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UNHEARD VOICES: ADOPTION NARRATIVES OF SAME-SEX MALE COUPLES

Malcolm Dort*

***Abstract:** This is the first legal study in Canada on same-sex adoption law, adoption administrative practice, and the social realities of parenting as experienced specifically by same-sex male couples. This paper identifies a gap in existing legal literature and jurisprudence with respect to the adoption narratives of same-sex male couples. Next, focusing on the province of Quebec, it offers insight into how legal rules and social expectations construct families headed by such couples. It also highlights how, post-adoption, same-sex male couples conceive of their own families in a legal and social environment that continues to privilege heterosexual family models. Contradictorily, by entering societal discourse as committed couples who create families, these men reproduce aspects of an idealized heterosexual, two-parent family model.*

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**INTRODUCTION: FROM STRAIGHT *DE FACTO*
FATHERS TO GAY MALE FATHERS**

Fifteen years ago, ideas about men raising children together were limited largely to depictions of the bumbling antics of *de facto* fathers in television programs and films such as *My Two Dads*, *Full House*, or *Three Men and a Baby*. The men in these stories had to learn how to be parents, having been thrown into the role of primary caregivers as a result of sudden changes in their lives. The men in these stories also happened to be straight.

Today, however, the idea of men raising children together has entered societal discourse in ways more serious than popular comedy. Families headed by two men in same-sex relationships increasingly are a public and visible presence in Canadian society. In 2007, for example, the *Edmonton Journal* reported on the efforts of Alberta Children and Youth Services to prevent, on grounds of sexual identity, a same-sex male couple from adopting their foster child.¹ In September 2009, the *Toronto Star* reported that area politician George Smitherman and his husband had been approved as adoptive parents by the provincial youth services agency.² Many men who head families together are now portrayed not just as “guys” who haphazardly become primary caregivers. Instead, these men, who are in committed relationships, make deliberate choices to create families by virtue of legal and administrative processes that enable them to do so.

¹ Mike Sadava, “Gay Couple Leaps ‘Walls’ to Adopt Son”, *The Edmonton Journal* (19 February 2007) online: Canada.com <<http://www.canada.com/edmontonjournal/news/story.html?id=643c0d39-9ccb-43d8-a7f1-9a034e83b06e&k=27198>>.

² Donovan Vincent, Rob Ferguson & John Spears, “Contenders to be the Next Mayor of Toronto”, *Toronto Star* (26 September 2009) online: Toronto Star <<http://www.thestar.com/article/701423>>.

The growth of adoptive families headed by same-sex male couples is part of a larger extension of familial legal rights and responsibilities to non-traditional family structures in Canada, and the continually evolving legal recognition of alternative families represents a societal transformation in the ways in which we conceive of private familial ordering. New legislation and jurisprudence have affirmed and recorded this transformation, including the recognition of same-sex civil unions by Quebec in 2002;³ the legalization of same-sex marriage across Canada in 2005;⁴ the granting, to two mothers, the right to register as parents on a child's birth certificate;⁵ amendments to provincial legislation permitting gays and lesbians to adopt jointly as couples;⁶ the granting of parental

³ See *An Act instituting civil unions and establishing new rules of filiation*, SQ 2002, c 6 [Bill 84].

⁴ See *Civil Marriage Act*, SC 2005, c 33.

⁵ See e.g. *Vital Statistics Act*, RSM 1987, c V60, CCSM c V60, s 3(6), as amended by SM 2002, c 24, s 54; CCQ art 115; and *Fraess v Alberta (Minister of Justice)*, 2005 ABQB 889, 390 AR 280 DLR (4th) 187.

⁶ See e.g. *Child and Family Services Act*, RSO 1990, c C11, s 136. *Re K and B* (1995), 125 DLR (4th) 653 struck down provisions of the *Act* that prevented adoption by same-sex couples. The *Act* permits joint adoption only by "spouses", and now defines "spouse" by reference to the *Human Rights Code*, RSO 1990, c H19, as modified to include same-sex relationships by *Amendments because of the Supreme Court of Canada Decision in M v H Act*, SO 1999, c 6, s 28(8) and subsequent legislation. See also *An Act instituting civil unions and establishing new rules of filiation*, SQ 2002, c 6. The Quebec *Act* clarifies that CCQ provisions regarding adoption apply to same-sex couples. See Marie-France Bureau, "Civil Union and New Filiation Rules in Quebec: from Ignorance to the Legal Recognition of the Homoparental Family", online: National Association of Women and the Law <<http://www.nawl.ca/en/newlibrarypage/jurisfemme/70jfvolume21fall2002/322-civil-union-and-the-new-filiationrul>

status to a third parent by the Ontario Court of Appeal in 2007;⁷ and the extension, in some jurisdictions, of traditional marital rights and responsibilities to cohabiting conjugal couples.⁸ Strikingly, legal discourse reflects the narratives of same-sex parental couples much less than it does those of other family forms.

Such families are, nevertheless, a social reality, and they often consist of filial relationships established through adoption.⁹ Same-sex male couples navigate legal and administrative adoption processes, and they challenge societal assumptions about how their families should function, in ways unique to them by virtue of their gay male identities. A clearer picture of the adoption experiences of gay male couples is critical to a broader understanding of legal and policy issues relating to the growth of alternative family structures in Canada.

This paper presents the first legal study in any Canadian jurisdiction in which same-sex male couples have

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⁷ See *A (A) v B (B)* (2007), 83 OR (3d) 561, 278 DLR (4th) 519 [*A (A)*].

⁸ See e.g. *Family Law Act*, RSO 1990, c F3, s 29; *Miron v Trudel*, [1995] 2 SCR 418. See also *Chartier v Chartier*, [1999] 1 SCR 252, in which the Supreme Court of Canada recognized *de facto* parental arrangements on a case-by-case basis.

⁹ Except where otherwise indicated, “filiation” in this paper refers both to the civil law concept of filiation as well as its common law equivalent, parentage. Note as well that although same-sex male couples can have children through other means, such as informal parenting arrangements or surrogacy, this paper focuses largely on adoption as one of the few institutions in Quebec that enable same-sex male couples to become legal parents.

been interviewed in order to gain insight into their interactions with the adoption process and the realities of adoptive parenting as gay men.¹⁰ It operates on two main levels. Substantively, it launches a preliminary scholarly legal discussion on adoption by gay male couples in Quebec. The results of the small-scale, qualitative study offer insight into how legal rules and social expectations construct families headed by same-sex male couples. The paper recounts the participants' negotiation of legal and administrative processes as well as how, post-adoption, these couples manage family life and conceive of their own families in a legal and social environment that continues to privilege heterosexual family models. The paper's key finding is the disjuncture between the pro-gay changes to the legal framework and the persistent, if variable, resistance to families headed by same-sex couples that still permeates aspects of the administrative system.¹¹ The other key insight is the somewhat conservative assumptions underlying parenting by gay males, despite its subversive qualities: by entering societal discourse as committed couples who create families, these men reproduce aspects of an idealized family model based on heterosexual, two-parent norms. The study's sample size means that the narratives cannot be generalized, but they provide an important preliminary glimpse at same-sex male-headed families' interactions with the adoption process and how their experiences shape emerging definitions of "family".

Methodologically, and implicitly, the paper intervenes in the Canadian family law literature in the sense that it addresses overlooked dimensions of the socio-legal study of

¹⁰ Section III summarizes the research methodology.

¹¹ More specifically, the administrative system refers to administrative policies, work practices, and decision-making discretion in public adoption systems such as Quebec's. See *infra* notes 28 to 31 and accompanying text.

law and families. It is possible to read the paper as speaking to the neglected sides of three axes of inquiry and calling for their further pursuit: empirical research relative to doctrinal analysis;¹² a focus on gay male couples, distinct from lesbian couples or same-sex couples generally;¹³ and an alertness to the informal, administrative side of legal processes as opposed to the formal inscriptions in statutes and regulations.

REVIEW OF LITERATURE AND JURISPRUDENCE ON ADOPTION

The interaction between adoption law and practice, as it relates to same-sex male couples, remains undocumented: academic legal literature and jurisprudence largely have omitted the stories of gay male couples who engage with the adoption process. Most publicly available narratives about adoptions within gay and lesbian communities focus instead on the experiences of same-sex couples generally or on lesbian couples. It is likely that legal, biotechnological, and cultural factors contribute to the omission of gay male voices.

A wealth of empirical and doctrinal literature addresses the growing practice of adoption by same-sex couples generally and its implications for adoption law and other areas of family law. This literature ranges from analyses of the legal consequences of being a gay or lesbian adoptive parent to

¹² For an important recent empirical study involving lesbian parents, see Fiona Kelly, “(Re)forming Parenthood: The Assignment of Legal Parentage within Planned Lesbian Families” (2009) 40 *Ottawa L Rev* 185.

