Recognition of Common-law Spousal Relationships in Canadian Family Law

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Abstract

Common-law spousal relationships have become increasingly common with a growing number of Canadians electing to enter into them. This thesis appreciates the injustices suffered by common-law spouses during and at the termination of their spousal relationships, and reinforces the view that the denial of marital property benefits dishonors the dignity of common-law spouses. Common-law spouses experience similar needs as their married counterparts when the relationship ends. Most of the current functions of marriage can be fulfilled within common-law spousal relationships and should more appropriately be called functions of the family.

Both Canadian courts and the legislatures have acknowledged and responded to the injustices that often flow from power imbalances in unmarried persons' families and have thereby given increased recognition to common-law spousal relationships. They have taken stock of the fact that by not recognizing the rights of common-law spouses in Canada on the basis of their marital status is an affront to justice. Legislatures have also enacted various statutes and have amended existing ones to extend certain rights to common-law spouses.

The various ways in which the rights of common-law spouses have been recognized in Canada will be examined and discussed, in particular the remedial notion of constructive trust which is imposed by courts to prevent injustice and unjust enrichment. It is argued this notion of constructive trust has proven effective, especially in cases where property is being divided after a long-term intimate relationship.

Common-law spouses have advanced constitutional challenges in their quest to benefit from marital benefits and protections in their relationships since it is argued that both relationships are functionally the same.

Finally, this thesis suggests lessons that can be learned from the Canadian developments of recognizing common-law spouses. It also concludes by examining similar developments that have taken place in other countries of Europe and Africa.

Résumé

Les rapports conjugaux des conjoints de fait sont devenus de plus en plus communs du fait du nombre croissant de Canadiens qui optent pour ce régime. Dans cette perspective, la présente thèse évalue les injustices subies par les conjoints de fait durant, et à la fin, de leur relation conjugale. Ceci renforce ma thèse selon laquelle un refus des bénéfices de la propriété conjugale déshonore la dignité de conjoints de fait. Ceux-ci ont les mêmes besoins, quand vient la fin de la relation, que leurs équivalents mariés. La plupart des fonctions courantes du mariage peuvent être accomplies dans le cadre de la relation conjugale des conjoints de fait et devrait, de façon plus appropriée, être appelée fonctions familiales.

Tant les tribunaux que le législateur ont admis, et corrigé, au Canada les injustices qui souvent découlent des déséquilibres de pouvoir au sein des groupes familiaux non mariés, reconnaissant ainsi de manière accrue les relations conjugales des conjoints de fait. Ils ont pris en considération le fait que ne pas reconnaître de droits aux conjoints de fait sur la base de leur état civil était un affront à la justice. De la même façon, le législateur a établi diverses législations et en a amendé certaines déjà existantes afin d'étendre certains droits aux conjoints de fait. Les différentes voies par lesquelles les droits des conjoints de fait ont été reconnus au Canada seront examinées et discutées ; en particulier l'accent sera sur la notion réparatrice de la confiance constructive. Il est soutenu que cette notion réparatrice a prouvé son efficacité, spécialement dans les cas où la propriété est divisée après une longue relation de façon à prévenir les injustices et l'enrichissement sans cause. Les conjoints de fait ont également avancé des arguments

constitutionnels dans leur lutte pour profiter de la protection et des bénéfices du mariage ; l'argument étant que les deux relations sont similaires au plan fonctionnel.

En conclusion, cette thèse suggère les leçons qui peuvent être tirées des développements canadiens quant à la reconnaissance des cohabitants. Elle conclut également en examinant les développements semblables qui ont eu lieu dans d'autres pays de l'Europe et de l'Afrique.

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Introduction

Over the past thirty years, there has been increasing recognition of common-law spousal relationships outside marriage, and focus has been placed on the rights of common-law spouses[1] as their lifestyle has come to be perceived as functionally similar to marriage. The imposition of support obligations and provisions dealing with cohabitation agreements in the seventies,[2] continuing with the use of principles of unjust enrichment to provide rights in property in the eighties and nineties[3] and the extension of statutorily defined benefits during a similar period, has marked a fundamental change in the rights and obligations enjoyed by common-law spouses.[4]

This thesis examines some of the avenues that have been utilized by common-law spouses in their quest for legal and social recognition in Canadian society. Chapter I explores the changing societal norms and changing family structures in Canada. In particular, I examine the institution of marriage and the emergence of common-law spousal relations either as a prelude or as an alternative to marriage. Generally, the legal and social nature of "the family" and "marriage" have always been evolving concepts, though the pace of change has dramatically accelerated in recent years.[5] It is clear that contemporary marital relations are in transition in response to macro-structural changes

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[1] In this thesis, I use the term "common-law spouses" to mean two adult persons of the opposite-sex, not married to one another, who for a period of time share a primary or common residence and a life together, as married people.
[2] Winifred Holland, "Symposium: Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation" (2000) 17 Can. J. Fam. L. 114.
[3] See *Pettkus v. Becker,* [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 [cited to D.L.R.]; *Peter v. Beblow*, [1993] 11 S.C.R. 980, 101 D.L.R. (4th) 621 [cited to D.L.R.]; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1 [cited to D.L.R.].
[4] Holland, *supra* note 2.
[5] Nicholas Bala, "Symposium: Alternatives for Extending Spousal Status in Canada" (2000) 17 Can. J. Fam.L. 169.

that the Canadian society is experiencing. These changes are initiated by an egalitarian ethos that overarches legal reforms and gender roles.[6]

For many years, marriage was the only officially recognized family form which historically represented a decisive dedication or covenant that bridged the sex divide, thus commanding public reverence and dignity. Gone are the days when marriage was viewed as a static institution. Both marriage and the laws that regulate it have gone through extensive fundamental changes for the past three decades. Far from being monolithic, marriage is a social phenomenon that presents different facades and forms.[7] Until recently, however, there was little legal recognition of common-law spouses.[8] They were excluded from the rights and obligations which attached automatically to marriage and it was not clear whether any agreements which they entered into in order to create similar rights and obligations, were legally enforceable.[9] Over the past 30 years, however, there has been increasing recognition of the rights of opposite-sex common-law spouses.[10]

Chapter II analyzes the doctrine of unjust enrichment and the remedy of constructive trust as one of the first legal mechanisms invoked by courts in an attempt to secure equitable outcomes for realizing the rights of common-law spouses in cohabitational property disputes. Courts in Canada have dealt with a number of cases that involve opposite-sex common-law spouses, where the defendant is unjustly enriched and there is a corresponding deprivation of the plaintiff, usually the female spouse. Courts have developed remedies that recognize the contribution of one partner to the acquisition

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[6] G.N. Ramu, ed., *Marriage and Family in Canada Today*, 2nd ed. (Scarborough: Prentice-Hall Canada, 1993).
[7] Steven K. Homer, "Against Marriage" (1993) 29 Harv. C.R.-C.L.L. Rev. 505.
[8] Gary S. Belkin & Norman Goodman, *Marriage, Family, and Intimate Relationships* (Chicago: Rand McNally, 1980).
[9] Holland, *supra* note 2
[10] *Ibid.*

of property by the other in order to prevent unjust enrichment.[11] The choice of remedy, where a court must choose between a proprietary remedy and a monetary award, will also be discussed.

Chapter III examines statutory reform and the notion of 'ascribed spousal status' that cuts across different Canadian statutes, both federal and provincial, with the significant purpose of securing equality between married couples and common-law spouses. The definition of 'ascribed spousal status' in these statutes has residency, duration and conjugality requirements.[12] Spousal status is generally acquired under these legislative schemes if there has been cohabitation for a specified period of one to three years or if the cohabiting couple has a child.[13] Though there has been some reluctance to fully equate the two types of relationships in law, the disparity between the legal status of married and common-law couples is continually shrinking.[14]

It is noteworthy that the term "common-law spouse", referring to opposite-sex cohabiting couples, has received mixed reactions from many people including lawyers, judges, academics etc. Some have postulated that the term is misleading principally because most rights and obligations enjoyed by common-law spouses flow from statute law and not from the common law. Some have referred to common-law spouses by terms including "cohabitants", "statutory spouses", and "unmarried partners".[15] Most of the federal statutes with provisions that deal with common-law spouses however have settled

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[11] Nicholas Bala, "Breaking Up is Hard to do: Family Law," online: The Vanier Institute of the Family <http://www.vifamily.ca/tm/302/2.htm>.
[12] Brenda Cossman & Bruce Ryder, "Close Personal Relationships between Adults: The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation," online: Law Commission of Canada <http://www.lcc.gc.ca/en/themes/pr/cpra/cr/cr.asp#p2ic>.
[13] *Ibid.*
[14] Bala, *supra* note 11.
[15] Simon R. Fodden, *Essentials of Canadian Law: Family Law* (Toronto: Irwin Law, 1999).

on a uniform terminology called "common-law partners" to include both opposite-sex and same-sex cohabiting couples.[16]

Chapter III also examines *Charter*[17] challenges to the statutory definitions of 'spouse' that exclude common-law relationships. Common-law spouses have advanced equality claims seeking the extension of marital benefits and protection to their relationships. Issues have included protection against discrimination, the legal rights of children and unmarried spouses, the effect of common-law spousal relationships on custody and support decisions, extension of insurance benefits, and the division of property at termination.[18] *Charter* challenges have had tangible effects on family law especially laws that concern married spouses. Through court challenges, a good number of family law provisions have been found problematic when subjected to *Charter* scrutiny. Often these provisions have been declared of no effect, and subsequently have undergone legislative reform.[19]

Chapter IV discusses the significance of cohabitation agreements for common-law spouses. It is evident that during the past thirty years, the number of persons opting to live common-law has steadily and consistently increased. Though still excluded from certain legal rights and protections that accrue to marriage, common-law spouses may acquire some of these rights by expressly securing such benefits in cohabitation agreements. Some rights can be secured through contract because they relate to aspects of the relationships between parties to the cohabitation agreement, for example, property

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[16] Cossman & Ryder, *supra* note 12.
[17] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
[18] Maureen Baker, *The Family: Changing Trends in Canada* (Toronto: McGraw-Hill Ryerson, 1990).
[19] Susan B. Boyd, "The Impact of the Charter of Rights and Freedoms on Canadian Family Law" (2000)17 Can. J. Fam. L. 293.

rights. However rights between common-law partners and the state, for example testimonial privilege cannot be secured by contract.[20]

Chapter V which is a concluding chapter reviews lessons from the Canadian experience that may be relevant to other jurisdictions. The role played by legal reform, the achievements gained by common-law spouses through remedial constructive trust, the importance of cohabitation agreements and the role played by ascription in abating the exploitation of the vulnerable spouse are some of the lessons of the Canadian experience. It is also vital to note that the Canadian experience in recognizing the rights of common-law spouses parallels experiences in other countries. For instance most European countries like Sweden, France and Denmark, have recognized the rights of common-law spouses at various levels.

[20] Cossman &Ryder, *supra* note 20

I: Changing Societal Norms and Changing Family Structures

I.1 Marriage

The marriage institution historically earned respect because it involved fidelity and demanding duties. The marriage vow was a public commitment to a dedicated and at the same time difficult monogamous journey. The vows publicly embraced the future suffering and sacrifices necessary to sustain this bond. The vows committed the couple to a resilient and stable form of life to meet the unique challenges of heterosexual bonding, procreation and child rearing.[21]

However marriage in Canada has been subject to a considerable amount of legal and social upheaval over the past few decades. Of note are the establishment of no-fault divorce, the disconnect between marriage and procreation, the blurring of distinctions between marriage and common-law unions, liberalized abortion laws, and major reconfigurations of parent-child relationships.[22] Divorce rates have risen; marriage rates have declined; common-law relationships among the young adults have increased, out of wedlock births have soared, fewer and fewer children are reared from birth to adulthood by their biological parents.[23] Needless to say, all these developments have had a significant impact on marriage.

