Abstract
After a judge declared its parentage regime violated the Canadian Charter of Rights and Freedoms, in 2016, Ontario passed the All Families Are Equal Act (AFAEA), which recognized LGBTQ families and parents of children born through assisted reproduction. This article analyzes the legislative hearings on the AFAEA, and highlights three factors that shaped the final policy outcome: a coordinated group of progressive witnesses with legal expertise; the presence of “rights talk” to inflate the scope of the judicial ruling; and the government’s use of the Charter as both “shield” and “sword” to minimize conservative opposition. This highlights how the Charter can shape policy outcomes not just in the courtroom, but also during the lawmaking process. It also demonstrates that activists are now using the Charter—particularly the equality rights provisions—to change policy for two groups facing discrimination: trans parents and individuals using assisted reproduction.

Keywords: Canadian Charter of Rights and Freedoms, equality rights, LGBTQ, law and politics, assisted reproduction

Résumé
Après qu’un juge ait déclaré, en 2016, que le régime ontarien de filiation violait la Charte canadienne des droits et libertés, l’Ontario a édicté la Loi de 2016 sur l’égalité de toutes les familles, laquelle reconnaît les familles LGBTQ et les parents d’enfants issus de la reproduction assistée. Le présent article analyse les audiences législatives de la Loi de 2016 sur l’égalité de toutes les familles et souligne les trois facteurs ayant eu un impact sur la politique finale : un groupe coordonné de témoins dotés d’une expertise légale; des discussions sur les droits afin d’accentuer la portée de cette décision judiciaire; et enfin, le recours à la Charte par le gouvernement à la fois comme bouclier et comme épée pour minimiser l’opposition conservatrice. Ceci illustre à quel point la Charte façonne les résultats en matière de politiques non seulement au tribunal, mais également dans le cadre du processus d’élaboration des lois. Cela démontre également que les activistes emploient dorénavant la Charte, notamment les dispositions concernant l’égalité des droits, pour changer les politiques visant deux groupes aux prises avec la discrimination : les parents transgenres et les personnes ayant recours à la reproduction assistée.

Mots clés : Charte canadienne des droits et libertés, droit à l’égalité, LGBTQ, droit et politiques, reproduction assistée
Introduction

Of all the rights in the 1982 Canadian Charter of Rights and Freedoms, the section 15 right to equality has had the most complicated journey. On the one hand, uncertain Supreme Court of Canada jurisprudence has made it difficult for litigants to succeed with equality rights claims. On the other hand, section 15 has been recognized by many as a critical factor in achieving policy change for LGBTQ Canadians and broadening the definition of “family” (Harvison Young 2001; Kirkup, forthcoming; Smith 2005). For all its early trepidation about whether the Charter protects against discrimination based on sexual orientation in the early 1990s, by the turn of the century the Supreme Court of Canada had used section 15 to reject traditional definitions of the family based on biology and heteronormativity.

Same-sex marriage was not an end game for LGBTQ activists, some of whom worried that achieving a gender-neutral (but bipartite) definition of marriage “may require a normalisation of lesbian and gay intimate relationships to appear as marriage-like as possible” (Young and Boyd 2006, 219). As more parents use assisted reproduction and gestational surrogacy, and as social norms regarding parenthood, gender identity, and trans-inclusivity continue to evolve, the equation of “family” with a two-parent household does not reflect the lived experience of many LGBTQ families. Advocacy groups have thus begun to challenge provincial parentage policy rooted in the heteronormative two-parent family. After Alberta and British Columbia reformed their parentage laws in the early 2010s, Ontario became the third province to overhaul its parentage regime, with the sweeping 2016 All Families Are Equal Act (AFAEA). Like many changes to family law before it, this legislation was preceded by a successful section 15 Charter challenge.

Ontario’s parentage policy change provides an opportunity to examine the ways in which, twelve years after the federal recognition of same-sex marriage, LGBTQ activists continue to use the Charter to effect policy change. This paper provides an analysis of the judicial decision that led to the legislative change (Grand v. Ontario 2016), and the subsequent legislative debates and committee hearings on the AFAEA. This analysis highlights three factors from these debates that helped effect the policy outcome: a coordinated group of legislative witnesses with extensive legal knowledge; the use of “rights talk” to inflate the scope of a brief and ambiguous judicial ruling; and the use of the Charter to minimize the effect of party politics, particularly opposition from the Progressive Conservatives. Each of these factors is illustrative of the ways in which Charter politics have evolved along with the Charter itself. In this instance, they combined to enable progressive witnesses to achieve two significant amendments, and to contribute to neutralizing social conservative opposition in the legislature.

I close with three conclusions and directions for future research. First, the use of rights talk, coupled with a coordinated legal strategy among committee witnesses, can be an especially effective way to produce policy change with respect to equality rights. By using the Charter as a trump card, legislators and witnesses can limit the effect of party politics, even when the policy outcome goes beyond what is required from a judicial decision. In particular, MPPs from the governing Liberals used the...
Charter both offensively and defensively, as a “shield” and “sword,” to fend off opposition from conservative witnesses and legislators.

Second, after a period relying on human rights tribunals to achieve policy change, LGBTQ activists focusing on trans Many rights have made a foray into Charter litigation through the courts. It is not surprising that the first such case sought to broaden the definition of “family,” an area of previous jurisprudential success for LGBTQ activists. Given this success, we should expect trans activists seeking redress for discrimination in family law to continue to use the Charter and the courts. Finally, the growing number of Canadians who use assisted reproduction to build their families are turning to the Charter to overturn laws that restrict family formation. This portends potential challenges to the federal Assisted Human Reproduction Act, which contains many such restrictions.

