

**COMMON LAW MARRIAGE IN COMMON
LAW CANADA: LEGISLATURES AND
COURTS RECOGNIZE “MARRIAGE-LIKE”
RELATIONSHIPS**

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INTRODUCTION: THE CANADIAN CONTEXT

Over the past fifty years Canada, like many other countries, has experienced dramatic changes in social attitudes towards cohabitation outside of marriage and a significant increase in the number of individuals living in non-marital relationships.¹ The wide range of legal responses to these developments within a single federal country makes Canada an interesting “laboratory” for law makers, scholars, and practitioners from other countries to consider when assessing policy arguments and practical implications of different legal regimes for spousal status being ascribed to unmarried partners.²

In Quebec, often characterized as “distinct society” within Canada, the legislature has not recognized rights or obligations for unmarried partners at the end of their relationship unless the parties have taken affirmative steps to register or enter into a formal agreement.³ In the rest of Canada, there has been much greater legislative recognition for “marriage-like” relationships.⁴

1. Andrew Morrison, *Who Is Family: Cohabitation, Marriage, and the Redefinition of Family*, 29 CAN. J. FAM. L. 381, 381 (2015).

2. See Robert Leckey, *Judging in Marriage’s Shadow*, 26 FEMINIST LEGAL STUD. 25, 28 (2018) (metaphorically referring to Canada as a “laboratory” for studying responses to cohabitation).

3. See generally Dominique Goubau, *Why Does Quebec Family Law Seem so Different in the Eyes of Canadian Common Law Lawyers? But How Different Is it?*, 38 CAN. FAM. L. Q. 1 (2018) (comparing Quebec family law to common law Canada). Comparisons between Quebec and the rest of Canada (ROC) are standard fare for Canadian social scientists, but in the context of this article, the ROC is generally referred to as “common law Canada.” *Id.*

4. See Robert Leckey, *Differences in a Minor Archive: Feminist Activists and Scholars on Cohabitation*, A. J. OF COMP. L. (forthcoming), <https://ssrn.com/abstract=3732465> (explaining how cohabitation entails no statutory

This ranges from full ascription to marital status if parties have cohabited in a relationship of some permanence, to limited recognition for support obligations after three years of cohabitation combined with judicially developed remedies for unjust enrichment that often result in a significant property remedy for unmarried partners.⁵ The difference in approach between Quebec and the rest of Canada is especially striking since Quebec has a much higher rate of unmarried cohabitation than other Canadian provinces and a relatively strong feminist movement.⁶

There is variation in Canada in the English terms used for an unmarried cohabiting intimate partner, including “*de facto* spouse” and “adult interdependent partners,” but the most widely employed is the term “common law spouse,” and unmarried partners are often described as “living common law.”⁷ While the historical derivation of the term “common law spouse” can be traced to a time when common law courts recognized that a man and woman who cohabited and held themselves out as married might be legally treated as married, even lengthy unmarried cohabitation is not at present a basis for being regarded legally married in Canada.⁸

This article considers the legal approach to cohabitation in the nine provinces and three territories of Canada that are predominantly English-speaking and have a common law heritage. The article by Dean Robert Leckey, also in this Special Issue, addresses the approach to unmarried cohabitation of the

rights and obligations between partners in Quebec, while in the other provinces cohabitation triggers some or all marital rights and obligations).

5. See Family Law Act, R.S.O. 1990, c. F.3, s 29 (including in the definition of “spouses” for support purposes unmarried cohabitants living together for three or more years or, if parents of a child, in a relationship of some permanence); see also Goubau, *supra* note 3, (comparing Quebec and the rest of Canada).

6. Leckey, *supra* note 4.

7. See The Canadian Press, *From Common Law to ‘Adult Interdependent Relationship’: How Laws Vary by Region*, CAN. PRESS (Feb. 11, 2016, 8:23 AM), <https://toronto.citynews.ca/2016/02/11/from-common-law-to-adult-interdependent-relationships-how-laws-vary-by-region/> (showing how different Canadian regions refer to common law partnerships).

8. See *Dutch v. Dutch* (1977), 1 R.F.L.(2d) 177 (Ont. Cty.Ct.). Common law marriages are, however, still recognized in some American states: see Jennifer Thomas, *Common Law Marriage*, 22 J AM ACAD MAT LAW 151 (2009).

courts and legislature in Quebec, Canada's predominantly French speaking province, where relationships between cohabitants are governed by the *Civil Code*.⁹ Each article explores the jurisprudence under Canada's *Charter of Rights and Freedoms*¹⁰ on the development of the law governing cohabitation in the jurisdictions being considered. This article will also touch on the subtle interrelationship of the *Charter* litigation on the legal recognition of same-sex marriage with laws governing unmarried cohabitation. The national acceptance of same-sex marriage while having varying approaches to cohabitation in different parts of Canada illustrates the complexity of this relationship.

While the decisions of the Supreme Court of Canada interpreting the *Charter* are binding throughout the country, the *Charter* has had different effects on the development of the laws governing unmarried partners.¹¹ As Dean Leckey explains, *Charter* litigation has ultimately had no impact on legislation in this area of law in Quebec.¹² However, as will be discussed in this article, the *Charter* has had an impact on the law in Canada's common law jurisdictions, though ultimately it has been legislatures in these jurisdictions that have recognized these relationships. As will be explored in both articles, there is continuing advocacy for legislation to be enacted to fully equate long term cohabiting relationships to marriage in those Canadian jurisdictions that treat them differently. The possible abandonment of "conjugal" as a central concept for governing interpersonal intimate relationships will also be discussed in this article. Although for the foreseeable future conjugal will remain a key concept in Canada, there is a gradual trend to give some legal recognition to non-conjugal relationships.

9. See generally Robert Leckey, *Cohabitation Law in Quebec: Confusing, Incoherent, and Unjust*, 45 HOUSTON JOURNAL OF INTERNATIONAL LAW (2022); see generally Civil Code of Québec, S.Q. 1991, c 64, (Can.).

10. Robert Leckey, *Cohabitation Law in Quebec: Confusing, Incoherent, and Unjust*, 45 HOUSTON JOURNAL OF INTERNATIONAL LAW (2022).

11. *Id.*

12. See *id.*

II. UNMARRIED COHABITATION IN CANADA: SOCIAL CONTEXT

In the half century since Canada first accepted the possibility of a no-fault divorce based on a period of separation,¹³ there have been fundamental changes in attitudes and behaviours relating to marriage. There have also been major changes in gender roles within marriage: many more married women are in the labor force, fathers are playing a greater role in child care, and families have fewer children.¹⁴ There has also been a decrease in the “permanence” of the marriage bond, with slightly less than four in ten Canadian marriages now ending in divorce.¹⁵

There is a much wider social acceptance of cohabitation outside of marriage; according to Census data (which only began to track this trend in 1981), the portion of all opposite-sex Canadian couples living common law as opposed to married rose from 6% in 1981, to 14% in 2001, and 21% in 2016.¹⁶ In 2017, in Quebec, 31% of couples were living common law, more than twice the rate in any other province, though rates of living common law are even higher in some of the northern territories.¹⁷ In 2017, among 25 to 64-year-olds who married, 39% lived common law with their current spouse before marrying that person; this was up from 25% in 2006.¹⁸ Although for many, especially outside Quebec, living common law is a prelude to marriage, most of those

13. Donald S. Moir, *No Fault Divorce and the Best Interests of Children*, 69 DENV. U. L. REV. 663, 680 (1992) (reporting that in 1968, a ground for divorce was three years consensual separation, which in 1985 was reduced to one year separation).

14. Statistics Canada, *The Surge of Women in the Workforce*, DAILY (May 17, 2018), <https://www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2015009-eng.htm#archived>.

15. See CBC News, *4 in 10 1st Marriages End in Divorce: Report*, CBC, (Oct. 4, 2010, 11:01 AM), <https://www.cbc.ca/news/canada/4-in-10-1st-marriages-end-in-divorce-report-1.953894>.

16. Statistics Canada, *Family Matters: Being Common Law, Married, Separated or Divorced in Canada*, DAILY (May 5, 2019), <https://www150.statcan.gc.ca/n1/daily-quotidien/190501/dq190501b-eng.htm> (showing Statistics Canada data from 2016 Census and 2017 General Social Survey).

17. Andrea Mrozek and Peter Mitchell, *Building Instability Putting New Census Data in an International Context with Key Canadian Takeaways*, CARDUS (Aug. 2, 2017), <https://www.cardus.ca/research/family/>.

18. Statistics Canada, *supra* note 16.

living common law in Canada do not marry one another.¹⁹ While most of those who are living common law are younger, a growing segment of the older population (55 years plus) are living common law after a prior marriage that ended in divorce or by the death of a spouse.²⁰

Those who are Canadian born adults are three times more likely to be living common law than foreign born Canadians, and there are especially high rates of common law relationships among Indigenous Canadians.²¹ Public opinion research reveals a growing belief, especially among younger Canadians, that marriage itself is “not that important,” and that there is less support in Canada than in the USA for the view that marriage is an “important social institution”.²²

There is a lack of reliable social science research about the nature of common law relationships in Canada as compared to marriages, though it is clear that there is great diversity in common law relationships and in the reasons that people are cohabiting rather than marrying. Some long-term unmarried relationships are “functionally equivalent” to marriages,²³ with high levels of economic interdependence and children. Some of those in these long-term relationships have made a principled decision not to marry, but many may have started cohabiting without clear expectations and their interdependencies developed over time, without the parties having had a clear discussion of

19. Don Kerr, et al., *Tying the Knot or Just Living Together: Demographic and Socioeconomic Characteristics*, 20 PSC DISCUSSION PAPERS 1, 28–29 (2006).

20. See Anne Milan, et al., *Emerging Trends in Living Arrangements and Conjugal Unions for Current and Future Seniors*, INSIGHTS ON CAN. SOC'Y, 1, 7 (2014) (showing the percentage of older age groups living common law, including for seniors who have been previously married).

21. See Statistics Canada, *supra* note 1, at 386 (quoting Zheng Wu, *Cohabitation: An Alternative Form of Family Living*, (Don Mills: Oxford University Press, 2000, at 47).

22. See Angus Reid Institute, *I Don't: Four-in-Ten Canadian Adults Have Never Married, and Aren't Sure They Want To*, ARI, (May 7, 2018), <https://angusreid.org/marriage-trends-canada/> (showing that Canadians between the age of 24-65 are more likely to find marriage “not important”); cf. Kata Fustos, *Marriage and Partnership Turnover for American Families*, PRB, (June 17, 2010), <https://www.prb.org/resources/marriage-and-partnership-turnover-for-american-families/> (describing that Americans are more likely to say that marriage is important to them and less likely to agree that “marriage is an outdated institution.”).