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[21] Gilbert K. Chesterton, *Brave New Family* (San Francisco: Ignatius Press, 1990).
[22] Daniel Cere, "Wars of the Ring" (2002), online: Catholic Educator's Resource Center <http://www.catholiceducation.org/articles/marriage/mf0033.html>.
[23] *Ibid.*

Furthermore, the emergence of individualism, egalitarian sex role expectations, affluence, and moral degeneration in most communities have fundamentally changed the roles of marriage and the family. Some commentators argue that the expectations of today's marriages centre on the fulfillment of two separate individuals' needs, desires, and capacities. Both partners enter marriage primarily to get something out of it. Like a bank account, it soon runs bankrupt if the withdrawals outnumber the deposits.[24] Yet as the traditional purposes of marriage and the family have disappeared, there are fewer ways for the partners in a marriage to make their contribution, and the less creative input that is applied to a marriage, the less its capacity to be a source of personal fulfillment.[25]

In the last two decades, the institution of marriage has been in turmoil. Marriage has been less and less a prerequisite to establishing a couple, and has tended to vanish from early conjugal life.[26] Some advocate in favor of the deregulation of marriage and thus maintain that it should be treated more like common-law relationships, rather than vice versa.[27] The familiar way of marriage as a "union" between a man and woman is now the focus of intense legal scrutiny and controversy. Same-sex activists in Canada have been busy developing legal, historical, philosophical, psychological, theological, and emotive arguments with the sole aim of abolishing the opposite-sex requirement as an integral element in the definition of marriage.[28] Their main aim is to dismantle the ideology of the conventional family which is responsible for much of the oppression

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[24] Kerry J. Mothersill, "Marriage Breakdown In North America: A Psychological Perspective," online: <http://www.geocities.com/bahaimarriage/articles/marriagebreak.htm>.
[25] *Ibid.*
[26] Wu, Zheng. *Cohabitation: An Alternative Form of Family Living*, (Oxford University Press: Canada, 2000).
[27] John Dewar, *Law and the Family* (London: Butterworths, 1989).
[28] Cere, *supra* note 22.

faced by same-sex partners and other individuals who are not disposed to conforming to that mold.[29]

Some authors maintain that marriage has lost much of its legal, religious and social meaning and authority. It has dwindled to a "couples' relationship", mainly designed for the sexual and emotional gratification of each adult.[30] The argument is that there has been a shift from state intervention and state-imposed norms toward more private decision-making.[31]

Since the 1960s there has been erosion of traditional gender roles specifying husbands as breadwinners and wives as homemakers. There was a shift to a service economy which increased the demand for women's involvement in paid work.[32] This is indicative of a very dramatic shift in marital roles, suggestive of a reorganization and redefinition of marriage itself.[33]

The women's liberation movement of the 60s inserted feminism in the political, social, and economic discourse. The movement has persisted to the present day in Canada, and its main achievement is progress towards women's emancipation and the decline of patriarchy. The movement criticized the place of women in marriage and the family, in factory and office, in field and in parliament, indeed in all the private and public spheres where women were confined by the old notions.[34] The women's

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[29] Lori Chambers & Edgar-Andre Montigny, eds., *Family Matters: Papers in Post-Confederation Canadian Family History* (Toronto: Canadian Scholars' Press, 1998).
[30] David Popenoe & Barbara Dafoe Whitehead, (1999) "What's Happening to Marriage?" online: The National Marriage Project <http://marriage.rutgers.edu/pubwhatshappening.htm>.
[31] Barbara A. Babb, "An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective" online: Indiana University <http://www.law.indiana.edu/ilj/v72/no3/babb1.html>.
[32] Janet C. Saltzman & Jacqueline Hagan, "The Gender Division of Labor and Family Change in Industrial Societies" (1996) 27 Journal of Comparative Family Studies 2.
[33] *Ibid.*
[34] John F.Conway, *The Canadian Family in Crisis,* 4th ed. (Toronto: James Lorimer, 2001).

movement led to structural changes in the society and it affected the family. Definitely, some of these changes had to do with women's changing attitudes about themselves and their purpose in life. Women could more and more conceive of a life and an identity outside the home, since more and more jobs became available.[35] Advances in household technology and declines in the birthrate meant less time each day and fewer years of a woman's lifetime had to be devoted to domestic labor and child rearing.[36]

Women's movement into the market reflected emerging household requirements, while at the same time it has influenced these requirements. The declining fertility rates are both cause and product of women's movement into the market, and they, too, have an impact on family life in Canada. As more people survive through the early years and live into old age, both households and the economy are affected. In the process, marriage patterns have been altered.[37]

Furthermore, the expansion that occurred in the labor market as of the 60s particularly involved jobs that could be seen as extensions of women's unpaid work, particularly in the areas of clerical work, teaching, nursing and other services. This put pressure on women to postpone marriage as they extended their period of education and invested in their work lives. For both young women and young men, marriage became less important as a means of structuring their relationships and understandings, and consequently living in common-law became an alternative. Women became less

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[35] *Ibid.*
[36] *Ibid.*
[37] Baker, ed., *supra,* note 18.

dependent on marriage, making divorce and common-law relationships more feasible alternatives for both sexes.[38]

In short, there have been significant changes in gender roles which have been prompted by the feminist ideology, and the rise in educational and occupational accomplishments of women, especially those who are married. However, all these changes do not automatically ensure marital equality and domestic peace; nonetheless they create conditions for demanding the equal treatment of women both inside and outside the family.[39]

Changing societal norms and changes in the conventional Canadian family have also been reflected in the emergence of single-parent households especially headed by women. Single parent families, which have increased the most rapidly of any family form except common-law spouses, have grown at twenty-one times the rate of married spouses. Thus there has been a marked increase of both the absolute and the relative number of single-parent families.[40] In previous years, the death of the husband was the impetus for most single-parent families; recently, however, divorce and separation have accounted for the majority of these families.[41]

Single-parent families were in many respects the pioneers of family diversity, paving way for the recognition of other families. The growing social acceptance of divorced, single-parent families facilitated the emergence of yet another form of single

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[38] Roderic Beaujot, "Family Transformation, Changing Relationships, and Implications for Children", *Paper presented in Family Transformation and Social Cohesion Workshop Held in* Ottawa, June 20-21, 2002, online: <http://www.ssc.uwo.ca/sociology/ftsc/Family%20Transformation,%20Changing%20Relationships,%20and%20Implications%20for%20Children.PDF>.

[39] Ramu, *supra* note 6.

[40] Pat M. Keith & Robert B. Schafer, *Relationships and Well-Being Over the Life Stages* (New York: Praeger, 1991).

[41] *Ibid.*

parenthood: resulting not from divorce, but from women electing to give birth while remaining single. Some women even viewed motherhood without marriage as offering greater satisfaction and security than marriage of questionable stability.[42]

The increasing diversity of family forms and behaviors seems to suggest that marriage is not the only legally and socially sanctioned living arrangement anymore. Canadian society has become pluralistic, with a broader range of family forms and expectations than in the past.[43] Familial diversity is a major challenge of this century and to meet it, families must be recognized and supported in their different shapes. Throughout history, families have always evolved and changed; they have never been stable. Even the great social evolutionist Lewis Henry Morgan, writing in the last century, believed that the Western nuclear family was only one moment in human history.[44]

In Canada, as in many other industrialized nations, conjugal relationships have undergone significant change. Most Canadians do not subscribe to the fact that marriage is the only acceptable relationship or family structure. They believe that all types of adult family relationships should be valued. The family diversity that exists in Canada today includes married and common-law couples, relatives or friends sharing a household, and care recipients and caregivers.[45] And it also includes children, half of whom live in a family structure other than with two married parents.[46] Innovations in reproductive

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[42] G. Jagger & C. Wright, eds., *Changing Family Values* (London: Routledge, 1999).
[43] Nicholas Bala, "Cases & Comments: Alternatives for Extending Spousal Status", online: Joel Miller's Family Law Centre <http://www.familylawcentre.com/ccbalaspousal.html>.
[44] Solly Dreman, ed., *The Family on the Threshold of the 21st Century: Trends and Implications* (Mahwah: Lawrence Erlbaum , 1997).
[45] Law Commission of Canada, (2002) "Beyond Conjugality: Recognizing and Supporting Close Personal Relationships," online: <http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp>.
[46] *Ibid.*

technology have vastly opened up possibilities for people to create new kinds of families, further challenging conventional definitions of family.[47]

Although who is and who is not family continues to be a matter of debate among academics and the general public, Canadian courts have tended to take a functional approach in solving the problem. That is, if persons perform the functions of family in relation to each other, the courts tend to view them as family, complete with associated rights and responsibilities. Such an approach not only acknowledges the changing realities of family life but also supports the need for a broader definition and application of the term.[48]

The Law Commission of Canada has described social realities, and sought to contribute to the evolution of legal norms regulating adult personal relationships. In January 2002, it made public a set of proposals which if adopted would effectively spell the end of marriage as a social or religious institution. The report, entitled *Beyond Conjugality*, by this independent, government-funded agency, called on Parliament to pursue a more principled and comprehensive approach to the legal recognition and support of the full range of adult personal relationships.[49] As the President of Law Commission of Canada noted: "There is no justification for maintaining the current distinctions between same-sex and hetero-sexual conjugal unions in the light of the

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[47] Pauline I. Erera, *Family Diversity: Continuity and Change in the Contemporary Family* (Thousand Oaks: Sage, 2002).
[48] Shirley L. Zimmerman, *Understanding Family Policy: Theories and Applications*, 2nd ed. (Thousand Oaks: Sage, 1995).
[49] *Supra* note 45

current understandings of the states' interests in marriage... Anything less is discrimination... What is important in our society is caring."[50]

In *Beyond Conjugality*, the Law Commission of Canada argued that governments have tended to rely too heavily on conjugal relationships in accomplishing important state objectives. Rather than advocating simply that the law should cover a broader range of relationships, the Law Commission was of the view that it is time for governments to re-evaluate the ways in which they regulate personal adult relationships.[51]

The Law Commission of Canada agrees that it recognizes and respects that for many, marriage is a sensitive issue bound up with deeply felt religious and moral beliefs and cultural practices. It is nevertheless also a reality that there are many committed Canadians living today in non-conjugal relationships. They are entitled to respect and dignity and should be afforded the same recognition as persons living in conjugal relationships.[52] In her words the President of the Law Commission of Canada emphasizes:

> People want stability and certainty in their personal relationships, as in other aspects of their lives. The state must provide adequate legal structures to support the relationships that citizens develop, structures that respect the values of equality, autonomy and choice. Marriage has long been the main vehicle by which two people publicly express their commitment to each other and seek to ensure certainty and stability in their own and their family's relationship. But marriage is no longer a sufficient model, given the variety of relationships that exist in Canada today. In addition, if governments are to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion.[53]

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[50] Nathalie Des Rosiers, "Beyond Conjugality," online: Law Commission of Canada <http://www.lcc.gc.ca/en/pc/message/msg20020312.asp>.
[51] Law Commission of Canada, *supra* note 45.
[52] Law Commission of Canada, *supra* note 45.
[53] Des Rosiers, *supra* note 50.

