Exporting Same-Sex Marriage, Importing Same-Sex Divorce — (Or How Canada’s Marriage and Divorce Laws Unleashed a Private International Law Nightmare and What to Do About It)

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1. INTRODUCTION

A marriage media storm was unleashed in January 2012 when the front page of The Globe and Mail declared that “Ottawa does an about-face on same sex marriage for non Canadians”.1 A non-Canadian lesbian couple who had married in Canada were being denied a divorce in Canada, because they did not meet the residency requirement for the Divorce Act,2 and because, in the opinion of the Department of Justice lawyer arguing the case, their marriage was not a valid marriage. Equality rights activists and the LGBT community in Canada and abroad were outraged. Dan Savage weighed in, declaring that he had been “divorced overnight”,3 and raised the hysteria that Canada just unilaterally nullified thousands of American same-sex marriages.

The Minister of Justice Rob Nicolson moved quickly to quell the fears that the Conservative majority was seeking to reopen the same-sex marriage debate. He announced that it was the position of the government that all same-sex marriages performed in Canada were valid in Canadian law, and that he would introduce amendments to the Civil Marriage Act to make this clear.4 Within a month, he had introduced Bill C-32, an Act to Amend the Civil Marriage Act. While some within the LGBT community worried that the provisions of the amendment did not provide sufficient protections to non-resident couples, the media furor had largely passed. However, the Bill stalled in the House of Commons, and opposition introduced its own version of a bill to amend the Civil Marriage Act, Bill C-435.

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2 R.S.C., 1985, c. 3 (2nd Supp).


The debate over whether and how to recognize the marriages of non-residents, and whether to assume jurisdiction over their divorce, engages a complex and somewhat arcane set of legal rules of private international law (sometimes also referred to as conflict of laws) that deal with disputes involving jurisdictionally complex facts. These rules determine issues such as which courts have jurisdiction to hear the matter and which law should be applied (choice of law rules) to resolve the dispute. In this article, I explore the web of rules that created the furor, and the potential solutions to the problems of jurisdiction over divorce and recognition of marriage. I argue that the controversy — framed as Canada recoiling from same-sex marriage equality — operated to obscure the legal problems, and in turn, the reform options for both divorce jurisdiction and foreign marriage recognition. I begin by reviewing the Canadian laws that lead to the controversy: the Civil Marriage Act, the Divorce Act, and the rules of private international law, that together create the scenario where non-residents can marry but not divorce in Canada. I then explore the reform options: those contained in the government’s proposed Bill C-32, the opposition’s private member’s bill, as well as a range of other reform options. I seek to shift the debate to where it belongs: when and how non-residents — same and opposite sex alike — should have access to Canadian marriage and divorce laws.

2. MARRIAGE, DIVORCE AND NON-RESIDENTS

The Civil Marriage Act was enacted in 2005\(^5\) to legislatively redefine marriage to include same-sex couples. After years of constitutional challenges in which courts overwhelmingly struck down the opposite-sex definition of marriage,\(^6\) the Civil Marriage Act redefined marriage for civil purposes as “the voluntary union of two persons to the exclusion of all others”\(^7\). The Civil Marriage Act did not impose any residency requirements on who could marry. The Act included some consequential amendments to the Divorce Act, including a redefinition of the word “spouse” to mean “either of two persons who are married to each other”\(^8\), an amendment specifically intended to ensure that the Divorce Act applied equally to same-sex and opposite-sex married couples.

In contrast, the Divorce Act has always contained a one year residency requirement for a spouse to apply for a divorce. Section 3 sets out jurisdiction in a divorce proceeding, stating that “a court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the

\(^5\) S.C. 2005, c. 33.

\(^7\) Civil Marriage Act, above note 5.

\(^8\) Ibid.
proceedings". These provisions were designed with a view to potential inter-provincial jurisdictional conflicts, not international ones. Yet, they are the only provisions dealing with jurisdiction, and therefore govern the jurisdiction of Canadian courts in relation to divorce. No amendment was made to this residency requirement when the Civil Marriage Act was passed.

These two statutes created a potential legal vacuum: a non-resident couple could marry in Canada, but they would not be able to divorce. This vacuum is made all the worse — and more complicated — with the rules of marriage recognition in private international law. There are two different rules for foreign-marriage recognition in private international law: lex domicile, according to which a marriage would be recognized if it is valid where the couple is domiciled, and lex loci celebrationis, according to which a marriage would be recognized if it is valid according to the law of where the couple got married.

Canada has a dual approach: lex domicile applies to determine what is termed the essential validity of marriage, while lex loci celebrationis applies to determine the formal validity of marriage. In considering the rules of essential validity — the rules determining whether the individuals have the capacity to marry — we apply the law of the couple's domicile. More specifically, we apply what is called the dual domicile rule: the essential validity of the marriage is determined by the law of the domicile of both of the spouses at the time of the marriage. But, for the rules of formal validity — the ceremonial requirements of marriage — we apply the law of the place where the marriage was performed.

In the context, then, of same-sex marriage, Canadian rules of private international law recognize a marriage as formally valid if it is valid according to the laws of the place it is performed. A same-sex marriage performed either in Canada, or Massachusetts or in some other state that recognizes same-sex marriage, would be recognized as formally valid in Canada. But, Canadian rules of private international law would recognize a same-sex marriage as essentially valid if and only if it was valid in the place where the couple lived at the time of the marriage. This means that according to the well-established rules of Canadian foreign marriage recognition, a same-sex marriage entered into in Canada by a couple that resided in Texas — a state that does not recognize same-sex marriage — would not be recognized as essentially valid in Canada.