23. *Walsh v. Bona*, [2002] S.C.C. 83, at para 118 (Can.).

expectations;²⁴ in these relationships, expectations may have subtly changed over time, and the expectations of the two parties may not have been the same.²⁵

The limited available research suggests common law relationships in Canada are more likely than marriages to end in separation and are generally of shorter duration than marriages, and that cohabiting parties are more likely to maintain separate finances than those who marry.²⁶ Those living in common law relationships in Canada have less education, on average, than those who marry.²⁷ Research also suggests that many of those who are cohabiting do not feel sufficient commitment to the present partner to marry, and significant numbers have concerns about whether they, or their partners, have the financial resources to marry.²⁸ However, Census data from 2016 reveals that 43% of common law couples have one or more children residing with them (compared to 52% of married couples).²⁹

24. See Elizabeth S. Scott, *Marriage Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 244–245 (2004) (stating that though many American cohabiting couples make a considered decision not to marry for principled reasons, many cohabit without clear intentions and goals for the relationship).

25. See Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 995 (2005) (describing an American study which found that 53% of individuals in cohabiting relationships “did not describe the process of cohabitation as a deliberate decision”); see Eriz Aloni, *Compulsory Conjugalit*y, 53:1 CONN L REV 55, 67 (2021) (a study reporting that many Canadians in cohabiting relationships also began their cohabitation without clear consideration or discussion of the implications or expectations, let alone legal rights and obligations); see Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L. J. 1247, 1273 (2020) (explaining how couples in cohabiting relationships sometimes have different expectations for their relationship than their partner).

26. Margrit Eichler, *Contemporary and Historical Diversity in Families*, 17 CAN. J. FAM. L. 54, 58 (2000); Inst. of Law Resch. and Reform, *Survey of Adult Living Arrangements: Technical Report ii* (1984).

27. See Laetitia Martin & Feng Hou, *SHARING THEIR LIVES: WOMEN, MARITAL TRENDS AND EDUCATION* 70 (Statistics Can. ed., 2010) (reporting that women with less than a university education are more likely to be in a common-law relationship than more educated women, and that most women marry men of the same educational level).

28. Angus Reid Institute, *supra* note 22.

29. See Stat. Can., *Data Tables, 2016 Census, Census Family Structure and Presence and Ages of Children* (2016), <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?TABID=2&Lang=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&>

It would seem that, as in the United States, there is a significant economic correlation associated with unmarried cohabitation, with cohabitation associated with lower income groups and less stable relationships, and wealthier and better educated partners being more likely to enter more stable marital relationships.³⁰ Not surprisingly, however, a Canadian study of reported court decisions in British Columbia and Saskatchewan involving common law partners found that litigation is more likely if there are significant assets, and the duration of the period of cohabitation (an average of 9 years) was substantially more than the statutory minimum (2 years in those two provinces) for having full common law status.³¹

One indisputable reality is that most Canadians in common law relationships do not fully understand the legal implications of living common law, and do not appreciate the rights and obligations that they may have on separation.³² This in part reflects a broader issue that a majority of people have only vague ideas of the laws that may affect their lives until those laws become directly relevant. However, this lack of awareness also reflects the complexity of the law governing separation of common law partners in Canada. As will be described in this article, some of the complexity results from different definitions and laws for different purposes, including the differences between federal and provincial or territorial laws. The legal status of a couple may be significantly altered if the couple moves to a province with a different legal regime, but few Canadians are aware of this. Understandably, individuals who complete federal census and tax

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30. Cahn, *supra* note 25, at 1247, 1273; W. Bradford Wilcox & Wendy Wang, *The Marriage Divide: How and Why Working-Class Families Are More Fragile Today*, INSTITUTE FOR FAMILY STUDIES (Sept. 25, 2017), <https://ifstudies.org/blog/the-marriage-divide-how-and-why-working-class-families-are-more-fragile-today>.

31. Robert Leckey, *Cohabitation, Law Reform, and the Litigants*, 31 INT'L J. OF L. POL'Y & THE FAM. 131, 13 (2017) (explaining how unmarried Canadian partners with limited claims usually do not bring them to court because of the expense, hassle, and possible requirement to pay if they lose; the cases that were litigated were for large amounts (average post reform of \$133,200 with a maximum of \$969,400)).

32. Aloni *supra* note 25, at 60, 74, 84.

forms indicating that they have a “common law marriage” after one year cohabitation, which confers some status and rights, may assume that this applies to other contexts as well, but it may not.

III. LEGAL RECOGNITION OF UNMARRIED COHABITATION

A. *Constitutional Responsibility*

Before considering the evolution of Canada’s laws governing unmarried cohabitation, it is useful to describe the constitutional framework for these laws. While the federal government has jurisdiction over most rights and obligations that arise on the divorce of married spouses under s. 91(26) of the *Constitution Act, 1867*,³³ primary responsibility for unmarried cohabitation rests with provincial and territorial governments as an aspect of “property and civil rights” under s. 92(13), which results in the variation in approaches across Canada to common law relationships.³⁴ Provincial and territorial law also govern property rights of married spouses on separation.

The federal government is, however, responsible for defining spousal status for the purposes of certain matters within federal jurisdiction, such as immigration and income tax; for those purposes the federal government has adopted a definition that includes as “common law partners” those who have cohabited in a conjugal relationship for at least a year.³⁵ This federal jurisdiction is significant for some family law purposes, most notably establishing a claim to Canada Pension Plan credits accrued by partners during cohabitation.³⁶

33. *Constitution Act, 1867*, 30 & 31 Vict., c 3 (U.K.), s. 91(26), reprinted in R.S.C. 1985, App. II, No.5, gives the federal government authority over “Marriage and Divorce.” See Robert Leckey & Carol Rogerson, *Marriage, Family, and Federal Concerns*, in *THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION* 576 (Oxford University Press, Peter Oliver, Patrick Macklem & Nathalie Des Rosiers eds., 2017) (explaining how federal law in Canada governs family matters).

34. *Constitution Act, 1867*, 30 & 31 Vict., c 3 (providing that provincial and territorial governments govern property and civil rights under s. 92(13)).

35. Leckey, *supra* note 33, at 20–21.

36. *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 248(1) (defining “common-law partner” based on 12 months of conjugal cohabitation); see, e.g., *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 2(1) (providing that a person is a “common-law partner” to a contributor when the person lives with the contributor in a conjugal relationship for at

B. *Early Support Legislation for Common Law Partners*

Historically, Canadian law did not recognize "meretricious relationships," as unmarried cohabitation was known, for any purposes, based on the view that doing so would promote immorality and social destabilization.³⁷ In the 1970's some legislatures in Canada began to accept the argument of law reformers that it was fair to impose support obligations if dependency relationships arose as a result of roles assumed during a long term cohabiting relationship, while also appreciating that creating such private obligations might reduce dependence on social assistance and reduce burdens on government.³⁸

In 1972, British Columbia became the first province to recognize opposite-sex cohabitation for purposes of spousal support, extending the statutory definition of "spouse" for this purpose to include opposite-sex partners if they "lived together as husband and wife" for at least two years.³⁹ The Ontario statute, enacted in 1978, created a spousal support obligation if partners "cohabited" for three years in a "conjugal relationship," or if the couple cohabits in a "conjugal relationship . . . of some permanence" and has a child together.⁴⁰

These early legislative reforms dealt only with spousal support claims, in large part because in Canada until the late

least one year); and Merchant Seamen Compensation Act, R.S.C. 1985, c. M-6, s. 44(3) (stating that for income tax purposes the definition of "common law partner" is broader, including both someone who has cohabited for 12 months with another in a conjugal relationship, or a shorter period of cohabitation if they are parents of a child).

37. See, e.g., IWAN SAUNDERS, MAINTENANCE LAW IN CANADA 7-3 (Law Reform Comm'n of Can., 1975).

38. See, e.g., Ont. L. Reform Comm'n, *Report on Family Law, Part IV: Family Property Law* 184-185 (1974); Roy McMurtry, *Family Law Reform in Ontario*, L. SOC'Y GAZETTE, 1976, at 145.

39. Family Relations Act, S.B.C. 1972, c. 20, s. 15(e)(iii).

40. Family Law Act, R.S.O. 1990, c. F.3, s. 29-30. (first enacted in 1978 as *The Family Law Reform Act, 1978*, S.O. 1978, c. 2, s.14) (requiring five years of cohabitation under the 1978 Act; reduced to three years in 1986).

1970's, even married spouses did not have statute-based property claims in the event of divorce.⁴¹

C. *Early Property Jurisprudence – A “Relationship Tantamount to Spousal”*

Historically, Canadian courts rejected claims based on constructive trust, or similar doctrines, invariably made by a woman, to a share in property acquired by her partner during a non-marital relationship.⁴² The courts reasoned that there was no unjust enrichment of a partner as any contribution that she made was regarded as a “gift” to the man.⁴³ In 1980, however, the Supreme Court of Canada, in *Pettkus v. Becker*, used the constructive trust remedy to award a woman an equal share of the property acquired by her partner during a nineteen-year relationship in which both worked together at various jobs, ultimately acquiring a farm, on the basis that he would be unjustly enriched if her contribution to the acquisition of the property were not recognized.⁴⁴ Justice Dickson held that it is wrong to presume that one intimate partner intends to contribute to the acquisition of property on a “gratuitous basis.”⁴⁵ To the contrary, “where one party in a relationship tantamount to spousal” benefits her partner by helping to acquire or maintain property, there will be a “reasonable expectation” of compensation unless there was an agreement to the contrary.⁴⁶ Justice Dickson observed that there was “no basis for any distinction” in applying equitable remedies between “those in marital relationships and those more informal relationships which subsist for a lengthy

41. Family Relations Act, S.B.C. 1979, c. 121, s. 43(1) (providing for the division of marital assets to give each spouse an interest in family assets if they divorced on or after March 31, 1979).

42. *Pettkus v. Becker*, [1980] 2 S.C.R. 834 (Can.).

43. *Id.* at 862.

44. *Pettkus*, 2 S.C.R. at 835; SAMUEL SCHWISBERG, SWARM BEFORE ME V-VI (Friesen Press, 2015) (discussing the *Pettkus* case, written by plaintiff's lawyer Samuel Schwisberg); Mitchell McInnes, *Book Review*, 36 Can. Fam. L. Q. 233 (2017).

45. *Pettkus*, 2 S.C.R. at 849 (holding that it would be unjust to presume Miss Becker intended to gratuitously work for nineteen years and not award her a portion of the property she helped build).

46. *Id.* at 835.

period.”⁴⁷ “This was not an economic partnership, nor a mere business relationship, nor a casual encounter . . . Their lives and their economic well-being were fully integrated.”⁴⁸

As will be discussed more fully below, while the caselaw of the 1980’s recognized contributions of unmarried partners in relationships where both parties worked on a farm or business, more recent jurisprudence has also recognized that a “joint family venture” may be established based on purely domestic contributions that may give rise to a property-based claim. However, these doctrines recognize contributions, and are not based merely on the status of being an unmarried cohabitant.