I.2 Common-law spousal relationships

In Canada, the incidence of common-law relationships has increased, and so too has their social and legal acceptance.[54] Once subject to punitive social and legal sanctions, common-law spouses now enjoy much greater social acceptance and have acquired many of the legal rights and obligations that traditionally attached only to marriage. Living common-law, whether as an alternative to marriage, a prelude to marriage, or even as a sequel to marriage, is a growing phenomenon that now has widespread social and legal acceptance.[55] As early as 1980, the Supreme Court of Canada took note of their functional similarity with married partners in *Pettkus v. Becker.*[56] Dickson J. wrote: "I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period."[57] And what is new about the present time is that there are fewer social barriers to the increased diversity, and freedom of family choice has become an acquired right.[58]

In general, researchers have found increased acceptance of the idea of living in common-law, especially among the young.[59] A large majority of young Canadians believe that over the next 25 years, the general trend in Canada will be in favor of

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[54] Kara L. Kuffner, "Common-Law and Same-Sex Relationships under the Matrimonial Property Act" (2000) 63 Sask. L. Rev. 237.
[55] Law Commission of Canada, (2002), "Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships", *supra* note 45.
[56] *Supra* note 3.
[57] *Pettkus v. Becker, Ibid.* at 275.
[58] David Cheal *et al., How Families Cope and Why Policymakers Need to Know* (Ottawa: Canadian Policy Research Networks, 1998).
[59] Baker , *supra* note 37.

common-law relationships rather than marriage.[60] Seventy percent of the young Canadians outside Quebec hold the view that the underlying trend for couples in Canada is in fact away from marriage and towards common-law relationships.[61] In Quebec, living in common-law has become the norm and the order of the day for younger couples, with marriage decidedly less preferred.[62] By the mid 1990s, living in common-law was an arrangement of choice; for one in seven couples nationally, and for one in four couples in Quebec.[63] In addition, in Quebec a majority (57%) of young people entering their first conjugal relationships are now choosing to live common-law rather than marry.[64]

Some phases through which common-law relationships develop have been identified. For instance, there is a simplified first phase where living in common-law emerges as a deviant or *avant garde* phenomenon practiced by a small group of the single population whilst the great majority of the population marry directly.[65] In the second phase, living in common-law functions as either a prelude to marriage or a probationary period where the strength of the relationship may be tested before committing to marriage. This is predominantly a childless phase.[66]

In the third phase, living in common-law becomes socially acceptable as an alternative to marriage and becoming a parent is no longer restricted to marriage. Finally in the fourth phase, living in common-law and marriage become indistinguishable with

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[60] Susan A. McDaniel & Lorne Tepperman, *Close Relations: An Introduction to the Sociology of Families* (Scarborough: Prentice-Hall Canada, 1999).
[61] Wu, *supra,* note 26.
[62] *Ibid.*
[63] Statistics Canada, "1996 Census: Marital Status, Common-law Unions and Families", *The Daily* (14 October 1997), online: The Daily- Statistics Canada <http://www.statcan.ca/Daily/English/971014/d971014.htm>.
[64] Statistics Canada, "Formation of first Common-law Unions 1995" *The Daily* (9 December 1997), online: The Daily- Statistics Canada <http://www.statcan.ca/Daily/English/971209/d971209.htm#ART2>.
[65] Jan N. Hoem & Britta Hoem, "The Swedish Family: Aspects of Contemporary Developments" (1988) 9 Journal of Family Issues 397.
[66] *Ibid.*

children being born and reared within both, and the partnership transition could be said to be complete. These phases may vary in duration but once a society has reached a particular phase, it is unlikely that there will be a return to the earlier phase.[67]

It is important to underline here that at any given time the notion of common-law unions may be valued differently and may be perceived differently by men and women that are involved. For instance, common-law relationships may be viewed as an alternative to being single, or as a prelude to marriage, or a substitute for marriage.[68] Moreover how a common-law couple perceives their relationship may change and the perception may also vary between partners. The notion of common-law relationships is a diverse phenomenon and, as compared to marriage, it is a process rather than an event.[69]

Over the past few decades, common-law relationships have transformed family patterns in Canada.[70] Many scholars have been grappling with what exactly could be behind the astronomical rise in common-law relationships, since the 60s. And this kind of scenario has been interpreted by some to be a manifestation of a serious retreat in marriage, in other words, living in common-law is symptomatic of, and reinforces a decline in the belief that marriage is sacred and integral in the foundation of a family.[71]

In Canada, not only family related behavior has changed, but also attitudes and values.[72] One most important factor behind the high rates of persons living in common-

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[67] Kathreen Kiernan, "Unmarried Cohabitation and Parenthood: Here to Stay?- European perspectives", *Paper presented in the Conference on Pubic Policy and future of Family, October 25 2002, London School of Economics and Political Science*, online: < http://www-cpr.maxwell.syr.edu/moynihan-smeedingconference/kiernan.pdf>.
[68] D. Manting, "The Changing Meaning of Cohabitation" (1996) 12 European Sociological Review 53.
[69] J. Hoem & B. Hoem, "The Swedish Family: Aspects of Contemporary Developments" (1988) 9 Journal of Family Issues 397.
[70] Beaujot, *supra* note 38.
[71] Andrew J. Cherlin, *Marriage, Divorce, Remarriage* (Cambridge: Harvard University Press, 1992).
[72] T.R Balakrishnan, E. Lapierre-Adamcyk & K.J Krotski, *Family and Child Bearing in Canada: A Demographic Analysis* (Toronto: University of Toronto Press, 1993).

law is the high rate of divorce prevalent among the married. Hence in a survey carried out in 1984, it was found out that common-law unions and divorce have become socially acceptable and children are no longer considered as the focal point of women's life or the basis of a couple's relationship.[73]

Young couples in the 1990s, particularly those who have experienced common-law relationships, assign less importance to children and to living as a couple and marriage is no longer seen as a primary source of happiness.[74] Marriage, to most people, no longer has the essential relationship to long-term heterosexual bonding and children. Marriage and family can only be valued if they complement, or at least do not interfere with, personal aspirations and self fulfillment. For most, the quality of the relationship is more important than the structure.[75]

Two major reasons behind some people not embracing marriage thus choosing common-law relationships have been identified and labeled: the first is cultural and the second economical.[76] Under the cultural aspect, rising individualism and secularism are manifest. Individualism has been translated to mean the increasing importance of individual goal attainment whereas secularism denotes the fact that the rate of peoples' indulgence in religious values has sharply fallen.[77]

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[73] Zanaida R. Ravanera, "Family Transformation and Social Cohesion: Project Overview and Integrative Framework" *Paper presented at the Annual Meeting of the Canadian Population Society in Edmonton, May 28-30, 2000 and at the First Workshop of the Family Transformation and Social Cohesion Project in Ottawa, June 9-10, 2000*, online: < http://www.ssc.uwo.ca/sociology/ftsc/overview.pdf>.
[74] É. Lapierre-Adamcky, C. Le Bourdais & N. Marcil-Gratton, "Vivre en couple pour la première fois. La signification du choix de l'union libre au Québec et en Ontario" (1999) 29 Cahiers québécois de démographie 1-2, 199.
[75] McDaniel & Tepperman, *supra* note 60.
[76] Ron Lesthaeghe & Johan Surkyn, "Cultural Dynamics and Economic Theories of Fertility Change" (1988) 14 Population and Development Review 1.
[77] *Ibid.*

A more proximate and direct cultural source of the rise in common-law relationships is the 'sexual revolution'. This revolution has eroded the main grounds for earlier disapproval of living in common-law. For instance, in the past it was considered immoral for unmarried young adults to engage in sexual activities before marriage.[78] Most importantly there has been the dramatic weakening of the normative imperative to marry and to stay married. At the same time, normative proscriptions against premarital sex, living together in common-law and out-of-wedlock childbearing have declined dramatically, with large numbers believing that living together before marriage is a good idea.[79]

Under the economical aspect, there are massive social changes wrought by industrialization, and other issues focusing on women changing roles in the labor market and concomitant shifts in values and attitudes about gender roles.[80] Living in common-law may symbolize, particularly for women, greater female autonomy in the work place and in the home, and the avoidance of the notion of dependency that is typically implicit in marriage. Women may be anxious that marriage may alter the balance of power in their partnerships arrangements and make these relationships less equitable.[81]

For today's young adults, the first generation to come of age during the divorce revolution, living together in common-law seems like a good way to achieve some of the benefits of marriage without the risks involved in emotional commitment, for instance divorce. They believe couples who live together can share expenses and learn more about

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[78] Larry L. Bumpass, "What's Happening to the Family?: Interaction Between Demographic and Institutional Change" (1990) 27 Demography 483.
[79] Arland Thornton, "Changing Attitudes toward Family Issues in the United States" (1989) 51 Journal of Marriage and the Family 873.
[80] John W. Goode, *World Revolution and Family Patterns* (Glencoe, IL: Free Press, 1963).
[81] Kiernan, *supra* note 67.

each other. They can find out whether their partner has what it takes to be married. If things do not work out, there is a chance to terminate the relationship which is foundered and is destined for disaster without recourse to the machinery of the State and its legal institutions.[82] Moreover, common-law spouses do not have to seek legal or religious permission to dissolve their union.[83]

In Canada, it is on record that some mothers in common-law families prefer living in common-law to lone motherhood or to marrying a man they were uncertain they could rely upon for support. This finding resonates with Wilson's thesis developed in his book, *The Truly Disadvantaged.*[84] Wilson discusses the influence of economically stable men and joblessness on family structure. He argues that the decline in marriage among US blacks is associated with the declining economic status of black men. Wilson emphasizes that this decade's underclass is mostly black, socially isolated, and comprised primarily of unmarried mothers dependent on welfare and the jobless fathers of their children.[85] This may have a corollary in Canada, in the declining status of men who have uncertain job prospects.

Finally, living in common-law, for some, may be a rational choice in the face of uncertainty, insecurity, unemployment, and socio-economic disadvantages; just as it was in times past, it represents in effect a poor man's marriage.[86]

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[82] L.B. Curzon, *Family Law* (London: Cavendish, 1995).
[83] Dr. David Popenoe, (2000) "Cohabitation: The Marriage Enemy", online: USA Today <http://www.usatoday.com/news/opinion/columnists/lovemarriage/love4.htm>.
[84] William J. Wilson, *The Truly Disadvantaged* (Chicago: University of Chicago Press, 1987).
[85] *Ibid.*
[86] Kiernan, *supra* note 67.

I.2.1 Who lives in common-law relationships?

Who is living in common-law relationships is as important as why. In Canada and other industrialized nations, living in common-law has largely been associated with younger cohorts of men and women.[87] Despite this finding, there are other types of individuals that are prone to living in common-law relationships. These relationships tend to be selective of people who consider themselves to be liberal, less religious and more supportive of egalitarian gender roles and non-traditional family roles.[88] A study conducted in Canada about people living common-law found that Canadian women who reported that they were not church goers or are atheist, tended to be more supportive of living in common-law than in marriage.[89] On the contrary, it was reported in the same report that women who are church goers supported the idea of formalizing or legalizing their common-law relations.[90]

There are also inter-generational effects that connect preference for common-law relationships by some individuals to family background. Imperatively therefore, many scholars have concurred on the finding that the dissolution of a parents' marriage has a great impact in influencing some young people's preference for living common-law.[91] It is believed that where children witness the breaking up of their parents' marriages before

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[87] Pierre Turcotte & Alain Bélanger, "The Dynamics of Formation and Dissolution of First Common-Law Unions in Canada", Statistics Canada Research Paper, 1997.
[88] Martin E. Clarkberg, Rose M. Stolzenberg & Linda J. Waite, "Attitudes, Values, and Entrance into Cohabitational versus Marital Unions" (1995) 74 Social Forces- International Journal of Social Reasearch, 609; Lye D. Waldron, "Attitudes Toward Cohabitation, Family, and Gender Roles: Relationships to Values and Political Ideology" (1997) 40 Sociological Perspectives 199.
[89] Turcotte & Bélanger, *supra* note 87.
[90] *Ibid.*
[91] *Ibid.*

the age of 15, it significantly increases the likelihood of living in common-law by these children.[92]

A series of studies has found that where children whose parents divorced or whose parents expressed either implicit or explicit approval of living common-law were more likely to enter into common-law relationships as young adults compared to other children that have been brought up in more stable homes and families, especially religious families. Also the phenomenon of living in common-law tends to be more common for people of slightly lower levels of educational attainment and income than is marriage.[93]

There are also clues that the avoidance of marriage by some people in favor of unmarried parenthood may be more closely associated with impoverishment than empowerment. Researchers have shown that women who become mothers in common-law relationships are more likely to have partners who are unemployed or who are in semi-skilled or unskilled occupations, which may account for why common-law spouses with children are amongst the poorest two parent families.[94]

Some Canadians in favor of marriage have been faced with challenging questions from a cross-section of people who believe that living in a common-law relationship is the best alternative to marriage. For example, a young daughter or son in their 20s may decide to move in with the person he or she has been dating, pointing to the failed or unhappy marriages of others and their desire to take a trial run. Another challenging situation occurs when divorced women or single mothers who fear losing everything they

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[92] *Ibid.*
[93] Larry L. Bumpass & Hsien Hen Lu, "Trends in Cohabitation and Implications for Children's Family Contexts in the United States" (2000) 54 Population Studies 29.
[94] Kiernan, *supra* note 67.

have worked for should a second marriage fail.[95] These are challenges that many families in Canada are faced with everyday as more people choose to live "common- law".

