

Ontario
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

HEDY HALPERN and COLLEEN ROGERS
MICHAEL LESHNER and MICHAEL STARK
MICHELLE BRADSHAW and REBEKAH ROONEY
PETER MAGEE and DAVID BRIGGS
DAWN ONISHENKO and JULIE ERBLAND
CAROLYN ROWE and CAROLYN MOFFATT
BARBARA McDOWALL and GAIL DONNELLY
ALISON KEMPER and JOYCE BARNETT

Applicants

- and -

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO
NOVINA WONG, THE CLERK OF THE CITY OF TORONTO

Respondents

AFFIDAVIT OF KATHERINE ARNUP
(Sworn November 16, 2000)

I, **Katherine Arnup**, of the City of Ottawa, in the Province of Ontario, **MAKE OATH AND SAY:**

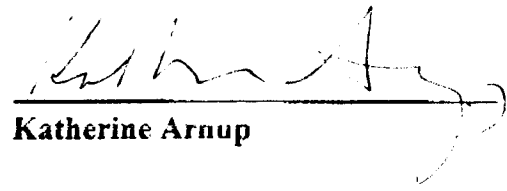
1. I am Associate Professor of Canadian Studies at Carleton University, Ottawa. I completed a doctorate in History at the University of Toronto, and my research interests include the

history, ideology and experience of motherhood, and changing definitions and experiences of the family. I have published extensively on lesbian motherhood in Canada. Attached as Exhibit "A" to this affidavit is my *curriculum vitae*.

2. In my opinion, as outlined in my report attached as Exhibit "B", there have been dramatic changes to "the family" over the past two centuries in Canada. These ongoing changes have regularly been accompanied by expressions of fear and disapproval, with cries that the family is "in crisis". From a contemporary perspective, these concerns probably seem foolish or irrational, but their political impact is clear: the language of "crisis" was deployed to exclude families perceived to "different." Similarly, some would attempt to deny gays and lesbians the freedom to choose marriage on the basis that it is a "threat" to the meaning of marriage, to family and to civilization itself. The lesson of history is that, despite constant changes, families -- in all their varieties -- persist. Indeed, families arguably benefit from the recognition of equality and diversity.
3. My report also suggests that, as women's equality has advanced, the history of the law related to marriage has been marked by a movement from a patriarchal approach to a more egalitarian model. The increasing recognition of equality for gays and lesbians has also resulted in the acknowledgment of same sex families for the purposes of many familial benefits and obligations. Equality in marriage for gays and lesbians is a logical step in this process.
4. While lesbian and gay male families have been invisible over much of Canadian history, legal protections have recently increased the visibility of lesbian and gay relationships. My report also address addresses the question of the size of the gay and lesbian population.

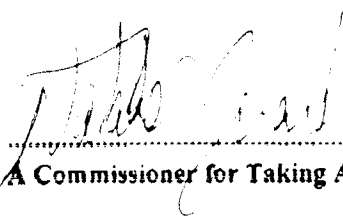
Despite the growing visibility, it is still difficult, if not impossible, to determine exactly how many same sex couples there are in Canada, or how many are rearing children together. In my opinion, it is clear that many lesbians and gay men are parents. There has been a lesbian "baby boom" in the past two decades. The reality is that lesbian and gay families are part of the diverse families in Canada today.

SWORN before me at the City of)
Ottawa, in the Province of)
Ontario, this 16th day of)
November, 2000)
Stéphane Girard)
A Commissioner for taking affidavits)



Katherine Arnup

This is Exhibit "B"
referred to in the Affidavit of
KATHERINE ARNUP
SWORN THIS 16th DAY
OF NOVEMBER, 2000



.....
A Commissioner for Taking Affidavits

Expert Report for Freedom to Marry Case
Dr. Katherine Arnup
Associate Professor
School of Canadian Studies
Carleton University
Ottawa, Canada

The Changing Canadian Family

Many people assume that the family as an institution has no history, that it is a transhistorical, unchanging phenomenon. Such a view holds that there is only one "real" family form, the "traditional family" - comprised of a husband, his wife, and their children - the nuclear family - and that all other family forms, be they single parents, extended kin networks, or lesbian and gay couples, represent a threat to the integrity and continued strength of the heterosexual nuclear family.