Section 15 of the Charter and LGBTQ Mobilization

Section 15(1) of the Canadian Charter of Rights and Freedoms declares that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” This broad language has led to jurisprudential confusion at the Supreme Court of Canada. Justice William McIntyre, writing in the Court’s first section 15 case in 1989, held that equality was an “elusive concept” that “more than any of the other rights and freedoms guaranteed in the Charter… lacks precise definition” (Andrews v. Law Society of British Columbia 1989). The Supreme Court’s subsequent section 15 jurisprudence has been described as “inconsistent, halting and surprisingly restrained” (Bateman 2012, 593), subject to “continual reinvention” from a Court that “has struggled to achieve consensus” (Sanguiliano 2015, 603). The division has not been helpful to Charter claimants from marginalized groups, who have found the jurisprudential obstacles difficult to navigate (McColl, Bond, and Shannon 2016; McIntyre and Rodgers 2006). For many, the Charter’s promise of substantive equality has yet to be realized.

However, LGBTQ activists have had the most success using section 15 to effect policy change. The Supreme Court of Canada unanimously recognized sexual orientation as a ground of discrimination in 1995 and eventually declared that same-sex marriage “flows from” the Charter in 2004 (Egan v. Canada 1995; Reference re Same Sex Marriage 2004, para. 43). LGBTQ activists have been “one of the key beneficiaries” of the Charter (Kirkup, forthcoming) and have favoured increased judicial power, a phenomenon recognized by Charter supporters and critics alike (Morton and Knopff 2000; Smith 2005). It is therefore curious that as LGBTQ activists have specifically targeted policy change for the trans community in recent years, the same courtroom strategy has not been used. As Kyle Kirkup notes, trans activists have opted for human rights tribunals and administrative bodies rather

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1 In this paper, I use “trans” synonymously with “transgender,” which Egale Canada (2017, 6) defines as “A person who does not identify either fully or in part with the gender associated with the sex assigned to them at birth—often used as an umbrella term to represent a wide range of gender identities and expressions.”
than the Charter to redress discrimination, achieving important victories in two areas: sex markers on government-issued identification, and discrimination in policing and corrections. In each instance, section 15 of the Charter “played virtually no role” (Kirkup, forthcoming).

Equality litigation also has implications for inter-institutional “dialogue,” wherein legislatures respond to Supreme Court Charter decisions. The dialogue metaphor, popularized by Peter Hogg and Allison Bushell (1997), reflected the notion that when a judicial decision strikes down a law for violating Charter rights, the legislature has considerable room to respond. Within a few years of publication, the Supreme Court had cited the metaphor approvingly, as dialogue became “the dominant paradigm for understanding the relationship between Charter-based judicial review and democratic governance” (Manfredi and Kelly 1999, 524).

In the decades since, scholars have been divided about how to operationalize dialogue, with Knopff et al. (2017, 622–24) distinguishing between adherents of “court-centric” and “coordinate dialogue.” Court-centric scholars argue that legislative responses to judicial review must take place within judicially-defined boundaries (Hogg, Thornton, and Wright 2007, 31; see also Roach 2001), while coordinate scholars claim it is permissible for legislatures to offer their own interpretation of Charter rights (Baker 2016; Knopff et al. 2017). While debates over the legitimacy of coordinate dialogue continue, few dispute that it is rare. In a study of all legislative responses to Supreme Court Charter rulings from 1984 to 2009, Emmett Macfarlane found that legislatures responded with their own independent consideration in only 17 percent of cases. More pertinent for parentage policy, no provincial or federal legislature has ever responded with coordinate dialogue to an adverse Supreme Court ruling in a section 15 equality rights case. Macfarlane suggests that, because politicians “face a particular symbolic difficulty in being seen as infringing equality,” the political price to pay is not worth even the appearance of violating equality rights (2013, 47). A victory at the Supreme Court on equality grounds thus produces a more permanent policy victory than with other rights.

Overall, the history of LGBTQ advocacy and the courts has been a successful one. LGBTQ Canadians have undoubtedly benefitted from the Charter, and have made considerable policy gains through the courtroom. Coupled with the fact that a judicial victory on equality rights has more staying power than victories in other fields, this makes Charter litigation an especially attractive strategy. Ontario’s parentage policy provides further evidence of this.

**Parentage Policy in Ontario: From Rutherford to the All Families Are Equal Act**

Parentage policy, which in Canada is determined by provincial legislatures, refers to “the rules concerning the procedures and eligibility requirements used to determine legal parenthood for children born through assisted conception or surrogacy” (Snow 2016, 6–7). Traditionally, provincial law in Canada assumed that the birth mother and her male partner, if any, were the parents of a child. However, with the growing number of LGBTQ families and the increased use of assisted reproduction, this assumption has come under scrutiny and has been subject to a number of recent judicial challenges. As recently as 2009, Fiona Kelly wrote that “Only a single Canadian
province has attempted to address through legislation the assignment of legal parentage” (2009, 185). By contrast, a 2016 survey of provincial parentage policy found that “most provinces have laws for parentage, both with respect to children born through surrogacy and assisted conception,” and that the judiciary had played a large role in effecting policy change. However, there exists considerable provincial variation in terms of policy restrictiveness, and uncertainty regarding how judicial rulings are being implemented (Snow 2016, 6; see also Harder 2015).

Until recently, Ontario's parentage policy—which includes provisions in both the Vital Statistics Act (VSA) and the Children's Law Reform Act (CLRA)—was quite restrictive, and was consequently challenged in court a number of times. Prior to 2006, the VSA only permitted a child's Statement of Live Birth to list one mother and one father. In Rutherford v. Ontario (Deputy Registrar General) (2006), two lesbian co-mothers whose children were conceived through assisted reproduction challenged this law. Justice Rivard found Ontario's policy discriminated on the basis of their sex and sexual orientation, and that the discrimination was not a reasonable limit under the Charter. He noted that the applicants sought (and, by implication, the Charter required) a “reconceptualization” of the “institution of parentage… in light of their needs and experiences of what is normal in our society” (Rutherford v. Ontario 2006, para. 192). Justice Rivard suspended the declaration of invalidity for one year, giving the government time to respond. Several months later, in A.A. v. B.B. (2007), a case involving a lesbian couple and a known sperm donor, the Ontario Court of Appeal granted that a child born through assisted reproduction could have three legal parents. Justice Rosenberg held that there was a gap in CLRA, and cited assisted reproduction and LGBTQ families in his judgment: “[p]resent social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA’s legislative scheme.” Because the CLRA failed to recognize these forms of parenting, “the children of these relationships are deprived of the equality of status that declarations of parentage provide” (para. 35). Justice Rosenberg granted the appeal and added the non-birth mother as the child's third parent. However, it was not clear whether this applied “beyond the individual facts of the case,” or whether all future three-parent families would need to litigate (Kelly 2009, 193).