As already highlighted, living in a common-law relationship has come to be viewed, for some, as an alternative to marriage in light of the increasing divorce rates and family breakdown.[96] For others, it is a way to test the waters and be sure a relationship has what it takes to last.[97] Undoubtedly there has been a loosening of social control over the union formation process amongst Canadians and generally the whole of North America. Several scholars have noted that North American societies are going through a transition in the way men and women become couples or partners.[98]

In almost all the Canadian provinces, there have been temporal increases in the propensity to live common-law and to have children outside marriage; and there have also been varied policy responses to these developments.[99] The signs all point in the direction of common-law relationships or unmarried partnerships being here to stay. But if families continue to be formed outside marriage then current signals also point to legal institutions and regulatory authorities continuing to formalize relationships within families.[100] In fact several countries, including Canada, treat common-law couples as equivalent to married couples if they have cohabited for at least one year or have a child of their union.[101] However, one has to appreciate the fact that common-law relationships

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[95] David R. Hall & John Z. Zhao, "Cohabitation and Divorce in Canada" (1995) 57 Journal of Marriage and the Family 1.
[96] Hilda Rodriguez, "Cohabitation: A Snapshot" Cohabitation Fact Sheet. (1998), online: Center for Law and Public Policy (CLASP) <http://www.clasp.org/Pubs/Pubs_Couples>.
[97] *Ibid.*
[98] Baker, *supra* note 18.
[99] *Ibid.*
[100] Holland, *supra* note 2.
[101] Baker, *supra* note 18.

still differ from marriage in that they still tend to be short lived and are characterized by lower fertility rates.[102]

A US Senator, Gruening Ernest Henry while giving evidence in 1968 on the Population Crisis on the issue of fertility control had this to say: "The taboo of the day before yesterday becomes the controversial of yesterday and the accepted of today and the wanted of tomorrow."[103] This is a classic description of the pathways of common-law relationships over the last four decades in Canada. The taboo and controversial hurdles are past and from where Canada stands today, these relationships have become reasonably acceptable forms of behavior, hence to a bigger extent, have become normative.

However there is no reason not to hold to Westermarck's[104] thesis propounded in his commendable work entitled *The Future of Marriage in Western Civilization*,[105] published in 1936 where he espouses that the family founded upon some form of marriage based on deep-rooted sentiments both conjugal and parental, will last as long as these sentiments last.[106]

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[102] *Ibid.*
[103] The Colombia Encyclopedia, 6th ed., online: Bartleby.com <http://www.bartleby.com/65/gr/Gruening.html>.
[104] Edward Alexander Westermarck,(1862–1939) Finnish Social Philosopher and Anthropologist. He was professor of sociology at the University of London (1907–30) and professor of philosophy at the Abo Akademi (until 1935). Westermarck was an authority on the history of morals and of marriage customs, his best-known work being *The History of Human Marriage*, 5th ed., (London: Macmillan, 1921).
[105] Edward A. Westermarck, *The Future of Marriage in Western Civilization* (London: Macmillan, 1936).
[106] *Ibid.*

II: Legal Recognition of common-law spouses and Unjust Enrichment Remedies

Legal recognition of the rights of common-law spouses during or at the end of their relationships requires a social and legal consensus about the evolving concepts of marriage and family in Canada. It is clear from the legal and demographic literature that the social practices of common-law spouses have shifted significantly over the past three decades and that the transition is still continuing. And it seems clear that the traditional legal category of the married can no longer account for the broad range of intimate relationships in Canada today.

Unlike married couples, common-law spouses do not have legislated rights to share in property upon the breakdown of a relationship. The Supreme Court of Canada recently decided on the constitutionality of this problem in *Nova Scotia (Attorney General) v. Walsh*[107] The exclusion of common-law spouses from property equalization schemes was challenged on the basis that the different treatment between married and common-law spouses violated the guarantee of equality[108] in the *Charter.* The court found that this was not the case, as the distinction reflects the differences between those two types of relationship.

The Supreme Court of Canada concluded that common-law spouses have other legal avenues through which they can claim property rights upon the breakdown of their

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[107] *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, 221 D.L.R. (4th) 1 [cited to D.L.R.].

[108] Section 15(1) of the *Charter* reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability."

relationship. It was held that existing remedies based on unjust enrichment principles are adequate in compensating common-law spouses for contributions actually made.[109]

The principles of unjust enrichment and constructive trust have been employed by courts to provide compensation for a contribution to the acquisition or maintenance of property of a former common-law spouse. Unjust enrichment occurs where one party gains a valuable advantage from another without cause. A constructive trust gives the plaintiff a property right, as was well described in *Peter v. Beblow*,[110] a case that seemed to collapse distinctions between married and unmarried couples by awarding an unmarried woman a share of her former partner's property under the doctrine of unjust enrichment. A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.[111]

II.1 Test for Unjust Enrichment

There have been three leading Supreme Court of Canada decisions on unjust enrichment and common-law spousal relationships: *Pettkus v. Becker*,[112] *Sorochan v. Sorochan*[113] and *Peter v. Beblow*.[114] In *Pettkus v. Becker*, Mr. Pettkus, developed over the years a successful beekeeping business. He owned two rural Ontario properties, where the business was conducted, and had the proceeds from the sale in 1974 of a third

[109] *Nova Scotia (Attorney General) v. Walsh, supra* note 107; See discussion, *infra*, Part III.3.2.
[110] *Peter v. Beblow, supra* note 3.
[111] Nedim P. Vogt, ed., *Disputes Involving Trusts* (Basle: Helbing & Lichtenhahn, 1999).
[112] *Pettkus v. Becker, supra* note 3.
[113] *Sorochan v. Sorochan, ibid.*
[114] *Peter v. Beblow, ibid.*

property located in Quebec. Ms. Becker, through her labor and earnings, also contributed substantially to the good fortune of the common enterprise. Although unmarried, Mr. Pettkus and Ms. Becker lived as husband and wife from 1955 to 1974, save for a three-month separation in 1972. When the relationship terminated in late 1974, Ms. Becker commenced an action seeking a declaration of entitlement to one-half interest in the lands and a share in the beekeeping business. The Supreme Court of Canada decided that Mr. Pettkus was unjustly enriched, and imposed a constructive trust on half of all his assets in favor of Ms. Becker who had supported him for the first 5 years of their relationship so he that could save to acquire a bee farm.[115]

In *Sorochan v. Sorochan,* the facts of the case reveal that Mary and Alex Sorochan lived together for forty-two years. They jointly worked a mixed farming operation and had six children. They were never married. Ms. Sorochan ran the household, cared for their children and worked long hours on the farm. For a number of years, Mr. Sorochan worked as a traveling salesperson. During these periods, Ms. Sorochan often assumed sole responsibility for the farm chores. When the parties began living together, Mr. Sorochan owned six quarter sections of farmland along with his brother; he later became sole owner of three quarter sections. At the time of the transfer, Ms. Sorochan was asked to sign documents barring any potential dower entitlement. Early in their relationship, Ms. Sorochan had asked her partner to marry her, with the reply of "later on". In 1971, she requested that he transfer part of the land into her name and was refused. She commenced a legal action for an interest in the farm after failing health and a deteriorating relationship forced her to move to a senior citizen's home. The Supreme Court of Canada decided that Mr. Sorochan was unjustly enriched. The Court

[115] *Pettkus v. Becker, ibid.*

imposed a constructive trust on one-third of the farm, plus awarded a money payment that brought the total value of the award to almost half the value of the farm.[116]

In *Peter v. Beblow,* Catherine Peter lived in a common law relationship with William Beblow for 12 years, doing the domestic work of the household and raising the children of their blended family without compensation. Mr. Beblow had purchased the house occupied by the couple and appellant had undertaken a number of projects -- gardening, planting a hedge, painting -- to maintain or better it during the relationship. During the course of the relationship he was able to pay off the mortgage on the house and to buy a houseboat and a van; Ms. Peter bought a lot with money earned outside the family unit. The house lay vacant after the parties separated.

An action for unjust enrichment arises when three major elements are proven: enrichment, a corresponding deprivation, and finally lack of juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out.[117] Of course, mere proof that the defendant was unjustly enriched at the plaintiff's detriment is not a sufficient basis for awarding restitutionary relief. The claimant also must prove, under the third element of the cause of action in unjust enrichment, absence of any juristic reason for the enrichment, or, stated more positively, that the enrichment resulted from an unjust factor.[118]

Establishing the claim for unjust enrichment in common-law spousal relationships begins with an examination of the relationship of the parties and the roles they played. There has to be a contribution made by the plaintiff in a collaborative relationship, which

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[116] *Sorochan v. Sorochan, ibid.*
[117] Donovan Waters, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1993).
[118] Mitchell McIness, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada" (1998) 25 Man. L.J. 513.

ought to be recognized for compensation. The contribution does not have to be connected directly to the acquisition of property. For instance where the common-law husband purchased a house, the woman must prove that she contributed directly to the purchase of the house or that she did so indirectly by freeing her husband's income so that he could pay the mortgage while she paid other bills, or she took care of domestic responsibilities and child care.[119] A sufficient nexus may exist where the plaintiff's contribution relates to the preservation, maintenance or improvement of property,[120] or where there are quasi-financial contributions such as the purchase of consumables for the family, raising animals, tending a garden for food, or taking care of the children.[121]

In its 1993 decision, the Supreme Court of Canada in *Peter v. Beblow* expounded on the vital importance of recognizing domestic services in favor of a common-law spouse that had been unjustly deprived of her property rights by the former spouse.[122] The Supreme Court upheld the trial judgment that recognized the contributions made by Catherine Peter who, during a twelve year common-law relationship provided domestic services and childcare to William Beblow's children. Catherine Peter was awarded sole ownership of the family home which was acquired by William before their relationship began. The court found that the man had been unjustly enriched. It calculated the appropriate compensation on the basis of what the man would have had to pay a housekeeper, less the benefit the woman received from the accommodation. Since Mr.

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[119] Carol Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge & Kegan Paul, 1984).
[120] *Sorochan v. Sorochan, supra* note 3.
[121] Len Fishman, "Unjust Enrichment in the Family Law Context," online: Family Law Manitoba <http://www.fbfamilylaw.mb.ca/unjust.htm>.
[122] Nicholas Bala, "Canada: Struggling to find a Balance on Gender Issues" (1995) 33 U. of Louisville J. of Fam. L. 301.