In fact, there have been enormous changes in "the family" over the past two centuries, changes so profound that many scholars place the term "the family" in quotation marks to denote the fact that there is not now and never has been one family form. From the large, multi-generational, rural based family of the "pioneer" days to the smaller, "nuclear" and single-parent families of today, the family has changed in size, membership, and function throughout history.

Despite our tendency to think of the family as "a haven in a heartless world" (to use historian Christopher Lasch's famous phrase), a retreat somehow immune to external forces, it is in fact no more or less sheltered from these forces than the workplace or religious or educational institutions, all of which have of course changed and continue to change. Furthermore, at countless periods throughout history, observers from a range of constituencies have expressed consternation about these changes, arguing that they represented a "crisis" which threatened the very foundation of the family.

What has caused these changes in the family? Why have observers feared for the future of this institution? How has the law adapted to the changing demographics and roles of the family? In this section of my report, I will outline the major forces that have caused changes in the Canadian family in the past two centuries. In addition, I will consider the ways in which family law has evolved to adapt to the changing realities of families.

1) Economic and technological factors

Perhaps the most dramatic economic and technological change was the industrial revolution itself, with its attendant shift from domestic to factory production. Prior to industrialization, Canada was primarily a rural, farm-based economy. Most goods and services - ranging from food to clothing and other household necessities - were produced within the home and the surrounding local community. All family members, from the youngest child to elderly grandparents, participated in the family economy, and no one individual was designated as the family "breadwinner." Full participants in the family economy, children were educated within the home. Arriving relatively late in Canada, by the mid to late 19th century, industrialization had replaced domestic production with factory production and, eventually, the family economy with wage labour.

~~This shift from domestic to factory production~~ had a profound effect on the family and the roles of every member within it. Foremost, the industrial transformation signalled a shift in the location of work from the home to the factory or office. Men followed their work into the factories while women's work increasingly centred around the home. Children, no longer required for domestic production, were increasingly educated in schools, which provided the skills and discipline necessary for the industrial age. Within working class families, initially all family members - men, women, and children - followed their work into factories. But the passage of child labour laws and other factory acts during the latter part of the 19th Century eventually brought an end to "family" labour, creating the model of male breadwinner which has predominated during the 20th century.

It is important to recognize that for working class families the male breadwinner model was much more of an ideal than a reality. Working class wives found myriad ways to contribute to the family economy - piece work, taking in boarders, doing laundry - while their children might help by carrying the finished goods back to the owner, or by selling newspapers or performing domestic labour for other families.

Over the course of the late 19th and early 20th centuries, industrialization also resulted in a migration from rural to urban areas, where factories were located, and a gradual shift from a predominantly rural to a largely urban nation. (Ontario, for example, remained predominantly rural until the 1921 Census). Technological changes in transportation also resulted in greater mobility. Coupled with the shift to an urban population, mobility created greater distances between family members and the gradual decline in the extended family, as people moved from their town or village of origin in search of employment.

Widescale immigration, beginning in late 19th century, and in particular under Wilfrid Laurier (1896 to 1911), also had a dramatic impact on the make-up and family structure of the predominantly Anglo-Celtic population of Canada. Many of the new immigrants established large, extended families in their new land, enjoying familial habits and structures that the predominantly Anglo-Celtic inhabitants of Canada often found peculiar and threatening.¹

2) Demographic changes

Demographic changes have included the rising age at first marriage, the dramatic decline in the birth rate and in infant and maternal mortality, and the rise in life expectancy. These changes have had an enormous impact on the composition of the family, from the age and number of family members to the relationship between those who share the same dwelling. In 1851, for example, "a woman who had come to the end of her childbearing years would have borne on average 7.02 children; by 1921 the average had dropped to 3.54."² That number continued to decline throughout the 20th Century.