The Ontario government responded by modifying the regulation attached to the VSA. This regulation was amended to enable the woman giving birth and the “other parent” to register a child's birth “where the father is unknown and conception occurred through assisted conception,” seemingly rectifying the cause of litigation in Rutherford (see Ontario 2017). However, the legislation did not respond to A.A. v. B.B., thus leaving three-or-more-parent families requiring a judicial remedy in the future. It also did not address parentage in the case of surrogacy, in spite of a 2008 Ontario Superior Court of Justice case granting a declaration of parentage to a heterosexual couple who conceived a child with the aid of a gestational surrogate (M. D. et al. v. L. L. et al. 2008).

Between 2009 and 2015, criticism of Ontario's regime mounted. Although the socially liberal, centrist Liberal Party of Ontario had been in government since 2003, it had shown little inclination to introduce more progressive parentage legislation,
and the government was certainly not being pushed to do so by the official opposition, the centre-right Progressive Conservatives. In late 2015, Cheri DiNovo, a Member of Provincial Parliament (MPP) from the third-largest party in the legislature, the centre-left New Democratic Party (NDP), introduced a private members’ bill titled *Cy and Ruby’s Act*. The bill sought to transform Ontario’s parentage regime by introducing sweeping changes that would encompass surrogacy, assisted reproduction, and three-or-more-parent families. Although the bill passed second reading with support from all parties, the Liberal government delayed sending the bill to committee. After this delay, legal activist Joanna Radbord, on behalf of twenty-one LGBTQ parents, launched a judicial challenge to declare parts of the CLRA and VSA unconstitutional for violating the *Charter*. In June 2016, Justice Chiappetta of the Ontario Superior Court of Justice issued an order in *Grand v. Ontario* granting that the *Children’s Law Reform Act* violated section 15 of the *Charter* for failing to provide “equal recognition and the equal benefit and protection of the law to all children, without regard to their parents’ sexual orientation, gender identity, use of assisted reproduction or family composition” (*Grand v. Ontario* 2016, 1–2; see also Radbord 2016).

In addition to the court order, *Grand* also contained Minutes of Settlement, which included a statement of issues that the parties to the litigation agreed to resolve. This statement noted that the Attorney General of Ontario conceded that the CLRA violated the *Charter*; that the Attorney General would not oppose declarations of parentage sought by the *Grand* applicants; that the Registrar General would permit parents to identify as “mother,” “father,” or “parent” on all Statements of Live Birth by August 31, 2016; and, most importantly, that the government would propose a bill amending the CLRA and VSA by September 30, 2016. The statement also held that the Attorney General’s recommendation on the bill’s contents would be “informed by the following principles”:

- Protection of children, “regardless of their parents’ sexual orientation, gender identity, use of assisted reproduction or family composition”;
- Pre-conception intention would be the basis for parents “in the context of same-sex relationships and assisted reproduction,” and would be a factor for determining a child’s best interests;
- Presumptions of parentage based on biology and a relationship to the birth parent will be expanded to include “the intention to parent” with assisted conception, irrespective of the parents’ sex/gender and “without precedence to biology”;
- Consenting parents will be included on a child’s birth registration where this presumption applies, unless there is a dispute;
- A donor is not a parent by reason of donation alone;
- For surrogacy, a court should be required to declare parentage;
- Parentage will “acknowledge the possibility of more than two parents,” with up to four parents recognized administratively;
- The definition of “birth” should be trans-inclusive;
- Courts can still issue declarations of parentage, and these declarations will have equal protection to those done through adoption;
- Subsequent amendments to other legislation will be consistent with these principles (*Grand v. Ontario* 2016, 4–5).
On September 29, 2016, the Ontario government introduced Bill 28, the *All Families Are Equal Act* (AFAEA), which amends the CLRA, VSA, and several other statutes. In a press release, the Attorney General’s office highlighted three goals of the legislation: to “provide greater clarity and certainty for parents who use assisted reproduction,” to “provide a streamlined process for the legal recognition of parents who use a surrogate,” and to “reduce the need for parents who use assisted reproduction to have to go to court to have their parental status recognized in law” (Ontario 2016b). Drawing heavily (though not entirely) from *Cy and Ruby’s Act*, the legislation makes Ontario’s parentage regime more inclusive of LGBTQ families: it uses gender-neutral language for birth registration by replacing references to “father” and “mother” with “parent,” and removes references to “natural parents” and relations “by blood.” The CLRA now states that, except in cases of surrogacy, the “birth parent” (a more trans-inclusive term than “birth mother”) is the child’s parent. The legislation also amends the CLRA to stipulate that merely donating reproductive material or an embryo does not make someone a parent.

The new law clarifies that, if a child is conceived through assisted reproduction, the birth parent’s spouse at the time of conception is the other parent. It stipulates that if the birth parent enters into a pre-conception agreement with up to three other intended parents, they are all the child’s parents without the need for a court order. If the parentage agreement includes more than four total parents, those parents must apply to a court for a declaration of parentage. Thus, the new CLRA recognizes four-parent families without the need for judicial intervention, regardless of how the child was conceived. The movement away from court orders in the AFAEA is most pronounced with respect to surrogacy, where the intended parents are recognized as the child’s legal parents if a number of conditions are met, including the surrogate’s written consent. The surrogate cannot relinquish her rights until the child is at least seven days old; before she does so, she and the intended parents share parental responsibilities for and rights over the child. Overall, pre-conception intention, rather than biology, is now the primary way to determine parentage (Radbord 2016, 4).