¹³ There is recent scholarship from the United Kingdom concerning the socio-legal dimensions of masculinity: see Richard Collier, *Men, Law and Gender: Essays on the Man of Law* (London: Routledge Cavendish, 2010). Equivalent scholarship from Canada, however, has yet to be published.

examinations of prejudicial social narratives that colour judicial decision-making on same-sex adoption.¹⁴ This literature also includes analyses of reforms to the law of filiation and adoption in several different jurisdictions,¹⁵ re-evaluations of the “best interest of the child” standard in the context of families headed by same-sex parents,¹⁶ and reviews of the effect of equality laws on the right to adopt.¹⁷

The scholarly legal literature overlooks, however, the possibility that same-sex male and same-sex female couples

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- ¹⁴ See Carole S Cullum, “Co-parent Adoptions: Lesbian and Gay Parenting” (1993) 29 *Trial* 28 (the legal consequences of non-recognition range from an inability to authorize medical treatment for one’s child to loss of custody or access in the event of the breakdown of the parents’ relationship); Martha A McCarthy & Joanna L Radboard, “Family Law for Same-Sex Couples: Chartering the Course” (1998) 15 *Can J Fam L* 101; Timothy Lin, “Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases” (1999) 99 *Colum L Rev* 739.
- ¹⁵ See Renée Joyal, “La filiation homoparentale, rupture symbolique et saut dans l’inconnu. Quelques réflexions à la lumière de l’évolution récente du droit de la filiation” in PC Lafond & B Lefebvre, eds, *L’union civile: nouveaux modèles de conjugalité et de parentalité au 21e siècle* (Cowansville, QC: Yvon Blais, 2003) at 307; Robert Leckey, “Where Parents Are of the Same Sex: Quebec’s Reforms to Filiation” (2009) 23 *Int’l JL Pol’y & Fam* 62 [Leckey, “Quebec’s Reforms”]; Jean-Louis Renchon, “Parenté sociale et adoption homosexuelle: Quel choix politique?” (2005) 35 *RGD* 129; Molly Cooper, “Gay and Lesbian Families in the 21st Century: What Makes a Family?: Addressing the Issue of Gay and Lesbian Adoption” (2004) 42 *Fam Ct Rev* 178.
- ¹⁶ See Scott D Ryan & Scottye Cash, “Adoptive Families Headed by Gay or Lesbian Parents: A Threat... or Hidden Resource?” (2004) 15 *U Fla JL & Pub Pol’y* 443.
- ¹⁷ See Carl F Stychin, “Faith in Rights: The Struggle Over Same-Sex Adoption in the United Kingdom” (2008) 17 *Const Forum Const* 117.

may interact with adoption law and administrative policy in different ways.¹⁸ The literature is largely gender-neutral; it does not separate its treatment of gay men from lesbians, but instead categorizes them as a single social group. It is true that adoption laws and policies that enable adoption by same-sex couples generate space for scholarly discussion of how gays and lesbians generally navigate the adoption process.¹⁹ Yet one must separate adoption law's equal procedural treatment of gay and lesbian couples collectively vis-à-vis straight couples from the ways in which gays and lesbians experience adoption as distinct groups or even as individuals. In addition, one must distinguish formal adoption law's treatment of gays and lesbians from the administrative policies, practices, and other forms of "soft law" that may have decisive, but differing, impacts on the adoption practices of gay and lesbian couples.

While the literature largely consolidates the experiences of gay and lesbian couples vis-à-vis adoption law into a single category of academic inquiry, the stories of lesbian couples who already have biological children at the time of litigation dominate Canadian jurisprudence.²⁰

¹⁸ Indeed, there has been little scholarly study of adoption law as applied to either gay or lesbian couples exclusively. One of the few articles published on the issue of lesbian adoption concerns adoption by a partner following the birth mother's pregnancy by assisted procreation: see Alan Roy, "Chronique de jurisprudence : la conjointe de la mère doit-elle adopter l'enfant issu d'une procréation médicalement assistée?" (2003) 105 R du N 119.

¹⁹ McCarthy & Radboard, *supra* note 14; Stychin, *supra* note 17.

²⁰ Several recent cases confirm this trend. Four of these cases concern applications for second-parent adoption by female partners of women who gave birth to children conceived through assisted procreation: *Re K and B* (1995), 23 OR (3d) 679, 125 DLR (4th) 653 (Ct J (Prov Div)); *T (KG) v D (P)*, 2005 BCSC 1659, 21 RFL (6th) 183 (Fam Div); *Re A*, 1999 ABQB 879, 2 RFL (5th) 358 (Fam Div); *SCM and NJC*, 2001 NSSF 24. One case concerns a lesbian couple's

The prominence of lesbian couples—and the corresponding under-representation of gay male couples—in the case law on same-sex adoption are partially rooted in human biology and biotechnology. Advances in assisted-procreation technology, as well as the recent full legal recognition of gay and lesbian relationships in Canada, have generated novel social situations in which the parental rights and responsibilities of lesbian couples have yet to be fully mapped. For example, Quebec law has enabled lesbian couples to establish full legal links with one partner's biological children through reforms to the law of filiation.²¹ Legal disputes arising from claims to establish such links evidence an evolving area of law in which courts are reinterpreting the legal regimes of adoption and filiation to reflect the changing social realities of the family.

application for joint spousal adoption that was contested by a New Brunswick administrative agency: *A (A) v New Brunswick (Human Rights Commission)* 2004 CarswellNB 395, Labour and Employment Board [A(A)]. Two cases in Ontario and Quebec address adoption disputes between lesbian couples and the biological father of the couple's child. In the Ontario case, the biological father refused to consent to the adoption by the biological mother's partner: *C (MA) v K (M)*, 2009 ONCJ 18, 94 OR (3d) 756. In the Quebec case, the applicant requested establishment of filiation with his biological child: *O(L) v J(S)*, 2007 QCCA 361, [2007] RJQ 525. In another Ontario case, several lesbian couples sought to avoid having to apply for adoption by requesting that both spouses be named as parents on their children's birth certificates: *Rutherford v Ontario (Deputy Registrar General)* 270 DLR (4th) 90 [Rutherford].

Note that although jurisprudence concerning adoption by gay males exists in the United States, discussion here is limited to Canadian case law. For examples of American case law involving adoption by gay males, see e.g. *In the Matter of the Adoption of John Doe and James Doe*, 2008 WL 5006172 (Fla Cir Ct 25 Nov 2008) [John Doe and James Doe]; *Adar v Smith*, 591 F Supp 2d 857 (ED La 2008).

²¹ See arts 538 – 542 CCQ.

The prominence of lesbian couples in jurisprudence may also have partial roots in cultural assumptions and practices surrounding the role of women in the modern family unit. The way in which we conceive of the allocation of familial responsibilities conceivably predisposes more lesbian couples to have children than gay male couples. Underpinning Western social conceptions of the family lays a cultural assumption that mothers are primary caregivers—and in many cases, they are.²² In contrast, with the rare exception of the stay-at-home father, men almost never face social pressure to assume primary responsibility for overseeing their children's daily lives.²³ This assumption even occasionally lurks in academic legal literature examining same-sex adoption law questions, as the titles of two recent articles, “Are you still my mother? Interstate recognition of adoptions by gays and lesbians,”²⁴ and “My Two Moms: An Analysis of the Status of Homosexual Adoption and the Challenges to its Acceptance,” suggest.²⁵

²² See Richard Collier & Sally Sheldon, *Fragmenting Fatherhood* (Oxford: Hart, 2008) at 4. Note also that in two recent custody cases brought by lesbian couples, Quebec courts granted shared custody to the non-biological mother on the ground that the child or children viewed her as a second mother: *Droit de la famille—072895*, 2007 QCCA 1640, [2008] RJQ 49; *Droit de la famille—092011*, 2009 QCCS 3782, suspension of execution pending appeal refused, *Droit de la famille—092327*, 2009 QCCA 1824.

²³ “[There is a] mistaken belief that for some reason ... men cannot be adequate primary parents. Society says that women are supposed to raise children, not men. Men are supposed to have a bigger impact on children when they are teenagers.” (Gerard P Mallon, *Gay Men Choosing Parenthood* (New York: Columbia University Press, 2004) at 129 [Mallon, *Choosing Parenthood*]).

²⁴ Rhonda Wasserman, (2008) 58 Am UL Rev 1.

²⁵ Jeff LeBlanc, (2006) 27 J Juv L 95.

At times, law still reflects assumptions and practices that categorize the mother as primary caregiver. For example, in custody and access litigation arising between heterosexual parents, courts tend to award custody of children under three years old to the mother, who historically has been the primary caregiver.²⁶ In another example, a mother was granted custody in a domestic violence case in which she initiated violence against the father but did not act violently towards the children.²⁷

The legal literature leaves unanswered many questions about how the current adoption administrative policy regime affects the choices of same-sex male couples in Quebec or elsewhere in Canada. The literature omits discussion of the adoption process as experienced by gay males specifically. More importantly, the literature also omits discussion of the various “soft law” administrative policies, work practices, and high levels of administrative discretion in public adoption systems such as those in Quebec.²⁸ Despite this omission, soft

²⁶ See Michel Tétrault, *Droit de la famille*, 3d ed (Cowansville, QC: Yvon Blais, 2005) at 1463. Some commentators have suggested that courts recently have developed a rebuttable presumption in favour of shared custody. See Marie Christine Kirouack, “La jurisprudence relative à la garde: où en sommes-nous rendus?” in Barreau du Québec, Service de la formation permanente, ed, *Développements récents en droit familial* (Cowansville, QC: Les Editions Yvon Blais, 2007) 665 at 722-27; Robert Leckey, “Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past” (Montreal: Institute for Research on Public Policy, 2009) at 24.

²⁷ See Nicholas MC Bala et al, “Spousal Violence in Custody Access Disputes: Recommendations for Reform” (Ottawa: Status of Women Canada, 1998).

²⁸ Note that in other settings, however, courts and legal scholars have begun to recognize that soft law policies and practices often moderate the effects of formal law, particularly with respect to an individual’s

law measures can play a critical, if not decisive, role in shaping adoptive families. Formal and informal administrative policies, agency practices, and discretionary powers effectively determine pathways to adoption for same-sex male couples or any person who wishes to adopt.²⁹ Indeed, the administrative staff at adoption agencies has wide latitude in making decisions about the services that their clients can receive.³⁰ Their decisions oftentimes have a decisive impact on their clients.³¹

Similarly, the jurisprudence provides no answers to these questions. Much of the case law concerns the resolution of filiation disputes between two parents, not applications brought by adoptive parents challenging administrative decisions or informal practice. Other cases concern

Charter rights. See e.g. *Little Sisters Book and Art Emporium v Canada*, [2000] 2 SCR 1120; Lorne Sossin, "Discretion Unbound: Reconciling the Charter and Soft Law" (2002) 45 *Can Public Admin* 465.