Many of these demographic changes were themselves directly linked to the industrial transformation. The demise of the family farm resulted in a decline in family size, as large numbers of children were no longer needed to help with the work on the farm. In an urban setting, especially after the passage of child labour laws in the late 19th century, children become a financial liability, rather than an asset. Compulsory school attendance legislation required parents to feed, clothe, and care for their children for an extended period of time, without benefit of the additional income children had often provided.

Over the course of the 20th Century, medical and scientific discoveries (e.g. discovery of antibiotics, vaccines to prevent epidemic diseases), improved nutrition, and sanitation resulted in dramatic improvements in the overall health and lifespan of the population. Thus, while families today have on average one or two children, they often include grandparents or even great grandparents, as life expectancies rise.

3) Legal changes

Over the course of the past two centuries, family law has changed in response both to changes in the family and to political and social movements for change. These changes have been particularly dramatic in the areas of divorce and child custody. For most heterosexual couples prior to the 20th century, marriage was a tie for life. While, on rare occasions starting in the 19th century, Parliament would grant a divorce petition, such

instances were few and far between.³ As in most areas of the law at that time, a legal double standard clearly applied. So, while a husband could sue his wife for divorce on the grounds of adultery alone, a wife had to prove that her husband had also committed incest, bigamy, cruelty, or desertion of two years or more.⁴ This legal "double standard" remained in force until 1923 in Britain and 1925 in Canada.

Not surprisingly, then, divorce reform was a major campaign of feminists throughout the 19th and much of the 20th century. This activity culminated in the Canadian Divorce Act of 1968, which extended grounds for divorce to include both matrimonial offenses (like adultery) and marital breakdown. The last major revision of the Divorce Act was made in 1985, a change that heralded the advent of no fault divorce. Couples could obtain a divorce after a separation of one year, and without recourse to claims of matrimonial offenses. Since 1985, the number of divorces in Canada has increased sharply to the point where today, approximately one in every three marriages ends in divorce.⁵

Contrary to the popular perception of the universality of the "maternal presumption" (i.e. all things being equal, mothers should be granted custody of their children, because they are the ones best suited to care for their children) in fact, until the late 19th century, fathers had virtually unlimited rights to custody of their legitimate minor children. Under British Common Law, the family operated with strict hierarchical and patriarchal standards. Just as wives had no legal rights to their property or person,⁶ so children were essentially the property of their fathers, to be protected or dispensed with as they saw fit (They could, for example, be sold or traded into domestic service or apprenticeship). Not surprisingly, then, 19th century feminists were vigorous in their campaigns to win custodial (and access) rights to their children in the event of the dissolution of their marriage. Indeed, along with property rights and suffrage, family law reform was a major feminist campaign in the late 19th and early 20th centuries.

The shift away from fathers' automatic rights to custody began to take place slowly during the 19th century, as a result of both feminist lobbying efforts and the enormous social and economic changes wrought by industrialization. As notions of the maternal instinct and the gendered division of labour began to gain wider currency during the 19th century, and as concern grew over issues of the declining birth rate among white, middle class women,⁷ and the health and well-being of the nation's children, feminist arguments about mothers' entitlement to child custody slowly began to win the day.

Changes to custody laws took place incrementally throughout the 19th and early 20th centuries. The rationale for this shift is what is known as the tender years doctrine. The assumption was

that for very young children, the nurturing care of a mother provided the optimum environment. Beginning with children under the age of 7,⁸ and gradually extending up to 12, and finally the age of majority, revised legislation extended women's rights to custody of their children, to equal those of fathers.⁹ By the end of the first quarter of this century, the principle of formal legal equality between parents had been entrenched in family law in Britain and North America,¹⁰ a principle that still applies in custody and access disputes today.