D. *Charter Litigation & Legislative Reform*

During the late 1980s and early 1990s, Canada’s federal Parliament and several provincial legislatures in common law jurisdictions amended some statutes to confer specified rights and obligations on common law partners who cohabited in a “conjugal relationship” or “lived together as husband and wife” for a specified period of time or had a child together.⁴⁹ For example, Canada’s federal income tax and pension laws were amended in 1993 to include in the definition of “spouse” common law partners who cohabited for one year.⁵⁰ Reflecting a desire to be seen as not discriminating against common law partners, during this period politicians led the way on the of recognition of common law relationships. At that time judges took the position that since those who lived outside of marriage chose not to marry, it was not a violation of the prohibition on discriminatory treatment in the *Charter of Rights* for legislation to deny them the same rights and obligations of those who were married.⁵¹

47. *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 850 (Can.).

48. *Id.*

49. See Nicholas Bala, *Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, 29 QUEEN’S L.J. 41, 48 (2003).

50. See, e.g., *Schachtschneider v. Canada* (1993), [1994] 1 F.C. 40, para. 33 (C.A.) (citing An Act to amend the Income Tax Act, the Canada Pension Plan, the Income Tax Conventions Interpretation Act, the Tax Rebate Discounting Act, the Unemployment Insurance Act and certain related Acts, S.C. 1993, c. 24, s. 52).

51. See, e.g., *Leroux v. Co-operators General Insurance Co.* (1991), 4 O.R. (3d) 609 (Can. Ont. C.A.) (holding that an infringement of section 15 of the *Charter* had not been

In 1995, the Supreme Court of Canada, in *Miron v. Trudel* considered a constitutional challenge to the statutory definition of “spouse” for the purpose of entitlement to benefits under an Ontario insurance policy by a woman in a long-term cohabiting relationship whose partner was killed in a motor vehicle accident and was denied coverage as a “spouse.”⁵² While she was a spouse under provincial support law, the definition in the applicable insurance legislation was restricted to married spouses.⁵³ In a five-to-four decision, the Court held that excluding long-term unmarried cohabitants from the statutory definition of “spouse” for insurance purposes was contrary to s. 15 of the *Charter of Rights*, which prohibits discrimination based on marital status.⁵⁴ The Court “read into” the definition of “spouse” for insurance purposes the definition of common law partners that had already been enacted in Ontario for spousal support purposes—parties who had cohabited for at least three years.⁵⁵ The dissenting judges in *Miron* were of the view that individuals who chose not to be married should have neither the rights nor the obligations of marriage.⁵⁶ However, McLachlan, J., writing for the majority, observed:

In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one’s partner to marry; financial, religious or social constraints—these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual’s effective control.⁵⁷

shown because unmarried persons who live together are not subject to the legal burdens and obligations of married persons); *Schachtschneider*, 1 F.C. 40 at para. 22.

52. See *Miron v. Trudel*, [1995] 2 S.C.R. 418, 418–19 (Can.).

53. See *id.*

54. See *id.* at 420.

55. See *id.* at 421.

56. See *id.* at 424–25.

57. *Id.* at 498.

Prior to *Miron*, only Quebec and Alberta had not enacted legislation to impose support obligations on long-term unmarried opposite-sex partners, though the reasons for not acting differed in those provinces.⁵⁸ As discussed by Dean Leckey, the legislature in Quebec has been unwilling to impose support obligations on those who cohabit outside of marriage as they had not formalized their relationship or contracted to adopt obligations towards one another,⁵⁹ though these relationships are recognized in that province for some taxation and public pension purposes. Quebec is in many respects Canada's most progressive province, and this rejection status for *de facto* spouses for family law purposes reflects its formalist civilian legal tradition and respect for choice.

Alberta, on the other hand, is in many respects Canada's most conservative province.⁶⁰ Prior to *Miron*, Alberta gave relatively little statutory recognition to unmarried opposite-sex cohabitants for any purpose, as the provincial government did not wish to be seen as recognizing relationships which were regarded as immoral by many in the province.⁶¹ The 1998 decision of the Alberta Court of Appeal in *Taylor v. Rossu*, however, resulted in provincial legislative action to recognize common law relationships.⁶² Citing the Supreme Court decision in *Miron*, the Alberta Court in *Taylor* ruled that it was a violation of s. 15 of the *Charter* to exclude common law cohabitants from the definition of "spouse" in the province's support statute and allowed a long-term common law partner to claim support at the end of her relationship with her partner.⁶³ Rather than appeal to the Supreme Court, the Alberta legislature amended several of its statutes to include within the definition of "spouse" opposite-sex

58. Leckey, *supra* note 9.

59. See Robert Leckey, *supra* note 33, at 575, 588 (contending that Quebec's focus on formalism, individual freedom, and reluctance to attribute obligations absent consent explains Quebec's decision to not ascribe spousal rights and duties to unmarried couples).

60. Bala, *supra* note 49, at 50.

61. See *Taylor v. Rossu*, 1998 ABCA 193, para. 75 (Can.).

62. See *id.* at para. 153, 156 (stating that the government should amend legislation to conform with Charter requirements by extending the obligations afforded to married partners to common law partners).

63. See *id.* at para. 129.

partners who had lived in a “marriage-like” relationship and had cohabited for at least three years or had a child together.⁶⁴

Prior to *Miron*, only the Northwest Territories had enacted a matrimonial property regime that included in the definition of “spouse” a common law partner.⁶⁵ In 1999, a Saskatchewan court, relying on the Supreme Court decision in *Miron*, held that it was a violation of the *Charter* to deny a long-term common law partner the same statutory possessory rights as enjoyed by a married spouse with regard to a family home.⁶⁶ In response to this decision, in 2001, the Saskatchewan legislature amended its matrimonial property law and several other statutes to give unmarried partners who have “cohabited . . . as spouses continuously for at least two years” the same recognition as married spouses.⁶⁷ The following year, in the neighboring province of Manitoba, the legislature enacted a statute to give common law partners who cohabited in a conjugal relationship for at least three years the same rights and obligations as legally married spouses for a range of purposes, including matrimonial property law.⁶⁸ This legislative action in Manitoba and Saskatchewan was largely a response to the *Charter* litigation involving unmarried partners.

Following the trend in these decisions, in 2000 in *Walsh v. Bona* the Nova Scotia Court of Appeal upheld a *Charter* challenge to the province’s matrimonial property law.⁶⁹ A woman who had lived for 10 years in a common law relationship with a man, during which they had two children, claimed that the failure of the statute to grant rights to common law partners was discrimination on the basis of marital status.⁷⁰ The Nova Scotia Court of Appeal, citing the Supreme Court of Canada decision in *Miron*, concluded that, by excluding unmarried opposite-sex

64. See Domestic Relations Amendment Act, S.A 1999, c. 20, s. 2 (Can.).

65. See Family Law Act, S.N.W.T 1997, c. 18, s. 1 (Can.).

66. See *Watch v. Watch* (1999), 182 Sask. R. 237, para. 15 (Can. Sask. Q.B.).

67. The Family Property Act, S.S 1997, c. F-6.3, s. 2 (Can.).

68. See The Common-Law Partners’ Property and Related Amendments Act, S.M. 2002, c. 48, s. 16 (Can.) (amending The Marital Property Act to include the definition of common-law partner and adding “or common-law partner” after “spouse” wherever it occurs).

69. See *Walsh v. Bona*, 2000 NSCA 53 (Can.).

70. *Id.* at para. 1.

partners, the legislation “perpetuates the view that unmarried partners are less worthy of recognition, or value, as human beings or as members of Canadian society, equally deserving of concern, respect and consideration.”⁷¹ In 2002, the Supreme Court of Canada overruled the Nova Scotia Court of Appeal.⁷² The Supreme Court in its decision in *Walsh v. Bona* held that it is not discriminatory to treat common law partners differently from married ones for purposes of matrimonial property law, as they had chosen to avoid the consequences of marriage and therefore should not have the obligations of marriage imposed on them, at least for property law purposes.⁷³ Justice Bastarache, for the majority, emphasized the importance of “freedom of choice” in one’s intimate personal relationships.⁷⁴ He concluded:

[C]hoice must be paramount . . . [P]eople who marry can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from the choice of the parties . . . All cohabitants are deemed to have the liberty to make fundamental choices in their lives.⁷⁵

Justice Bastarache distinguished *Miron* as that case involved a claim against a third party on an insurance policy, and unmarried partners had no way of being recognized as spouses under such a policy unless a court or legislature granted them spousal status.⁷⁶ In contrast, common law partners could acquire property rights against each other by entering into an agreement.⁷⁷ The majority judgment in *Walsh v. Bona* also noted that the law of unjust enrichment could be used to afford some

71. *Id.* at para. 51.

72. *Walsh v. Bona*, 2002 SCC 83, at para 189 (holding that the definition of spouse found in the *Marital Property Act* violates the *Charter*).

73. *Id.* at para. 43 (interpreting the Matrimonial Property Act to only apply when couples have purposely chosen to avail themselves of the “obligations” of marriage.).

74. *Id.* at para. 43 (noting that generally the decision to marry or not to marry is a matter a free choice by those involved.).

75. *Id.* at paras. 43, 55, 62.

76. *Id.* at para. 53.

77. *Id.* at para. 49.

protection to those who may be unfairly disadvantaged as a result of the termination of their relationship.⁷⁸

Although *Walsh v. Bona* was criticized for its unfair treatment of claimants, usually women and their children,⁷⁹ it effectively ended the *Charter*-based pressure for legislative action in common law Canada to recognize the contributions and protect the dependencies of cohabiting partners—primarily women. As Dean Leckey discusses, the Supreme Court revisited the issue of *Charter*-based claims of unmarried cohabitants in 2013 in *Quebec (Attorney General) v. A*, where the Supreme Court ended the *Charter*-based pressure for legislative action in Quebec.⁸⁰

Interestingly, by the time that the Supreme Court decided *Walsh* in 2002, recognition of unmarried cohabitation had lost its salience as a contentious political issue in common law Canada, but there was a growing tide of controversy over allowing same-sex partners to marry.⁸¹ By distinguishing marriage from opposite-sex common law relationships in *Walsh*, the Supreme Court could be seen as upholding the importance of “marriage.” However, the emphasis in *Walsh* on the importance of “choice” in forming conjugal relationships gave a clear signal on the direction the Supreme Court was likely to take on the same-sex marriage challenges that were then before the lower courts. Indeed, the majority judgment in *Walsh* was quoted by the Ontario Court of Appeal in its 2003 ruling in *Halpern v. Canada (Attorney General)*, concluding that the *Charter* required recognition of same-sex marriage.⁸² The *Charter* litigation in *Halpern* and growing public support for same-sex marriage led Canada’s Parliament to enact the *Civil Marriage Act* in 2005.⁸³

78. *Id.* at para. 85 (noting that the Matrimonial Protection Act initially created two regimes, one statutory for married couples and another for unmarried couples which relied on doctrines like the unjust enrichment doctrine.).