²⁹ Numerous social work studies from the United States examine the degree to which adoption agencies accommodate applications from gay and lesbian prospective parents. See e.g. David M Brodzinsky, Charlotte J Patterson, & Mahnoush Vaziri, "Adoption Agency Perspectives on Lesbian and Gay Prospective Parents: A National Study" (2002) 5:3 *Adoption Quarterly* 5; Gail L Kenyon et al, "Public Adoption by Gay and Lesbian Parents in North Carolina: Policy and Practice" (2003) 84 *Fam in Soc'y* 571.

³⁰ For example, the recommendations of adoption agency workers on judicial orders of placement almost always guide judicial decisions, even though their reports are supposed to be advisory. See Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980) at 130; Michael Lipsky, "Toward a Theory of Street-Level Bureaucracy" in Willis D Hawley, ed, *Theoretical Perspectives on Urban Politics* (Englewood Cliffs, NJ: Prentice-Hall, 1976) at 196 [Michael Lipsky, "Toward A Theory"].

³¹ See Michael Lipsky, "Toward A Theory", *ibid* at 197.

applications for second parent adoption in the context of assisted procreation by lesbian couples. Of the two cases cited above that do concern judicial review of administrative action, *A(A)*³² and *Rutherford*,³³ neither addresses the policies of provincial adoption agencies. In addition, there is no jurisprudence concerning disputes over administrative decisions of Quebec's public adoption regime. One primary reason for this dearth in the case law could be the applicants' reluctance to initiate public disputes against the agencies that have the discretion to grant or deny them adoptive children.³⁴

The academic legal literature and the prominence of lesbians in Canadian same-sex adoption case law generate a general impression that gay male adoption is unusual or inexistent.³⁵ Precisely because of the legal, biotechnological, and cultural factors discussed above, the adoption experiences of gay male couples do not form part of the publicly available legal narrative on same-sex adoption.

Yet, the absence of gay male voices from the legal debate on adoption does not reflect the level of engagement by gay male couples with the adoption process. Same-sex male couples interact with adoption law and administrative procedures in unique ways by virtue of their position as gay males, and they do create families through adoption.³⁶ Indeed,

³² *Supra* note 7.

³³ *Supra* note 20.

³⁴ See interview 1 (24 October 2009) ["Confidential Interview No 1"].

³⁵ Note, however, that lesbian overrepresentation in same-sex adoption case law exists primarily in second-parent adoption. Domestic (and international) adoption, then, remains a marginalized topic in legal discourse on *both* gay male and lesbian families.

³⁶ See *Choosing Parenthood*, *supra* note 23; Gerald P Mallon, *Lesbian and Gay Foster and Adoptive Parents: Recruiting, Assessing and Supporting an Untapped Resource for Children and Youth*

an analysis of the adoption process as lived by same-sex male couples, specifically, has been undertaken in other areas of academic literature, particularly in social work³⁷ and psychology.³⁸ Despite its invisibility in the legal landscape, adoption by gay male couples is a growing social reality.

**REVIEW OF STATUTORY LAW AND
ADMINISTRATIVE PRACTICE: HOW QUEBEC
REGULATES SURROGACY AND ADOPTION**

Biological realities mean that no same-sex couple can conceive and have a child unaided under the ordinary regimes of filiation by blood or legal parentage. In Quebec, rules provide an avenue for lesbian couples to become parents by assisted procreation.³⁹ But those rules do not operate in favour of gay male couples. The obvious alternative paths to become parents are thus surrogacy and adoption.

(Washington, DC: Child Welfare League of America, 2006); KJ McGarry, *Fatherhood for Gay Men: An Emotional and Practical Guide to Becoming a Gay Dad* (New York: Harrington Park Press, 2003).

³⁷ See e.g. Stephen Hicks, “Maternal Men—Perverts and Deviants?: Making Sense of Gay Men as Foster Carers and Adopters” (2006) 2:1 J GLBT Fam Std 93 at 102; Stephen Hicks & Janet McDermott, eds, *Lesbian and Gay Fostering and Adoption: Extraordinary Yet Ordinary* (London: Jessica Kingsley, 1999); Mallon, *Choosing Parenthood*, *ibid.*

³⁸ See e.g. Edward R Lobaugh, “Gay Male Couples Who Adopt: Challenging Historical and Contemporary Social Trends Toward Becoming a Family” (2006) 42 Perspectives in Psychiatric Care 184.

³⁹ Arts 538 – 542 CCQ recognize the original filiation of a birth mother and her partner, regardless of the latter’s gender, in situations of assisted procreation.

A provision in the *Civil Code of Québec* (“CCQ”) appears to be a major impediment to surrogacy. Article 541 CCQ deems that, as a matter of public order, all surrogacy agreements are null and cannot be enforced. Gay male couples conceivably could have biological children through a surrogacy agreement anyway, although doing so incurs significant risks and costs. A gay male couple could ask a woman in Quebec to carry the birth father’s child to term, and then request her special consent for adoption by the birth father’s partner.⁴⁰ The arrangement’s unenforceability, however, would generate uncertainty for both the couple and the woman in light of the possibility that one of the parties might change his or her mind about its terms.⁴¹ Article 541 thus disprivileges gay male couples who want biological children by failing to provide them with any measure of legal certainty in the event that they do so through the institution of surrogacy.

Alternatively, a gay male couple could create a surrogacy arrangement in a Canadian province that enforces surrogacy contracts. Again, however, the financial costs of surrogacy may deter gay male couples in Quebec from having biological children across provincial borders.⁴² Even if a gay

⁴⁰ See art 541 CCQ.

⁴¹ In one recent case involving a child brought to term through a surrogacy arrangement, the Court of Quebec refused to declare the female partner of a biological father the child’s mother: *Adoption – 091*, 2009 QCCQ 628, [2009] RJQ 445 [*Adoption 091*]. But in two later cases, adoptions were granted: *Adoption—09184*, 2009 QCCQ 9058, [2009] RJQ 2694 (adoption granted on unusual facts, including the altruism of the surrogate mother who was the aunt of the woman seeking to adopt the child); *Adoption—09367*, 2009 QCCQ 16815, [2009] JQ n^o 18623 (QL) (adoption granted, distinguishing *Adoption—091*, *ibid*, on the basis that the contractual side of the arrangements had been legally executed in California).

⁴² See *infra* note 67 and accompanying text.

male couple were intent on having biological children irrespective of these risks and costs, the prohibition of paid surrogacy under the federal *Assisted Human Reproduction Act* generates additional uncertainty by exposing such a couple to potential criminal liability for engaging in a paid parental project.⁴³ Because of the high levels of risk and uncertainty associated with surrogacy, therefore, adoption is often the only viable means for legally sanctioned fatherhood by gay males in Quebec.⁴⁴

Under Quebec law, adoption by two men is subject to the same regulatory regime as adoption by opposite-sex partners: the CCQ, the *Youth Protection Act* (the “*Act*”),⁴⁵ and associated regulations. Article 546 CCQ effectively legalizes gay male adoption by enabling any adult to adopt a child, alone or with another individual. Division VII of the *Act* regulates various aspects of the adoption process, including the delegation of authority to the Director of Youth Protection, certification guidelines for adoption agencies, and the handling of confidential information. Neither the CCQ, the *Act*, nor any of its associated regulations specifically regulates adoption by gay couples.⁴⁶

⁴³ SC 2004, c 2, s 6.

⁴⁴ See *infra* note 67 and accompanying text.

⁴⁵ RSQ, c P-34.1.

⁴⁶ The regulations include *International Adoption Regulation*, RQ c P-34.1, r.0.01; *Order respecting the adoption without a certified body of a child domiciled outside Québec by a person domiciled in Québec*, RQ c P-34.1, r.0.02; *Order respecting the certification of intercountry adoption bodies*, RQ c P-34.1, r.0.03; *Regulation respecting financial assistance to facilitate the adoption of a child*, RQ c P-34.1, r.0.1.1; *Regulation respecting financial assistance to facilitate tutorship to a child*, RQ c P-34.1, r.0.1.2; *Regulation respecting the conditions of placement in an intensive supervision unit*, RQ c P-34.1, r.0.3; *Regulation establishing the Register of Reported Children*, RQ c P-

The *Act* delegates broad administrative discretion over adoption placement decisions to the Quebec adoption agencies. Section 3 states that all decisions made pursuant to the *Act* must be in the interest of the child.⁴⁷ Sections 4 and 57 elaborate on this standard, stating that if returning a child to his or her family is impossible, decisions must aim to “ensure continuity of care, stable relationships and stable living conditions corresponding to the child’s needs and age on a permanent basis.”⁴⁸ Section 71 empowers the Director of Youth Protection to facilitate adoption through several statutory powers. These powers include examining applications for adoption; receiving the general consents required for adoption; taking charge of children entrusted to the Director of Adoption Services; having children judicially declared eligible for adoption; and seeing to the placement of children.⁴⁹ No provision of the *Act* or its associated regulations restricts how the Director of Youth Protection may evaluate applicants for adoption other than in the best interest of the child. This high level of administrative discretion, when considered in the context of the predominance of the two-parent, heterosexual parenting model, can have an adverse impact on applicants such as same-sex male couples whose profiles do not match that model.⁵⁰ Understanding this potential requires a brief

34.1, r.2.2; and *Regulation respecting the review of the situation of a child*, RQ c P-34.1, r.4.

⁴⁷ *Supra* note 45.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ While one cannot know whether Quebec adoption administrators either refer to or rely on provincial legal doctrine to guide their decisions, two recent publications on adoption in Quebec have expressed deep reservations about adoption by same-sex couples. See Carmen Lavallée, *L’enfant, ses familles, et les institutions d’adoption: regards sur le droit français et le droit québécois*

overview of the institutional structures through which that discretion is exercised.