By contrast, U.S. jurisdictions follow lex loci celebrationis: American conflict of laws has been based on the principle that a marriage that is valid where it is performed will be valid in all states. There is, however, also a public policy exception to this rule of celebration which has been used to deny the validity of same-sex marriages in many U.S. states. This public policy exception — and particularly

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9 Divorce Act, above note 2, section 3. Section 4 sets out jurisdiction in a corollary relief application, and section 5, for a variation proceeding, both provide that a court in a province has jurisdiction to hear the proceeding, if one of the spouses has lived in the province for a year, or both of the former spouses accept the jurisdiction of the Court.

10 See Restatement, 2d, Conflict of Laws, §283(2) (1971) on the validity of marriage, which states "A marriage which satisfies the requirements of the State where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another State which has the most significant relationship to the spouses and the marriage at the time of the marriage". The public policy exception has
its application to evasive marriages — creates a major obstacle for non-resident same-sex marriages. Most of the non-resident same-sex couples who came to Canada to marry typically did so precisely because they could not get married in their domicile or resident state. For the most part, these same-sex couples were unable to legally export their marriage: in their home state, they were not considered to be legally married. Accordingly, if the couple wed in Canada, went back home to a jurisdiction like Texas that does not recognize their marriage, and then separated, they would be unable to obtain a divorce in Texas, since in the eyes of the law of their state, they were never married.

This is not only a problem for non-resident marriages celebrated in Canada, but has emerged in the U.S. for couples who marry in a state that recognizes same-sex marriage, but live in a state that does not. There have been a number of cases where a same-sex couple married in Massachusetts or Vermont but residing in another state has been unable to get a divorce.\(^1\) Like Canada, Massachusetts and Vermont have residency requirements for divorce,\(^2\) so the couple has been unable to get divorced there. Nor are they able to get a divorce in their state of residence, if that state refuses to recognize same-sex marriage.

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1. See Chambers v. Orniston, No 2006-340 (P06-2583), 935 A.2d 956 (2007), where a same-sex couple married in Massachusetts but living in Rhode Island were denied a divorce by the Rhode Island Supreme Court. See also Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct., 2002), Lane v. Albanese, 39 Conn. L. Rptr. 3, 2005 WL 896129 (Conn. Sup. Ct., 2005), where the Connecticut courts applied Connecticut law as denying Connecticut domiciliaries jurisdiction to dissolve a Vermont civil union and a Massachusetts marriage, respectively. Both Rosengarten v. Downes and Lane v. Albanese were decided before Connecticut legalized gay marriage in 2008.

2. Among U.S. states which recognize same-sex couples, one year residency is required for divorce in Connecticut (Conn. Gen. Stat. §46B-44), Massachusetts (Mass. Gen. Laws Ch. 208 §4, 5), New Hampshire (NH Rev. Stat. §458:5), New York (N.Y. Dom. Rel. §230); Vermont (although proceedings can begin after 6 months in Vermont, a divorce cannot be finalized until a one year residency has been established: VT. Stat. Ann. Tit. 15 §592); and Iowa (if the petitioner lives in Iowa, there is a one year residency requirement; if the respondent lives in Iowa, the duration of residency is irrelevant: Iowa Code §598.17). For a full list of residency requirements for divorce in the U.S., see Family Law Quarterly, Volume 45, Number 4, Winter 2012, pp. 500–503.
Ironically, the problem has only been exacerbated as more states have come to recognize same-sex marriage. A state that recognizes same-sex marriage will typically recognize a foreign same-sex marriage; for example, the couple that married in Canada will be recognized as married in New York State. But, if the couple married in Canada now resides in Texas, the marriage will not be recognized as valid in Texas, and the couple will not be able to obtain a divorce there. Since Canada and New York State both have residency requirements for divorce, the separated couple will find themselves in the position of being married in the eyes of the law of New York State, but unable to divorce. And if one of the “spouses” then seeks to marry a third person, (for example, travelling to Canada again to enter into a same-sex marriage, or entering into an opposite-sex marriage in any jurisdiction) they will, in the eyes of New York, be committing bigamy, and the second marriage will be invalid.

In other words, Canadian marriage laws plus Canadian divorce laws plus the various laws of marriage recognition in private international law equals a sticky legal mess for non-resident same-sex couples who married in Canada. These couples are married in some jurisdictions, not in others, and unable to secure a divorce in any jurisdiction.

3. THE DIVORCE CHALLENGE: VM & LW V. THE ATTORNEY GENERAL OF CANADA

This is more or less what happened in the non-resident lesbian divorce challenge in January 2012. A lesbian couple married in Canada in 2005 and separated in 2009. At the time of the divorce application — and seemingly at the time of marriage — one of the spouses was living in London, England, and the other in Florida. Neither of the spouses was able to obtain a divorce in their home jurisdiction, since their marriage was not recognized as a valid marriage. They jointly sought a divorce in Canada. But, according to section 3 of the Divorce Act, for a court to have jurisdiction to grant a divorce, one of the parties has to have been living in Canada for a year. The couple sought a divorce pursuant to the parens patriae jurisdiction of the Ontario Superior Court. In the alternative, they sought a declaration that the one year residency requirement violated their rights to equality contrary to section 15 and/or their rights to life, liberty and security of the person contrary section 7, was not justifiable under section 1, and was therefore unconstitutional.

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13 The courts in Texas have applied the public policy exception to refuse to recognize same-sex marriages, and have denied a divorce to same-sex couples. In Re: Matter of Marriage of JB and HB, 326 S.W.3d. 654 (Tx 5th Cir. Clt. of App., 2010), the court held that “Texas courts have no subject matter jurisdiction to adjudicate a divorce petition in the context of same sex marriage.” As a result, the parties who had married in Massachusetts were denied a divorce in Texas.