79. D.A.R. Thompson, Annotation to *Walsh v. Bona*” (2002), 32 R.F.L. (5th) 81 at 92 (noting that the holding in *Walsh v. Bona* is likely to reenforce the imbalances of power in relationships disproportionately harming women and children).

80. Robert Leckey, *Cohabitation, Female Sacrifice, and Judge-Made Law*, 41 J. Social Welfare & Fam. L. 72, 75 (2019).

81. Bala, *supra* note 49, at 57.

82. *Halpern v. Atty. Gen. of Canada*, 65 O.R. (3d) 161, 163 (ONCA 2003).

83. *Civil Marriage Act*, S.C. 2005, c. 33 (Can).

As a prelude to the recognition of same-sex marriage, there had been litigation and legislative reforms related to the recognition of same-sex non-marital cohabitation. In 1999, the Supreme Court in *M. v. H.* held that the limitation in the definition of common law "spouse" in Ontario legislation to opposite-sex partners violated s. 15 of the *Charter*, as it constituted discrimination on the basis of sexual orientation.⁸⁴ Justice Cory, for the majority of the Court, emphasized the social importance of recognizing same-sex cohabiting relationships:

The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of [spousal support law] . . . promotes the view that . . . individuals in same-sex relationships . . . are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances . . . [Such] exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.⁸⁵

While some of the political responses to *M v H*, prior to legalization of same-sex marriage, were begrudging,⁸⁶ all jurisdictions which had legislation recognizing opposite-sex cohabitation amended their laws in response to *M v H*. to give same-sex cohabiting partners that same status as opposite-sex

84. *M. v. H.*, [1999] 2 S.C.R. 3 (Can.).

85. [1999] 2 S.C.R. 3, at para. 73 (Can.).

86. One example of the initially begrudging nature of the response to *M v H* was in Ontario, where the government made clear it was only acting because of the Supreme Court decision. The Conservative Premier at the time, Mike Harris, commented disparagingly on same-sex unions: "It is not my definition of the family." Rather than change the definition of "spouse", Ontario initially added the new concept of the "same-sex partner" to the legislation, reserving the term "spouse" for opposite-sex partners who are married or in common-law relationships: S.O. 1999, c. 6, s. 25 (2). However, in 2005, after the enactment of laws to recognize same-sex marriage, the government (by then led by the Liberals) amended the definition simply recognize as spouses "two persons who live together in a conjugal relationship for at least three years" or have a child together: S.O. 2005, c. 5, s. 27 (4-6). See John Ibbitson *Ontario gets 'on-message'*, THE GLOBE AND MAIL (25 October 1999), A15.

cohabitants. The federal government's response to *M. v. H.* was the enactment of the *Modernization of Benefits and Obligations Act*, amending all federal statutes that recognized as common law partners to include "two persons" who "cohabited in a conjugal relationship" for at least one year.⁸⁷ Nova Scotia and Manitoba also amended their legislation to establish a registered domestic partnership law, allowing two cohabiting partners of the same or opposite-sex, to register and immediately be given the status of a "spouse" for most purposes of provincial law, including matrimonial property, support, and succession laws.⁸⁸

The response to *M v H.* was most begrudging in conservative Alberta. To satisfy the requirements the Supreme Court in *M v H*, the Alberta Legislature enacted the *Adult Interdependent Relationships* in 2002, creating the new legal status of the "adult interdependent relationship," which applied equally to same-sex and opposite-sex non-marital conjugal relationships.⁸⁹ However, to satisfy the then prevailing political sentiments in the province, the Act provided that the term "spouse" was limited to married opposite-sex partners, though after the federal government recognized same-sex marriage in 2005, the term "spouse" was amended to also include same-sex married partners.⁹⁰

87. Modernization of Benefits and Obligations Act, S.C. 2000, c. 12 (Can.).

88. See Bill 75, *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, 1st Sess., 58th Leg., Nova Scotia, 2000 (Third Reading, 30 November 2000); see also *The Common-Law Partners' Property and Related Amendment Act*, S.M. 2002, c. 48, s. 23.

89. Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5§1(1)(c)(Can.) (defining an Adult Interdependent Relationship as "between 2 persons" not 2 persons of the opposite sex.).

90. Compare *supra* note 89 at §1(1)(g), with Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5§1(1)(g) (Can.) (amended 2014).

IV. STATUTORY REGIMES FOR “MARRIAGE-LIKE” RELATIONSHIPS

A. *Statutory Recognition*

There are now two basic approaches to family law regimes for those in a “marriage like” or conjugal relationships in Canada’s common law jurisdictions, though there is some variation within each approach. One approach treats common law relationships as the same as married for purposes of both property and support, and the other only extends the definition of spouse for purposes of support law,⁹¹ though as discussed below, even in these jurisdictions, the courts may recognize property-based claims to address on the judicially developed doctrine of unjust enrichment.

In most of Canada’s western and northern jurisdictions, those in common law relationships gain the same property and support statutory rights as the married, once past a threshold period of cohabitation.⁹² In British Columbia,⁹³ Saskatchewan,⁹⁴ Nunavut⁹⁵ and the Northwest Territories,⁹⁶ the rights arise if the parties have cohabited in a conjugal relationship for two years or have cohabited and have a child together. In Manitoba and Alberta,⁹⁷ for the spousal characterization to attach, the parties must have cohabited for three years or cohabited and had a child together.⁹⁸ In all of these jurisdictions except Saskatchewan, once the specified qualifying period of cohabitation has passed, the property regime is imposed retrospectively to commence from the

91. Robert Leckey and Carol Rogerson, Marriage, Family, and Federal Concerns, in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017) 576.

92. Family Law Act, S.B.C. 2011, c. 25, s. 3(1) (Can. B.C.); Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5, s. 3(1) (Can. Alta.); The Family Property Act, S.S. 1997, c. F-6.3, s. 2(1) (Can. Sask.); Consolidation of Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1) (Can. Nun.); Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1) (Can. N.W.T.); The Common-Law Partners’ Property and Related Amendments Act, S.M. 2002, c. 48, s. 5(2); 6(2); 8; 9; 12(2); 13(2); 14(2); 18; 20(2); 25(2) (Can. Man.).

93. Family Law Act, S.B.C. 2011, c. 25, s. 3(1) (Can. B.C.).

94. The Family Property Act, S.S. 1997, c. F-6.3, s. 2(1) (Can. Sask.).

95. Consolidation of Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1) (Can. Nun.).

96. Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1) (Can. N.W.T.).

97. Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5, s. 3(1) (Can. Alta.).

98. The Common-Law Partners’ Property and Related Amendments Act, S.M. 2002, c. 48, s. 5(2); 6(2); 8; 9; 12(2); 13(2); 14(2); 18; 20(2); 25(2) (Can. Man.).

date that cohabitation began.⁹⁹ In Saskatchewan, there is no retrospective application.¹⁰⁰

While there is some variation in the details of the property regimes that govern married couples and common law partners in these jurisdictions, all are based on a sharing of the increase in wealth during the period of cohabitation, generally without considering individual financial contributions or roles assuming the relationship. These regimes apply whether the relationship ends due to separation or the death of a partner. Further, these regimes create not only claims to property or the value of property, but also allow a partner to apply for exclusive possession of the family home, which can be especially significant if there are children or issues of intimate partner violence.¹⁰¹

The legislation in other jurisdictions only imposes support obligations on common law partners, excluding property claims from the statutory regime. In Ontario¹⁰² and Prince Edward Island¹⁰³ spousal support obligations arise if two partners cohabit for three years or in a relationship of some permanence and have a child together. In Newfoundland¹⁰⁴ and Nova Scotia,¹⁰⁵ the parties must have cohabited for at least two years. In **New Brunswick**,¹⁰⁶ to be eligible for spousal support, the couple must have either been living together for three years and one person

99. Family Law Act, S.B.C. 2011, c. 25, s. 3(3) (Can. B.C.); Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5, s. 2; 3(1) (Can. Alta.); Consolidation of Family Law Act, S.N.W.T. 1997, c. 18, s. 33 (Can. Nun.); Family Law Act, S.N.W.T. 1997, c. 18, s. 33 (Can. N.W.T.); The Common-Law Partners' Property and Related Amendments Act, S.M. 2002, c. 48, s. 10(2); 13(2); 16(8)(2.1-1); 25(2) (Can. Man.).

100. The Family Property Act, S.S. 1997, c. F-6.3, s. 2(1) (Can. Sask.).

101. Family Law Act, S.B.C. 2011, c. 25, s. 97(2)(a) (Can. B.C.); The Family Property Act, S.S. 1997, c. F-6.3, s. 5(2)(b) (Can. Sask.); Consolidation of Family Law Act, S.N.W.T. 1997, c. 18, s. 55(1)(b) (Can. Nun.); Family Law Act, S.N.W.T. 1997, c. 18, s. 5(1)(b) (Can. N.W.T.); LAW REFORM COMMISSION OF NOVA SCOTIA, FINAL REPORT: DIVISION OF FAMILY PROPERTY 19 (2017). Legislation in common-law Canadian provinces that do not recognize property rights may still allow for civil restraining or interim possession orders in cases involving domestic violence; *see, e.g.*, Victims of Family Violence Act, S.P.E.I. 1996, c. 47, s. 1 (Can. P.E.I.).

102. Family Law Act, R.S.O. 1990, c. F.3, s. 29 (Can. Ont.).

103. Family Law Act, S.P.E.I. 1995, c. 12, s. 29 (Can. P.E.I.).

104. Family Law Act, R.S.N. 1990, c. F-2, s. 35 (Can. Nfld.).

105. Parenting and Support Act, R.S.N.S. 1989, c. 160, s. 2(m) (Can. N.S.).

106. Family Services Act, S.N.B. 1980, c. F-2.2, s. 112(3) (Can. N.B.).

must have been substantially dependent on the other for support, or they must have been living together for one year and have a child together. In the Yukon Territory,¹⁰⁷ eligibility for spousal support arises in a couple have cohabited in a relationship of “some permanence.”

On paper, Canada’s common law jurisdictions vary in the periods of conjugal cohabitation required that must pass before spousal status is acquired. At the shorter end are situations where, particularly if there is a child, there only needs to be conjugal cohabitation in a relationship of “some permanence,” which case law indicates is a period ranging from three to six months.¹⁰⁸ In other jurisdictions the minimum period may be as long as three years.¹⁰⁹ The legislatures are trying to gauge a minimum period of cohabitation for which substantial economic and emotional interdependence is likely. This is inevitably an arbitrary exercise, as the speed and degree of integration will vary greatly from one couple to another. However, the typical reality is reflected in most jurisdictions in the legislative regimes that have a significantly shorter period if a couple has a child together.