The Direction de la Protection de la Jeunesse (“DPJ”) is a public administrative agency that oversees the adoption of children residing in Quebec. Each administrative region of the province has its own Centre Jeunesse that supervises the adoption process; the centres fall under the authority of the DPJ.⁵¹ In the city of Montreal, where the research for this project was conducted, two such centres exist: the Centre jeunesse de Montréal (“CJM”), which oversees adoption of francophone children, and Batshaw Youth and Family Centres, which oversees adoption of anglophone children.⁵² Both centres oversee two kinds of adoption processes: domestic adoption and mixed-bank adoption. Domestic adoption refers to the adoption of a newborn whose parents have consented to adoption.⁵³ The mixed bank is a foster-to-permanent placement program for foster children who are not likely to return to their biological families, often because of continuing issues of family abuse or neglect.⁵⁴ Foster children from the mixed bank are placed with families who intend to adopt, not to foster. The goal of the mixed bank is to provide these children with a stable family environment until they are deemed judicially

(Montreal: Wilson & Lafleur, 2005); Alain Roy, *Le droit de l'adoption au Québec* (Montreal: Wilson & Lafleur, 2006).

⁵¹ Online: CJQ <<http://www.centrejeunessedequébec.qc.ca/Afficher.aspx>>.

⁵² Online: Batshaw Youth and Family Centres <<http://www.batshaw.qc.ca/>>.

⁵³ See *Adoption and Fostering of Children Residing in Quebec: A Guide for Gays and Lesbians*, online: Coalition des familles homoparentales <http://www.familleshomoparentales.org/docs/Adoption_Guide_Gay_Lesbian.pdf> at 16 [*Adoption and Fostering Guide*].

⁵⁴ See *ibid* at 18-20.

admissible for adoption, instead of transferring them from one foster family to another until they are deemed admissible.⁵⁵

RESEARCH METHODOLOGY

Research Method: Qualitative Interviews

The findings of this study are based on data compiled through qualitative interviews with gay male couples in the Montreal, Quebec area. A research ethics certificate was obtained from the McGill University Research Ethics Board prior to commencing these interviews.

The qualitative interview method was the chosen means of data collection because it offers several important research advantages. First, the qualitative interview enables close scrutiny of particular aspects of gay family life that might not be possible through surveys or other quantitative methods.⁵⁶ Second, it allows participants to provide detailed descriptions of how complex adoption statutes, regulations, and administrative practices affect their decision-making processes with respect to adoption.⁵⁷ Third, the qualitative interview grants access to knowledge that otherwise might be excluded from a larger picture of the social realities of adoption by same-sex couples gained through jurisprudence, for example.⁵⁸ Finally, the qualitative interview preserves the multivocality

⁵⁵ See *ibid* at 15.

⁵⁶ See Sharlene Nagy Hesse-Biber & Patricia Leavy, *The Practice of Qualitative Research* (Thousand Oaks: Sage Publications, 2006) at 16; Carol AB Warren & Tracy Xavia Karner, *Discovering Qualitative Methods*, 2d ed (Oxford: Oxford University Press, 2010) at 5.

⁵⁷ See Nagy Hesse-Biber & Leavy, *ibid* at 16.

⁵⁸ See *ibid* at 123.

and complexity of the experiences of gay male couples with respect to adoption law.⁵⁹

Research Design: Benefits and Limitations

Study participants were recruited through the Coalition des familles homoparentales, the sole non-profit organization in Montreal that provides information resources and other forms of social support specifically to gay and lesbian parents.⁶⁰ Contact with the coalition facilitated recruitment to a degree that might not have been possible through other means. However, since the sample was non-random and derived from a sole source, the research findings cannot be generalized to the larger gay and lesbian adoptive parent population in Quebec or elsewhere in Canada. Yet despite this limitation, the research findings provide for plausible and factually grounded interpretations of the interplay between adoption law, adoption regulatory practices, and how gay male couples navigate these laws and policies in order to create families.

Data Collection Process

The data collection process consisted of semi-structured interviews with members of six same-sex male couples who were considering adoption, who were in the process of adopting, or who had already adopted. The 11 participants ranged in age from 31 to 47 years old. Most participants had university degrees and professional backgrounds. One participant was a person of colour. Four participants were anglophone, five were francophone, and two spoke first

⁵⁹ See William L Miller & Benjamin F Crabtree, "Depth Interviewing" in Nagy Hesse-Biber & Patricia Leavy, eds, *Approaches to Qualitative Research* (Oxford: Oxford University Press, 2004) 185.

⁶⁰ Online: Coalition des familles homoparentales <<http://www.familleshomoparentales.org>>.

languages other than English or French. The interviews were conducted over an eight-week period in October and November of 2009.⁶¹

Most couples were interviewed either jointly or separately depending on their availability. In one case, only one member of a couple was available for an interview. The interviews lasted between thirty and sixty minutes each, depending on the extent to which participants wished to discuss their experiences. Interviews were conducted either in English or French, and they were conducted either in participants' homes or workplaces.

Although a list of several questions concerning gay male couples' choices and experiences with the adoption process was used to guide the interviews, participants were free to discuss any topic within the subject area of gay male adoption that they found personally relevant or important. The interview questions touched on several major themes. These themes included options for having children that participants saw themselves as having; how participants understood and felt about the adoption process; whether participants thought that the adoption process might have been different had they been a same-sex female or heterosexual couple; how participants envisioned and defined their families; and their experiences as families headed by same-sex male parents. All interview data were transcribed for the purpose of analysis.

NARRATIVE ONE: NARROWED CHOICES

Interviews with project participants illustrated the various ways in which several same-sex male couples residing in Quebec

⁶¹ No single gay male adoptive parents were interviewed for the purposes of this study, due in large part to a lack of single parents among participant candidates.

have navigated the legal and administrative architecture described above. Interview responses revealed a set of common themes related to having children, either through adoption or other means.⁶² Some participant responses, such as a lack of legal information on adoption, are representative of any adoptive parent's anxieties about the adoption process. Other responses, however, suggest that the nature of Quebec family law and policy creates an environment that narrows participants' possible choices for having children because of their position as same-sex male couples. In particular, rules on surrogacy, informal parenting arrangements, and international adoption exclude participants from having children through these means. In addition, recent administrative policy at the CJM potentially excluded participants even further: until spring 2010, its placement policy explicitly privileged heterosexual couples over same-sex couples and single parents. This policy limited the extent to which gay male couples, as a group, could adopt. Such laws and policies, discussed during participant interviews, illustrate a scenario in which participants cannot access many of the different means for building families.

⁶² It is important to note that the interview responses in Sections III, IV, and V reflect a wide variety of concerns, not all of which are specific to same-sex male couples. Some concerns articulated by participants could be shared by same-sex female couples, straight couples, or more generally by any person who adopts. Other concerns, however, focus specifically on issues that participants, by virtue of their position as same-sex male couples, encounter with adoption. In addition, many responses point to a legal, administrative, and social milieu that continues to privilege heterosexual family models, in spite of an ostensibly progressive provincial family law regime in Quebec that enables gay male couples to create families.

Lack of Legal Information on Adoption

Undoubtedly, like many people who adopt, participants voiced concern about a lack of legal information on adoption.⁶³ Some participants did not understand, for example, the difference between an order of placement and a final adoption order,⁶⁴ or the legal rights of biological grandparents with respect to the adopted child post-adoption.⁶⁵ In addition, they voiced concern about what they perceived as the extensive nature of legal rights granted to biological parents vis-à-vis their biological children. They also expressed anxiety over the possible extension of these rights through a new draft provincial bill on adoption and parental authority.⁶⁶

⁶³ See Confidential Interview No 1, *supra* note 34; interview 2 (27 October 2009) ["Confidential Interview No 2"]; interview 4 (5 November 2009) ["Confidential Interview No 4"]; interview 5 (12 November 2009) ["Confidential Interview No 5"].

⁶⁴ See interview 6 (15 November 2009) ["Confidential Interview No 6"].

⁶⁵ See Confidential Interview No 2, *supra* note 63.

⁶⁶ See Confidential Interview No 1, *supra* note 34; Confidential Interview No 2, *supra* note 63; interview 3 (28 October 2009) ["Confidential Interview No 3"]; Confidential Interview No 5, *supra* note 63; Confidential Interview No 6, *supra* note 64; interview 7 (16 November 2009) ["Confidential Interview No 7"]; *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, 1st Sess, 39th Leg, Quebec, 2009. The draft *Act* envisages several reforms to the provincial adoption regime, including, for example, new rules regarding the confidentiality of adoption files, creation of an open adoption process, and judicial delegation of parental authority. Interviewees expressed concern over provisions in the draft that would grant courts discretion to maintain the filial link between a child and her biological parents. Such discretion could expose same-sex adoptive parents to discrimination if a judge were to rule, on the basis of prejudicial belief, that maintaining biological filiation was more appropriate than filiation

A Narrowing of Choices: Surrogacy, Informal Parenting, and International Adoption

Participants described how having a same-sex partner channels them towards adoption through a Quebec provincial agency as the only viable formalized means for having children. The laws that regulate the creation of families, both in Canada and abroad, lead to unease with, or outright prohibition from, having children through other common alternatives to adoption in Canada. These alternatives include surrogacy, informal parenting arrangements, and international adoption.

For all participants, surrogacy was a potentially difficult, if not impossible, option due to both high financial cost and legal uncertainty under Quebec provincial law.⁶⁷ While some participants knew of other couples who had had children through out-of-province surrogacy agreements or who had organized informal arrangements in Quebec, they felt

with adoptive parents alone. See Mona Greenbaum & Gary Sutherland, “Mémoire de la Coalition des familles homoparentales: Consultation sur l’Avant-projet de loi intitulé *Loi modifiant le Code civil et d’autres dispositions législatives en matière d’adoption et d’autorité parentale*”, online: Assemblée Nationale du Québec <<http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CI/mandats/Mandat-8963/memoires-deposes.html>>.