14 At the time of the divorce application, the parties are described as living in Florida and England, respectively. There is no indication that they were living anywhere else at the time of marriage. The domiciles at the time of marriage therefore appear to have been both Florida and the UK.
In its response, the Attorney General of Canada argued, *inter alia*, that the Superior Court of Ontario did not have the jurisdiction to grant the divorce, because "under principles of private international law that apply in Canada, the Joint applicants are not legally married under Canadian Law".\(^{15}\) The Attorney General elaborated:

In order for a marriage to be legally valid under Canadian law, the parties to the marriage must satisfy both the requirements of the law of the place where the marriage is celebrated (the *lex loci celebrationis*) with regard to the formal requirements, and requirements of the law of domicile of the couple with regard to their legal capacity to marry one another.\(^ {16}\)

In this case, neither party had the legal capacity to marry a person of the same sex under the laws of their respective domicile — Florida and the United Kingdom. As a result, their marriage is not legally valid under Canadian law.\(^ {17}\)

Accordingly, the Attorney General argued, they are not "spouses within the meaning of the *Divorce Act* and the Court has no jurisdiction to grant them a divorce".

This was the argument that set the issue on fire: a marriage entered into Canada was now being said not to be a valid marriage in Canada. It appeared as an about face on the legality of same-sex marriage. Yet, the Attorney General was, at least in the technical sense, doing no more than stating the rules of private international law on marriage recognition. As reviewed above, the capacity to marry — which goes to the essential validity of marriage — is to be determined by the law of domicile, not the law of the place of celebration; in other words, where the couple was living at the time of marriage, not where they got married. This is a rule that applies regardless of sexual orientation. It was the legal rule of recognition that governed other controversial marriages, like first cousin or polygamous marriages. The underlying policy considerations, at least in the context of evasive marriages, are relatively straightforward: couples should not be able to circumvent the marriage law of their domicile by getting married somewhere else.

In terms of the lesbian couple in the case, this rule of private international law meant that the law of their respective domiciles at the time of the marriage, not the law of the place where they celebrated the marriage, would determine the validity of their marriage. Since neither Florida nor the UK recognized the validity of same-sex marriage, this rule of private international law meant that it is not a valid marriage in Canada. Ironic, perhaps. Hypocritical, in light of the luring of gay tourist dollars to the same-sex wedding industrial complex emerging in major Canadian cities, certainly. Yet, strictly speaking in terms of the rules of private international law that have long governed the recognition of non-resident marriages, legally accurate.

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\(^{16}\) Ibid.

\(^{17}\) Ibid, at p 2.
4. THE GOVERNMENT RESPONSE: BILL C-32

The Minister of Justice, after the outpouring of outrage at the government’s apparent about-face on same sex marriage, promised to look into protecting the ability of non-resident same-sex couples who married in Canada ability to obtain a divorce in Canada. In February 2012, Bill C-32, An Act to Amend the Civil Marriage Act, was introduced in the House of Commons. Bill C-32 contains two parts. The first part addresses the validity of non-resident marriages entered into in Canada. Section 3 of C-32 would replace section 5 of the Civil Marriage Act, and would provide:

(5)(1) A marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile.19

The provision would make clear that in the marriages of non-resident Canadians who marry in Canada would be recognized as valid in Canada. It effectively establishes a law of lex loci celebrationis, but only for marriages celebrated in Canada, thereby carving out a limited exception to the general law of domicile. It should also be noted that there is nothing in section 5 that is specifically restricted to same-sex marriages. Rather, the lex loci celebrationis rule would apply to any marriage celebrated in Canada, such as a cousin marriage, which might not be valid in the couple’s domicile.

The second part of the amendment introduces a new divorce process for non-residents who entered into marriages in Canada. Clause 4 introduces Part 2 to the Civil Marriage Act: “Dissolution of Marriage for Non-Resident Spouses”. Section (7)(1) of Bill C-32 would establish three requirements for a court to grant a divorce.

The court of the province where the marriage was performed may, on application, grant the spouses a divorce if

(a) there has been a breakdown of the marriage as established by the spouses having lived separate and apart for at least one year before the making of the application;

(b) neither spouse resides in Canada at the time the application is made; and

(c) each of the spouses is residing — and for at least one year immediately before the application is made, has resided — in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.20

Section 7(2) provides that the application may be made jointly by both spouses, or by one spouse with the other spouse’s consent. In the absence of consent, section 7(2) provides that the application can be made by one spouse if they

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18 1st Sess, 41 Parl, 2012 (first reading 17 February 2012).
19 Ibid.
20 Ibid.
obtain a court order from one of their resident states that declares that the other spouse is:

(a) is incapable of making decisions about his or her civil status because of a mental disability;
(b) is unreasonably withholding consent; or
(c) cannot be found.\textsuperscript{21}

Section 8 specifically provides that the Divorce Act does not apply to a divorce granted under this Act. The marginal note for section 8 states “No corollary relief” which suggests that the purpose of the provision is to make clear that the corollary provisions of the Divorce Act dealing with child support, child custody and spousal support do not apply to divorces under the Civil Marriage Act. Section 8 may also provide more clarification regarding the grounds of divorce under Civil Marriage Act. Section 7(1)(a) provides that a divorce can only be granted on the basis of marriage breakdown as evidenced by living separately and apart for at least one year. When read with section 8, this makes clear that the other grounds for divorce contained in the Divorce Act, that is, adultery and cruelty, are not available under the Civil Marriage Act.

5. THE OPPOSITION RESPONSE: BILL C-435

In June 2012, the NDP introduced its own private member’s bill, C-435.\textsuperscript{22} The Bill is largely the same as Bill C-32. It contains an identical provision on the validity of marriages performed in Canada.\textsuperscript{23} Many of the provisions on the dissolution of non-resident marriages are identical: the grounds and process for divorce.\textsuperscript{24} However, where the government bill states that the corollary relief provisions of the Divorce Act do not apply, Bill C-435 provides that these corollary relief provisions could apply:

8. (1) If a divorce has been granted under section 7, the court of the province where the marriage was performed may, on application, make an order in respect of child custody, child support or spousal support if the courts

\textsuperscript{21} Ibid.