The AFAEA drew heavily from the principles agreed to by the parties in the Minutes of Settlement in *Grand v. Ontario*. Although she critiqued certain aspects of the law, litigant Joanna Radbord said the law “represents a dramatic improvement to parentage law” and will “make Ontario a world leader in parental recognition without discrimination” (2016, 2). Bill 28 unanimously passed third reading and received Royal Assent on December 5, 2016.

**The AFAEA at Committee: Charter Politics in Action**

Between October 17 and 18, 2016, Ontario’s Standing Committee on Social Policy heard seventeen presentations\(^2\) on the AFAEA from witnesses; the committee also met, without witnesses, on November 1 to vote on amendments. Of the seventeen presentations, some were joint presentations, and some were by a single witness. In total, there were seventeen presentations.

\(^2\) Because Emery Potter and Julia Gruson-Wood presented together, theirs is counted as a single presentation. An 18th presentation was given by Neil Gardiner, but he did not discuss Bill 28 at all, and instead gave a presentation on the difficulty of being an artist. His presentation was brief, and largely ignored.
presentations, three were highly critical of the legislation for engaging in “social engineering” of the family. By contrast, fourteen presentations were in favour of the direction of the legislation, although many of these witnesses argued that the law did not go far enough in combating discrimination, and recommended amendments more in line with *Cy and Ruby’s Act*.

Throughout the committee hearings, the *Charter* played an important role in shaping the discussion. Below, I highlight three factors that shaped the ultimate policy: strategic coordination and mobilization of witnesses with high legal knowledge; the prevalence of “rights talk” and *Charter* inflation; and the use of the court order to help neutralize conservative opposition. Collectively, these factors enhanced the scope of the judicial ruling and limited conservative opposition to a few uncoordinated witnesses. Each of these factors ultimately contributed to the government amending the legislation in a manner more (though not entirely) congruent with the progressive witnesses’ concerns.

**Strategic Coordination and Legal Expertise Among Witnesses**

At committee, there was strategic coordination and considerable legal knowledge among those witnesses who supported the goals of the legislation but did not think it went far enough in several crucial respects. These fourteen presentations, which I categorize as progressive, included the following witnesses:

- Rachel Epstein, the former program coordinator at the LGBTQ Parenting Network, an LGBTQ advocacy group, who was an applicant in *Rutherford v. Ontario*
- Andy Inkster, a Health Promoter at the LGBTQ Parenting Network
- Jennifer Mathers-McHenry, Kirsti Mathers-McHenry, and Joanna Radbord, lawyers and architects of *Cy and Ruby’s Act*
- Dr. Donna McDonagh and Dr. Carolyn Fitzgerald, applicants in *Grand v. Ontario*
- Emery Potter and Julia Gruson-Wood, LGBTQ partners who gave a joint presentation about their difficulty navigating the existing Ontario regime
- Dara Roth Edney, social worker and mother to a child conceived through surrogacy
- Cheryl Appell, a representative from an Ontario adoption association
- Sara Cohen, Cindy Wasser, and Shirley Eve Levitan, lawyers specializing in fertility law

Of these witnesses, two (fertility lawyers Sara Cohen and Shirley Eve Levitan) were positive about the overall direction of the legislation, but primarily recommended a number of changes to the surrogacy provisions in section 10. Their recommendations for amendments were echoed by neither the government nor MPPs nor other witnesses, and thus do not reflect any coordinated effort with other witnesses or MPPs.

By contrast, the other twelve progressive presentations demonstrate a high level of coordination. This coordination was, in certain ways, obvious: many of the witnesses spoke of working with each other and with Cheri DiNovo on *Cy and Ruby’s Act*. At third reading, DiNovo acknowledged a number of people “who really are the stalwarts and who have really been fighting for this for the last decade,” including six witnesses who gave presentations (Ontario 2016e, 1905).
These witnesses had strong knowledge of jurisprudence and the law; six mentioned *Rutherford* specifically, several had been involved in parentage litigation, and several had helped craft *Cy and Ruby’s Act* (Ontario 2016b, SP-4, 7, 14, 20, 22; 2016c, SP-38). While the progressive witnesses were positive about the legislation’s general direction and applauded the Liberal government for acting, they were also adamant that the bill had serious flaws that needed to be rectified. Two concerns in particular dominated the proceedings: the primacy given to the biological father of children conceived without assisted reproduction (section 7) and the rebuttable presumption of parentage for the birth parent’s spouse (section 8). Of the fourteen presentations supporting the bill, eight recommended making major changes to the biological father provision,³ and seven recommended changing the rebuttable parentage provision, with witnesses often using similar language.⁴ Both of these sections had been highlighted by NDP MPP Cheri DiNovo at second reading as two of the five “amendments that are absolutely essential if we’re going to get this right” (Ontario 2016a, 538).

The language used to critique these sections by witnesses was unequivocal: Rachel Epstein was “somewhat alarmed” by section 7(1), which “elevates biological fathers above other parents” and “undoes the trans inclusiveness of the rest of the act”; she was also “very concerned” about section 8, which failed to offer “ironclad proof of parentage” for non-biological parents. Kirsti Mathers-McHenry said “sections 7 and 8... require a great deal of work,” insofar as “[t]he language in sections 7 and 8 is not trans-inclusive,” and “undoes a lot of the good work that is elsewhere in the act.” Jennifer Mathers-McHenry referred to these as two of the “deal-breaker sections” (Ontario 2016b, SP-4, SP-12; 2016c, SP-47). Three separate witnesses also raised the possibility that a “rapist” or perpetrator of “sexual assault” could be given parental primacy under section 7, echoing Cheri DiNovo’s concern at second reading that “The focus on biology in section 7 makes a rapist a parent” (Ontario 2016b, SP-6; 2016c, SP-48; 2016a, 538). While recommendations were made regarding other, smaller aspects of the law, by far the most attention from witnesses was dedicated to changing sections 7 and 8.⁵

³ Epstein, Kirsti Mathers-McHenry, Appell, Inkster, Levitan, Radbord, and Jennifer Mathers-McHenry recommended changes to the section specifically. Emery Potter did not mention the section specifically, but said, “We need this new bill to understand and truly inscribe that while some parents share a biological connection, parenting is actually about more than biology and is sometimes nothing about biology” (Ontario 2016b, SP-22).