⁶⁷ See Confidential Interview No 1, *supra* note 34; Confidential Interview No 4, *supra* note 63; Confidential Interview No 5, *supra* note 63; Confidential Interview No 7, *supra* note 66. Participants’ concerns about legal uncertainty are well justified. In one recent case involving a child brought to term through a surrogacy arrangement, the Court of Quebec refused to declare the female partner of a biological father the child’s mother: *Adoption 091*, *supra* note 41. In another recent case, however, the Court of Quebec granted the female partner’s request: *Adoption – 09184*, 2009 QCCQ 9058, *supra* note 41.

uncomfortable assuming a similar level of risk in order to have children.⁶⁸ One participant recounted that surrogacy “is a lot of money ... and you never know what’s going to happen.”⁶⁹ Legal risks and financial costs aside, several participants expressed personal unease with the idea of providing financial compensation to a surrogate mother. Two participants stated they felt that providing compensation to a surrogate was equivalent to buying one’s own biological child.⁷⁰

Several participants considered the possibility of informal co-parenting arrangements with friends or acquaintances. As with surrogacy, however, informal co-parenting breeds legal uncertainty; participants decided against parenting through an informal arrangement since the partner of the biological child’s father would have no legal rights vis-à-vis his *de facto* child.⁷¹ For one participant, informal co-parenting also breeds social uncertainty: he stated that a child born through an informal co-parenting arrangement might encounter social difficulties from having two sets of parents with “different issues and different realities.”⁷²

Finally, participants described how international adoption, which is a popular option for couples generally, presents them with a unique set of legal and personal obstacles. The prohibition of adoption by gay couples in most foreign

⁶⁸ See Confidential Interview No 1, *supra* note 34; Confidential Interview No 6, *supra* note 64.

⁶⁹ See Confidential Interview No 6, *ibid.*

⁷⁰ See Confidential Interview No 2, *supra* note 63; Confidential Interview No 3, *supra* note 66.

⁷¹ See Confidential Interview No 5, *supra* note 63; Confidential Interview No 6, *supra* note 64; Confidential Interview No 7, *supra* note 66. See also art 541 CCQ.

⁷² See Confidential Interview No 5, *ibid.*

countries necessarily precludes same-sex couples from adopting abroad.⁷³ If same-sex couples wish to adopt internationally, they must give the foreign adoption agency through which they apply the appearance that they are not gay. In order to create this appearance, applicants must live separately from each other during the adoption process, and they must designate one partner to adopt the child as a single parent. Married gay couples, however, cannot misrepresent their public conjugal status; their public status effectively bars them from applying to adopt internationally.⁷⁴

All participants stated that, while they knew of other couples who had adopted internationally, they were unwilling to represent themselves to foreign adoption agencies as anything other than same-sex male couples in order to have children. One participant said, “we didn’t want to lie. It is just a matter of ethics and of principles.”⁷⁵ Another stated that he would not know how to communicate to his children that he had lied to government authorities in order to have them.⁷⁶ Seven participants traced their hesitancy to misrepresent their same-sex partnerships to other possible adverse consequences, such as risk of revocation of professional licenses or prohibition from applying through domestic adoption processes in the future.⁷⁷ In addition, one participant conceived of adoption as a common project to be shared by both partners, not a process in which one adopts while the other “sits in the background.”⁷⁸

⁷³ See *Adoption and Fostering Guide*, *supra* note 53 at 7.

⁷⁴ See Confidential Interview No 5, *supra* note 63.

⁷⁵ See Confidential Interview No 3, *supra* note 66.

⁷⁶ See Confidential Interview No 5, *supra* note 63.

⁷⁷ See Confidential Interview No 2, *supra* note 63.

⁷⁸ *Ibid.*

In summary, participants felt that they could not access parenthood through either surrogacy or international adoption. This inaccessibility largely stems from legal rules that effectively serve to prohibit gay males from parenthood, as in the case of surrogacy, or that explicitly prohibit gay males and lesbians from parenthood, as in the case of international adoption. Inaccessibility also stems from an absence of legal protections that might otherwise encourage alternative means of becoming a father, as is the case with informal parenting arrangements. The interviews also reveal that while some gay male couples may choose to overcome these obstacles by circumventing legal rules, both legal risk and a sense of personal unease with circumvention deterred participants from taking advantage of alternative options.⁷⁹ These legal and personal concerns result in a significant narrowing of the choices for starting families available to participants.

The Choices Narrow Further: Heterosexism in the Quebec Mixed-Bank Adoption System

The legal limitations and personal concerns described above indicate that participants—whether because of legal regimes or their perceptions of these regimes—had a relatively narrow range of options to choose from: foster parenting, domestic adoption, or adoption through the mixed bank. As all participants expressed interest in becoming permanent adoptive parents, none chose to have children through temporary foster parent placements. In addition, participants chose not to apply

⁷⁹ Note, however, that risk reduction and personal unease are not the only reasons for declining to take advantage of alternative options. For example, one participant summarized his and his partner's decision to adopt in altruistic terms: "Why bring another child [into the world] when there are so many that need a home? And why go overseas [to adopt] when there are so many in our backyard?" (Confidential Interview No 6, *supra* note 64).

through the domestic adoption process, as the average waiting period for a placement is seven years.⁸⁰ Instead, all participants applied to adopt from the mixed bank in Quebec.⁸¹ Applying through the mixed bank was attractive to participants for its two main advantages: high permanent placement rates and comparatively short waiting periods.⁸²

Even within the mixed-bank program, however, the adoption possibilities for some participants were circumscribed even further. These participants reported the existence of heterosexist policies at the CJM. Participants who applied to adopt through Batshaw, meanwhile, did not report any similar policies, nor did they report encountering any form of discrimination.⁸³

Participants who applied through the CJM recounted how agency representatives stated at mixed-bank adoption information sessions that the CJM prefers to place eligible children with straight couples before same-sex couples or single parents.⁸⁴ For example, one participant said, “in the first meeting, [the CJM representative] said that [the CJM] prioritizes hetero couples, then gay couples, and then single parents, man or woman.”⁸⁵ Another participant recounted,

⁸⁰ See Confidential Interview No 2, *supra* note 63.

⁸¹ See *Adoption and Fostering Guide*, *supra* note 53 at 15.

⁸² See Confidential Interview No 1, *supra* note 34; Confidential Interview No 4, *supra* note 63.

⁸³ See e.g. Confidential Interview No 2, *supra* note 63; Confidential Interview No 6, *supra* note 64; Confidential Interview No 7, *supra* note 66.

⁸⁴ See Confidential Interview No 1, *supra* note 34; Confidential Interview No 3, *supra* note 66.

⁸⁵ See Confidential Interview No 3, *ibid.*

“they tell you very openly that straight couples come first.”⁸⁶ This policy of preference appears to have been instituted recently; several participants who applied through the CJM several years ago did not recall hearing about such a policy.⁸⁷

Participants speculated as to different possible rationales for the policy. Several suggested that the policy could have been developed as a means for ranking prospective parent applications in the context of a recent increase in the number of mixed-race applicants.⁸⁸ Alternatively, the policy could have reflected the personal beliefs of the current director or senior staff members of the CJM.⁸⁹

The CJM’s policy had a tangible effect on participants’ available adoption options. Participants reported feeling “unwelcome” at the CJM.⁹⁰ Upon hearing about the policy, one francophone couple that speaks fluent English chose to apply instead through Batshaw.⁹¹ Batshaw does not have a similar policy, and in fact actively recruits gay and lesbian couples.⁹² Another couple that adopted through the CJM reported that their adoption application file was rejected by one child’s

⁸⁶ *Ibid.*

⁸⁷ See Confidential Interview No 1, *supra* note 34; Confidential Interview No 4, *supra* note 63.

⁸⁸ See Confidential Interview No 1, *supra* note 34. During this interview, one participant noted that “I think what’s happening now is that [the CJM] just has so many couples that they have a lot of choice. So this is, unfortunately, one of the ways that they have decided that they are going to choose [among prospective parents].”

⁸⁹ See *ibid.*

⁹⁰ *Ibid.*

⁹¹ See Confidential Interview No 3, *supra* note 66.

⁹² See Confidential Interview No 1, *supra* note 34.

social worker because she insisted that the child, a boy, have a “feminine role model.”⁹³ Yet another participant mentioned that because of same-sex couple applicants’ strong interest in having children, they were likely not to question or challenge the policy for fear of negative reviews of their application files.⁹⁴

One couple that applied through the CJM believed that the policy most likely would not have an appreciable effect on their evaluation, as department staff indicated to them in private that their application profile was “ideal” for a mixed-bank adoption.⁹⁵ Nevertheless, the couple questioned the rationale of the policy. They noted that “[the CJM] would never dare to say ... ‘we don’t think that white children should not be adopted by black parents’, but they dare to say to gay couples, ‘we don’t think that you’re really the right family because we think it’s better to have a father and a mother’.”⁹⁶

Beyond its effects on participants’ own experiences with adoption, two participants suggested that the CJM policy has an effect on the kinds of mixed-bank children made available to same-sex couples. It is impossible to substantiate such claims, as placement decisions are made through a closed-door procedure to which no outside parties can obtain access. Anecdotally, however, these participants felt that privileging straight couples means that children who have “popular” profiles—usually, Caucasian and East Asian children—tend to be placed more often with straight couples. Gay couples whose profiles may otherwise be a good fit for such children could be “passed over” by the CJM. These participants felt that,

⁹³ See Confidential Interview No 4, *supra* note 63.

⁹⁴ See Confidential Interview No 1, *supra* note 34.

⁹⁵ See Confidential Interview No 3, *supra* note 66.