\textsuperscript{22} An Act to amend the Civil Marriage Act (divorce and corollary relief), Bill C-435, 1st Session, 41st Parl, 2012 (first reading 15 June 2012).

\textsuperscript{23} Clause 3, replacing section 5 of the Civil Marriage Act, is identical between Bill C-32 and Bill C-435.

\textsuperscript{24} Clause 4 replacing section 6 and 7 of the Civil Marriage Act are also identical between Bill C-32 and Bill C-435. Randall Garrison, MP for Esquimalt, stated that the bill contains a provision to “correct a technical flaw in the government’s bill that would require one member of a same-sex couple seeking a divorce, where the other was missing or unreasonably withholding consent, to get a declaration stating this from a court in the home jurisdiction. This is obviously impossible if the same-sex marriage is not recognized in that jurisdiction.” House of Commons Debates, 41st Parl, 1st Sess (15 June, 2012) (Randal Garrison) archived at: openparliament.ca/bills/41-1/C-435/ (accessed 5 August 2012). Puzzlingly, however, the text of section 7(2) in Bill C-435 is identical to the provision in Bill C-32, requiring the declaration from the home jurisdiction.
located in the state or states where the former spouses reside decline to make such an order.\textsuperscript{25}

Section 8(2) then specifies that sections 15 to 17, (dealing with child and spousal support) and sections 20 to 24 (dealing with child custody) apply to applications made under subsection 8(1).

Randall Garrison, sponsor of Bill C-435, explained the reasoning behind the proposed application of the corollary relief provisions of the Divorce Act:

The most important is to add a clause to allow Canadian courts, if asked, to assume jurisdiction for corollary remedies. This would allow them in non-resident same-sex divorce cases to deal with important matters like child custody and division of property. Without this provision, which is not in the government's bill, non-resident same-sex couples would be able to get a divorce but they would have no way of dealing with outstanding legal questions connected with that divorce, including child custody.\textsuperscript{26}

It should be noted that the corollary provisions of the Divorce Act, contained in sections 15-17, and sections 20-24 do not include division of property, but rather, spousal support, child support and child custody. Division of property on marital breakdown in Canada has been exclusively within provincial jurisdiction. Presumably, given the text of Bill C-435, Garrison misspoke in his example of division of property, intending to say "spousal or child support" in its stead.

However, the application of the corollary relief provisions to these non-resident divorces is a significant difference between the government and opposition bills. The NDP is motivated by equality concerns, worried about the inability of these divorcing couples to resolve issues of support and custody in their home jurisdiction. Dany Morin, deputy LGBT critic for the NDP, according to an interview with Xtra, "says that if a couple is looking to go through the divorce process in Canada, they should be able and willing to deal with child custody through Canadian courts as well. He points out that areas that don't recognize same-sex marriage are biased toward the biological parent in matters of custody."\textsuperscript{27}

While admirably motivated, this extension of corollary relief provisions is highly problematic. Jurisdiction is not typically asserted simply because of a belief that Canadian courts would more adequately resolve the issue, in this case, in a manner more consistent with the values of LGBT equality. The proposed amendment flies in the face of established rules of jurisdiction, both statutory and common law, that have been devised over the years to deal with inter-jurisdictional disputes on matters of child custody, access and support. As I will argue below in assessing the various options for reform, while there is certainly room for improvement in these jurisdictional rules, the Bill C-435 proposal is neither principled nor practical.

\textsuperscript{25} C-435, above note 19.


6. ASSESSING THE BILLS

(a) Grounds for Divorce

Bill C-32 has been criticized by some commentators for creating two tiers of divorce, one for Canadians and one for non-residents. Some have criticized Bill C-32 for creating a double standard, whereby Canadians can obtain a divorce on the basis of living separately and apart, as well as adultery and cruelty, whereas non-residents have only the ground of living separately and apart. The justification for limiting the grounds of divorce for non-residents is evidence based. The two fault-based grounds for divorce — adultery and cruelty — require that a range of potentially disputed facts must be established on a balance of probabilities. The Press Secretary for the Minister of Justice, Julie de Mambro, has stated “Canadian courts would not be best placed to hear evidence of events that happened in another country, which would be needed in cases of allegations of adultery or abuse”. Further, the legislative summary of Bill C-32, while not directly addressing the issue, notes that 95 per cent of Canadian divorces are obtained on the basis of living separately and apart. Presumably, this is meant to indicate that the grounds of adultery and cruelty are of marginal importance, and thereby support limiting the grounds for non-residents. Some commentators have gone further, and suggested that it would be an opportune time to reform the Divorce Act to remove these no-fault grounds. Given the evidentiary issues, the limited use of these grounds for divorce amongst Canadians, and the more general critique of the retention of these fault-based grounds, limiting the grounds for divorce for non-resident couples seems to be a reasonable compromise.

(b) Procedures for Divorce

However, a more serious concern has been expressed over the specific procedures imposed on non-resident Canadians for non-consensual divorces. In these

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28 See for example Baluja, Tamara. “Bill to close loophole in same-sex marriages creates ‘double standard’” Globe and Mail, February 17, 2012; Christian Schmitz “C-32: It is not a real divorce” Lawyers Weekly, 30 March 2012.

29 Ibid. The Canadian Bar Association National Family Law Section’s submission to the Minister of Justice Nicholson recommended that Bill C-32 should be revised to allow non-residents access to these other grounds for divorce (Jordan, Kelly D et al, 22 March 2012. Online: cba.org/cba/submissions/pdf/12-21-eng.pdf accessed 15 October 2012).