Beblow did not have sufficient funds to pay this amount, Ms. Peter was awarded a constructive trust interest in the entire matrimonial home.[123]

In *Peter v. Beblow,* Madame Justice McLachlin said that: "The notion that household and childcare services are not worthy of recognition ... fails to recognize that these services are of great value, not only to the family, but to the other spouse".[124] In the same vein, an approach that focuses on the direct financial contributions and downplays the significance of indirect non-financial contributions places women at a disadvantage.[125] The practical effect of this decision is to give the disadvantaged spouse whom is almost always the woman a strong claim to an equitable sharing in the family property where there has been a significant period of a common-law relationship and a degree of economic integration.[126]

In *Sorochan v. Sorochan,* where the contribution was work on the property already owned by the defendant, Dickson J., for the unanimous court, clarified that:

> ...While it is important to require that some nexus exists between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice.[127]

Further, he said that "the 'clear link' to property may also be found where the claimant's labor directly and substantially contributed to the maintenance and

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[123] *Peter v. Beblow, supra* note 3.
[124] *Ibid.* at 647.
[125] Susan Scott-Hunt & Hilary Lim, eds., *Feminist Perspectives on Equity and Trusts* (London: Cavendish, 2001).
[126] Bala, *supra* note 5.
[127] *Sorochan v. Sorochan, supra* note 3 at 10.

preservation of the farm, preventing asset deterioration or divestment. There is, therefore, a "clear link" between the contribution and the disputed assets." [128]

Dickson C.J., speaking for the Court in *Sorochan v. Sorochan* observed that: the common-law wife "...was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land".[129] So there is no general duty presumed by the law on a common-law spouse to perform work and services for her partner.

It is important to note here that, the Supreme Court's decisions in trying to recognize the rights of common-law spouses in cohabitational disputes require a fair approximation of the value of the contribution vis à vis the family assets and should not grant an automatic property claim based just on the common-law spouse status.[130]

However, the court's position of elevating domestic services of the plaintiff as being capable of founding an action for unjust enrichment has been a controversial one. McLachlin J. in *Peter v. Beblow* highlighted the arguments that were advanced by the defendant against this court's position.

> It was argued, for example, that the services cannot give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother. It was also said that the law of unjust enrichment should not recognize such services because they arise from natural love and affection. These arguments raise moral and policy questions and require the Court to make value judgments.[131]

McLachlin J. went on to explain her point in the case at bar:

> It was argued first that the appellant's services were rendered pursuant to a common law or equitable obligation which she had assumed. Her services were part of the bargain she made when she came to live with the respondent, it was

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[128] *Ibid.*
[129] *Ibid.* at 7.
[130] Bala, *supra* note 5.
[131] *Peter v. Beblow, supra* note 3 at 645.

said. He would give her and her children a home and other husbandly services, and in turn she would look after the home and family.[132]

The proponents of this position are very much against the idea of 'commercialization' of domestic services by the plaintiff under the guise of reasonable expectation, that is, receiving something in return. They suggest it is unfair for a recipient of indirect or non-financial contributions to be forced to provide recompense for those contributions.[133]

Furthermore on the test for unjust enrichment, the enrichment can be evaluated when the defendant has gained something; improved his lot, bettered himself, gotten ahead, as a result of the efforts of the plaintiff. The defendant will have visible assets, a piece of property, may have paid off a mortgage, may have improved his property, or may have had his property saved from ruin through neglect.[134]

The deprivation of the plaintiff is usually the other side of the enrichment coin, although not always as obvious.[135] The plaintiff will have put herself out caring for the defendant's interests and in the process will have sacrificed her own opportunities, her energy, her free time, her future, and her prospects.[136] Cory J. in *Peter v. Beblow*, summarized the issue as follows, in the process of creating a new presumption: "...particularly in a matrimonial or long-term common-law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will

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[132] *Ibid.* at 646.
[133] *Ibid.*
[134] Fishman, *supra* note 121.
[135] *Sorochan, Ibid.* note 3 at 6.
[136] *Ibid.*

result in a deprivation of the other".[137] As concerns the 'no juristic reason' requirement, when a claimant is under no obligation contractual, statutory or otherwise to provide the work and services to the recipient, there will be an absence of juristic reasons for the enrichment.[138]

II.2 Remedial Constructive Trust

The chief device or weapon invoked by courts to settle cohabitational property disputes is the doctrine of unjust enrichment whereby courts intervene to impose a constructive trust in a matrimonial property dispute where other remedies are not available.[139] Constructive trust and equitable title emerged as an alternative to where legal title determination of property entitlements.[140] The doctrine of constructive trust allows courts to develop an inclusive notion of family, based on the rights and responsibilities that common-law spouses exercise with respect to one another.[141]

The claim of unjust enrichment and the remedy of constructive trust is a useful tool for the family lawyer, whether the client is married and separating, or one who is in a "common-law" or other kind of relationship which can be called "tantamount to spousal" or "quasi-marital".[142] A remedial constructive trust is imposed by the court in order to prevent injustice and unjust enrichment. As mentioned earlier, this type of constructive

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[137] *Peter v. Beblow, supra* note 3 at 632.
[138] Waters, ed., *supra* note 117.
[139] *Ibid.* at 47.
[140] *Ibid.* at 48.
[141] Laura Weinrib, "Reconstructing Family: Constructive Trust at Relational Dissolution" (2002) 37 Harv. C.R.-C.L. L. Rev. 207.
[142] *Ibid.*

trust is considered restitutionary because it imposes liability upon one person to make restitution to another by transferring the property back to that person.[143]

Few people doubt the effectiveness of the proprietary remedy of constructive trust, especially in cases where property is being divided after a long-term intimate relationship. Many have asked: should only one party retain the benefit of joint effort just because this person holds title to the property acquired or improved by the joint effort? The Canadian constructive trust has been employed as an equitable response to unjust enrichment in non-marital property disputes. The courts chose to unify the different causes of action giving rise to a constructive trust under the principle of unjust enrichment.[144] Although cohabitation cases are used to demonstrate the use of the constructive trust as a remedial device used to prevent unjust enrichment, its use extends to the business world as well.[145]

The constructive trust has been a useful concept in the family law context over the years and continues to be one. It has often been used, where no legislation existed, to extend the bounds of property sharing upon dissolution of marital or non-marital unions, leading to legislative reform and, where that has been deficient, to bold strokes of judicial lawmaking.[146]

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[143] Vogt, *supra* note 111.
[144] Stuart Hoegner, "How Many Rights (or Wrongs) Make a Remedy? Substantive, Remedial and Unified Constructive Trusts" (1997) 42 McGill L.J. 437.
[145] Eileen E. Gillese, *The Law of Trusts* (Concord: Irwin Law, 1996).
[146] Waters, *supra* note 117 at 49.

II.2.1 Causal connection requirement

Before the application of the remedial constructive trust in cohabitational property disputes, the court must first know when and under what circumstances it is appropriate for it to impose a constructive trust. In this regard, the first issue to be considered is the 'causal connection requirement'; some connection must be shown between the deprivation and the actual acquisition of the property in question. [147]

In *Sorochan v. Sorochan*, while assessing whether a constructive trust remedy was appropriate, the first factor considered was whether there was a 'clear link' between the claimant's contribution and the disputed property. The Court also ascertained whether the contribution made by the plaintiff was profound enough to entitle her to an interest in the property in question. Hence Dickson C.J. making a reference to *Pettkus*, stated:

> It is suggested simply that there should be "a clear link" between the contribution and the property in question. The question of a connection between the deprivation and the property is further explained as "an issue of fact". That is, courts must ask whether the contribution is "sufficiently substantial and direct" to entitle the plaintiff to an interest in the property in question.[148]

A "clear link" was established in favor of Mary Sorochan, whose labor directly and substantially contributed to the maintenance and preservation of the farm, preventing asset deterioration or divestment.[149] This is true because Mr. Sorochan undoubtedly benefited from her many years of unpaid labor, maintaining, preserving the farm and running the household. As a result she suffered a corresponding deprivation and there was no legal justification of the enrichment garnered by Mr. Sorochan.[150] However, the conservative valuation of the contributions made by the claimant who has undertaken a

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[147] *Sorochan, supra* note 3.
[148] *Ibid.* at 8.
[149] *Ibid.*at 13.
[150] *Ibid.*at 3.

purely domestic role in the common-law relationship may result in judges finding that her contributions have been sufficiently recognized and compensated for during the relationship.[151]

The unjust enrichment approach taken by Canadian courts illustrates a greater willingness to take into consideration both financial and non-financial contributions of the claimant as being incontrovertible benefits for the purposes of establishing an unjust enrichment.[152] Most familial relationships operate as common enterprises where each member contributes in accordance with his or her abilities and resources, and the needs of other members of the family. Upon the breakdown of the relationship, any rights over the property should accord with the contributions made, be they financial or non-financial. In so doing, it is argued, the approach is less susceptible to accusations of gender bias, since the approach allows for the greater recognition of indirect contributions such as domestic services.[153]

Nonetheless, a causal connection must be established between the property and a significant contribution; the court in *Pettkus v. Becker* posed this question: "was her contribution sufficiently substantial and direct as to entitle her a portion of the profits realized upon sale of the property?"[154] In addition to this threshold, the quantum of relief granted must reflect the value of the contribution. Dickson J. had this to say:

> Although equity is said to favor equality, as stated in *Rathwell*, it is not every contribution that will entitle a spouse to a one-half interest in the property. The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal.[155]

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[151] Scott-Hunt & Lim, *supra* note 125 at 138.
[152] *Ibid.*
[153] *Ibid.*
[154] *Pettkus v. Becker*, *supra* note 3.
[155] Waters, ed., *supra* note 117 at 49; *Pettkus v. Becker, supra* note 3.

II.2.2 Reasonable expectation

Although the courts have noted that some 'proprietary link' is required to justify the imposition of constructive trust, the proprietary nexus appears more easily satisfied through the establishment of the claimant's 'reasonable expectation' of an interest as a result of her contributions and the presumptions raised in her favor stemming from the nature of the parties' relationship.[156]

In *Sorochan v. Sorochan*, Dickson C.J. said:

> In assessing whether a constructive trust remedy is appropriate, we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in property and whether the respondent was or reasonably ought to have been cognizant of that expectation.[157]

He even commented in the same case that:

> Mary Sorochan came to live with Alex Sorochan on his farm. Together they worked the land, had six children and held themselves out to the community as married. In my view, Mary Sorochan had a reasonable expectation of receiving some benefit in return for her forty-two years of domestic and farm labor. Indeed, it was reasonable for her to believe that this would take the form of an interest in the property.[158]

The notion of 'reasonable expectation' in also evidenced in *Pettkus v. Becker* where court conferred upon Ms Becker a 50% share of the farm and beehive operation. Dickson J. stated:

> Where one person, in a relationship tantamount to spousal, prejudices herself in the reasonable expectation of receiving an interest in property, and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it. [159]

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[156] Scott-Hunt & Lim, eds., *supra* note 125 at 138.
[157] *Sorochan v. Sorochan, supra* note 3 at 12.
[158] *Ibid.*at 7.
[159] *Pettkus v. Becker, supra* note 3 at 274.

Both the reasonable expectation of parties and equity will require that upon termination of common-law relationship, the parties will receive an appropriate compensation based on the contribution each has made to their relationship.[160] That expectation is the key ingredient and the constructive trust arises to perfect it.[161]

II.2.3 Longevity of the relationship

The length of time in which the common-law spouses live together before separation plays a big role in a case of unjust enrichment and its constructive trust remedy . In *Sorochan*, one of the factors that was considered as to whether a constructive trust remedy was appropriate was the longevity of their relationship that lasted for 42 years. The labor done for 42 years by Mary Sorochan constituted for her a corresponding deprivation.[162] In the same case, Dickson C.J. wrote:

> The trial judge held that there was "clear evidence of enrichment" to the respondent. The Court of Appeal found that Mary Sorochan "performed all the work of a diligent farm wife". In my view, it is clear that the respondent derived a benefit from the appellant's many years of labor in the home and on the farm.[163]

In Justice Dickson's view, Mary Sorochan had a reasonable expectation of receiving some benefit in return for her forty two years of domestic and farm labor.[164] This constitutes a compelling factor in favor of granting proprietary relief.[165]

In *Peter v. Beblow*, Justice McLachlin had this to say: "Certainly, it can't be said that the relationship was so short lived that it should not give rise to mutual rights and

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[160] *Ibid.*
[161] Robert Chambers, "Constructive Trusts in Canada" (1999) 37 Alberta L. Rev. 173.
[162] *Sorochan v. Sorochan, supra* note 3.
[163] *Ibid.* at 6.
[164] *Ibid.* at 12.
[165] *Ibid.* at 7.

obligations. Twelve years is not an insignificant period of time to live in a relationship based on mutual trust and confidence".[166]

In short, courts assess all the evidence presented to estimate the contribution made by each of the parties in a common-law relationship, the nature of the relationship and its duration. A long term relationship is one of the markers of a stable relationship whether for married spouses or spouses in common-law relationships.