In practice, the variation in minimum statutory period of conjugal cohabitation is not significant. In all of common law Canadian jurisdictions, the amount and duration of spousal support, whether the parties are married or common law spouses, is established by the *Spousal Support Advisory Guidelines*, which take account of the duration of the relationship, the roles assumed during the relationship and the relative after-child support incomes of the parties.¹¹⁰ While legislation in Canada’s common law jurisdictions has variation in the threshold for entitlement,

107. Family Property and Support Act, R.S.Y. 2002 c. 83, s. 37 (Can. Yukon).

108. Contrast *Pecanac v. Mamado*, 2017 CarswellOnt 5103, 2017 ONCJ 233 at para. 87 (Can. Ont.) (3 months cohabitation was not a relationship of some permanence) and *DeSouza v. DeSouza*, 1999 CarswellOnt 1550, 48 R.F.L. (4th) 63 (Ont. Ct. J.) at para. 10-11 (Can. Ont.) (6 months cohabitation with a child was not a “relationship of no permanence” and hence not eligible for support.)

109. Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5, s. 3(1) (Can. Alta.); The Common-Law Partners’ Property and Related Amendments Act, S.M. 2002, c. 48, s. 5(2); 6(2); 8; 9; 12(2); 13(2); 14(2); 18; 20(2); 25(2) (Can. Man.).

110. See Rollie Thompson, *Spousal Support Eh? Sorry, Not Your American Alimony*, 41 HOUS. J. INT’L L. 641, 651-52 (2019).

crossing the threshold is not a guarantee of spousal support in any of them.¹¹¹ In practice, the termination of most common law relationships will not give rise to an award of spousal support. Spousal support is only likely under the *Guidelines* if it is a relationship of several years or there are children, and there is a substantial income disparity. Similarly, in those common law Canadian jurisdictions that statutorily recognize property rights, the claim will be dependent on the increase in wealth during the period of cohabitation, and it is unlikely that it will be worth the cost of litigation if the period is less than five years.¹¹²

B. “Marriage-like” or “Conjugal Cohabitation”

A central element to all statutory regimes in common law Canada that recognize common law relationships is that they are “marriage-like,” or use different statutory words that have been interpreted in the same way, where the relationships involve “conjugal cohabitation.” No Canadian legislation defines conjugal or marriage-like, but courts across the country have adopted the same multifactorial approach to the question of whether two partners have lived in a marriage-like relationship, rather than “dating,” being roommates, or being a homeowner and a “tenant with benefits.”¹¹³ Establishing conjugal cohabitation is often not contentious, but the issue of determining when the conjugal cohabitation began and ended is often litigated, as the statutory

111. *Id.* at 650 (considering the analysis of the amount and duration initially and issues that arise on variation, such as re-partnering and retirement).

112. Family Law Act, S.B.C. 2011, c. 25, s. 95(3) (Can. B.C.); Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5, s. 1(2) (Can. Alta.); Consolidation of Family Law Act, S.N.W.T. 1997, c. 18, s. 16(5) (Can. Nun.); Family Law Act, S.N.W.T. 1997, c. 18, s. 16(5) (Can. N.W.T.); The Common-Law Partners’ Property and Related Amendments Act, S.M. 2002, c. 16(11)(4(3)) (Can. Man.); The Family Property Act, S.S. 1997, c. F-6.3, s. 3 (Can. Sask.); Leckey, *supra* note 31, at 131, 138 (reporting that in two provinces allowing property claims, Saskatchewan and British Columbia, the average duration of cohabitation in litigated cases was nine years and three months, with a median duration of seven years and nine months).

113. *Molodowich v. Pentinnen*, (1980), 17 RFL (2d) 376, 1980 CarswellOnt 274 (Ont. Dist. Ct), per Kuisko J., at para. 16 (Can.) (considering various factors to decide whether cohabitation existed including the couple’s shelter, sexual behavior, economic arrangements, domestic services, and thoughts on children).

remedy will be influenced not only by whether parties lived in a conjugal relationship, but also by its duration.¹¹⁴

The Canadian courts recognize that there is great diversity in spousal relationships. An often-cited Saskatchewan decision held that the point of departure in the analysis is that spousal relationships are “many and varied”—and recognized that “this variation in the way human beings structure their relationships . . . make[s] the determination of when a ‘spousal relationship’ exists difficult to determine.”¹¹⁵ The most frequently cited Canadian decision on what constitutes conjugal cohabitation is one of the first reported cases on the issue, *Molodowich v Penttinen*, where the court recognized the need to assess a “complex group” of inter-related factors, none of which alone is necessary or sufficient:

1. Shared residence;
2. Sexual and personal behavior;
3. Provision of domestic services to a partner;
4. Socializing together;
5. Societal representation as a “couple;”
6. Economic support and sharing of expenses or joint property acquisition; and
7. Children born to the couple, or living with them, or discussed for the future.¹¹⁶

Canadian courts have tended to take a liberal interpretation of the concept of conjugal cohabitation, reflecting an intent to protect vulnerable or dependent applicants for relief—usually women. In most cases that are litigated, the partners have

114. *Climans v. Latner*, 2020 ONCA 554 at para. 44 (Can. Ont.) (using the length of the relationship as a factor in awarding spousal support under the relevant statute); *Pecanac v. Mamado*, 2017 CarswellOnt 5103, 2017 ONCJ 233 at para. 92 (Can. Ont.) (considering the length of the relationship to be too short to award spousal support as defined by the statute); Robert Leckey, *supra* note 31, at 131, 139 (finding that the issue of the duration of a conjugal relationship was contested in over half of reported cases from two provinces that gave cohabiting partners property rights).

115. *Yakiwchuk v. Oaks*, 2003 SKQB 124 at para. 10.

116. *Molodowich v. Penttinen*, (1980), 17 RFL (2d) 376, 1980 CarswellOnt 274 (Ont. Dist. Ct), per Kuisko J., at para. 16 (Can.).

children,¹¹⁷ but the expansive approach of the courts clearly does not require this. In a 2020 Ontario decision, the Court of Appeal upheld the trial judge's finding that a man and woman were cohabiting in a "conjugal relationship" for 14 years, even though they maintained separate residences in the same city, and often did not sleep together.¹¹⁸ The parties had a committed sexual and romantic relationship.¹¹⁹ The man was very wealthy, and almost as soon as the sexual relationship began, he gave the woman a monthly allowance for her living expenses and lavish gifts, though they never merged their finances.¹²⁰ In the early years of the relationship, the woman spent alternate weekends at the man's home, when her children were with their father.¹²¹ They spent every summer during their relationship at the man's vacation property, and they spent many winter vacations together.¹²² They saw each other almost every day, and often ate and socialized together, but they maintained separate residences, and after the first few years of the relationship, only occasionally spent the night together when in the city.¹²³ The man gave the woman an engagement ring, but he told the woman that he would not marry or live with her unless she signed a domestic contract; although draft contracts were prepared and presented to the woman, she never signed one.¹²⁴ When the relationship ended, the woman sought spousal support.¹²⁵ The man argued that the woman was just his girlfriend.¹²⁶ The Court of Appeal accepted that she was a "spouse" and awarded her support for 10 years.¹²⁷ The decision was criticized in the media, as the parties made an explicit decision not to share a residence, and the man may have been surprised that his generosity to his "girlfriend" resulted in a

117. Robert Leckey, *supra* note 31, at 131, 138 (finding that roughly three quarters of the cohabiting couples in contested cases in two provinces had children).

118. *Climans v. Latner*, 2020 ONCA 554 at para. 32, 53, 58, 75 (Can. Ont.).

119. *Id.* at para. 31.

120. *Id.* at para. 22.

121. *Id.* at para. 53.

122. *Id.* at para. 23.

123. *Id.* at paras. 19–20.

124. *Id.* at paras. 18, 26.

125. *Id.* at para. 25.

126. *Id.* at para. 48.

127. *Id.* at para. 25.

financial commitment that lasted after the relationship.¹²⁸ However, the decision is consistent with Canadian precedents, and protected a woman who became economically dependent on her partner during the relationship while her possibilities for developing her earning potential decreased.¹²⁹

V. PROPERTY RIGHTS AT COMMON LAW AND “JOINT FAMILY VENTURES”

The equitable doctrine of unjust enrichment and the remedy of constructive trust have long been part of the common law. Although historically the law largely developed in the context of commercial and fiduciary relationships, by the late 1970's, prior to the enactment of legislation giving women property rights at the end of marriage, Canadian courts were applying this doctrine to recognize the contributions of married women to the acquisition of farms and other assets by their husbands.¹³⁰ As noted above, in 1980 in *Pettkus v. Becker*, the Supreme Court of Canada held that the equitable doctrine of unjust enrichment could also be used to give a woman in a common law relationship a half-interest in a farm that was acquired in the name of her partner during the course 19 years of cohabitation as a result of the joint efforts of both.¹³¹

In 1993 in *Peter v. Beblow*, the Supreme Court extended the doctrine of unjust enrichment and held that it could be applied in a flexible fashion to recognize domestic contributions.¹³² In this case, a woman lived with a man for 12 years.¹³³ She had initially

128. See, e.g., Janice Fiamengo, *The Millionaire, His Ex-Girlfriend, and the Family Court Judge*, C2C JOURNAL (Nov. 5, 2020)(referring to the court's finding of spousal economic dependency as misconstruing the boyfriend's generosity).

129. See *Climans v. Latner*, [2020] ONCA 554 (quoting and affirming the trial judge's review of the case law, where the trial judge found that a woman who became economically dependent on her partner during the relationship could be the basis for finding a conjugal relationship).

130. See, e.g., *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (Can.)(finding a husband's unjust enrichment entitled the wife to succeed in constructive trust in a 1978 case where the farm was in the husband's name only but the wife had labored on the farm for no compensation).

131. *Pettkus v. Becker*, [1980] 2 S.C.R. 834 (Can.).

132. *Peter v. Beblow*, [1993] 1 S.C.R. 980 (Can.).