30 Quoted in Baluga, ibid.


32 See for example Boulby, Sarah and Jennifer Shuber. “Divorce Canadian Style.” Toronto Family Law Blog, February 28, 2012. torontofamilylawblog.ca/2012/02/28/divorce-canadian-style/ (accessed 15 October 2012) who write “As an aside, while the issue is before Parliament it would be worthwhile to remove cruelty and adultery as options for all spouses and thereby bring our divorce law into the 21st century with a truly no fault system.”
cases, a non-resident applicant must obtain a Court order indicating one of three reasons for the absence of consent (incapacity, unreasonable withholding or residence unknown). Critics worry that a same-sex spouse who is unable to obtain a divorce in their home state will similarly be unable to obtain the required court order. The National Family Law Section of the Canadian Bar Association writes:

It is unreasonable to expect parties to obtain an order in their domicile to declare the other spouse incapable, unavailable or unreasonable, particularly if that domicile does not recognize the relationship. Canadian courts routinely deal with service or other issues where the opposing party is domiciled outside of Canada. Canadian courts could and, in our view, should make these determinations, as the small number of non-resident divorces would not cause undue burden on Canada’s justice system.\(^3\)

Others have echoed this critique, including the NDP justice critic, who then puzzlingly, did not make the amendments in their version of the amendments to the Civil Marriage Act.\(^3\)

There is good reason to worry that a non-resident same sex spouse who is unable to obtain divorce in their own jurisdiction will be unable to obtain the required court order. The courts in Texas, for example, which have specifically rejected applications for same-sex divorce on the basis that the marriage was never valid, are unlikely to be more sympathetic to the idea of issuing a court order declaring a spouse to be incapable, unavailable or unreasonable. Having said that, it will nevertheless be important that the procedure for obtaining a divorce for non-resident couples be specified in any amendment to the Civil Marriage Act. The proposal of the Canadian Bar Association — of allowing Canadian courts to make the determinations in the event the application is not joint — seems to be a reasonable one. The current section 7(2) of the Bill C-32 could be revised to eliminate the requirement for a court order from the domicile jurisdiction, replacing it instead with the ability of the court hearing the divorce application to make the determination.

(c) Jurisdiction over Corollary Relief: Custody, Access and Support

The NDP Bill 435 would amend the Civil Marriage Act to include jurisdiction over the corollary issues of support, custody and access. Under the current Divorce Act, section 4 sets out jurisdiction in relation to corollary issues, providing that “a court in province has jurisdiction to hear and determine corollary relief proceedings if (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding or (b) both former spouses accept the jurisdiction of the court”.\(^\text{35}\) Section 5 deals with jurisdiction in a variation proceeding, with the same criteria as section 4. Section 6 sets out jurisdiction to transfer the entire divorce, corollary relief and variation proceedings where a custody application has been made under section 16. It provides that:

\[
\text{... where an application for an order under section 16 is made in a divorced} \\
\text{proceeding to a court in a province and is opposed and the child of the mar-}
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\(^3\) Jordan, above note 29 at para 2.

\(^3\) Ling, above note 27.

\(^3\) Divorce Act, above note 2 at Section 4.
riage is respect of whom the order is sought is most substantially connected with another province, the court may, on application of a spouse or on its own motion, transfer the divorce proceeding to a court in that other province. 36

The Divorce Act currently gives jurisdiction to courts in corollary relief matters on the basis of the spouse’s “ordinary residence”, and in the case of child custody and access, jurisdiction to transfer the proceeding, if the child is “most substantially connected” with another province. As with divorce jurisdiction more generally, these rules are intended to apply between provinces within Canada. There is nothing in the Divorce Act that specifically addresses jurisdiction over corollary relief in international cases, where the question is which state should assume jurisdiction.

There are, however, existing common law conflict of laws rules that govern questions of international jurisdiction. The Supreme Court of Canada has endorsed a two step test for jurisdiction. First, there is the question of whether a court has jurisdiction, (jurisdiction simpliciter) which is to be determined according to the real and substantial connection test. Second, there is the question of whether the court should exercise that jurisdiction, which is determined according to the forum non conveniens test 37. In the divorce context, once courts have determined that they have jurisdiction under the Divorce Act, they can then consider whether they ought to decline to exercise this jurisdiction where a foreign court is a more appropriate forum. In Hughes v. Alfano, the British Columbia Supreme Court held that “the court may decline to exercise its jurisdiction if there is a clearly more appropriate forum for the action”. 38 In Jenkins v. Jenkins, the Ontario Superior Court considered whether to decline jurisdiction in relation to a divorce application involving custody where the children were living in Ontario with the mother, and the father had returned to England. 39 The Court held that the question of whether it should decline to exercise its jurisdiction should be based on the more appropriate forum test, and concluded that Ontario was the more appropriate forum for the custody determination. In Folwell v. Holmes, an Ontario Court declined jurisdiction to hear a custody application under the Divorce Act on the basis that Nicaragua, where the children were now living with their mother, was the more appropriate forum. 40

36 Ibid, at Section 6. Section 6(2) and 6(3) provide respectively for a transfer of corollary relief proceeding and a variation proceeding on the same basis.


The Court noted that the children, as well as all the evidence and witnesses related to the best interests of the children were all located in Nicaragua.

In each of these cases, jurisdiction was first determined under the Divorce Act, and then the question was whether this jurisdiction should be declined on the basis of most appropriate forum. If there is a connection both in a Canadian and a competing jurisdiction, the court has discretion under convenient forum to decline jurisdiction. In many cases, such as Jenkins and Folwell, the application of the most appropriate forum test resulted in cases being heard in the jurisdictions in which the children were resident.