While both parents now have an equal right to the custody of their children, in practice, approximately 85% of children of divorced parents reside with their mothers. That figure includes the children in both contested and uncontested custody dispositions. The vast majority of cases are in fact uncontested - the father does not ask for custody of the children and the mother retains it, either by desire or default (or, most likely, some combination of the two). In contested cases, the proportion of determinations for fathers and mothers is much closer to 50%.¹¹

Other legal changes had similar if less dramatic effects on families. The legalization of birth control and abortion (1968) legitimized practices that had in fact been widespread, if covert, since at least the Second World War. Birth control and abortion enabled women to control their fertility, as well as to engage in heterosexual sexual intercourse outside of marriage without fear of an "illegitimate" pregnancy. Finally the Charter of Rights and Freedoms has led to an increasing recognition and legitimization of the rights and responsibilities of unmarried opposite sex co-habiting couples, and, in the past decade, lesbian and gay relationships.

In large measure, these legal changes mirror changes in society at large, as increasing numbers of citizens choose to live in familial units without having recourse to marriage. As well, they reflect the broader equality objectives now enshrined in the Canadian Constitution, and in family law statutes and common law. Marriage itself, once viewed as a vehicle for the transfer ~~and~~ protection of property rights, is increasingly viewed as an equal partnership of mutual interdependency. Gay and lesbian relationships are now recognized as spousal relationships entitled to full equality.

4) Social changes

Perhaps the most dramatic social and political change of the 20th Century has been the changes in the status of women. This has been reflected in the legal changes discussed above (family law reform; married women's property acts; franchise; personhood) but it also involves social, economic, demographic and political

changes. The post World War Two period has seen a steady increase in the labour force participation of women, and, in particular, of married women and women with young children. To accommodate this participation, the state has responded to a limited degree with the establishment of child care facilities (both public and private).

The struggle for women's equality - in the home and in the workplace - has led to numerous legislative and social policy initiatives, including pay and employment equity, sexual harassment, and the limited provision of child care. Such changes have, of course, had an enormous impact on the "traditional" male dominated structure of the heterosexual nuclear family. At the forefront of these changes have been social movements - the women's movement, the lesbian and gay movements, and the labour movement, pushing for legal, political, and social changes.

5) Political and economic events

As I have already noted, economic events, ranging from industrialization to the "technological revolution" have affected both the composition of and roles within families. The 20th Century witnessed a number of cataclysmic political events, including a world-wide economic depression and two world wars. Canada, like most Western nations, was dramatically affected by these events. While the wide-scale mobilization of Canadian men for military service during the First World War heralded the emergence of an independent Canadian nation, it also had a dramatic impact on Canadian families. By war's end, over 60,000 Canadians had been killed, leaving countless families without a male breadwinner, and untold women without a marriage partner. Governments responded to the growing number of fatherless families by establishing mothers' pensions to support the widows and children of Canadian soldiers.

The Second World War saw the mobilization of vast numbers of Canadians, for both military service and work on the home front. Thousands of women signed up for war work, and, eventually, for military service, and child care centres to care for their children were established. While governments hoped that married women's labour force participation might be solely for the duration of the war, in fact many women, both married and unmarried, remained in the labour force following war's end.¹²

Between the two world wars, a global economic crisis caused enormous disruption in both the public and private spheres. The Great Depression forced many men to abandon their families, at least temporarily, in search of work. Once again, women, both single and married, found a range of ways to support their families, whether through taking in laundry, performing domestic labour, or working in a factory. Such economic crises had a

dramatic effect on roles within the family, as male breadwinners increasingly found themselves forced to rely upon their wives and daughters for financial aid, and the traditional male breadwinner family model was called into question.

The economic boom of the 1950s and 60s enabled large numbers of middle class families to establish male breadwinner/ female homemaker families. Economic prosperity also encouraged widespread consumption of household goods, as consumption increasingly emerged as a central role of the family in Canada. The need for a large pool of labour in the rapidly expanding service sector, however, soon required the labour force participation of women to meet the demands and the 1960s witnessed a massive influx of women, both married and unmarried, into the paid labour force. That trend has continued unabated, and today, the vast majority of women work outside the home throughout their adult lives.

6) Interaction between these factors

All of these factors, and a host of others, interact in complicated and often unpredictable ways. The net result, however, has been enormous changes in the composition, role, and function of the family. ~~Of key significance for this case are the~~ growth in the number of dual income families, increasing number of single parent families, the increase in the number of unmarried co-habiting (commonlaw) couples, and the increase in number of lesbian and gay couples and families.