⁹⁶ See Confidential Interview No 3, *supra* note 66.

conversely, children whose profiles make them more difficult to place—usually, non-East Asian children of colour and disabled children—tend to be placed with gay couples more frequently quite simply because straight couples are less likely to express a preference for them.⁹⁷

The CJM maintained that the former policy, as understood by participants, was incorrect; it stated that any perceived exclusion of gay couples from the adoption process does not arise from their sexual identity. Under the policy, the CJM aimed to place its children—who have been subjected to family instability and trauma before entering the mixed bank—with families that can provide them with the environment most conducive to “social adaptation.”⁹⁸ In other words, the CJM maintained that its priority was to provide mixed bank children with a “social model” that would give them the easiest transition into life as adopted children.⁹⁹ In the judgment of the CJM, this usually means placement with a heterosexual couple. The CJM maintained that in many cases, placement with a gay male couple could result in social difficulties for the child by virtue of the fact that he has become part of an alternative family model.¹⁰⁰

⁹⁷ See Confidential Interview No 1, *supra* note 34.

⁹⁸ Interview of Michel Carignan, Director of Adoption Services, Centre jeunesse de Montréal (4 December 2009).

⁹⁹ The director noted that the CJM once chose a gay couple over a heterosexual couple on the basis of linguistic ties: a Spanish-speaking child was placed with a Latino gay couple in order to preserve his linguistic heritage: see interview with Michael Carignan, *ibid*. A participant subsequently noted, however, that this is a well-known example that the CJM cites when confronted with questions concerning heterosexist policies (interview 8 (4 December 2009) [“Confidential Interview No 8”]).

¹⁰⁰ See interview with Michel Carignan, *ibid*.

The differences between participants' and the CJM's interpretations of the policy are striking, and they raise a series of questions about the nature of the policy and how it is communicated and implemented. If the policy was not heterosexist by design, then why was this not clearly explained to participants at the information sessions so as to avoid any misunderstanding? Why did one couple receive apparently contradictory messages concerning the suitability of their profile as a same-sex male couple for mixed-blood children? Furthermore, why does Batshaw, which is governed by the same legislative framework as the CJM, not share similar concerns about the social adaptation of its children in the context of placement with a same-sex couple? Finally, why has the CJM's practice of explaining the policy at information sessions since been halted? Although answers to these questions are unclear, they point to an ill-conceived and poorly articulated policy that, whether by design or not, has had an appreciable and negative impact on participant experiences: the policy has created an environment hostile to same-sex couples and could have implications for equal access. In addition, it is important to note that irrespective of whether the policy itself was explicitly heterosexist, it reinforced systemic heterosexual bias in Quebec by reproducing the dominant heterosexual family model.¹⁰¹

¹⁰¹ One participant expressed his disagreement with the policy in the following way: "yes, our kids might have difficulties related to homophobia in schools or the general society when they arrive there ... but that doesn't come from our couple, that comes from the social context in which they are living, and I don't think they would have more troubles because of that homophobia than, say, a kid who grows up with a different sexual orientation. That has nothing to do with the parents. That's something as a society we really have to work on. But I don't think that's a reason to discriminate." Confidential Interview No 1, *supra* note 34.

In addition, the CJM's policy of heterosexual preference failed to appreciate how gay parents can be a source of strength in the face of discrimination for their adopted children. One participant expressed that, as members of a diverse social group, "we've dealt with difference for a very long time already ... we live with that difference. Maybe we're better placed than a lot of people to help [our children] understand their differences and understand how to integrate themselves within society with those differences."¹⁰² Thus, irrespective of whether the policy was discriminatory, it failed to capture one critically important positive aspect of parenting—an ability to manage issues of difference successfully and to communicate with others about those issues—that most gay parents, but not many heterosexual parents, can provide for their children.¹⁰³ Possessing and teaching this ability is especially critical for mixed-bank children, many of who may come from disadvantaged social backgrounds that are drastically different from those that they enter into through adoption.

Several participants reported that the apparent heterosexism in the adoption system exists as well among some biological parents of mixed-bank children. Although the homophobic biases of biological parents reportedly do not weigh into social work and judicial decisions in the adoption

¹⁰² *Ibid.*

¹⁰³ See *ibid.* The same participant later stated that, through his family's interactions with the outside world, "I show the kids already how to explain their lives to other people in a non-aggressive, non-confrontational way, you know, 'it's just my reality and that's it.' That's the type of thing that white heterosexual couples [who] haven't necessarily lived through a great deal of discrimination in their lives [can deal with]. Are they going to be able to deal with discrimination and to recognize it as well as we are? I'm not so sure."

process in Montreal,¹⁰⁴ they illustrate a continuing preference among some sectors of Quebec society for a heterosexual family model. One participant suspected that, in the months leading to the final order of adoption, their child's biological parents appeared reluctant to consent to a placement with a same-sex male couple. He felt that "the parents might have been able to let go more easily had the foster family been heterosexual."¹⁰⁵ Another participant had heard of a case in which the biological parents tried to stop a mixed-bank adoption by stating that they did not want their child placed with a same-sex couple.¹⁰⁶

Circumscribed Choices

Interview responses reveal that the adoption experiences of participants are defined in no small part by a legal and policy architecture that closely circumscribes the ways in which they can create families. Some components of this architecture, such as provincial statutes regulating surrogacy or the absence of laws recognizing informal parenting arrangements, exclude participants indirectly: they do not exclude gay male couples *per se*, but create a legal environment in which it becomes impossible for participants to have biological children. Other parts of this architecture, such as adoption laws in foreign jurisdictions, directly exclude participants by virtue of the fact

¹⁰⁴ See Confidential Interview No 2, *supra* note 63. Note that in the Monteregion region of Quebec, however, mixed-bank administrative practices reportedly include seeking approval of the placement family by the child's biological parents. This practice can prevent placements with qualified same-sex couples by enabling biological parents to override the professional judgment of social workers. See Interview of Gary Sutherland, Co-president, Coalition des familles homoparentales (6 May 2010).

¹⁰⁵ *Ibid.*

¹⁰⁶ See Confidential Interview No 7, *supra* note 66.

that they are in same-sex relationships. A final component of this architecture—the administrative policies and practices of the CJM—can be understood as excluding participants either indirectly or directly, depending on one’s perspective.

NARRATIVE TWO: PROPAGATING HETEROSEXISM

A second major theme arising from the interviews concerns the various legal, administrative, and social issues that arise once participants complete the adoption process. Such issues include declaration of maternal and paternal lineage at adoption hearings; gender-specific entry fields in administrative paperwork; conflict between domestic adoption orders and foreign laws; and myths about gay male parenting.¹⁰⁷ These issues highlight a few of the challenges that participants face with respect to raising their children in legal and social environments that continue to privilege heterosexual parenting models. In addition, they reveal the reproduction of the heterosexual nuclear family unit in administrative processes as well as the continuing predominance of the heterosexual nuclear family as a basic unit of social organization. In other words, from the perspectives of participants, Quebec society continues to privilege heterosexual family ordering, even years after the official recognition of adoption by same-sex couples, civil unions, and same-sex marriage.¹⁰⁸

¹⁰⁷ Note that some of these issues are shared by same-sex female couples as well—for example, designation of one “mother” and one “father” at adoption hearings, gender-specific administrative paperwork that parents must fill on behalf of their children, or conflicts between domestic adoption orders and family law in foreign jurisdictions.

¹⁰⁸ See Bill 84, *supra* note 3; *Civil Marriage Act*, *supra* note 4.

Preserving Maternal and Paternal Lines in the CCQ

Several participants reported that during judicial hearings authorizing their final adoption orders, they were requested by the presiding judge to designate one parent as “mother” and the other parent as “father”.¹⁰⁹ The purported purpose of this declaration is to assign maternal and paternal rights and obligations of succession vis-à-vis the child to each adoptive parent. In the case of a heterosexual biological family, these rights and obligations are automatically assigned to each parent upon the establishment of filiation.¹¹⁰

The basis for requiring this designation for any set of parents, heterosexual or same-sex, is unclear. The CCQ articles concerning maternal and paternal lines that are relevant to adoptive parents divide rights and obligations vis-à-vis the child evenly.¹¹¹ In the absence of any distinction in the quality of maternal and paternal rights and responsibilities in the CCQ, these rules serve no apparent function other than to recall the heterosexual family model in Quebec law.

¹⁰⁹ See Confidential Interview No 2, *supra* note 63; Confidential Interview No 5, *supra* note 63.

¹¹⁰ See art 578.1 CCQ.

¹¹¹ The CCQ appears to treat the issue of maternal and paternal rights and obligations inconsistently. Arts 676 and 679 CCQ refer specifically to the “maternal lines” and “paternal lines” that participants encountered at their children’s adoption hearings. Rights and obligations concerning parental authority listed in arts 598ff CCQ, however, use gender-neutral language. Art 539.1 CCQ, meanwhile, states that paternal rights, to the extent that they differ from maternal rights, can be transferred to an adoptive mother. It states “[i]f 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.” The wording of this article appears to contemplate the existence of lesbian, but not gay male, parents.

From the point of view of participants, requiring such a determination prior to the adoption order is illogical. In addition, it could be viewed as potentially offensive. One participant stated that if the judicial system entrusts a same-sex couple to be responsible for a child, it should not “come up with silly questions that do not apply.”¹¹²

Gender-Specific Administrative Paperwork

A second issue concerns participants’ regular encounters with administrative paperwork beyond the adoption context—that is, once the adoption is finalized—that reproduces the heterosexual family model through gender-specific entry fields. Several participants noted that birth certificates, health forms at hospitals, school enrollment forms, and other kinds of paperwork that they must process for their children still have “mother/father” entry fields instead of gender-neutral “parent/parent” fields.¹¹³ The gendered nature of these forms reflects lingering assumptions about parenthood and how families are constructed. Furthermore, these assumptions are reflected in the attitudes of health-care workers with whom participants have interacted. One participant remarked that even when health workers see both him and his partner with their children at the hospital, they ask “where’s the mother?”¹¹⁴

¹¹² See Confidential Interview No 2, *supra* note 63.