There is certainly room for legislative reform in this area. The Divorce Act does not currently have any jurisdictional rules for international cases. And the case law, although often following the most appropriate forum test, is not consistent. The courts sometimes assume jurisdiction with little or no consideration of the most appropriate forum test, or of the child's habitual or ordinary residence. There are reform models available. For example, for both custody and access, or what is increasingly referred to as parental responsibility, there is an international movement towards using the child's "habitual residence" as the basis for asserting jurisdiction. The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children [hereinafter the 1996 Hague Convention] is a private international law instrument covering a broad range of measures related to the protection of children, including custody and access. It provides for a common set of jurisdiction rules, choice of law rules, and rules for the enforcement and recognition of foreign measures. In terms of jurisdiction rules, designed to avoid conflicts of jurisdiction, the basic principle is based on the child's "habitual residence": jurisdiction should be vested in the authorities of the contracting state in which the child is habitually resident. Habitual residence is not defined in the 1996 Convention, but the concept has long been used in Hague Conventions, including the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The idea underlying "habitual residence" — not unlike "ordinary residence" used in the current Divorce Act — is that there should be an adequate nexus between the child and the court that is asserting jurisdiction.

While there are a range of questions regarding whether Canada should sign the 1996 Convention, and the kinds of amendments that would be required in the Divorce Act, it should be noted that the major debates regarding jurisdiction over children in the context of custody and access are those revolving around residence — habitual versus ordinary. In considering legislative reform, it is crucial to keep the underlying policy considerations in mind. There needs to be a significant connection between the child and the court assuming jurisdiction. There is no principled basis to assert jurisdiction over a child who has virtually no residential connection with a particular state or province, except that one or both of his or her parents got married in Canada. Jurisdiction cannot be assumed simply because the applicable Canadian law would be more in accordance with equality principles.

41 HC 96; RS 0.211.231.011.
42 Ibid, at Article 5.
43 HC 28; TIAS No 11670, 1343 UNTS 89.
7. OTHER OPTIONS FOR REFORM

Bill C-32 (and one could say the same of Bill 435), is an attempt to address the apparent inconsistencies in Canada’s laws related to marriage recognition and divorce jurisdiction. It is not the only way to eliminate these inconsistencies. In this section, I review the range of options open to the federal government to address these inconsistencies. I argue that the government’s approach to divorce jurisdiction — with some amendments — is a reasonable one but that a broader approach to the question of marriage recognition would be advisable.

(a) Divorce Jurisdiction

In Bill C-32, the Government proposes to amend the Civil Marriage Act to allow non-resident couples to divorce on the limited grounds of living separately and apart for one year, with no residency requirement. In this way, it would bring the marriage and divorce laws in sync for non-residents — they could marry and divorce without a residency requirement. In this section, I explore other options for reform.

(i) Reforming Marriage Law to Impose a Residency Requirement

In terms of marriage law, the government could go in a different direction: it could add a residency requirement for Canada’s marriage law. Many of the countries that recognize same-sex marriage do impose a residency requirement. Canada could follow the Belgian and Dutch models, and similarly impose a one year residency requirement. To the extent that equality of treatment is the goal, it could be accomplished by restricting access to marriage in Canada. Our marriage and divorce laws would align. However, this option would have a problem of optics: the government would be seen to be restricting same-sex marriage rights, and the government would still have to figure out how to deal with the thousands of same-sex foreigners already married here. A problem would also remain in the law: a couple could have lived and married in Canada, and then have moved permanently to another jurisdiction. If this jurisdiction did not recognize their marriage (as a result, for example, of application of the public policy exception to the rules of marriage recognition), the couple would be unable to obtain a divorce — either

44 There is a residency or citizenship requirement for marriage in the Netherlands (Civil Code of the Netherlands, Tit. 5, Art. 43 s 1); Norway (The Marriage Act of Norway, 1991 No. 47, s. 5a); Belgium (“Marriage.” Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation. diplomatie.belgium.be/en/services/services_abroad/Registry/marriage (accessed 13 October 2012)). In Spain and Argentina, the rules are not set federally, and foreigners cannot marry in most regions. This is in contrast with the U.S., where there is no residency requirement to obtain a marriage in any of the states which recognize same-sex marriage: Connecticut (Conn. Gen. Stat. §46b-20a); Iowa (Iowa Code §595); Massachusetts (Mass. Gen. Laws Ch. 207 §1-8); New Hampshire (NH Rev Stat §457:1-5); New York (N.Y. Dom. Rel. §5-8); Vermont (VT. Stat. Ann. Tit 15 §1a-8), as well as Canada, Iceland (Law in Respect of Marriage No. 31 (1993), Chapter 1, Article 14.) and South Africa (Civil Union Act 2006, Art. No. 17).
there or in Canada. So, a marriage residency requirement does not entirely remedy the issue.

(ii) Reform the Divorce Act to Eliminate the Residency Requirement

Instead of amending the Civil Marriage Act, the government could amend the Divorce Act to eliminate the residency requirements. This could be done across the board for all divorces, or it could be done within the Divorce Act, creating a specific exemption for non-residents. An across the board elimination of the residency requirements would be unwise, as it would unleash the problem of interprovincial forum shopping that these provisions seek to resolve. Moreover, it would likely need to be replaced with some other jurisdictional rule, such as substantial connection or habitual residence, the effect of which would continue to exclude non-resident couples who married in Canada, but now live in jurisdictions that do not recognize their marriage.

Alternatively, the Divorce Act could be reformed to create a specific exemption for non-residents. This approach would have the advantage of keeping divorce laws within the Divorce Act, and is the approach advocated by the Canadian Bar Association. Such an approach would, for the reasons discussed above, have to create the exemption in a manner that specifically limited the access of non-resident couples to both the broader grounds for divorce in section 8 (adultery and cruelty), and the corollary relief provisions in sections 15, 16 and 17 of the Divorce Act (support, custody and access). Further, if the Divorce Act were to be amended to create a specific exemption for non-resident couples, it would need to make clear that the general procedures under the Divorce Act do not apply, and it would need to specify the procedures that do apply. As noted above, the proposal of the Canadian Bar Association — of allowing Canadian courts to make the determinations in the event the application is not joint — seems to be a reasonable one. The current section 7(2) of the proposed Bill C-32 — which under this reform option would be an amendment to the Divorce Act — could be revised to eliminate the requirement for a court order from the domicile jurisdiction, replacing it instead with the ability of the court hearing the divorce application to make the determination.