⁴ Epstein, Kirsti Mathers-McHenry, McDonagh, Radbord, and Jennifer Mathers-McHenry recommended changes to this section specifically. Inkster and Potter criticized this aspect of the law without mentioning the section—Potter said, “Parenting is not about presumption; it’s about intention,” while Inkster said “The presumption of parenthood is simply not enough” (Ontario 2016b, SP-22, SP-19).

⁵ Other sections that witnesses recommended changing were: Section 2(3) regarding wills (Kirsti Mathers-McHenry, Radbord, and Fitzgerald); Section 4(4), which said there was no distinction between children born inside or outside of marriage (by Kirsti Mathers-McHenry, Radbord, and Jennifer Mathers-McHenry); section 10 regarding surrogacy (Wasser, Levitan, Cohen, and Roth Edney); section 13 regarding children’s best interests (Jennifer Mathers-McHenry), and section 17.3 regarding confidentiality (Wasser and Levitan). DiNovo introduced amendments to section 13 at committee, which were voted down. Section 4(4), however, was ultimately removed via an amendment introduced by the Liberal government (Ontario 2016e, SP-81).
This coordinated effort to focus on the failings of sections 7 and 8 of the AFAEA seems to have paid off. At the clause-by-clause committee meeting on November 1, 2016, section 7 and 8 were each amended. Consistent with what many witnesses had recommended, Cheri DiNovo introduced an amendment that would have removed the biological father provision, criticizing section 7 because it “continues to define biology as the marker of real parentage” and that this means the law “falls prey to the ideology of biological supremacy, at least for the ejaculator” (Ontario 2016d, SP-83). Ultimately, the motion was voted down; Liberal MPP Lorenzo Berardinetti recommended voting against it because it would “remove biology as a factor in parentage where conception occurs through sexual intercourse,” which “would leave a woman with an accidental pregnancy with no recourse or support against the biological father” (Ontario 2016d, SP-83).

However, the Liberals did offer their own amendment to section 7, which replaced the reference to “biological father” with the “person whose sperm resulted in the conception of a child through sexual intercourse,” thus making the section more trans-inclusive (other references to “biological father” were also replaced throughout the bill with “other biological parent”). The Liberals also introduced a technical amendment to the bill that, in the words of Berardinetti, would “ensure that the consent of a biological father, whose identity or whereabouts are unknown, would not be required in a child protection proceeding.” Berardinetti expressly noted that this amendment was meant to ensure that “[r]apists do not have any standing with respect to adoption decisions” (Ontario 2016d: SP-93). Having already had her amendment voted down, DiNovo voted in favour of these amendments.

With respect to section 8, DiNovo’s and the witnesses’ recommended changes were ultimately implemented. The government introduced a motion to remove the language of “presumption” from section 8, meaning that the birth parent’s spouse “is, and shall be recognized in law to be, a parent of the child.” There were no comments on this amendment, and DiNovo voted in favour of it. In the context of a majority Liberal government, the fact that over half of the progressive witnesses (some of whom had been directly mentioned by an NDP MP for their work on this policy area) recommended changes to sections 7 and 8, and that the government made substantive amendments to both of those sections, shows that this coordination had a demonstrable impact on the final legislation.

Rights Talk and Charter Inflation

An additional factor that helped frame the legislation was the witnesses’ claims that these amendments were required for the legislation to remain Charter-compliant, with several witnesses engaging in all-or-nothing “rights talk.” Canadian scholars have long drawn from American scholar Mary Ann Glendon’s description of rights talk—whereby complex policy issues “presented as absolute, individual and independent of any necessary relation to responsibilities” (1991, 4, 12)—to describe how the Charter has shaped political discourse. Rainer Knopff argues that such rights talk reduces incentives for political compromise and is the inevitable result of increased judicial policymaking, which “implies permanent winners and losers” (1998, 705). Emmett Macfarlane’s 2008 study on rights talk likewise found that media coverage of the Charter was “largely individualistic, absolutist
and uncompromising” and that there was a “generally simplistic portrayal of rights” (Macfarlane 2008, 324–25).

Such rights talk was clearly on display during the committee hearings for the AFAEA. The two aspects of the legislation that were most opposed by witnesses—sections 7 and 8—were portrayed not just as bad policy, but as clear Charter violations. Joanna Radbord noted that the Grand case “has not been settled on a final basis,” and promised that “[they would] proceed with the litigation if necessary amendments [we]re not made to the bill.” Radbord was categorical, saying, “Bill 28 does not satisfy the court order or the requirements of the Charter… Sections 7 and 8 must be amended. If they are introduced as written, the law will continue to be unconstitutional” (Ontario 2016c, SP-38). As noted below, rights talk was not limited to progressive witnesses and MPPs; conservative witnesses engaged in moral inflation from the other perspective, with religious leader Charles McVety in particular portraying the legislation as undemocratic social engineering. In the most notable example of rights talk from progressive witnesses, Cheri DiNovo responded to McVety with the following remark:

   I would hope, really, Mr. McVety, because I have been debating you for at least a decade of my life—going on 20 years now—that finally, finally—I'm sad to see that your children are here because God forbid—literally—that they should have children who are LGBTQ… I would hope that the love that you spread would extend to everyone, without judgment. That goes for same-sex marriage, which I know I've debated you on. You lost that one, sir. You're going to lose this one too. (Ontario 2016b, SP-33, emphasis added)

This rhetorical use of the Charter as an instrument that produces permanent winners and losers was ultimately effective. As noted above, those sections (7 and 8) that Joanna Radbord claimed “must be amended” or else “the law will continue be unconstitutional” were, in fact, amended at committee.

