existence and validity of such contracts in his discussion of the limits of contract as an alternative to statutory rights and obligations.¹³⁰ Enforcement of foreign contracts would be governed by the proper law of the contract, subject to any mandatory rules of the forum. An example of such a mandatory rule is subsection 58(c) of Ontario's *Family Law Act* stating that no provision in a cohabitation agreement respecting custody or access to children is enforceable in Ontario.¹³¹

Same-sex partners may also enter into a cohabitation agreement in the context of a statutory regime conferring status, or at least default rights and obligations, and providing for such contracts. For example, Ontario's *Family Law Act* extends certain rights and obligations to "same-sex partners" on the basis of cohabitation and including the right to enter into a "cohabitation agreement":

Two persons of the opposite sex or the same sex who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,

- (a) ownership in or division of property;
- (b) support obligations;
- (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
- (d) any other matter in the settlement of their affairs.¹³²

Some provinces have explicit choice-of-law rules governing statutory cohabitation agreements. For example, Ontario's *Family Law Act* provides that:

The manner and formalities of making a domestic contract and its essential validity and effect are governed by the proper law of the contract, except that,

¹²⁹ See e.g. *Chrispen v. Topham* (1986), 28 D.L.R. (4th) 754, 48 Sask. R. 106 (Q.B.), aff'd (1987), 39 D.L.R. (4th) 637, 59 Sask. R. 145 (C.A.).

¹³⁰ [1999] 2 S.C.R. 3 at paras. 121-24, 171 D.L.R. (4th) 577.

¹³¹ *Supra* note 23.

¹³² *Ibid.*, s. 53(1).

- (a) a contract of which the proper law is that of a jurisdiction other than Ontario is also valid and enforceable in Ontario if entered into in accordance with Ontario's internal law. ...¹³³

The act explicitly empowers the court to override the cohabitation agreement in defined circumstances and, more broadly, provides a set of default rules that may replace or supplement the agreement.¹³⁴

While status, as a matter of public law, cannot be created by contract alone, a state may confer status on parties who enter into a contract.¹³⁵ For example, under Alberta law, parties, including same-sex partners, may elect to become "interdependent partners" by entering into an agreement.¹³⁶ Those who enter into an interdependent partnership agreement create for themselves rights and obligations that would otherwise not exist. For example, an adult interdependent partner has the rights of a spouse in cases of intestate succession.¹³⁷ The incidents of an adult interdependent partnership, a hybrid of civil union and contract, can be given effect when Alberta law applies. And Alberta judgments based on adult interdependent partnership status should be recognized and enforced across Canada. But parties to an adult interdependent partnership will have the same difficulty as those who have entered into a civil union in having their status recognized under any law but that of Alberta.

Conclusion

Canada gives extensive recognition to same-sex relationships under its domestic laws and is one of the few countries in the world in which it is possible to celebrate a same-sex marriage. A state's domestic laws on same-sex relationships, however, are not conclusive of issues relating to recognition of foreign same-sex relationships. The principles of private international law may lead to a decision about a foreign same-sex relationship that is different from the result under domestic law. Foreign same-sex marriages that are not essentially valid under the parties' domiciliary law and formally valid under the *lex loci celebrationis* may not be recognized. In the absence of statutory reform, it may not be possible to extend the incidents of marriage to a foreign civil union. There may be no statutory authority for extending incidents of marriage to cohabiting parties despite the fact that these incidents apply to them under the law of their last common habitual residence. Contracts may be an effective mechanism for enforcement of private rights and obligations between partners, but cannot create a portable status. The breathtakingly fast development of domestic laws recognizing same-sex relationships has resulted in a diversity of approaches that create private international law challenges. As Canada moves forward with the bill to

¹³³ *Ibid.*, s. 58(a).

¹³⁴ See *e.g. Bosch v. Bosch* (1991), 6 O.R. (3d) 168, 84 D.L.R. (4th) 626 (C.A.).

¹³⁵ See Graveson, *Status*, *supra* note 12 at 62ff.

¹³⁶ *Adult Interdependent Partners Act*, *supra* note 31.

¹³⁷ *Intestate Succession Act*, R.S.A. 2000, c. I-10, s. 3.

open up civil marriage to same-sex couples, it may now be time to give more attention to, and to work with other countries on, cross-border issues.