133. *Id.* at 981.

been a paid caregiver for his children from a prior relationship, but she soon moved into his house with her own children from her prior relationship; the man stopped paying her when she and her children moved in.¹³⁴ The man was employed and provided much of the income to support the household.¹³⁵ By the time that the relationship ended, all of the children had moved out and the man had acquired various other assets that were worth more than the value of the house.¹³⁶ The Supreme Court upheld the trial judge's award of the house to the woman, based on a constructive trust remedy to address the man's unjust enrichment, even though he had fully owned it before she moved in.¹³⁷ The Court held that in performing childcare and housework the woman had enriched the man, and she had suffered a corresponding deprivation, the reduction in her opportunity to earn an income.¹³⁸ This was significant recognition that child-care and domestic services alone could be the basis of a claim for unjust enrichment. As in earlier cases, the Court held that when services are provided by one to another, in this case domestic services, there is a presumption that they are not provided as a gift, but that there should be fair compensation.¹³⁹ Although the seven-member Court in *Peter v. Beblow* was unanimous in upholding the trial decision to award the woman sole title to the house, there was a split on the questions of how to remedy the unjust enrichment and how to value the contributions of a common law partner.¹⁴⁰

In its 2011 decision in *Kerr v. Baranow*, the Supreme Court clarified its approach to remedies for unjust enrichment and the valuation of domestic contributions, developing the concept of the "joint family venture" to more specifically address issues that

134. *Id.* at 1004–05.

135. *Id.* at 1002.

136. *Id.* at 1004–05 (identifying that the respondent saved enough money to purchase a houseboat and van, worth more than the \$17,800 value of the Sicamous property by 1987).

137. *Id.* at 1003–05, 1018–19 (affirming the trial court decision to award the house in constructive trust).

138. *Id.* at 989.

139. *Id.* at 1018.

140. See generally *Peter v. Beblow*, [1993] 1 S.C.R. 980 (Can.).

arise in common law relationships.¹⁴¹ The Court had previously held that common law partners could make claims based on compensation for unjust enrichment for direct contributions of labor or materials to the acquisition or maintenance of assets like a farm or business.¹⁴² In *Kerr*, the Court accepted the need for a more flexible approach to compensate for indirect contributions, often domestic contributions, by one partner to acquisition of assets by the other partner.¹⁴³ Justice Cromwell, writing for the seven-member Court, articulated a “more comprehensive and more principled basis to address the wide variety of circumstances that lead to claims arising out of domestic partnerships,” developing the concept of the “joint family venture.”¹⁴⁴

For many domestic relationships, the couple’s venture may only sensibly be viewed as a joint one, making it highly artificial in theory and extremely difficult in practice to do a detailed accounting of the contributions made and benefits received on a fee-for-services basis The more extensive the integration of the couple’s finances, economic interests, and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture. The parties’ conduct may further indicate a sense of collectivity, mutuality, and prioritization of the overall welfare of

141. *Kerr v. Baranow*, [2011] SCC 10. For a further discussion of this decision and the later development of the joint family venture; see generally Jennifer Flood, *Share the Wealth? Kerr v Baranow and the “Joint Family Venture,”* 27 CAN. J. FAM. L. 361 (2011); Ben Hovius, *Unjust Enrichment Claims by Spouses upon Marriage Breakdown: Achieving a Measure of Fairness or Causing Uncertainty and Complexity?*, 33 CAN. FAM. L. Q. 141 (2014); David Frenkel, *Joint Family Venture: A Synthesis of the Post-Kerr Case Law*, 34 CAN. FAM. L. Q. 35 (2015); and Robert Leckey, *Cohabitation, Female Sacrifice, and Judge-Made Law*, 41 J. SOCIAL WELFARE & FAM. L. 72 (2019).

142. See Jennifer Flood, *Share the Wealth? Kerr v. Baranow and the “Joint Family Venture,”* 27 CAN. J. FAM. L. 361, 364 (2011) (Can.).

143. *Kerr v Baranow*, *supra* note 141, at para. 79.

144. *Id.* at para. 28. (explaining the result of coupling the principles of unjust enrichment with the possible remedy of a constructive trust).

the family unit over the individual interests of the individual members¹⁴⁵

Although indicating that there are “no presumptions” about the nature of remedy, Cromwell, J. accepted that the amount of the claim should reflect the nature of the contribution on a “value survived basis,” writing:

[W]here both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result, have accumulated assets, the money remedy for unjust enrichment should reflect that reality. The money remedy in those circumstances should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.¹⁴⁶

Kerr v. Baranow involved two complex fact situations, one of which was remitted for a rehearing, but the Court’s upholding of the trial decision in the other case gives a good sense of the application of the concept of the joint family venture.¹⁴⁷ In that case, for the first four years of their relationship, each party pursued their respective careers.¹⁴⁸ The man was involved in a successful high-tech start-up, while the woman worked as a civil servant.¹⁴⁹ The man’s business then required him to relocate, and the woman agreed to follow him to another city, giving up her career and staying at home to look after children, the first of whom was born shortly after the move.¹⁵⁰ During the next four-year period the business prospered, and the value of the man’s interest increased significantly.¹⁵¹ After the separation, the man

145. *Id.* at paras. 69 & 92–93.

146. *Id.* at para. 7.

147. *Id.* at para. 4.

148. *Id.* at paras. 129–30.

149. *Id.* at para. 130.

150. *Id.* at para. 131.

151. *Id.* (“In September 2000, [the man’s company] was sold and [he] netted approximately \$11 million. He placed the funds in a holding company, with which he continued to develop business and investment opportunities.”).

acknowledged the woman's career sacrifice during the four years that she had primary domestic and child care responsibility, accepting that she was entitled to "spousal support" under Ontario's legislation, but he argued that her property contribution should be determined by the value of the domestic services she rendered or income that she lost during that period.¹⁵² The Supreme Court upheld the trial judge's rejection of this argument and the award to compensate for the unjust enrichment, factoring in the appreciation of the man's business interest during the four years after the partner's relocation for his business purposes.¹⁵³ The one-half of this increase awarded to her was substantially more than her loss of income or the value of her domestic services: as the Court held, she was a "co-venturer, not the hired help."¹⁵⁴

The development of the concept of the joint family venture and the doctrine of unjust enrichment gives unmarried partners in long term relationships significant scope to make compensatory claims, especially if their relationships involve a joint enterprise like a farm or business, or the assumption by one partner, usually the woman, of a traditional domestic and childcare with career sacrifice. These claims are less certain than the property sharing claims made by spouses under legislation, and hence are only likely to be pursued if there are significant assets acquired during a relationship. The developments, however, provide an important remedy in common law jurisdictions without legislation allowing such claims. Further as discussed by Dean Leckey, the common law joint family venture also influenced the development of judicial approaches to the civil law in Quebec, also allowing unmarried partners in that province significant scope for seeking recognition for their contributions to a relationship.¹⁵⁵

152. *See id.* at para. 135.

153. *Id.* at para. 145.

154. *Id.* at paras. 7 & 140.

155. Leckey, *supra* note 10.

VI. AGREEMENTS TO OPT-IN & OPT-OUT

All of Canada's common law jurisdictions give unmarried partners the opportunity to make arrangements to establish rights and obligations that vary the default statutory regimes.

A. *Registration of Domestic Partners*

As noted above, commencing in the early years of this millennium there was *Charter*-based litigation to have same-sex marriage in Canada. In response to this litigation, two common law provinces, Nova Scotia and Manitoba, established a process to allow registration of domestic partnerships;¹⁵⁶ although primarily intended to allow same-sex partners to have a legal status, the statutes allow two cohabiting partners, of the same or opposite-sex, to register and immediately be given the status of a "spouse" for purposes of provincial law, including matrimonial property, support and succession laws.¹⁵⁷ In these two provinces, the annual rate of domestic registration is about 1% the marriage rate.¹⁵⁸ It is clear that only a tiny fraction of those who are living common law in those provinces have chosen to register their relationships. While a majority of the small number registering are opposite-sex partners, even at present, same-sex partners are a much greater proportion of those registering than same-sex partners are of those who are getting married.

B. *Cohabitation Agreements*

While historically in Canada agreements between common law partners were viewed as contrary to public policy and unenforceable as they were seen as promoting immoral relationships,¹⁵⁹ they are now legislatively endorsed in all jurisdictions in the country. Indeed, government sponsored public

156. Law Reform (2000) Act, 1st Sess., 58th Leg., Nova Scotia, 2000 (Third Reading, 30 November 2000); The Common-Law Partners' Property and Related Amendment Act, S.M. 2002, c. 48, s. 13.1.

157. Law Reform (2000) Act, *supra* note 157; The Common-Law Partners' Property and Related Amendment Act, *supra* note 157.

158. MANITOBA VITAL STATISTICS AGENCY, ANNUAL REPORT 16–17 (2015-16); NOVA SCOTIA VITAL STATISTICS, ANNUAL REPORT 90 (2017).

159. See *See Brown v. McNorgan*, [1954] 1 D.L.R. 447, para. 7 (1954) (Can.).

legal education websites encourage unmarried couples to make such agreements.¹⁶⁰ There are templates for cohabitation agreements available without charge on-line.¹⁶¹ There are generally no requirements to have lawyer draft an agreement, though government websites take care to suggest that parties seek legal advice before making such agreements.¹⁶²

These agreements are important and are not infrequently used in relationships where one or both parties have significant assets. However, for a number of social, psychological and financial reasons, the vast majority of unmarried partners in common law in Canada do not make agreements.¹⁶³ In jurisdictions which do not confer statutory property rights, such as Ontario, unmarried partners without agreements must resort to the doctrine of unjust enrichment to make a claim, which is considerably more complex and less certain than the process followed by married partners making a statute-based claim at the end of their relationships.¹⁶⁴ In jurisdictions such as British Columbia, which impose the property regime of the married for cohabitants after 2 years, not having an agreement means that the partners will be governed by the statutory regime of equal sharing of gains.¹⁶⁵

Regardless of the statutory default rule, the greater the assets of unmarried cohabitants, the more likely that they are to have an agreement. If a home is being purchased during

160. See *Dividing property when a marriage or common law relationship ends*, ONTARIO (Aug. 12, 2021) <https://www.ontario.ca/page/dividing-property-when-marriage-or-common-law-relationship-ends>.

161. See, e.g., *Free Cohabitation Agreement*, LAWDEPOT <https://www.lawdepot.ca/contracts/cohabitation-agreement/> (last visited on Nov. 3, 2021).

162. *Written Agreements Between Common-Law Couples*, EDUCALOI https://educaloi.qc.ca/en/capsules/written-agreements-between-common-law-couples/?gclid=CjwKCAjw5c6LBhBdEiwAP9ejG2DwAkBdv6cLfJjTAU8JZaKIY_9QcubXASWuuBUMqzl4j0pImFohmhoCGTkQAvD_BwE (last visited on Nov. 3, 2021).

163. See Law Commission of Canada, *Beyond Conjugalilty: Recognizing and Supporting Close Personal Adult Relationships*, 115 (2001) (explaining the reasons why Canadian couples are not creating agreements); see also Aloni, *supra* note 25, at 86–87 (finding that in a study of 30 cohabiting couples in British Columbia, only 2 couples had a formal contract, and 2 others had an informal contract).