Moreover, comments from MPPs from the governing Liberal caucus suggest that the government wanted to avoid any chance of another Charter challenge. One the one hand, government MPPs frequently lauded the bill as an important piece of progressive legislation that would better reflect the realities of modern families, using rights talk to critique the Conservative opposition; as detailed in the next section, Liberal MPP Lorenzo Berardinetti suggested that a proposed Progressive Conservative amendment reflected a party opposed to abortion and same-sex marriage (Ontario 2016e, SP-88). On the other hand, Liberal MPP Ted McMeekin shifted some responsibility to the courts in response to a presentation from Joe Clark,6 a witness who criticized the law for “eras[ing] motherhood completely” and “tak[ing] a good stab at eliminating fatherhood” (Ontario 2016c, SP-44). The exchange went as follows:

   Mr. Ted McMeekin: We're proposing to update the law so that all parents and their kids can be treated equally under the law. We've been instructed to do so. We have a court rendering that has lamented the lack of that right and has instructed the government to get on with making the changes that

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6 Not Canada's 16th Prime Minister.
are necessary. Are you questioning the legitimacy of the court system that reviewed this particular case as human rights legislation? Do you think their court doesn't work? Would that be your position?

...  

Mr. Joe Clark: Mr. Chair, no, that's certainly not my position. My position is that the Legislature had a mandate as a result of that court case to clear up legal parentage rights for gay and lesbian couples. The legislation, as presented, represents massive scope creep and attempts to redefine human biology, which is something that no one requested, let alone the court.

...

Mr. Ted McMeekin: Well, I would just say, you call it scope creep. I would respectfully suggest that we're not anxious as a government, nor, I suspect, are any of the parties represented here, to go through another court challenge because we didn't go far enough. (Ontario 2016c, SP-45)

Although McMeekin invoked the principle of equality, he also suggested a lack of agency on the government's part. By saying the government was “instructed” by the court and that to oppose the legislation would be to question “the legitimacy of the court system,” McMeekin passed the buck to the courts, a form of blame avoidance that has become common in post-Charter Canada, including in response to LGBTQ litigation.7

It is also worth noting that McMeekin’s response overstated the extent to which the court instructed the legislature to amend its legislation to ensure Charter compliance. Grand contained two components: a brief court order and corresponding Minutes of Settlement. In the court order, Justice Chiappetta found that Ontario’s existing parentage regime—which limited immediate parental recognition to opposite-sex couples—violated section 15(1) of the Charter and was not a reasonable limit because it discriminated against children based on “their parents’ sexual orientation, gender identity, use of assisted reproduction or family composition” (Grand v. Ontario 2016, 1). However, Justice Chiappetta did not undertake a jurisprudential analysis explaining why the laws were discriminatory, nor did she employ the section 1 “Oakes test” to determine what might constitute a reasonable limit. The Charter finding was one paragraph long, and open to interpretation about what Charter-compliant legislation would look like.

By contrast, the Minutes of Settlement contained a detailed statement of issues and specific principles that would inform the government’s legislation. However, these principles were not judicial declarations of Charter violations per se; they were merely agreed upon by the parties to adjourn the constitutional challenge. Justice Chiappetta did not order that each of those principles must be precisely inscribed in legislation for the new law to meet the requirements of the Charter.

7 The most obvious example of this was also in Ontario, when Mike Harris’ Progressive Conservative government responded to M. v. H. (1999). In that case, a Supreme Court decision found the opposite-sex definition of “spouse” in Ontario’s Family Law Act violated section 15(1) of the Charter and was not a reasonable limit. The Harris government’s legislative response, which made the definition of spouse gender-neutral, was called Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999.
Put another way, it is entirely possible that the legislature could amend the CLRA and VSA without implementing each of the principles, and that the legislation would nevertheless be deemed to be consistent with the Charter. For example, one agreed-upon principle was that, “In the context of surrogacy, a court-ordered declaration of parentage should be required given heightened vulnerabilities and a history of functional caregiving through the gestation of a fetus” (Grand v. Ontario 2016, 4), yet in the end the AFAEA contains no such requirement. Although a subsequent Charter challenge to the AFAEA could find certain provisions unconstitutional, a more comprehensive constitutional analysis would be required to determine which of these principles are required for Charter-compliant legislation.

This distinction between a judge’s finding that a law violates the Charter and her specifying what the Charter requires is admittedly a fine one, easily lost in the weeds during the complex lawmaking process. Yet these two components of the decision were successfully folded together by several witnesses with legal expertise who sought specific amendments. Joanna Radbord’s claim that the legislation did not satisfy the court order “or the requirements of the Charter” and that without amendments to sections 7 and 8 “the law will continue to be unconstitutional” (Ontario 2016c, SP-38) is certainly a plausible interpretation of the Charter, but not one that is guaranteed by Justice Chiappetta’s brief order. Ultimately, framing the court order in this way was a useful strategy, rhetorically elevating the agreed-upon principles in the Minutes of Settlement to constitutional status. It also shows that “rights talk,” whereby “[d]isputes over governmental policy choices and the normal disagreements in a pluralistic society are conflated with fundamental human rights” (Macfarlane 2008, 306–07), remains prominent not just in the courtroom, but also during the lawmaking process.