(b) Marriage Recognition

In Bill C-32, the Government proposes to amend the Civil Marriage Act to recognize marriages performed in Canada, even though the marriages are not valid

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45 This is the approach recommended by the Canadian Bar Association National Family Law Section, Jordan, above note 29.

46 Ibid. The Canadian Bar Association is of the view that the grounds of divorce in section 8 of the Divorce Act could and should be extended to non-resident couples, but the corollary relief provisions could and should be excluded. “The objectives of the Bill could be more effectively achieved through a consequential amendment to the Divorce Act, similar to the approach in the original Civil Marriage Act. This approach would ensure greater consistency between the treatment of resident and non-resident marriages. For example, non-resident divorces could be granted on grounds other than separation. Corollary relief applications for custody or child or spousal support could still be excluded, given the practical difficulties in enforcing any such orders.”
according to the domicile of either of the spouses. In other words, it would create a rule of celebration for marriages celebrated in Canada. It would not change the rules of marriage recognition for foreign marriages— that is— marriages celebrated in a foreign jurisdiction. In this section, I explore other options for reforming Canada’s law of marriage recognition.

(i) Revise the rules for same-sex marriage recognition

Some suggestions have been made— prior to the introduction of Bill C-32— that the rules of private international law could and should be revised to allow for the recognition of same-sex marriage. These arguments have been directed largely towards the courts, which have developed the common law rules of marriage recognition. There are certainly arguments to be made as to why ignoring this rule in the context of same-sex marriage would actually be consistent with Canadian constitutional values, as well as Canadian public policy on the recognition of foreign law. To the extent that these rules have emerged as common law rules, interpreted and developed by the courts, they could be interpreted in light of the equality provisions of the Canadian Charter of Rights and Freedoms.47 Not unlike the evolution of the common law definition of marriage itself, which the Canadian courts have developed to include same-sex marriages, the laws of foreign marriage recognition could here be interpreted and developed in light of Canadian equality values.

Martha Bailey has similarly suggested that “An argument can be made, however, that if a party’s personal law denies capacity to enter into a same-sex marriage, that incapacity should be ignored on public policy grounds.”48 She reviews a number of English cases, where a very limited exception has been made to the dual domicile rule, in the context, for example, of anti-miscegenation laws, laws imposing an incapacity to remarry on an adulterous wife and laws refusing to allow a man to marry outside of his religion.49 While recognizing that these exceptions have been both restricted and criticized, Bailey argues that they could provide a basis for recognizing same-sex marriages, notwithstanding the domicile of the parties to the marriage.

In light of the values enshrined in international human rights documents and the Charter, it is at least arguable that giving effect to a foreign law prohibiting same-sex marriage would be discriminatory, an unjustifiable interference with the freedom to marry and contrary to public policy.50

The arguments for creating an exception for same-sex marriages are directed towards the courts, and to the judicial development of the private international common law rules of marriage recognition. They are not arguments for the creation of a legislative exception for same-sex marriages. A legislative exception for same-


49 Ibid, at 1018-1019.

50 Ibid, at 1019.
Sex marriage would be unlikely to itself survive a constitutional challenge. However, this is not to say that there was no role for the federal government here. Indeed, it was in regard to the recognition of the Canadian same-sex marriage that the Government seemed to run most afoul of the spirit of Canada’s equal marriage laws in the lesbian divorce case. The federal Government could have taken a lead in making this argument in its initial response, rather than reasserting the traditional rule of dual domicile to invalidate the marriage. Such an approach would have been more in keeping with the equality spirit of the Civil Marriage Act and might have given the courts more latitude in recognizing the marriage under Canadian marriage law. However, creating an exception for same-sex marriage is not an appropriate legislative response. Nor, it should be emphasized, is it one considered by Bill C-32.

(ii) Revise the rules for all marriage recognition

Alternatively, the federal government could undertake a more systemic reform of the rules of all marriage recognition. It could amend the Civil Marriage Act to specifically endorse a rule basing recognition on the law of the place of celebration for all marriages, not only those celebrated in Canada.

Bill C-32 involves a modest shift towards the law of the place of celebration, but only for marriages celebrated in Canada. It would not change the law determining the validity of non-Canadian marriages. For these non-Canadian marriages, Canada would continue to have the dual marriage recognition laws: lex loci celebrationis on formal validity, and lex domicile for essential validity. These jurisdictional rules could create a future furor over same-sex marriage, with the possibility of a Canadian court refusing to recognize a same-sex marriage. Consider a same-sex couple who marries in Massachusetts or New York (which do not have residency requirements), but resides in Texas. One party to the marriage later moves to Canada, where the couple now seek a divorce. According to the traditional rules of private international law as they apply to marriage recognition in Canada, this would not be a valid marriage. The essential validity of the marriage would be determined according to the pre-marital domicile of both of the parties, and since one of the parties lives in Texas, the marriage would be invalid. The proposed section 5 of the Civil Marriage Act would not remedy this scenario, since it is limited to marriages celebrated in Canada. This is but one imaginable scenario of migrating same-sex marriages, where the complex rules of marriage recognition would run afoul of the constitutional values of equality in relation to same-sex marriage.