II.3 Choice of Remedy: Constructive Trust or Monetary Judgment

Both constructive trust and monetary judgment have been widely used by courts in Canada to remedy the vice of unjust enrichment either in both commercial and familial property disputes. However, this thesis is mainly concerned with non-marital cohabitational property disputes, that is, after the relationship has suffered a breakdown. It is important to note that though both remedies have their outstanding repute in solving the problem of unjust enrichment, one must be careful as to which remedy applies to the set of facts that are on the table.

The first question to be resolved is: which remedy is appropriate in the circumstances of the case? McLachlin J., speaking for the majority in *Peter v. Beblow*, commented on the remedy for a claim of unjust enrichment. She put it clearly that:

> ...the first step in determining the proper remedy for unjust enrichment is to determine whether the monetary reward is insufficient and whether the nexus between the contribution and the property as described in *Pettkus v. Becker* has

[166] *Peter v. Beblow, supra* note 3 at 633.

been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust.[167]

Traditionally, the remedy for payment of services rendered was a monetary award based on *quantum meruit.*[168] However, where that remedy is inadequate, because of a substantial and direct contribution to the acquisition, improvement, preservation or maintenance of the property, equity provides for the remedy of a constructive trust which gives the claimant a proprietary interest in the property to which he or she has contributed.[169]

In *Peter v. Beblow,* the trial judge found that the monetary award to be inadequate and that it would not be paid because the respondent had a few assets other than his houseboat and van, and no income except for the War Veteran's Allowance, thus a proprietary remedy was applied. He concluded that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust. He stated that Ms. Peter had shown the court that there was a positive proprietary benefit conferred by her upon the property in question.[170]

In *Peter v. Beblow*, Cory J. making a reference to *Sorochan* said that it was noted that before you apply a constructive trust, the court must consider whether there is a causal connection between the deprivation suffered by the plaintiff and the property in question, because in order to justify the imposition of a constructive trust, court must be satisfied that there is a "clear proprietary relationship" between the services rendered and

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[167] *Ibid.*at 652.
[168] This refers to the amount the defendant would have had to pay for the services on a purely business basis to any other person doing the work that was provided by the plaintiff.
[169] "Matrimonial Property Division, Constructive Trusts and Unjust Enrichment", online: Canada Law Topics <http://law.talou.net/familylaw/MatrimonialPropertyConstructiveTrustsUnjustEnrichment.htm>.
[170] *Peter v. Beblow, supra* note 3 at 652.

the disputed assets.[171] The imposition of a constructive trust in favor of the plaintiff was based on her indirect services rendered to the defendant. "The house keeping and the child care services by Ms. Peter constituted a benefit to Mr. Beblow, in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets".[172]

In *Peter v. Beblow*, it was put that the remedy provided by the constructive trust seems to best accord with reasonable expectations of the parties in a marriage or non-marital relationship. However in situations where the rights of *bona fide* third parties would be affected as a result of granting the constructive trust remedy, it may not be appropriate to do so, hence the monetary remedy would be the most suitable one.[173]

In some cases the monetary judgment has proven to be the most appropriate one. Some factors are available to determine its suitability as compared to the constructive trust. They include the following: First and foremost, the court must first determine whether the plaintiff's entitlement is relatively small compared to the value of the whole property in question. Another thing to be done by the court is to determine whether the defendant is able to satisfy the plaintiff's claim without the sale of the property at the center of the dispute. Also it has to be ascertained whether the plaintiff has any special attachment to the property in question. Finally, the court must examine what hardship might be caused to the defendant if the plaintiff obtained the rights flowing from the award of an interest in the property.[174]

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[171] *Ibid.*
[172] *Ibid.*
[173] *Ibid.* at 640.
[174] *Ibid.*

McLachlin J. downplayed the special treatment towards the domestic services offered by the plaintiff on which an argument is based to award a constructive trust. She plainly stated that the first choice remedy for unjust enrichment is a monetary award. The proprietary remedy of the constructive trust is limited to these cases where a monetary award is inadequate. "Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given him/her a special link to the property, in which case a constructive trust arises"[175]

McLachlin J. also put it this way. "The notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust".[176] One can conclude that the choice of a suitable remedy for unjust enrichment will be generally a monetary judgment. In this regard, McLachlin J. affirmed the applicability of unjust enrichment principles in other legal domains to family law. She emphasizes her point by saying that the creation of special rules for special situations might have an adverse effect on the development of the emerging are of constructive trust law.[177]

McLachlin J. was against the idea of going overboard by applying a constructive trust remedy on each and every case that involve family property disputes. She states that: "this would impede the growth and impair the flexibility crucial to the development of equitable principles".[178] She concluded by reiterating that "I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary

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[175] *Ibid.* at 650.
[176] *Ibid.* at 649.
[177] *Ibid.* at 650.
[178] *Ibid.*

compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed"[179] In a family case, McLachlin J. would not impose a constructive trust unless a monetary judgment would be inadequate and there was a special link between the efforts and the property.[180]

[179] *Ibid.*
[180] *Ibid.*

III Statutory Reform and *Charter* Challenges

III.1 Statutory Reform

While statutory reform has treated common-law spouses as equivalent to married couples in some contexts, one of the major criticisms is that law in Canada is inconsistent and in some cases incoherent in its treatment of common-law spouses. This certainly raises justice issues, and constitutional challenges have been advanced before Canadian courts.

Statutory reform in Canada has occurred, and more is underway, due to the difficult issues in law relating to common-law spouses in as far as their property is concerned at the termination of their relationships. For example the following questions have been posed by those involved in seeking a remedy to the problem. How far should one partner be entitled to the property of the other if their arrangement terminates? How far should one partner be entitled to look for support from the other partner again in the event of termination of their relationship?[181] In cohabitational arrangements, there are known instances of great injustice, where one cohabitant reaps all of the economic benefits arising from years of living in common-law and economic sharing.[182]

The policy direction for statutory reform could be taken with respect to reforming the law affecting common-law spousal relationships, that is, to equate such relationships with marriage. The functional effect would be to give common-law spouses the same

[181] Alberta Institute of Law Research and Reform, *Towards Reform of the Law relating to Cohabitation outside Marriage* (Edmonton: Albert, 1987).
[182] *Ibid.*at 10.

rights and obligations as married persons.[183] The proponents of such an approach generally argue from a premise of social reality, namely that society accepts such relationships; behavior within such relationships is marriage-like and injustice arises in a number of respects if the status is not granted.[184]

However the opponents of this approach argue that any recognition of common-law spouses' arrangements is inimical to the sanctity of marriage and therefore any statutory reform in this direction should be resisted.[185] They also point out that freedom of choice is vital.[186] It has been argued by some that the State should not interfere in the free choice of the parties who decide not to marry specifically to avoid the legal consequences of marriage.[187] The flaws in this argument however are that, the choice of not marrying may be unilateral, and, freedom of choice can be conferred by permitting domestic contracts.[188]

In response to these concerns, the most plausible way forward would be to amend the laws in certain specific areas only in order to remedy the injustices without necessarily imposing on common-law spouses all of the same rules that govern married couples and thereby not detracting from the significance of marriage as an institution.[189]

Most of the Canadian provinces have adopted such an approach which involves extending specific rights to common-law spouses. In general, however, such extended

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[183] *Ibid.*at 14.
[184] *Ibid.*
[185] Public Workbook, *Alberta Family Law Reform* (2002) online: Government of Alberta <http://www4.gov.ab.ca/just/ims/client/upload/FLRPwkbk.htm>.
[186] *Ibid.*
[187] Elizabeth Sloss, ed., *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985).
[188] Michael D. Freeman & Christina M. Lyon, *Cohabitation without Marriage: an Essay in Law and Social Policy* (Aldershot: Gower, 1983).
[189] Alberta Institute of Law Research and Reform, *supra* note 181 at 15.

rights have been granted only to common-law spouses that have cohabited for at least a period of three years or for a lesser period where there is a child of the union.[190]

The question of support for common-law spouses should their relationship breakdown or terminate is undoubtedly one of the springboards of these statutory reforms in Canada, and is an important one. Many have asked: Should there be support obligations between common-law spouses? If not, why not? At common law, there is no obligation of support as far as common-law spouses are concerned and in the absence of some express statutory provisions or an agreement highlighting the spouses' rights and obligations, a common-law spouse will not be able to obtain support. In the absence of such provisions, the only remedy open is to bring an action before a court seeking to establish an interest in the property.[191]

A good number of federal and provincial statutes in Canada have incorporated statutory provisions that recognize the rights and obligations of common-law spouses. Some of them are addressed in the following paragraphs.

Under the *Ontario Family Law Act,*[192] for example, in Part III entitled "Support obligations", the definition of the word 'spouse' was expanded to include a man and woman who are not married to each other but have cohabited continuously for a period of not less than three years.[193] Section 61 of the same *Act* broadens the class of claimants to include common-law spouses where there are cases of injury or death to a family member, and expressly permits recovery of damages for loss of guidance, care and

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[190] *Ibid.*at 17.
[191] Winifred H. Holland, *Unmarried Couples: Legal Aspects of Cohabitation* (Toronto: Carswell 1982).
[192] *Ontario Family Law Act,* R.S.O. 1990, c. F-3.
[193] *Ibid.* s. 29.

companionship that the claimant might reasonably have expected to receive from the person injured or dead if the injury or death had not occurred.

A number of recommendations for legislative reform concerning the formation of legal relations among families of common-law spouses were made by the Ontario Law Reform Commission. It recommended that the definition of the word "spouse" contained in section 1(1) of the *Family Law Act* should be amended to ensure that those spouses provided for under section 29 of the same *Act*, should in the future have the same rights and obligations as married spouses. This is suggestive of the fact the common-law spouses will be legally allowed to possess a matrimonial home and the division of the net family property at the termination of the relationship.[194]

In November 2000, *The Law Reform (2000) Act*[195] received royal assent in the Province of Nova Scotia. The Act, entitled "*An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*" extended certain legal rights to common-law opposite-sex partners as well as same-sex partners. With respect to property, several Acts[196] were amended to extend to common-law partners the same rights and obligations enjoyed by married spouses concerning the division of property upon separation and death. However, this is only possible when that the partners have chosen to execute a "domestic-partner declaration" in a prescribed form. Nova Scotia's matrimonial property regime was altered in 2000 to offer heterosexual unmarried

[194] Simon R. Fodden, *supra* note 15.
[195] *Law Reform (2000) Act*, S.N.S. 2000, c. 29.
[196] The amended Acts include: the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275; the *Pension Benefits Act*, R.S.N.S. 1989, c. 340; the *Members' Retiring Allowances Act*, R.S.N.S. 1989, c. 282; and the *Probate Act*, S.N.S. 2000, c. 31.

cohabitants the option of opting in to the matrimonial property regime by simply registering their partnership under the *Vital Statistics Act.*[197]

The recognition of common-law spousal relationships was also evidenced by the passage of the Bill 23 (*Modernization of Benefits and Obligations Act*)[198] by the Canadian Parliament in 2000 which marked a radical change in the legislative landscape of Canada. This was in direct response to the Canadian Supreme Court's decision in *M v. H.*[199] In Bill 23, an individual living in a common-law relationship that is of a conjugal nature with another for at least a period of one year is now considered a common-law partner.[200] This definition does not make any reference to gender, thereby extending ascribed common-law partner status to same sex couples. The approach adopted by the Canadian federal government in the passage of Bill 23 is of "one size fits all". Most of the statutes in Canada that have been subjected to reform in favor of common-law spouses carry the same definition as found in Bill 23. Examples of these statutes deal with a variety of subjects for example, taxation, employment, pensions, old age security, veterans' pension, diplomatic immunity, financial institutions and criminal law.[201]

The practical effect of this *Act* is that all conjugal unions are now almost fully equivalent under Canadian federal law, the main remaining distinction being that married people do not have to live together for a year for the benefits and obligations to apply to

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[197] *The Vital Statistics Act,* R.S.N.S. 1989, c. 494, as am. By S.N.S 1998, c. 8, ss. 60-71; S.N.S. 2000, c. 29, ss. 32-45; S.N.S. 2001, c. 5, ss. 40-49; S.N.S. 2001, c.45.
[198] *Modernization of Benefits and Obligations Act,* S.C. 2002, c.12.
[199] *M. v. H.*, [1999] 2 S.C.R. 3.
[200] *Ibid.*
[201] Brenda Cossman & Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18 Can. J. Fam. L. 269.

them.[202] Married and opposite-sex common-law couples had already been legally indistinguishable in some areas of federal law for years, such as taxes and social security. For example, members of opposite-sex cohabiting unions have been able to claim federal tax credit for their dependent partners since 1993.[203] Bill C-23 generalizes this to include same-sex couples and extends this symmetry to other areas like bankruptcy and certain aspects of the criminal code by replacing "spouse" with "common law partner." At the same time, important areas of family law, such as laws governing union dissolution and child custody, remain under provincial jurisdiction[204].