Minimizing Party Politics and Neutralizing Conservative Opposition

The Grand decision, and the legislative debate surrounding it, also contributed to neutralizing any formal political opposition to parentage policy reform. As noted above, three conservative witnesses gave presentations strongly opposed to the legislation: author Joe Clark, Reverend Charles McVety, and social conservative activist Queenie Yu. Each used strong language to condemn the legislation: McVety, speaking directly to the committee, said that, “with the exception of [Progressive Conservative MPP] Randy Hillier, I see a group of people who are committed to re-engineering the family”; Clark claimed the bill “literally rewrites motherhood and fatherhood” and “redefines motherhood out of existence”; and Yu criticized the legislation for “cutting out the mother” and claimed “Chinese immigrants didn’t know that the Wynne government would actually outdo the Communists and get rid of mothers entirely” (Ontario 2016b, SP-31; 2016c, SP-44, 51). In spite of the fact that two full sessions were given for presentations, each of these witnesses also criticized the process for being undemocratic. McVety said, “This is not a democratic process… it’s a kangaroo court,” and added, “two days is insufficient for such complicated legislation”; Clark claimed, “None of you were ever elected… to socially engineer the province of Ontario”; and Yu said the Bill was “rammed through,” insofar as “those who don’t speak English as their first language cannot truly participate in the democratic process” (Ontario 2016b, SP-33; 2016c, SP-45, 50).
As is common with rights talk, the rhetorical inflation on policy positions was equally strong, if not stronger, from those witnesses opposed to the legislation.

However, outright opposition to the legislation remained limited to the witnesses. Although McVety invoked the name of MPP Randy Hillier, Hillier’s actual opposition to the legislation was tepid, with his comments at committee largely limited to procedural questions regarding the processes for a child with more than two parents (Ontario 2016b, SP-13, 32). Hillier at one point praised the legislation, saying: “using various reproductive technologies, various arrangements—this bill is necessary. This bill is necessary to put our laws in step with the changes in society that we’ve agreed to make over the last number of decades” (Ontario 2016e, SP-88).

While the Progressive Conservative (PC) caucus contains a number of socially conservative members, they did not provide any substantive critiques of the AFAEA at committee or at second or third reading. At the amendment stage, PC MPP Michael Harris introduced an amendment that would have given parents the choice of being identified as a mother, father, or parent on a child’s birth registration, instead of leaving “parent” as the sole option. In putting forward the amendment, however, Harris praised the AFAEA, noting that “as Bill 28 aims to strengthen and be inclusive of all kinds of families, we are taking the step to further ensure that inclusivity by legislatively allowing for the option of registering as ‘mother,’ as ‘father,’ or as ‘parent,’ depending on what the respective parent elects” (Ontario 2016e, SP-88). By any interpretation, this amendment would have been consistent with the Charter; the Minutes of Settlement in Grand included a provision that “The Registrar General of Ontario shall approve a Statement of Live Birth under the Vital Statistics Act that permits the birth parent to self-identify as ‘mother,’ ‘father,’ or ‘parent’ and the other parent to self-identify as ‘mother,’ ‘father,’ or ‘parent’” (Grand v. Ontario 2016, 4).

However, the subsequent response from Liberal MPP Lorenzo Berardinetti is especially telling, insofar as it is the only point during the entire committee hearings—remarkable for their civility and non-partisanship—in which partisanship was a clear factor. Berardinetti took the opportunity to criticize PC leader Patrick Brown (who was not on the committee) in a classic example of morally-inflated rights talk: “this proposed amendment makes it clear that Patrick Brown and the PC Party are choosing to align themselves with right-wing, socially conservative groups that do not want LGBTQ2+ families, and families who use assisted reproduction, to be treated equally,” adding that “the amendment that Patrick Brown and the PC Party are proposing reflects the views of Charles McVety” (Ontario 2016e, SP-88). Berardinetti went on to say that “the PCs are aligning themselves with an individual [McVety] who represents a group that opposes a woman’s right to choose; gay marriage; and an up-to-date sex ed and health curriculum for our kids”
(Ontario 2016e, SP-88). Berardinetti’s invocation of McVety was especially notable given that McVety had only weeks earlier condemned Brown for reversing course on his opposition to sex-education curriculum reform, calling for him to step down as leader because he had "used, deceived, and betrayed" evangelicals (Benzie 2016).

The Progressive Conservative amendment eventually failed, and both Hillier and Brown eventually voted in favour of the legislation at third reading. The legislation passed unanimously, although twelve of the twenty-nine Progressive Conservative MPPs did not show up to vote, a handful of whom, known for their social conservative views, had been in the legislature earlier in the day (Jones 2016). The party’s newest MPP, Sam Oosterhoff, a known Christian social conservative who was not yet sworn in and thus could not vote, said he would “definitely not have supported” the bill, which he called a “horrible piece of legislation.” Liberal Deputy Premier Deb Matthews made note of the Progressive Conservative absences, stating that the party was “clearly a divided caucus.” Indeed, in order to highlight these internal divisions, the Liberals attempted to delay the vote in order to have Oosterhoff attend (and presumably vote against the bill), although they did not manage to do so (Rushowy 2016; Jones 2016). It is certainly likely that some others in the Progressive Conservative caucus opposed the legislation in the same manner as Oosterhoff and the three witnesses who strongly spoke against it.

Several factors likely contributed to the Progressive Conservatives’ muted opposition and the “diplomatic flu” that caused many to be absent for the vote. One was that Progressive Conservative Leader Patrick Brown had been trying to downplay social conservative sentiment within his party, particularly after he had to backtrack over his claim that he would reverse the Liberals’ new sex education curriculum just months before the AFAEA was being debated. The curriculum, which contained information about gay and lesbian relationships and gender expression, had caused anger among many socially conservative parents, some of whom had publicly protested the changes; public opinion data showed that forty percent of Ontarians disapproved, and one in six parents would contemplate removing their children from public schools as a result (Benzie 2016; Csanady 2016). This demonstrates that there is a social conservative constituency in Ontario, particularly within the Progressive Conservative party (Brown himself had voted against same-sex marriage while a federal Member of Parliament and had courted religious voters en route to winning the provincial party leadership). However, just months after his about-face on sex education, the absence of some of his more socially conservative MPPs from the vote on the AFAEA certainly suggests Brown felt it was important that his party not be defined by social conservatism.