Moving towards a place of celebration rule would be consistent with the contemporary developments in private international law, exemplified for example by the Hague Convention On Celebration And Recognition Of The Validity Of Marriage. The Convention would make the law of the place of celebration the determinant of the validity of a marriage. The Convention stipulates both specific and


52 Ibid. Article 2 reads “The formal requirements for marriage shall be governed by the law of the State of celebration” Article 9 reads: “A marriage validly entered into under the law of the State of celebration or which subsequently becomes valid under that law
general exceptions to the recognition of the validity of marriages. Article 11 provides that a state may refuse to recognize the validity of the marriage due to a prior existing marriage, consanguinity, minimum age requirements, mental incapacity or lack of consent.\(^{53}\) Article 14 incorporates the public policy exception.\(^{54}\) Canada could sign the Convention, and amend the Civil Marriage Act and Divorce Act accordingly. Ratification of the Convention would apply not only to same-sex marriages, but to all foreign marriages — same- and opposite-sex alike. However, while such ratification would go some distance to establishing a principled approach to marriage recognition, it would be an approach that only applied as between countries that are signatories to the Convention. Only six countries have signed to date.\(^{55}\)

Further, even if more states ratified the Convention, the incorporation of the public policy exception means that even contracting states would not necessarily recognize Canadian same-sex marriages. Non-resident couples who married in Canada, but were domiciled in a state that did not recognize same-sex marriage would continue to face problems of non-recognition of their marriages and accordingly, an inability to divorce. In other words, while signing the Convention would put Canada in step with the weight of emerging expert opinion in private international law, as captured by the Hague conventions, it would not — without further action — resolve the conflict of laws problems created by our laws of marriage and divorce.

8. CONCLUSION

Bill C-32 is a reasonable attempt to remedy the jurisdictional problems of divorce faced by non-resident couples who marry in Canada, but find themselves unable to divorce in their domicile. There is room for improvement in the Bill, in particular, by eliminating the requirement for a court order for non-joint applications. There is also a persuasive argument that these provisions would be better placed in the Divorce Act than in the Civil Marriage Act. However, in terms of marriage recognition, Bill C-35 provides more of a band-aid solution; while it does remedy the problem faced by non-resident couples whose Canadian marriage is not recognized by their domicile, a broader rethinking of the laws of marriage recognition and adoption of the law of the place of celebration rule would be preferable.

This often technical discussion of the rules of marriage recognition and divorce jurisdiction has also been intended to highlight the extent to which equality is a limited lens through which to view the problem. Marriage equality in Canada does nothing to ensure that the marriages of non-residents can in fact be exported. This is not a new problem; nor is it a specifically same-sex problem. From polyg-

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\(^{53}\) *Ibid.*, Article 11. These exceptions are consistent with the Canadian common law rules of the essential validity of marriage.


\(^{55}\) Austria, Egypt, Finland, Luxembourg, Netherlands, Portugal. See Hague Conference on Private International Law (HCCH) Status Table: hcch.net/index_en.php?act=conventions.status&cid=88 (accessed 5 August 2012.)
amy to first cousin marriages, private international law has been struggling with the question of the rules of marriage recognition for a long time. There is no doubt that the contemporary struggles around same-sex marriage recognition have given these laws a renewed relevance. And Canada can certainly be expected to be a leader in how it treats same-sex marriages—domestic and foreign. For this reason, the amendments proposed to the Civil Marriage Act are to be commended. The changes to marriage recognition make the law more consistent with Canadian equality law and values. And the changes to divorce jurisdiction provides a helping hand to those couples whose domiciles will not.

However, the extent to which the debate was mired in the language of marriage equality, of the government backsliding on equality, divorcing couples overnight, or otherwise undermining LGBT equality rights, all operated to obscure the important—and technical—underlying issues. I do not mean to suggest that there was no room for equality in this debate. As I have suggested above, the Government did seem to run afoul of the spirit of equal marriage when it insisted in its initial reply to the lesbian divorce case that their marriage was not valid in Canada. While strictly speaking, the Government was simply applying the existing rules of private international law, it could have taken a lead in bridging the gap between these common laws rules and Canadian equality values. However, the extent to which the debate became mired in exclusively equality language seemed for foreclose the kind of more nuanced rethinking of the intersection between Canada’s marriage laws, divorces laws and marriage recognition laws that was needed.

Indeed, the controversy suggests in that context of gay and lesbian rights in general and same-sex marriage in particular, the pro-gay/homophobic banners are trotted out so quickly that we remain incapable of having an informed, measured, and technical legal discussion. I certainly do not mean to suggest that there is not a time or place for the pro-gay banners; for denouncing discriminatory government laws and policies. The question is whether the same-sex divorce controversy was one of them. On the one hand, it was highly effective: the Conservative government responded immediately to the front page controversy, needing to quash the suspicions that it was advancing a socially conservative agenda on marriage. The mere allegation of discrimination against same-sex marriage, given the history of the Conservative Party of Canada on the matter, required that the Minister of Justice move quickly to put out the fire. (Admittedly, the same urgency has not extended to passing the legislation, which at the time of writing remains stalled in the House of Commons). On the other hand, the equality hysteria may have operated to pre-empt a more nuanced legal discussion about when and how non-residents should have access to Canadian courts and Canadian law.

We need to consider when and how non-residents should be able to access our marriage and divorce laws, and under what conditions we should recognize non-resident marriages. Equality values certainly have a role to play in these discus-

57 Nor should I be taken as criticizing the strategy of the plaintiff’s lawyer, Martha McCarthy in this case. Her legal strategy was nothing short of stellar, and she can hardly be held responsible for the Dan Savage type of equality hysteria that ensued. McCarthy was simply seeking a remedy for her clients.
sions — but so do a range of complex and broad reaching jurisdictional questions. These are not issues that typically capture headlines, or for that matter, much government attention. The lesbian divorce case provides an opening, an entry into a more systemic reconsideration of how our marriage and divorce laws intersect with our rules of private international law. We should not lose the opportunity by simply seeking to put out equality fires.

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