The following federal statutes were also changed by Bill C-23. The *Marine Liability Act*[205]and The *Employment Insurance Act*,[206] empower a common-law spouse who was cohabiting with the injured or deceased person to recover damages, on condition that they have cohabited for a period of at least one year.[207] Other statutes include the: *Bankruptcy and Insolvency Act*,[208] *Bank Act*,[209] *Old Age Security Act*,[210] *Income Tax Act*.[211] Under these statutes, a 'common-law partner' is defined as person of the opposite-sex or same-sex who has been cohabiting in a conjugal relationship having so cohabited for at least for one year.[212] It is important to observe that Canadian statutes have

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[202] *Ibid.*
[203] *Ibid.*
[204] *Ibid.*
[205] *Marine Liability Act*, S.C. 2001, c.6.
[206] *Employment Insurance Act*, S.C. 1996, c.23.
[207] *Ibid.* s. 4.
[208] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-C.
[209] *Bank Act*, S.C. 1991, c 46.
[210] *Old Age Security Act*, R.S.C. 1985, c.0-9.
[211] *Income Tax Act*, R.S.O. 1990, c.12.
[212] *Modernization of Benefits and Obligations Act*, S.C. 2002, c.12.

increasingly extended the rights and privileges associated with marriage to those in common-law spousal relationships.[213]

In Nova Scotia, *The Vital Statistics Act*[214] was amended to permit for registration of domestic partnerships. Any two unmarried people who are living in a conjugal relationship, and who wish to form a domestic partnership, may file a Domestic Partnership Declaration. The partners can be of same sex or opposite sex.[215] Registration of the domestic partnership means that the partners have the same rights and responsibilities as spouses under a variety of Acts, both as between themselves and with respect to any other persons. If the partners sign but do not register the partnership declaration, then it is only effective as between themselves.[216] This domestic partnership declaration is binding until terminated. A domestic partnership is automatically dissolved if one of the partners marries another person; it can also be dissolved by a separation agreement, an executed statement of termination by both parties, or by a separation of more than one year, if one or both partners intend not to continue the relationship.

Since June, 2001, same-sex and heterosexual couples in Nova Scotia have been able to obtain Domestic Registered Partnerships. Couples who register for a domestic partnership are given many of the rights and obligations of married couples under most provincial laws. This includes property rights in the event of death or separation. However, the adoption laws are different than for married couples.

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[213] A. Reidmann *et al.*, *Marriages and Families*, 1st ed. (Scarborough: Thomson-Nelson, 2003).
[214] *Supra* note 197.
[215] *Ibid.*, s. 53.
[216] *Ibid.*, s. 54(3).

Worth mentioning too is the Alberta's *Adult Interdependent Relationships Act* that was passed during the fall 2002 sitting of the provincial Legislature and became law on June 1, 2003. The *Act* amended several Alberta laws for people in unmarried relationships involving economic and emotional interdependency. These laws set out the financial and property benefits and responsibilities attached to these relationships. The *Act* covers a range of personal relationships that fall outside of marriage, including committed platonic relationships where two people agree to share emotional and economic responsibilities.[217]

There are two key elements that define an adult interdependent relationship. First, an adult interdependent partner is a person who is involved with another person in an unmarried relationship of interdependence where they: share one another's lives are emotionally committed to one another, and function as an economic and domestic unit. Second, to be considered adult interdependent partners, one of the following must apply to the relationship. The adult interdependent partners must be: living in an interdependent relationship for a minimum of three years living in an interdependent relationship of some permanence where there is a child by birth or adoption, or living in or intend to live in an interdependent relationship and have entered into a written adult interdependent partner agreement. [218]

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[217] *Adult Interdependent Relationships Act* S.A. 2002, c. A-4.5, s.1
[218] *Ibid.*

III.2 Ascribed Spousal Status

Over the past twenty-five years, most of the reforms relating to common-law relationships have been based on the ascription model: on an extension of spousal status to common-law spouses.[219] The extension of some marital rights and obligations to common-law spouses provides protection for vulnerable parties on termination of a relationship by death or separation. In Canada, courts and legislatures have a tendency to ascribe spousal status to persons living in common-law relationships, that is, treating common-law spouses as if they were married, without their having taken any positive action to be legally recognized.[220] This is because there is much potential for one party to a relationship, usually a wealthier and a more powerful one, often a man, to want to deprive the other party the benefits of the relationship, and if it terminates, to want to deny any responsibility for dependencies which may arise.[221] Other factors favoring ascription for specific issues include: protecting the interests of children, compensation for contribution, protecting the public purse or other interests, and the protection of third parties.[222]

In Ontario, ascription applies in the family law support context when a couple has lived together in a common residence for a continuous period of not less than three years and represented themselves as husband and wife, or less where there is a child of the relationship[223]. They will then be considered legally as spouses with many of the rights and obligations flowing from marriage. However this position has been controversial in

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[219] Holland, *supra* note 2.
[220] Law Commission of Canada, *supra* note 45.
[221] Bala, *supra* note 43.
[222] *Ibid.*
[223] *Ontario Family Law Act, supra* note 192.

that many scholars have argued that this is an imposition of rights and obligations which they did not subscribe to hence a violation of their freedom of choice.[224] The main purpose of ascribing spousal status is to protect the vulnerable dependant spouse. Canadian courts and legislators have rejected the argument that since there was a choice not to marry or contract, there should be no rights or obligations.[225]

However common-law spouses can contract out of this default position entrenched in the *Ontario Family Law Act* by making an express contract or agreement governing their relationship. Moreover, in property matters, common-law spouses who choose not to marry do not get a presumptive property share on separation; they must prove contribution to claim property rights or compensation. The existing remedies such as the constructive trust and monetary award recognize and compensate for contributions of the plaintiff but do not recognize a property claim based on status.[226] In Ontario, the marital property sharing regime is far reaching in taking into account prior wealth or contributions to the acquisition of assets; therefore some maintain that it is fair to require common-law spouses to establish a contribution or have a contract in order to make a substantiated property claim.[227]

It is noted that the mere fact that common-law spouses chose not to formalize their relationship should not be used to thwart their claims if they can demonstrate a contribution to a partner's acquisition of the assets, nor to deny the claims of those who

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[224] Bala, *supra* note 43.
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.*

have become dependent in a common-law relationship. They should be able to claim spousal status by ascription for spousal purposes.[228]

The issue of ascribing support to non-conjugal relationships has recently gathered attention in Canadian family law debates. There is a broad range of different non-conjugal situations in which two or more adults share a residence and may have a degree of economic interdependence. Those against this idea have relied on the argument that non-conjugal relationships do not give rise to the same expectations of on-going or future legal rights and obligations towards one another as arises in a conjugal relationship.[229]

However ascription is not devoid of disadvantages despite its effectiveness in preventing the risks of exploitation inherent in common-law spousal relationships. It has been found to be a blunt tool in that it treats all conjugal relationships in a similar manner not putting into account the level of emotional or economic interdependency present between unmarried partners. Another disadvantage of ascription is that it encroaches on the value of autonomy of the common-law spouses. Whereas there may be a possibility of contracting out of this default arrangement, people are not always aware of this possibility and the general requirements of the law.[230]

III.3 *Charter* Challenges to the definition of 'spouse'

Common-law spouses have advanced Charter claims fighting for the extension of marital benefits and protections in their relationships. And the decision of the Nova

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[228] *Ibid.*
[229] Law Commission of Canada, *supra* note 45.
[230] *Ibid.*

Scotia Court of Appeal in *Walsh v. Bona*[231] represented a substantial advancement in the protection of common-law spouses' economic interests following a relationship breakdown[232] until it was overturned by the Supreme Court of Canada in December, 2002.

Legal institutions while dealing with common-law cases have dealt with issues which include: discrimination based on section 15 of the *Charter* or analogous grounds, the legal rights of children born in common-law households, the effect of common-law spousal relationships on custody and alimony, extension of insurance benefits, etc.[233]

Section 15(1) of the *Charter* provides common-law spouses with a useful tool in their fight for equal status with married couples.[234] In most of the cases that involve common-law spouses and their rights, with the exception of the Supreme Court of Canada's December 2002 decision in *Walsh v. Bona*, Canadian courts have been moving away from the traditional definition of 'spouse' towards a more functional and modern approach. And this transition represents a substantial advancement in the protection of common-law spouses' economic interests following a relationship breakdown. Furthermore, these cases demonstrate an important role played by the *Charter* in ensuring both respect and recognition for non-traditional familial arrangements.[235]

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[231] *Walsh v. Bona*, 2000 NSCA 73, 183 N.S.R. (2d) 74 [cited to N.S.R].
[232] Onofrio Ferlisi, "Recognizing A Fundamental Change: A Comment on *Walsh*, The *Charter*, and the Definition of Spouse" (2001) 18 Can. J. Fam. L. 159.
[233] *Ibid.*
[234] Kuffner, *supra* note 54.
[235] Ferlisi, *supra* note 232.

III.3.1 *Miron v. Trudel*

In the first important *Charter* case recognizing the rights of common-law spouses, the Supreme Court of Canada in *Miron. v. Trudel*[236] came close to equating married spouses and their counterparts living in common-law relationships. The case involved the exclusion of a common-law spouse from insurance benefits that were available to married spouses. The plaintiff argued that the interpretation of the term "spouse" in the Ontario Standard Automobile Policy by confining it to married spouses violated s. 15(1) of the *Charter* and was not saved under s. 1. The Ontario Court of Appeal had earlier held that the exclusion of common-law spouses did not violate s. 15(1) of the *Charter* because common-law spouses were not considered to be members of a disadvantaged group in Canadian society nor were they a "discrete and insular minority".[237]

The common-law spouses at the center of the legal conflict were John Miron and Jocelyne Valliere who lived together for a number of years, with their children. Their family operated as an economic unit. John was injured while he was traveling in an uninsured car being driven by a driver who was also not insured. He could not work and support his family. Without any insurance either on the car or on the driver, John turned to the family automobile insurance policy that was in Jocelyne's name and claimed benefits under that, as Jocelyne's spouse.[238]

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[236] *Miron v. Trudel,* [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693. [cited to D.L.R.].
[237] Holland, *supra* note 2.
[238] "The Spouse Wars Trilogy: Episode 3 Revenge of the Charter", online: Justice Canada 2000 <http://canada.justice.gc.ca/en/justice2000/home.html>.