Brown’s public critique of sex education (and subsequent reversal) is telling when contrasted with his party’s public support for the AFAEA. There is no doubt that Brown learned from his experience with the curriculum changes, yet the existence of Grand meant that the debate over the AFAEA was infused with the language of rights and with the symbolism of a Charter victory. While it is impossible to determine the full extent to which Grand affected Brown’s decision-making in this regard, it is revealing that, unlike with sex education, Progressive Conservative MPPs apart from Oosterhoff were not publicly critical of the AFAEA. Berardinetti’s suggestion that the Progressive Conservative amendment reflected
“the views of Charles McVety” showed that government MPPs were willing to cast even moderate opposition to the progressive direction of the AFAEA in black-and-white, either-or terms. Moreover, Berardinetti’s invocation of abortion and same-sex marriage made direct reference to other issues in which progressive legislative change occurred following Charter-based rights victories. Thus Liberal MPPs simultaneously used the Charter as a “shield” against small-c conservative witnesses (by claiming the government had been “instructed” by the court to produce the legislation), and as a “sword” against big-C Conservative legislators (by accusing them of opposing equality and standing with Reverend McVety). Such rights talk likely contributed to neutralizing any potential opposition from conservative legislators, and minimizing the effects of party politics on legislative debate.

Discussion and Conclusion

The above analysis is based on a single piece of legislation in a single Canadian province. However, the movement towards parentage policy change in other provinces, coupled with growing LGBTQ activism on trans rights, makes Ontario’s experience instructive. I draw three conclusions from Ontario’s legislative debates, each of which can bring fruitful avenues for future research for legal scholars and political scientists. The first concerns the way in which the Charter continues to influence political debate, particularly with respect to equality rights. For decades, scholars have argued that the Charter has enabled strategic mobilization among activists with legal expertise to produce a “support structure for legal mobilization” and effectively engage in legal reform (Epp 1996; Morton and Knopff 2000; Smith 2005). Others have argued that “rights talk” in political discourse can preclude reasonable disagreement by framing complex policy areas simplistically, in black-or-white, winner-take-all form (Hutchinson 1995; Knopff 1998; Macfarlane 2008). This rights talk is especially effective insofar as governments are risk-averse when it comes to engaging in “coordinate dialogue” with courts on equality issues, even when a judicial decision leaves room for legislative response (Macfarlane 2013; Manfredi and Kelly 1999; Knopff et al. 2017).

All three of these mainstays of the Charter era—legal mobilization, rights talk, and a reluctance to engage in dialogue—were present during the legislative debates surrounding Ontario’s All Families Are Equal Act. Yet the venue in which they were most visible was the legislature, not the courtroom. This suggests that scholars ought to pay close attention not just to judicial decisions and legislative responses, but also to the way in which legislative debates shape those legislative responses. As White notes, “judicial rulings alone do not necessarily trigger wholesale change in policy practices” (2014, 175). The extent to which provincial legislatures implement these rulings varies considerably, particularly when the ruling is as brief as the court order in Grand v. Ontario (2016). In this case, a group of witnesses with legal expertise engaged in strategic coordination with a legislator from Ontario’s third party to persuade the government to amend its legislation in two crucial areas. This strategic coordination, coupled with the use of “rights talk”—of definitively calling the bill “unconstitutional” even though it might not have been—was effective in convincing a risk-averse government to change its mind to avoid the possibility of a future court challenge. In this case, the finding and the method are
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Equally important: Just as the factors behind this strategy cannot be understood without reference to rights talk and blame avoidance, so too could the legislation’s final form not be understood without detailed qualitative reading of Hansard debates.

The second conclusion is that LGBTQ activists targeting policies that affect trans people, at least in Ontario, have now shown a willingness to use the Charter and the courts to achieve policy change. This represents a shift from previous experience, where policy gains related to sex markers on government-issued IDs and discrimination in corrections and policing were achieved through administrative tribunals rather than the courts (Kirkup, forthcoming). Why did trans activists avoid the courts with those issues but venue-shift to courtroom litigation for parentage policy? One reason may be the specific policy issue at stake in the All Families Are Equal Act: the family. LGBTQ activists have a long history of courtroom success based on section 15 Charter claims in the Supreme Court of Canada (culminating in the legal recognition of same-sex marriage), and much of this jurisprudence was based on broadening the definition of family (Harvison Young 2001). Unlike activism to change policy for government IDs and policing/corrections, the Grand litigation can be seen as the logical extension of LGBTQ advocacy groups’ victories in the 1990s and early 2000s. Given the previous success of LGBTQ activists in cases involving the family, we should expect trans rights activism to continue in the courtroom.

Finally, this analysis provides evidence that individuals who use assisted reproduction are using the Charter to challenge restrictive policies that impede family-building. If this continues, the next Charter target could be the federal Assisted Human Reproduction Act, which includes a number of measures, including restrictions on payment for surrogacy, gametes, and human embryos, that have been critiqued for discriminating against those who require some form of assisted reproduction to conceive (Hnatiuk 2007; Snow 2012). Justice Chiappetta’s finding in Grand (2016, 1) that Ontario’s parentage law discriminated against children on the basis of their parents’ “use of assisted reproduction” suggests that courts could find fault with the federal prohibitions for similar reasons. This paper’s focus on the use of rights talk and legal mobilization during the legislative process could be especially pertinent, as the federal Liberal government announced in 2016 that it would be updating the Assisted Human Reproduction Act (Canada 2016). Insofar as those using assisted reproduction disproportionately include LGBTQ individuals, and insofar as the Supreme Court of Canada has been reluctant to allow restrictive legislation on the basis of traditional accounts of morality, the courtroom may be an ideal avenue for those seeking policy change.

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Equality Rights, LGBTQ Mobilization and Ontario’s All Families Are Equal Act


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Dave Snow
Assistant Professor
Department of Political Science
University of Guelph
snow@uoguelph.ca