It is equally important to remember that these factors do not affect all families equally or in the same manner. Class, race, ethnicity, nationality, region, sexual orientation, and religion, among others, dramatically alter the ways in which these changes affect the family. Religion, for example, has been of particular significance in Quebec, where the Catholic Church remained a dominant force in the lives and family practices of most citizens until at least the 1960s. Similarly, language and nationalism have been and remain major forces in Quebec. In poor and working class families, initially all family members shifted to factory work and waged labour. However, as factory acts and child and female labour laws were passed, working class families sought innovative ways to supplement the male wage by bringing in additional money through a range of "home work" options (e.g. taking in laundry and boarders, selling newspapers, children helping with piece work etc.). Overwork, poor living conditions, and inadequate nutrition were among the factors that ensured that health and increased life expectancy came first to the middle and upper classes.

7) Roles of the Family

Finally, there have been enormous changes in the role of the family in the broader society. The role of family has changed in concert with the social, political, economic, legal, and demographic changes I have discussed above. Thus, the family has shifted from a unit of reproduction, and domestic and agricultural production to a unit of affection, consumption and, where children are present, socialization. The roles within the family, particularly for men and women, have changed dramatically as well. From the partnership of pioneer families, to the male breadwinner family (more often an ideal than a reality for most Canadians) with its nurturing/socializing maternal role of women, we have moved to an understanding of the family as a partnership of equals.

In sum, changes in the family have been ongoing and constant. The family, as a static institution, has, in effect, never existed.

The Family in "Crisis"

If families have been subject to such profound changes throughout history, why do so many social commentators speak of the "crisis" in the family?

In her recent book on the history of families in Canada, historian Cynthia Comacchio makes the following observation: "Where the history of families is concerned, if there is one thread that winds unbroken through this era of rapid and intensive change, it is a widespread public perception that 'the family' was in a state of crisis. The nature of the crisis, its intensity, and the solutions proposed, all changed in relation to the pressing 'problems' of the day. What remained constant, at least among middle-class Euro-Canadian commentators, was a conviction that the crisis was ongoing."¹³

"At every turn," she continues, "those fretting about 'the Canadian family' also grasped the sense of opportunity that 'crisis' conveyed. They were committed to the comforting ideal of a particular family model that could withstand any demon and carry the nation to its own best destiny. The logical corollary was that certain social groups were best qualified to define this ideal, to identify as 'deviant' the families that did not meet it, and to decide how best to assist those deviant families in coming up to expectations."¹⁴

As well, this "crisis" has been deployed by various governments to exclude those families that are seen as a threat to the dominant society and in some way unassimilable within the mainstream. Chinese families, for example, were prevented from emigrating to Canada through the imposition of head taxes.

Lesbians and gay men were discouraged from forming families through the denial of immigration rights, the right to marry, and other spousal rights and benefits. All of these actions were justified in the name of "preserving the family" in the face of impending "crises."

Numerous examples of crises centred upon the family can be cited. During industrialization, with its accompanying trends of urbanization and high rates of non-Anglo-Saxon immigration, concern grew among members of the middle and upper classes about the declining birth rate among middle class women, and the possibility of the Anglo-Saxon "race" being over-run by immigrant populations.

The shift to the male breadwinner family form led social reformers to devise a new role for the "idle" women of the middle and upper classes, whose productive roles had been largely usurped by factories. In response, experts in a range of fields, including doctors, nurses, and social workers, emerged to advocate and teach women their role as "scientific" mothers of the modern age, a role they hoped would solve the declining birth rate and improve the health of the nation's children.¹⁵

Industrialization also led to the influx into cities of large numbers of young, single, working class girls - factory workers by day and frequenters of ice cream parlours and dance halls by night. Moral reformers in organizations ranging from the YWCA to Protestant church groups turned their attention to insuring that the morals of these young women, removed from the protective care of their fathers, remained intact. Reformers also evangelized to another growing urban phenomenon, prostitutes, whose appearance reformers feared was leading to the rapid spread of immorality and venereal diseases among middle and upper class men.¹⁶