¹¹³ See Confidential Interview No 5, *supra* note 63; Confidential Interview No 6, *supra* note 64. One participant described the following encounter at a hospital: “Just today, we went to the clinic, and [a health care worker] asked me, ‘who’s the father? And I said, ‘well, we’re both fathers.’ He said, ‘well, I have only one field for father.’ I said, ‘and you have one for mother?’ He responded yes. So I said, ‘put me as a father and [my partner] as a mother.’ [He replied] ‘I can’t put a male name into the mother [field]. And I said, ‘of course you can’.” see Confidential Interview No 5, *ibid.*

¹¹⁴ *Ibid.*

The same participant suggested that heterosexualized assumptions of health workers may derive, in part, from the fact that mothers, not fathers, typically have more say over the medical care of their children while in the hospital.¹¹⁵ It is entirely plausible that the responses of health-care workers described by participants reflect the predominant family model that assigns caregiving functions to the mother.¹¹⁶

Conflict Between Domestic Adoption Orders and Foreign Laws

Several participants highlighted how conflict of laws between domestic adoption orders and foreign filiation laws can create major legal obstacles for their children. One participant discussed how he cannot pass his foreign citizenship on to his child since his home country will not recognize the Canadian same-sex adoption order.¹¹⁷ Non-recognition of same-sex adoption in foreign jurisdictions generates additional difficulties for children of same-sex couples if they decide to live, work, or study abroad, as foreign consular authorities may deem their birth certificates invalid.¹¹⁸ Participants also described other administrative hassles in foreign jurisdictions arising from non-recognition of same-sex families, such as being required to go through customs separately at airports.¹¹⁹

Challenging Myths About Gay Male Parenting Post-Adoption

¹¹⁵ See *ibid.*

¹¹⁶ See e.g. Collier & Sheldon, *supra* note 22; Richard Collier, *Masculinity, Law and the Family* (London: Routledge, 1995) [Collier, *Masculinity*].

¹¹⁷ See Confidential Interview No 2, *supra* note 63.

¹¹⁸ See Confidential Interview No 1, *supra* note 34.

¹¹⁹ See Confidential Interview No 6, *supra* note 66.

As this discussion has suggested, the legal and administrative obstacles that participants encountered post-adoption mirror particularized, lingering societal attitudes about what a family should look like and which members should oversee which family functions.¹²⁰ Participants reported that in post-adoption social interactions, they regularly face these attitudes precisely because they are same-sex *male* couples. Deep-seated assumptions concerning the role of mother as primary caregiver continually call into question and undercut participants' roles in raising their adopted children.

Participants remarked that they feel a need to “prove” their parenting abilities to their families and communities to a much greater degree than a heterosexual couple or even a same-sex female couple might. Two participants noted that some women they interact with believe that men are “useless with kids, especially infants.”¹²¹ They noted that women have attempted to correct them about minor details of child-rearing.¹²² One of them said, “[we have received some] comments from women, they would tell us, ‘the bottle is too hot, the bottle is too cold.’ [And I would think] you know, this is my baby, not yours.”¹²³ One participant felt that even social service workers, who typically interface with many different types of family units, tend to believe that men are incapable of

¹²⁰ Arguably, such attitudes are also reflected in the current legal literature and jurisprudence on same-sex adoption, which, as argued above, presumes at times that the mother is the primary caregiver.

¹²¹ See Confidential Interview No 5, *supra* note 63. See also Confidential Interview No 7, *supra* note 66.

¹²² See *ibid.*

¹²³ See Confidential Interview No 5, *ibid.*

becoming nurturing primary caregivers.¹²⁴ The same participant also felt that a popular belief that same-sex male couples just do not raise children underscores cultural attitudes about maternal caregiving.¹²⁵ He explained that this belief has led him and his partner to carry adoption papers in the family car in the event that the police question them about their relationship to their children during traffic stops.¹²⁶ Two other participants, anticipating possible questions or speculation in their community about their future family, informed neighbors that they would be adopting a child soon.¹²⁷

Lingering Heterosexism

The pervasiveness of the social attitudes that participants described reflects an idealized model of the traditional nuclear family. In this idealized family, the biological mother and father assume exclusive, gender-specific roles that the other

¹²⁴ “[There is a belief that] nurturing, in the traditional ‘mother’ sense, doesn’t come naturally to a man. That’s a basic belief that we had to fight off with social services and with people in general” (*ibid*).

¹²⁵ *Ibid*. Worse yet, gay men frequently continue to be viewed as *incapable* of having children because of harmful stereotypes concerning gay male life: high levels of relationship instability, drug addiction, and higher suicide rates. See e.g. *In the Matter of the Adoption of John Doe and James Doe*, in which the State of Florida attempted to block an adoption by a same-sex male couple in 2008 on the basis of these discriminatory views: *supra* note 20. In addition, gay men may be seen as unfit to parent because of their status as members of a historically despised sexuality and a perceived agenda to influence their children to “become gay” or to engage in perverse sexual practices. See Hicks, *supra* note 37 at 102; Lobaugh, *supra* note 38 at 189.

¹²⁶ See Confidential Interview No 5, *ibid*.

¹²⁷ See Confidential Interview No 3, *supra* note 66.

parent cannot fulfill.¹²⁸ The mother provides a nurturing and caring role. She takes care of the child's daily needs and tends to him when he is sick. She provides emotional support and guidance, comforting him or her when he or she is hurt or scared. In the maternal caregiver model, no other person, male or perhaps even female, can fulfill these functions to the extent that the child's own biological mother can.¹²⁹ The biological father, meanwhile, embodies a forceful vision of masculinity that encompasses authority, rationality, discipline, and responsibility.¹³⁰ He is a calculating and logical individual who

¹²⁸ In Quebec, several family law scholars have lamented the decline of the idealized biological family model in recent years, particularly through criticism of 2002 reforms to provincial filiation laws that enabled same-sex female couples to claim parental status over their child from birth, not from adoption. See e.g. Joyal, *supra* note 15; Suzanne Philips-Nootens & Carmen Lavallée, "De l'état inalienable à l'instrumentalisation: la filiation en question" in Lafond and Lefebvre (eds), *L'union civile: nouveaux modèles de conjugalité et de parentalité au 21e siècle* (Cowansville, QC: Yvon Blais, 2003); Marie Pratte, "La filiation réinventée: l'enfant menace?" (2003) 33 RGD 541. Historically, however, biology alone has never been a key factor in determining filiation. For example, until 1980, illegitimate biological children were not granted the same scope of rights vis-à-vis their parents as legitimate biological children. Their prior exclusion from the legal definition of family suggests that the institution of filiation has been historically predicated on a selective "myth" of biology that privileges some kinds of biological children over others, rather than on actual biology itself. See Robert Leckey, "Quebec's Reforms", *supra* note 15.

¹²⁹ Conservative commentators frequently assert that the best environment for children is one in which they are raised by the couples who conceive them. See e.g. Dean A Byrd & Shirley E Cox, "Strict Scrutiny of Prospective Adoptive Parents: What Children Really Need" in Scott A Loveless & Thomas B Holman, eds, *The Family in the New Millennium: World Voices Supporting the "Natural" Clan*, vol 3 (Westport, CT: Praeger, 2007) 204 at 215.

¹³⁰ See Collier & Sheldon, *supra* note 116 at 235.

leaves the non-rational, emotional aspects of childcare to his wife.¹³¹ In addition, his primary commitment to the family as breadwinner excludes any meaningful participation in childcare and domestic labor.¹³²

Perhaps even more importantly, the father of the idealized family is heterosexual. Legal and social discourses on the family have long assumed that the father possesses a heterosexual identity.¹³³ The heterosexual father is a critical component of the biological family, as he assists in its establishment through procreative sexual intercourse. From this perspective, the heterosexual father is a necessary, non-negotiable condition for realization of the traditional heterosexual, biological family model.¹³⁴

The way in which participants have chosen to structure their own families profoundly disturbs this heterosexual, biological model. Participants challenge the privileged heterosexual mode of family organization by rearranging traditionally gendered familial responsibilities in the context of a homosexual relationship. As participants have indicated, however, their families' interactions in the public sphere serve as a constant reminder of how private family ordering continues to be represented in heterosexual, gendered ways. Participants are continually confronted with gender-specific aspects of everyday life in a family with children—when filling

¹³¹ See Collier, *Masculinity*, *supra* note 116 at 213-14.

¹³² See Richard Collier, "Engaging Fathers? Responsibility, Law and the 'Problem of Fatherhood'" in Jo Bridgeman, Heather Keating & Craig Lind, eds, *Responsibility, Law and the Family* (Aldershot, UK: Ashgate, 2008) 169 at 173.

¹³³ See Collier & Sheldon, *supra* note 116 at 112.

¹³⁴ See *ibid* at 234.

out gender-specific health forms or trying to decide what to do for Mother's Day, for example.

While no participants said that they faced hostility or intolerance while explaining their situations, nevertheless they are exposed continually to a system of subtle, institutionalized prejudice that favours heterosexual families. The pervasiveness of the heterosexual model means that participants must constantly explain their family situation to extended family members, friends, neighbors, administrative officials, store clerks, travel agents, teachers, or potentially any person with whom they come in contact. The pervasiveness of the model also means that they do not recognize their families in depictions of the family in popular media. Portrayals of families in film, television, children's books, or magazines rarely include alternative family structures.¹³⁵

The predominance of the heterosexual family model can have more insidious implications for participants' children: they face more flagrant, individualized discrimination by their peers, particularly classmates. Having two fathers, instead of a father and a mother, can open a child up to teasing or other expressions of intolerance rooted in a homophobic-heterosexist discourse. Participants noted that homophobia and general insensitivity to family diversity at school persists as an area of concern.¹³⁶

NARRATIVE THREE: DEFINING "FAMILY" BY CAREGIVING

¹³⁵ Although such portrayals remain rare, in 2002, the Supreme Court of Canada ruled that local school boards cannot prohibit classroom use of books portraying families headed by same-sex parents: *Chamberlain v Surrey School District No 36*, [2002] 4 SCR 710.