164. LAW COMMISSION OF CANADA, *supra* note 163, at 115–16.

165. Aloni, *supra* note 25, at 70–71 (citing Family Law Act, S.B.C. 2011, c 25, §3(1)(b) (Can.)).

cohabitation, a lawyer is invariably involved, and the parties are likely to be advised to make a cohabitation agreement or at least address the issue of ownership and claims to the residence.

There are statutory formality requirements for cohabitation agreements, such as that the agreement is to be written, signed and signatures are to be witnessed,¹⁶⁶ though courts have taken a “relaxed” approach to these formality requirements if satisfied that there has been a genuine agreement,¹⁶⁷ and an oral agreement could affect a claim based on unjust enrichment.¹⁶⁸ Courts, however, may set aside even a written and signed domestic contract, including a pre-nuptial marriage contract or a cohabitation agreement, if there are concerns about “unconscionability.”¹⁶⁹ The courts consider the parties’ bargaining power, whether there has been proper disclosure of assets and liabilities, the fairness of the agreement, and the good faith of the parties in making the agreement.¹⁷⁰ While the presence or absence of legal advice is an important factor in determining if a domestic contract is “unconscionable,” it is not determinative.¹⁷¹

The courts are particularly concerned about clauses of a cohabitation agreement made when a relationship starts that purport to waive the possibility of seeking spousal support in the event of future separation, as the interdependencies and circumstances at the time of separation may not have been foreseen when the agreement was made.¹⁷²

It is so widely accepted that Canadian courts would not enforce a clause of an agreement made at the start of cohabitation relating to parenting of children in the event of separation, though there are no reported cases of such clauses being included in a cohabitation agreement. Further, in all Canadian jurisdictions there are significant restrictions on terms of

166. See, e.g., Ontario Family Law Act, R.S.O. 1990, c. F.3, s.55(1) (Can.).

167. See, e.g., *Gallacher v. Friesen*, 2014 ONCA 399 at para. 27.

168. Law Commission of Canada, *supra* note 163, at 115.

169. Law Reform Commission of Nova Scotia, *Division of Family Property: Final Report—September 2017* 208 (2017).

170. *Dougherty v. Dougherty*, (2008) ONCA 302, 89 O.R. (3d) 760 (Ont. C.A.).

171. See, e.g., *Scheel v. Henkelman*, 2001 CarswellOnt 28, 52 O.R. (3d) 1 at para. 20 (Ont. C.A.).

172. See, e.g., *id.* at 1.

domestic contracts that might limit child support.¹⁷³ In most common law jurisdictions in Canada, individuals who cohabit with a partner who already has children from a prior relationship and come to “stand in the place of parent” will have support obligations for those children.¹⁷⁴ This not infrequently results in men (and sometimes women) being liable at the end of a cohabiting relationship for child support for a child who is not their biological child. It has been held that unmarried partners cannot waive the right to seek support for children for whom they may come to stand in the place of a parent in a cohabitation agreement made at the start of the relationship, since doing so might prejudice the interests of children.¹⁷⁵

VII. BEYOND CONJUGALITY?

While a major focus of law reform and litigation in Canada has been to give rights and obligations to couples who cohabit in a “conjugal” relationship, an interesting crosscurrent has been a discussion about whether the law should move “beyond conjugality.” Early in the millennium, during the debates over the legal recognition of same-sex marriage and common law relationships, a new proposal gained some attention: that the law should recognize the legal status of a “close personal adult relationship,” whether or not it involves sexual relations or could be characterized as “conjugal.”¹⁷⁶ This idea had two different proponents: progressive reformers and conservative politicians. The reformers were a relatively small group of policy analysts and academics who were concerned about not privileging conjugal relationships; they have been joined by a few advocates of polyamory.¹⁷⁷ The conservative politicians were legislators who were forced by the courts to provide recognition for same-sex

173. See, e.g., *Wright v. Zaver* (2002), 2002 CarswellOnt 887, 24 R.F.L. (5th) 207 (C.A.).

174. *Id.*

175. *Doe v. Alberta*, (2007) ABCA 50, at para. 9.

176. Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships*, xxiv - xxv (2001).

177. Brenda Cossman & Bruce Ryder, *Beyond Beyond Conjugality*, 30 CAN. J. FAM. L. 227, 231- 32 (2017).

relationships, but who did not wish to be seen as giving “special treatment” to “non-traditional” relationships.¹⁷⁸

The progressive argument for eliminating the legal significance of conjugality was made by the 2001 report of the Law Commission of Canada.¹⁷⁹ This report challenged the traditional approach of basing entitlements and obligations on spousal relationships (whether common law or married, same-sex or opposite-sex). It was argued that “conjugal relationship is a poor means of isolating those relationships that are likely to give rise to household economies.”¹⁸⁰ The report advocated an ambitious review of all statutory schemes based on marital or common law status, in order to determine whether the same rights and obligations should attach to other “close personal adult relationships” that “share the functional characteristics of emotional and financial interdependence,” such as relationships in which adult siblings reside together.¹⁸¹

The Law Commission’s arguments in 2001 for eliminating legal recognition of conjugality were tied to its view that there was “no justification” for continuing to discriminate against same-sex conjugal partners by denying them the right to marry.¹⁸² In contrast, the decision of the Alberta government to enact legislation to recognize “adult interdependent partnerships” in 2002 was clearly not motivated by any desire to de-emphasize the importance of heterosexual marriage, but rather was a political response to *Charter*-based court decisions requiring recognition of same-sex relationships, reserving the term “spouse” for those in opposite-sex marriages.¹⁸³ Although a year after the Alberta statute came into force the federal enactment of the *Civil*

178. *Id.* at 251–52.

179. Law Commission of Canada, *supra* note 176, at 7 (explaining that the legal significance of conjugality can be eliminated by considering “not just the situation of spouses and common-law partners, but also the needs of persons in non-conjugal relationships, including caregiver relationships.”).

180. *Id.* at 81.

181. *Id.* at xi.

182. *Id.* at 131 (explaining that in accordance “with Canada’s values and the secular nature of the state’s interest in marriage” the state cannot discriminate against same-sex couples).

183. See, e.g., Calgary Herald, *One Man, One Woman: Formalized Same-Sex Bond Should Not Be Called Marriage*, CALGARY HERALD, 18 July 2020 at A20.

Marriage Act required the recognition of same-sex marriage in all of Canada, including Alberta, the province kept its *Adult Interdependent Relationship Act* terminology.¹⁸⁴ That “adult interdependent relationship” terminology has inspired some commentators to argue that conjugality might be less significant,¹⁸⁵ at least in that province. However, Alberta lawyers, judges and commentators have consistently emphasized “conjugality,” and only apply the term “adult interdependent partner” to sexually intimate partners, of the same or opposite-sex, who reside together.¹⁸⁶

Both the Law Commission proposal and the Alberta statute only recognize relationships involving two adults.¹⁸⁷ Polygamy is an offence in s. 293 of Canada’s *Criminal Code*, which defines the offence as a marriage or “any kind of conjugal union with more than one person at the same time.”¹⁸⁸ However, there are a relatively small number of Fundamentalist Mormons and Muslims in Canada who have entered into “illegal” polygamous unions, with one man having a legal marriage to the first woman, and a religious ceremony with one or more other wives.¹⁸⁹ Prosecutions, however, are very rare, and only a real possibility if a woman involved is not an adult at the start of the relationship.¹⁹⁰ In 2011 in *Reference re s. 293 of the Criminal*

184. See Civil Marriage Act, S.C. 2005, c. 33 (Can); Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 (Can).

185. Brenda Cossman, *supra* note 177 at 245–255 (2017) (explaining that provinces like Alberta have taken steps toward “recognition of the rights of non-conjugal cohabitants in 2002 with the passage of the Adult Interdependent Relationships Act.”).

186. See Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners* 50 (2018) (explaining that “[t]here is a tendency to use ‘conjugal relationship’ as a synonym for sexual relationship, but there is more to it”).

187. *Mitchell v. Reykdal*, 2021 ABQB 301, para. 336 (Q.B.) (holding that one partner who has been deceived about the existence of a second relationship can make a claim against her partner under the Alberta *Adult Interdependent Relationship Act* even if the other partner has another relationship at the same time).

188. Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, para. 17.

Editor’s Note: does not need to be italicized

189. *Id.* at para. 236.

190. Nazim Baksh, *A man ‘cannot do that to a woman’: Why polygamy in Canadian Muslim community could be another #MeToo moment*, CBC NEWS, (Jan. 14, 2019, 4:00 AM

Code, the British Columbia Supreme Court held that this criminal provision is a restriction on the *Charter* guarantee of freedom of religion, but it is constitutionally valid as it is a reasonable, demonstrably justified limit due to the harms associated with women and children associated with polygamy.¹⁹¹

A significant aspect of the *Reference* decision was the Court's acceptance that while it is a crime to enter a polygamous conjugal marriage or union, it is not a crime to cohabit in a "polyamorous relationship."¹⁹² The Polyamory Advocacy Association, which was an intervener in the *Reference* case, provided the following definition:

"Polyamory" is the practice of having emotionally intimate, sexual relationships within groups of three or more people, where at least one person in the group has more than one emotionally intimate, sexual relationship at a time and where all members of the group formally or informally adopt these principles:

- a. men and women have equal rights in establishing the configurations of the groups; no gender has privileges with respect to intimate relationships that the other gender lacks;
- b. no sexual orientation is regarded as superior to any other.¹⁹³

The Court accepted that polygamy is based on a marital commitment that is intended to be lifelong, and, as practiced and promoted by religions like Islam and Fundamentalist Mormonism, is premised on a male-headed household, with exclusively heterosexual relations with the husband and one wife at a time.¹⁹⁴ By contrast, polyamory does not require life-long

ET), <https://www.cbc.ca/news/canada/polygamy-canadian-muslim-community-1.4971971>; 2011 BCSC 1588, at para. 1199.

191. 2011 BCSC 1588, at para. 1330-31, 1352.

192. *Id.* at para. 974 (stating that s. 293 is "not directed at multi-party, unmarried relationships or to common law cohabitation").

193. *Id.* at para. 138.