Virtually every decade of the 20th Century can be characterized by its unique "crisis" in the family. In the heady days of the 1920s, the appearance of the "new woman" - the unmarried, working "girl" - the flapper - led many observers to worry anew about women's role as mothers. Such concerns soon shifted to the fate of the male breadwinner, as the Depression forced many husbands and fathers to "ride the rails" in search of work, leaving behind a family struggling to make ends meet. During the Second World War as well, the breakdown and breakup of families worried observers, as did the "masculinization" of women working in wartime industries and the military. Despite the embracing of the nuclear family model in the post war period, commentators still found crises with which to occupy themselves, this time in the form of "teenagers" and their "loose morals." Finally, in the 1960s, the widespread use of birth control and the increased incidence of commonlaw unions and premarital sex led some observers once more to worry about the demise of both marriage and the family.

Despite this unending cycle of change, however, families persist. Most adults continue to form stable relationships, and if permitted by law, to marry. Many adults have children, albeit fewer than their counterparts in earlier times. They care for each other, for ill children and aging parents. As Cynthia Comacchio notes: "families persist because they are elemental, and change because they are constructed and reconstructed to meet specific social needs and objectives." The law both adapts to and sometimes leads these changes. But legal changes neither create nor destroy "the family."

Lesbian and Gay Families

In this review of the changing landscape of the Canadian family, one family form is largely absent - lesbian and gay families. This is not because lesbian and gay families did not exist. On the contrary, as numerous historians and scholars have demonstrated, lesbians and gay men have existed throughout history. They have formed committed relationships, raised children, cared for each other in sickness and old age. For the most part, however, they have, until recently, been largely invisible. This is primarily because of the lack of legal protections for homosexuals, whether within or outside of relationships. Lesbians and gay men have faced discrimination in employment, housing, social services, and family law. It is only with the advent of human rights protections and the Charter of Rights and Freedoms, as well as the growth of the lesbian and gay movements, that lesbians and gay men have been able to be open about their lives and their relationships. Thus, the apparent increase in the number of lesbian and gay relationships is largely an artifact of the human rights regime that we now enjoy, as increasing numbers of lesbians and gay men now feel safe to be open about their lives.

One might fairly ask, then, how many lesbians and gay men there are in Canada. How many of them live in long-term coupled relationships? How many of those couples have children? Because Statistics Canada has not, to date, collected information on this variable, we do not have an official count of lesbian and gay households. We must therefore rely upon social science research to answer these questions. Alfred Kinsey's pioneering work [Sexual Behavior in the Human Male, published in 1948, and its companion volume, Sexual Behavior in the Human Female, published in 1953] still represents the most comprehensive survey of lesbian and gay populations to date.¹⁷ So significant was Kinsey's work that the figure of 10% of the population became a benchmark in discussions of the incidence of homosexuality,¹⁸ and remains the best estimate of the prevalence of homosexuality in a given population.¹⁹

While indicative of homosexual activity and sexual orientation, Kinsey's work does not deal with lesbian and gay families. Once again we can turn to social science evidence and observations. The combination of openly gay and lesbian parents fighting for and, increasingly, winning custody of their children and of self-proclaimed lesbians choosing to have children through donor insemination has meant that gay and lesbian parents are increasingly visible in schools, neighbourhoods, and workplaces across the country. One widely quoted source estimates the number of lesbian and gay parents as follows: "The best estimates we have today suggest that there are between 3 and 8 million gay and lesbian parents in the United States, raising between 6 and 14 million children."²⁰ Canadian scholars have assumed that the figures would be proportionately similar for Canada.²¹ Statistics Canada will include a question on lesbian and gay relationships in the 2001 Census questionnaire. That may enable us to estimate with a greater degree of accuracy the prevalence of lesbian and gay families.²²

Other scholars have reported that about one-third of lesbians and 10% of gay men are parents.²³ Although not all lesbian and gay parents have custody of their children, nevertheless many children are raised by lesbian or gay male parents, often in the context of a lesbian or gay couple relationship.²⁴ Moreover, in the past two decades, increasing numbers of children are being conceived within lesbian and gay couples as a result of adoption or donor insemination,²⁵ resulting in what many scholars term a "lesbian baby boom." Thus, lesbian and gay families, with and without children, have taken their place in the changing landscape of the Canadian family.