¹³⁶ See Confidential Interview No 1, *supra* note 34; Confidential Interview No 8, *supra* note 64.

The following section discusses in greater detail how participants conceive of their own families in the face of the heterosexual, biological family model, and how they envision their own parenting responsibilities. Overall, the interview responses demonstrate that participants share a common understanding about what makes their families “families”: an ability to care for their children, rather than biological links to them. This way of re-envisioning what a family is can be understood as a direct response to the idealized heterosexual family model.

Caregiving, Not Biology

Several participants agreed that the most important criterion for determining what constitutes a family, in both social and legal terms, should be the way that parents treat and care for their children.¹³⁷ One participant mentioned that parenthood comprises, above all, caring for and providing guidance to one’s children until they reach adulthood.¹³⁸ Another participant mentioned that the ability to nurture and to love a child is what creates a familial bond. He said that “I don’t see him as [someone else’s] biological child, he’s my son, end of story ... I go to the daycare, and when [my child] sees me, he comes running to me ... you know that the bond is there, and that’s what counts.”¹³⁹

¹³⁷ See Confidential Interview No 1, *supra* note 34; Confidential Interview No 8, *supra* note 64. Another study has found that lesbian mothers, including biological mothers, also define parenting through caregiving, not biology. See Kelly, *supra* note 12.

¹³⁸ See Confidential Interview No 1, *ibid.*

¹³⁹ See Confidential Interview No 6, *supra* note 64. In addition, the participant related how he has formed a bond of identity with his son: “When I look at his picture, when I look at him, when I see us three together, I don’t think of him being any different than us. He’s as stubborn as us, he laughs like us.” The participant’s partner felt that

Participants also agreed that biological links are not determinative of the membership of one's family. Two participants mentioned that they felt no need to see their own physical image in their children in order to consider them their own.¹⁴⁰ Another participant went even further, stating that it would only seem "selfish" to have a biological child when there are many children in need of homes.¹⁴¹ In addition, two participants stated that ultimately, biological links are an arbitrary means of defining family; it is possible for biological parents and children never to become emotionally close to one another, just as it is possible for adoptive parents and children to become emotionally close to one another.¹⁴² While participants' opinions with respect to biology may not reflect those of all same-sex male couples with biological children, particularly those who have children through surrogacy, they nevertheless speak to an alternative means of envisioning the family.

Yet perhaps more important than the act of caregiving itself is the manner in which participants conceive of their caregiving roles that truly sets their families in opposition to the idealized heterosexual family model. Participants described a dynamic and continually changing allocation of parental responsibilities that is foreign to the idealized family. Two participants remarked that their parenting responsibilities are not divided along static, clearly delineated caregiving and disciplinary functions, but according to who is available to take

"[my son] is part of me now, even though he is not biologically linked to me:" see *ibid.*

¹⁴⁰ See Confidential Interview No 1, *supra* note 34.

¹⁴¹ See Confidential Interview No 5, *supra* note 63.

¹⁴² See Confidential Interview No 6, *supra* note 64.

care of the children on any given day.¹⁴³ One participant said he believes that when a child has two parents, regardless of their sex, that child has a “full family solution.”¹⁴⁴ In addition, the same participant noted that as he and his partner’s caregiving responsibilities towards their children shift from week to week, so shifts the emotional attachment of their children to each of them.¹⁴⁵

Caregiving as Counterpoint

Participants’ views concerning what defines their families serve as a counterpoint to existing laws, administrative policies, and social practices that continue to support the biologically determined family. Law itself privileges particular biological relationships. It does so through, for example, rules on filiation or the primacy of biological parents’ rights in the context of foster parenting arrangements.¹⁴⁶ Yet the family identities that participants have created are, nevertheless, a product of a legal and social environment that both prioritizes blood relationships as well as those who can create them. As same-sex male couples, participants have decided against having biological children because of the legal uncertainty that doing so would generate for the biological father’s partner. As a result, they have rewritten the meaning of family for themselves by building their own family identities through caregiving for their children.

The emphasis on caregiving as the definitive criterion for identifying the participants’ families is striking given the

¹⁴³ See Confidential Interview No 5, *supra* note 63; Confidential Interview No 7, *supra* note 66.

¹⁴⁴ See Confidential Interview No 5, *ibid.*

¹⁴⁵ See *ibid.*

¹⁴⁶ See *Adoption and Foster Guide*, *supra* note 53 at 12.

negative or puzzled public reactions to male-centered caregiving that the participants reported. One could argue that participants define their families through caregiving precisely because they do not have biological ties to their children. Such an argument is reductionist, however, narrowing competing visions of the family to a polarizing choice between nature and nurture. Alternatively, one could consider participants' responses as part of an evolving definition of family that, while shifting away from a biologically oriented vision of the family, consciously claims the ability to nurture from the idealized biological mother.

Finally and ironically, although participants envision their own families in ways that oppose idealized cultural norms in some respects, they also reproduce those norms in others. For example, the aforementioned belief in a two-parent household as a "full family solution" reproduces the idealized family structure against which participants define themselves. By establishing a familial hierarchy where two-parent households are deemed to be "better" for children, participants relegate single parents to the margins of social acceptability; in other words, they assume certain aspects of the idealized family model. Thus, although participants manage successfully to resist particularized legal and social visions of the family, they also *become* normalized parts of that family by virtue of their status as *de facto* spouses, civilly united partners, or married couples.¹⁴⁷

¹⁴⁷ For a detailed discussion of how sexual minorities neutralize their sexual difference by assimilating and normalizing themselves into dominant sexual paradigms, see Brenda Cossman, "Sexing Citizenship, Privatizing Sex" (2002) 6 *Citizenship Studies* 483. Note, however, that as a practical matter, one cannot deny that a two-parent household often offers children greater access to economic resources and extended social networks than a one-parent household might.

This tendency towards normalization does not only normalize gay couples. It can also affect negatively single individuals who wish to adopt. Gay couples who rely on their conjugal status to assimilate themselves with idealized family norms in order to adopt potentially disadvantage those who are not in committed relationships.¹⁴⁸ The adoption choices of single individuals are limited to those eligible children who remain after other couples adopt, if such individuals can overcome inherent biases in the two-parent family model.

CONCLUSION: AN EMERGENT SOCIAL REALITY

Many men who share parenting responsibilities are not heterosexual *de facto* fathers. Rather, they form the emergent social reality of another kind of male parenting: parenting by same-sex male couples. This paper is a preliminary effort to understand interactions between this social reality and the various interlinking legal, policy, and social assumptions that shape how families are created and depicted. It brings as-yet unheard voices into legal discussions of adoption and family law and it enables narratives of same-sex male parenting, as they relate to a particularized legal and social vision of the family, to be studied. While some features of the accounts are Quebec-specific, many of the insights apply more widely.

¹⁴⁸ The disadvantage of those outside conjugal relationships is not unique to the adoption context. The Law Commission of Canada has found that “while the law currently recognizes and supports personal relationships beyond marriage, it continues to be centered mainly on conjugal relationships.” This focus on status rather than on function not only indicates that “people’s choices are not being respected,” but results in an array of under-inclusive legislation and policy (*Beyond Conjugal Relationships: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Public Works and Government Services, 2001) at xxiii-xxv.

Note that this is but a preliminary qualitative study into the interactions between law, policy, and same-sex male parenting. Research in this area could be expanded in a number of ways. Further research could include, for example, a qualitative study of single gay male adoptive parents, who suffer the dual social stigmas of being both gay and single; a comparative study between the experiences of gay male couples who have adopted and female couples who have domestically adopted instead of adopting as second parents; or a comparative study focusing on Canadian jurisdictions other than Quebec.

By virtue of developments noted above, Quebec is often viewed as a progressive jurisdiction with respect to accommodating alternative family structures through legal reform.¹⁴⁹ Yet the participant narratives in this paper reveal that even a relatively liberal adoption and family law regime can nevertheless dictate and condition how members of a particular social group build their families. Some of the challenges that the participants face could easily be shared by all people who seek to adopt; some are shared by all same-sex couples; and some are particular to the participants as same-sex male couples. Participant narratives indicate that a combination of surrogacy laws, filiation laws, adoption laws of other jurisdictions, and adoption administrative practices continue to restrict the ways in which they create families. Post-adoption, participants must navigate a legal and social environment that both affirms an idealized heterosexual family model and continually questions their capacity to act as caregivers. Faced with popular beliefs, expressed in both law and social attitudes, that do not depict their own family realities, participants have

¹⁴⁹ Note, however, that Quebec courts have excluded the application of matrimonial and civil union rules to *de facto* unions. See *Droit de la famille—091768*, 2009 QCCS 3210, [2009] RJQ 2070, inscription in appeal filed 17 August 2009.

defined their families in alternative ways that serve as a counterpoint to predominant paradigms. Strikingly, they also reproduce certain aspects of the paradigms that they oppose.

Of course, legal regimes and administrative practices are but two of a multitude of factors that influence gay male couples' adoption decisions and the ways that they envision their own families. Other influences, such as the openness of gay men's families to alternative family forms, the level of acceptance of gay families within gay men's communities, portrayals of alternative families in the media, and more general societal attitudes, all matter in the decisions of gay men who adopt. Thus, while law and policy can play a crucial role shaping and defining the families of same-sex male couples, so, too, can other extralegal factors.

The conclusions offered here enrich and clarify the understandings of how some same-sex male couples manage the adoption process in Quebec and the social realities of living as a same-sex family. More generally, these conclusions encourage further reflection on the possibilities of diverse family membership, on how law and social practices can expand or constrict those possibilities, and on how alternative family structures simultaneously challenge and are assimilated by law and social practices.