194. 2011 BCSC 1588, at para. 273, 277; John-Paul Boyd, *Polyamory in Canada: Research on an Emerging Family Structure*, THE VANIER INST. OF THE FAM. (April 11,

commitment, is egalitarian from a gender perspective, and usually involves multiple sexual relationships.¹⁹⁵ The Court noted that group sex involving consensual adults is not a crime in Canada, and concluded that those who live in polyamorous relationships are not committing an offence under s. 293 of the *Code*, as “the offence is not directed at multi-party, unmarried relationships or common law cohabitation.”¹⁹⁶ Although there is no reliable data, it is apparent that the number of polyamorous relationships is increasing, and that there are likely several thousand polyamorous households in Canada.¹⁹⁷ These relationships have no formal legal recognition or status, but Canadian courts have accepted that a child born to a woman in a polyamorous relationship may have three parents identified on the birth certificate.¹⁹⁸

All statutory recognition of “conjugal” relationships in Canada is specifically limited to “two persons.”¹⁹⁹ The courts have been prepared to recognize that one pair of individuals in a polyamorous relationship are spouses (such as a husband and wife), and that another partner resides with them in an intimate relationship that does not give rise to a legal status.²⁰⁰ Although there are no reported Canadian cases of litigation arising relating to property or other economic issues at the end of a polyamorous relationship, it seems inevitable that in the future there will be cases where claims are made at the end of a such a relationship based on unjust enrichment or a domestic contract.

2017), <https://vanierinstitute.ca/polyamory-in-canada-research-on-an-emerging-family-structure/>.

195. *Id.*

196. 2011 BCSC 1588, para. 1037.

197. Boyd, *supra* note 194.

198. C.C. (Re.), 2018 NLSC 71, para. 40; and *British Columbia Birth Registration No. 2018-XX-XX581*, 2021 BCSC 767, para. 6; *see also* B.D.G. v. C.M.B., 2016 BCPC 97, para. 126 (holding that the fact that a parent is living in a polyamorous household should not be regarded as a negative factor in dispute over parenting, in the absence of evidence of harm).

199. John-Paul Boyd, *Strange Bedfellows: Polyamorous Relationships and Family Law in Canada*, CANADIAN RSCH. INST. FOR L., at 7 (June 2016) (stating that s. 293 provides that everyone who practices or agrees to practice any kind of conjugal union with more than one person at the same time is guilty of an indictable offense).

200. *See id.* at 42; and *Buckman v. Wyckham*, 2020 BCSC 2076, para. 59.

The existence of polyamory and the proposal of the Law Commission of Canada for recognition of close personal adult relationships raise the fundamental question of why conjugality based on a dyadic relationship is important, and whether there should be a rethinking of the central role played by the concept of a monogamous spouse in various legal and social policy schemes. There are undoubtedly some legal and policy purposes for which it is appropriate to reconsider the basis for eligibility, abandoning the concept of “spousal status” or “conjugality,” and replacing it with the more inclusive concept like the “close personal adult relationship.” Canadian courts have already held that the legislative restrictions that allow only a “spouse” of a parent to adopt a child and become the second legal parent may not be in the best interests of a child.²⁰¹ Courts have allowed an adoption even if that person is not a spouse of a parent, if the person is prepared to undertake such a commitment has a strong, positive but non-conjugal relationship to the biological parent.²⁰²

However, for the most important aspects of private law—those which define the rights and obligations of adults towards each other under family and succession law—jettisoning the concept of conjugality would not be appropriate. As discussed above, in Canadian law, conjugality—living together in a spousal relationship—is not defined in exclusively sexual terms, though a sexual relationship is almost always an important element of conjugality. Conjugality is established by a combination of sharing of economic, social, and emotional lives, and usually also involves a sexual relationship.²⁰³

What generally distinguishes a conjugal cohabiting relationship from two roommates living together, or from an adult child and parent residing together, is the combination of economic and emotional interdependencies *and* the parties’ expectations and

201. Natasha Bakht & Lynda M. Collins, *Are You My Mother? Parentage in a Nonconjugal Family*, 31 CAN. J. FAM. L. 105, 138 (2018) (arguing that the All Families Are Equal Act was retrogressive in its restriction of the Court’s ability to protect the best interests of a child on the issue of parentage, by requiring parentage to be established at or near birth.).

202. Bakht, *supra* note 201, at 105.

203. *M v. H.*, [1999] 2 S.C.R. 3, para. 59, (citing *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.)).

understandings about the relationship. While individual attitudes and behaviours vary, Canadians generally have a common set of cultural, psychological and spiritual feelings about conjugal relationships. There is usually an expectation that a conjugal relationship is indefinite or even “permanent,” though all conjugal relationships will come to an end, whether by death or separation. Those who live in long-term conjugal relationships almost always share at least some significant aspects of economic lives and recognize that both parties are gaining from the relationship. There are cases where it may be difficult to determine whether a particular couple is cohabiting in a “conjugal” relationship, such that “spousal” consequences should attach to the relationship. The occasional difficulty in line-drawing, however, does not mean that conjugality is not an important legal and social concept in Canada. Although it is sometimes inappropriate to award spousal support at the end of a conjugal relationship, in many cases it is fair to do so. Canada’s *Spousal Support Advisory Guidelines* do not always require that support is to be paid at the end of a conjugal relationship, but rather require consideration of such factors as the length of the relationship, the contributions and responsibilities of each party, and whether there were children. The key issue is not whether the parties were legally married, but rather there is to be an assessment of the particular conjugal relationship, the particular interdependencies, contributions, resources and needs of the parties. For non-conjugal close personal adult relationships, like the common situations of an adult child who is living with an older parent,²⁰⁴ or two friends in a non-sexual relationship sharing a residence to minimize their individual expenses, it would almost invariably be unfair, unexpected and socially undesirable to impose support obligations if the parties cease to reside together. Given the

204. Interestingly, the law in several common law jurisdictions in Canada provinces recognizes that an adult may be legally obliged to support a parent even if they are not living together, though this obligation is rarely enforced: see Christa Bracci, *Ties that Bind: Ontario’s Filial Responsibility Law*, 17 CAN. J. FAM. L. 455, at *465, *490 (2000) (stating that filial responsibility laws require adult children to assume responsibility for elder parents). However, if, for example, an elderly widow shares her residence with and provides support for her unemployed adult son, she may require him to leave at any time, and generally will have no obligation towards him.

profound importance of conjugal relationships to Canadians, it seems unlikely that the legal concepts of “marriage,” “spouse” and “conjuality” will be abandoned in the foreseeable future in favor of the more “rational” concept of the “close personal adult relationship,” though the concept continues to interest academic commentators.²⁰⁵ With the controversies about same-sex marriage and common law marriage resolved, Canadian politicians clearly do not have any interest in undertaking an ambitious project to rethink the centrality of monogamous conjuality, though there may be a gradual rethinking of concepts as individual pieces of legislation are reviewed or enacted.

VIII. FURTHER REFORMS AND CONCLUSIONS

Intimate partners have always lived in relationships outside the monolithic ideal of opposite-sex marriage, but it has only been relatively recent that the legal regime in common law Canada has changed to be more reflective of the social reality of these relationships, and to recognize the vulnerability and contributions of parties to these relationships. The historic lack of legal recognition of relationships in which cohabiting parties lived tended to marginalize them and increase vulnerability and possible exploitation, especially of women. In the last four decades, the laws governing cohabiting relationships have changed dramatically. In significant measure these legal changes have been a response to changes in social behavior and attitudes, but the changes in law have also influenced attitudes and behaviour, and in turn increased the number and visibility of these relationships.

As discussed in this article, all of Canada’s common law jurisdictions offer legal recognition to non-marital conjugal relationships, in particular for purposes of eligibility for spousal support. There is no evidence in Canada that the imposition of obligations on common law partners has had an effect on the willingness of individuals to cohabit, as there are significant social, psychological, and economic benefits to forming a conjugal

205. Brenda Cossman, *supra* note 177, at 227, 255 .

unit, though statutory regimes may increase the likelihood of formal agreements being made.²⁰⁶

Although there is some variation in the definitional statutory thresholds for possible entitlement to spousal support in Canada's common law jurisdictions, in practice there is little difference between jurisdictions, as spousal support is only likely to be awarded if there is dependency arising from a long-term conjugal relationship, or there are children, and one partner has assumed primary responsibility for their care. These types of cases are generally within the spousal support definitions of common law spouse in all of these jurisdictions. Since spousal support reflects roles assumed during a relationship and relative income, imposing support obligations is a socially desirable way to protect the vulnerable. Although there is some scope for contracting out of a support obligation, courts appropriately limit the extent to which this can occur.

The issue of what property rights should arise because of non-marital cohabitation is more contentious, which is reflected in the divergence of legal approaches to this issue in common law Canada. On one hand, there are those who raise concerns about "compulsory conjugality" and imposing obligations on individuals who may not appreciate that this is occurring.²⁰⁷ Certainly, there are strong arguments for more public legal education about options for contracting out in jurisdictions like British Columbia that have a default position that equates a couple of years cohabitation with marriage for property purposes.

It can also be argued that the development in Canada of the "joint family venture" and remedies for unjust enrichment affords significant protection for those who contribute to the acquisition or preservation of the wealth of a partner, and that further statutory remedies are not needed. Despite the force of these arguments, there has been a gradual increase in the number of jurisdictions that provide statutory property rights to unmarried conjugal partners. Further law reform bodies in two Canadian

206. It would certainly be worthwhile to undertake empirical research to test the validity of this proposition.

207. See Alonzi, *supra* note 25, at 95, 104 (reporting the attitude of half of the non-marital couples in his study rejected equal division of assets and support obligations upon separation, which is the law for conjugality).

jurisdictions that do not recognize property rights for unmarried conjugal partners, Ontario and Nova Scotia, have recommended the inclusion of unmarried partners in the statutory regimes for the married after cohabitation for a specified minimum period.²⁰⁸ It is submitted that legislative recognition of property rights for unmarried partners is a preferable approach, as it reduces uncertainty and protects those who made be more vulnerable to avoiding litigation risk and allows for protection of possessory claims, while encouraging a partner with greater wealth to take positive steps to clarify the expectations of the other party by having a domestic contract to waive property claims.

While there is variation in approaches in common law Canada to cohabitation, the broad trend is clear and provides greater social recognition and economic protection for those who are vulnerable. This approach does not, of course, always result in litigation at the end of a relationship. Many common law relationships in Canada are relatively short in duration, have no children, and limited wealth is accumulated. For these relationships, even if a legal threshold is crossed, legal issues that arise on separation will, as a practical matter, be resolved informally by each partner taking the property that they own, and a division of any assets jointly acquired, with no claim for spousal support. However, where there are sufficient resources, it is fair to provide recognition and compensation to those who are dependent or have contributed to a partner's wealth by legally recognizing cohabiting relationships.

208. LAW REFORM COMM'N OF NOVA SCOTIA, DIVISION OF FAMILY PROPERTY – FINAL REPORT, at 82, 127 (Sept. 2017); and ONTARIO LAW REFORM COMM'N, REPORT ON THE RIGHTS AND RESPONSIBILITIES OF COHABITANTS UNDER THE FAMILY LAW ACT, at 1 (1993). For a discussion of legislative reforms regarding cohabiting partners, *see also* Andrew Morrison, *Who is A Family: Cohabitation, Marriage, and the Redefinition of Family*, 29 CAN. J. FAM. L. 381, 385 (2015).