As this report has demonstrated, Canadian families have changed and continue to change throughout history. Yet, most Canadians continue to live in families, and all Canadians deserve the benefits of legal recognition and protection, social acceptance, and support. This includes the freedom to choose marriage.

Endnotes

1. For a discussion of such concerns, see Mariana Valverde, The Age of Light, Soap and Water: Moral Reform in Canada, 1885 - 1940 (Toronto: McClelland and Stewart, 1991).

2. Alison Prentice et al., Canadian Women: A History (Toronto: Harcourt Brace, 1996), 176.

3. By 1867, in Ontario, only 7 such petitions had been heard, all of them brought by men. Of these, two were abandoned, four were granted, and one was granted but then disallowed. All of the petitions were brought by men. For a discussion of changing divorce laws, see Constance Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada (Toronto: Women's Press, 1991).

4. She could also obtain a divorce on the grounds of sodomy, bestiality, or rape.

5. Anne-Marie Ambert, "Divorce: Facts, Figures and Consequences." Vanier Institute of the Family, Ottawa, 1998. Ambert challenges the widely cited figure of one in every two marriages, noting that that figure is based on the American experience.

6. As Blackstone, the famous 18th century architect of Common Law, noted, a mother was "entitled to no power, but only to reverence and respect."

7. Contemporary observers, ranging from social reformers to politicians to members of the Women's Christian Temperance Union, expressed concerns about the declining population among the Anglo-Celtic middle classes. Terming these concerns "race suicide," observers feared that the "founding" population of white, Anglo Saxons would be "over-run" by immigrants, who, they claimed had a much higher birth rate. Hence, they encouraged women to embrace their maternal duty.

8. In Britain, the 1839 Custody of Infants Act first allowed a mother to have physical custody of her children under the age of seven. The law stipulated that a mother who had committed adultery was entitled to neither custody of NOR access to her children. It is important to note that judges tended to apply this legislation with great hesitation and they generally refused to exercise their discretion in favour of mothers except in the most horrific cases. "The father had to have behaved completely outrageously, and the mother's character and reputation had to be able to withstand critical scrutiny from the bench and emerge without the slightest taint of impropriety." (Backhouse, 203). Usually 19th C. mothers were only awarded custody if they were living under the protection of some other adult man such as their brother or husband.

9. These maternal custody rights were extended in 1855 to include children up to the age of twelve, and by the mid 1880s, the upper age limit had been removed. In Ontario, in 1887, the law removed the upper age limit and the adultery bar that had applied only to women. Under this legislation, judges were instructed to consider "the welfare of the infant," "the conduct of the parents" and the "wishes ... of the mother as of the father" in determining custody of children.

10. In Britain, the Guardianship of Infants Act (1925) "provided that no parent had a superior claim and that decisions would be made in the 'child's best interest'."

11. Phyllis Chesler has claimed that as many as 75% of fathers won custody of their children in contested cases. Mothers on Trial: The Battle for Children and Custody (New York: McGraw Hill, 1987).

12. For the discussion of the impact of the Second World War on Canadian families, see Ruth Roach Pierson, They're Still Women After All: The Second World War and Canadian Womanhood (Toronto: McClelland and Stewart, 1986).

13. Cynthia R. Comacchio, The Infinite Bonds of Family: Domesticity in Canada, 1850-1940 (Toronto: University of Toronto Press, 1999), 3-4.

14. Ibid., 4.

15. See Katherine Arnup, Education for Motherhood: Advice for Mothers in Twentieth Century Canada (Toronto: University of Toronto Press, 1994).

16. See Mariana Valverde, The Age of Light, Soap and Water: Moral Reform in Canada, 1885 - 1925 (Toronto: McClelland and Stewart, 1991).

17. Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, Sexual Behavior in the Human Male (Philadelphia: W.B. Saunders, 1948); Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin, and Paul H. Gebhard, Sexual Behavior in the Human Female (Philadelphia: W.B. Saunders Co., 1953).

18. In a 1995 article, Franklin E. Kameny, a longtime gay civil rights advocate, claimed that he was the first to use the 10 per cent figure. In a brief filed with the United States Supreme Court on January 27, 1961, in his appeal against his dismissal from the federal civil service, Kameny wrote: "A rough but probably fair estimate ... of the number of homosexuals in the United States would have them making up 10 percent of our population at the very least." Franklin E. Kameny, "Where did that 10 percent figure come from?" Washington Blade, 24 March

1995, 41.

19. Some scholars have suggested that Kinsey's scale over-estimates the incidence of homosexuality. For detailed discussions of Kinsey's work, see, inter alia, John C. Gonsiorek and James D. Weinrich, "The Definition and Scope of Sexual Orientation," in Homosexuality: Research Implications for Public Policy, ed. John C. Gonsiorek and James D. Weinrich, eds. (London: Sage Publications, 1991); Vern L. Bulloch, Science in the Bedroom: A History of Sex Research (New York: Basic Books, 1994).

20. April Martin, The Gay and Lesbian Parenting Handbook: Creating and Raising Our Families (New York: HarperCollins, 1993), 6, citing Charlotte Patterson, "Children of Lesbian and Gay Parents," Child Development 63, 5 (1992).

21. See, inter alia, Katherine Arnup, Lesbian Parenting: Living with Pride and Prejudice (Charlottetown: gynergy, 1995; 1997).

22. There will likely be significant problems with under-reporting, however, because of concerns with public disclosure. For a discussion of these problems, see Katherine Arnup, "Still Hidden in the Household: Counting Lesbian and Gay Families," paper presented at the Canadian Lesbian and Gay Studies Association, June 1995, and "Counting Us Out: Same-Sex Households and the Canadian Census," Paper presented at the Canadian Law and Society Association Annual Conference, Ottawa, June 2, 1998.

23. See, for example, A.P. Bell and M.S. Weinberg, Homosexuality: A Study of Diversity Among Men and Women (New York: Simon and Schuster, 1978); Charlotte Patterson, "Children of Lesbian and Gay Parents," Child Development 63 (1992), 1025-42.

24. See, inter alia, F.W. Bozett, Gay and Lesbian Parents (New York: Praeger, 1987); Charlotte Patterson, "Children of Lesbian and Gay Parents," Child Development 63 (1992), 1025-42; Ellen Lewin, Lesbian Mothers: Accounts of Gender in American Culture (Ithaca, N.Y.: Cornell University Press, 1993); Laura Benkov, Reinventing the Family: The Emerging Story of Lesbian and Gay Parents (New York: Crown Publishing, 1994); Katherine Arnup, ed. Lesbian Parenting: Living with Pride and Prejudice (Charlottetown: gynergy, 1995 1997); Fiona Nelson, Lesbian Motherhood: An Exploration of Canadian Lesbian Families (Toronto: University of Toronto Press, 1996).

25. See April Martin, The Lesbian and Gay Parenting Handbook: Creating and Raising Our Families (New York: HarperCollins, 1993); Laura Benkov, Reinventing the Family: The Emerging Story of Lesbian and Gay Parents (New York: Crown Publishers, 1994); Katherine Arnup and Susan Boyd, "Familial Disputes? Sperm Donors,

Lesbian Mothers, and Legal Parenthood," in Legal Inversions: Lesbians, Gay Men, and the Politics of Law, ed. Didi Herman and Carl Stychin (Philadelphia: Temple University Press, 1995); Katherine Arnup, ed. Lesbian Parenting: Living with Pride and Prejudice (Charlottetown: gynergy books, 1995); Katherine Arnup, "In the Family Way: Lesbian Mothers in Canada," in Feminism and Families, ed. Meg Luxton (Halifax: Fernwood Books, 1997).