Legally speaking, John Miron was not Jocelyne Valliere's married spouse. They were living together common-law; and for the purposes of the law,[239] the policy was based on the term 'spouse' which was considered to include only a person legally married to the policy holder. Mr. Miron and Ms. Valliere advanced the argument that the denial of benefits to them on the ground that they are not legally married and hence 'spouses' violated the equality provisions of the *Charter.*[240] In other words, they argued that the interpretation of the term 'spouse' in the Ontario Standard Automobile Policy confining it to married spouses violated section 15(1) of the *Charter* and was not saved under section 1 of the same *Charter.*[241]

According to the Supreme Court of Canada in *Miron v. Trudel*, a two-step process must be undertaken when determining whether there has been a violation of sub-section 15(1) of the *Charter*. A court must first determine whether there has been a denial of "equal protection or equal benefit of the law", if yes, a court must then determine whether this difference is the result of discrimination, and to establish discrimination, the claimant must bring the distinction within an enumerated or analogous ground.[242]

In *Miron*, marital status was found to be an analogous ground of discrimination. McLachlin J. stated that marital status possesses characteristics often associated with recognized grounds of discrimination under section 15(1) of the *Charter.*[243] In her words:

> ...discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of

[239] *Ontario Insurance Act*, R.S.O. 1980, c.218.
[240] *Miron v. Trudel, supra* note 236 at 738.
[241] Holland, *supra* note 2.
[242] *Miron v. Trudel, supra* note 236 at 739.
[243] *Ibid.*at 698.

> discrimination are violative of fundamental human rights norms. Specifically it touches the individual's freedom to live with a mate of one's choice in a fashion of one's choice. This is a matter of defining importance to individuals. It should not be a matter which should be excluded from the *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.[244]

In *Miron,* McLachlin J. reviewed numerous factors supporting the view that marital status is an analogous ground of discrimination and concluded as follows:

> These considerations, taken together, suggest that denial of equality on the basis of marital status constitutes discrimination within the ambit of s. 15(1) of the *Charter*. If the evil to which s. 15(1) is addressed is the violation of human dignity and freedom by imposing limitations or disadvantages on the basis of the stereotypical application of presumed group characteristics, rather than on the basis of individual capacity, worth or circumstance, then marital status should be considered an analogous ground. The essential elements necessary to engage the overarching purpose of s. 15(1) --violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making --are present and discrimination is made out. [245]

In the principal majority judgment, McLachlin J. held that marital status was not a reasonable marker of the financially interdependent relationships relevant to the achievement of the legislative objective. Equality rights required that the legislature find a better way of identifying relationships characterized by financial interdependence. Hence she urged that:

> It thus emerges that in fixing on marital status as the criterion of eligibility for family accident benefits, the Legislature chose a criterion that was at best only collaterally related to its legislative goal; a criterion , moreover, that had the effect of depriving a substantial number of deserving candidates of receipt of benefits. Better tests were available. In short, the Legislature did not choose a reasonably relevant marker.[246]

She also concluded that the government, failed the section 1 test of the *Charter* and that the appropriate remedy was to 'read-in' the definition of cohabitation from the

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[244] *Ibid.*at 749.
[245] *Ibid.* at 750.
[246] *Ibid.* at 694.

amendment to the statute in question, which had already been passed in 1990.[247] Furthermore she pointed out in the same case that governments should frame legislation not by reference to marital status, conjugality or marriage-equivalence, but by reference to the functional attributes of relationships that are relevant to the legislative objectives at issue.[248]

The Supreme Court of Canada, by a 5-4 majority, held that the exclusion of unmarried partners from accident benefits available to married partners under the policy violates section 15(1) of the *Charter*. They also concluded that although marital status is not one of the grounds listed in section 15(1), it is an analogous ground. It is therefore a violation of the *Charter* to discriminate on the basis of someone's marital status and the law did not pass the section 1 test.[249] The value of the insurance law is to sustain families when one of their members is injured in an automobile accident. That is an important objective. But in the 1990's, families are made up of more than just married couples. More and more people are choosing to live together in common-law relationships. Restricting a 'spouse' to a legally married person did not fulfill the legislative objective and infringed on the rights of unmarried people more than it needed to.[250] Analyzing the case under section 1 of the *Charter*, the Court concluded that the exclusion of common-law couples was not rationally connected to the objectives of the legislation of sustaining families when one of their members is injured in an automobile accident.[251]

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[247] Holland, *supra* note 2.
[248] Cossman & Ryder, *supra* 201.
[249] *Miron v. Trudel, supra* note 236 at 737.
[250] *Ibid.*at 753.
[251] Cossman & Ryder, *supra* note 12.

Judging from the Supreme Court's position in *Miron*, it is evident that laws or statutes dealing with spousal relationships which exclude unmarried couples could be in violation of section 15(1) of the *Charter*. They will be unconstitutional unless the government can demonstrate that the limitation of these laws to married spouses is necessary to accomplish pressing and substantial objectives. Court rulings since *Miron* have declared unconstitutional laws that exclude common-law spouses from the right to seek spousal support and a division of family property pursuant to provincial family laws.[252]Across Canada, a number of law reform commission reports have similarly concluded that the continuing exclusion of common-law couples' right to seek a division of property from provincial family laws is not justifiable.[253]

III.3.2 *Walsh v. Bona*

Before the decision of the Nova Scotia Court of Appeal in *Walsh*[254] was overturned by the Supreme Court of Canada in December 2002, common-law spouses had registered a breakthrough insofar as matrimonial property rights are concerned. The Nova Scotia Court Appeal had concluded that the definition of 'spouse' in the *Matrimonial Property Act* did violate section 15(1) of the *Charter* in a purposive sense. It held that the *Matrimonial Property Act* was an affront to Susan Walsh's human dignity because the statute recognizes that a married spouse contributes to a relationship, both

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[252] *Ibid.*
[253] See the Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (Toronto, The Law Reform Commission, 1993); Law Reform Commission of Nova Scotia, *Final Report on the Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Halifax: The Commission, 1997); and British Columbia Law Institute, *Report on the Recognition of Spousal and Family Status* (Vancouver: British Columbia Law Institute, 1999).
[254] *Walsh v. Bona*, *supra* note 231.

financially and otherwise, such as raising a family, but it fails to do the same for common-law relationships.[255] The Court of Appeal went on to say that the *Matrimonial Property Act* perpetuated 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.[256]

Ms. Walsh and Mr. Bona lived together in a common-law relationship for approximately ten years and were parents of two children, Edwin and Patrick, but later their relationship suffered a breakdown. This prompted Ms. Walsh to commence an application before the court under the *Matrimonial Property Act (MPA)*, seeking an equal division of the couple's assets. She alleged that she had suffered discrimination under the *MPA* because the presumption of equal division of matrimonial property applicable to married spouses did not apply to her as a common-law spouse. Instead, the onus was on her, by way of constructive trust, to prove the extent, if any, to which she might have been entitled to a share in property held in Bona's name alone. In other words, she claimed that the definition of 'spouse' in the *Matrimonial Property Act* discriminated against her as a common-law spouse in violation of section 15(1) of the *Charter* and that such discrimination was not justified under section 1 of the *Charter* as it could not be justified in a free and democratic society.[257]

Although Ms Walsh succeeded at the Nova Scotia Court of Appeal, in 2002, the Supreme Court of Canada dismissed her claim. The Supreme Court held that: "The exclusion from the *MPA* of unmarried cohabiting persons of the opposite sex is not

[255] *Ibid.* at 72.
[256] Ferlisi, *supra* note 232.
[257] *Walsh v. Bona*, *supra* note 231 at 52.

discriminatory within the meaning of section 15(1) of the *Charter*. The distinction does not affect the dignity of these persons and does not deny them access to a benefit or advantage available to married persons".[258] Out of the nine judges that presided over the case in the Supreme Court, only one dissented. The majority ruled against the idea that the presumption of equal division of property that is embedded in marriage should be extended to common-law couples.[259] The justices noted that there are other available judicial remedies, for example, unjust enrichment and constructive trust remedies that could be invoked by common-law spouses in solving matrimonial property disputes at the closure of their relationships, and the ability to enter cohabitation agreements.[260] Given these alternatives, the laudable goals of the *Matrimonial Property Act (MPA)* of empowering the family in society and recognizing the contributions of married couples outweighed the deleterious effects of the impugned legislation.[261]

The Supreme Court of Canada did not approve of the argument that common-law relationships and marriage have functional similarities and thus must be treated the same. Writing for the majority, Bastarache J. concluded as follows:

> The equality guarantee is a comparative concept. The comparator groups in this case are married and unmarried heterosexual cohabitants. Although in some cases certain functional similarities between these two groups may be substantial, it would be wrong here to ignore the significant heterogeneity that exists within the claimant's comparator group. Reliance solely on certain 'functional similarities' between the two groups does not adequately address the full range of traits, history and circumstances of the comparator group of which the claimant is a member.[262]

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[258] *The Attorney General of Nova Scotia v. Susan Walsh and Wayne Bona, supra* note 107 at 14.
[259] *Ibid.* at 5.
[260] *Ibid.* at 3.
[261] *Ibid.* at 19.
[262] *Ibid.* at 27.

Walsh argued that she should not be subjected to differential treatment as compared to married spouses because there are many relational and functional similarities between the two types of familial arrangements: marriage and common-law relationships. The Supreme Court concluded that: "the fact that some unmarried couples have relationships similar to those of married couples does not undermine the central distinguishing feature of the institution of marriage: permanent contractual commitment." The Supreme Court's position has its foundation on the integral element of "choice" that is inherent in married spouses.[263]

Gonthier J. in his concurring reasons, argued that "choice" is a paramount element in marriage. As he put it, "When couples marry, they commit to respect the consequences and obligations flowing from their choice. It is this choice that legitimizes the system of benefits and obligations attached to marriage generally, and in particular, those relating to matrimonial assets". In principle, the Supreme Court finds that common-law spouses have not chosen to assume marital rights and obligations hence they should neither be accorded married couple status nor the benefits that flow from it.[264]

In short, the Court was concerned that extending the presumption of equal division of matrimonial property to common-law spouses would translate into an infringement of peoples' rights and freedoms. Moreover, this would show non-respect of the fundamental and personal choices of unmarried cohabitants by imposing upon them a familial arrangement to which they did not subscribe. The Court was of the view that "to presume that common-law couples want to be bound by the same obligations as married couples is contrary to their choice to live in a common-law relationship without the

[263] *Ibid.* at 86.
[264] *Ibid.* at 87.

obligations of marriage".[265] The Supreme Court of Canada concurred with the decision of the trial judge, Haliburton J. and it was observed in paragraph 11 of the judgment that:

> ...extending the provisions of the *MPA* to unmarried couples would create uncertainty, injustice, and impediments to property transactions and the rights of third parties because married couples relinquish the right to deal with their property as sole owners upon marriage.[266]

It is worth noting here that Walsh and Bona lived together for a period of 10 years and within this period, they did not take any initiative to solemnize their relationship or get married. Walsh detached herself completely from the obligations and consequences that flow from the institution of marriage, and later, at the termination of their relationship, she sought redress based on the institution she had rejected.

The Supreme Court of Canada appreciated the fact that unmarried cohabitants have routinely suffered from historical and stereotypical disadvantages which may result in unfairness on relationship breakdown; however it noted that "...there is no constitutional requirement that the State extend the protections of the *MPA* to those persons. Alternative choices and remedies are available to persons unwilling or unable to marry". As Gonthier J. emphasized:

> The *Charter* does not require that the legislature treat married and unmarried couples identically. The right to equality is a comparative right, the scope of which can only be understood with reference to an appropriate comparator group. The purpose of such a comparison is to determine whether the person invoking s. 15(1) of the *Charter* is subject to differential treatment sufficient to constitute a violation of the equality right. The situation of couples who have chosen life commitment through marriage is not comparable to that of unmarried couples when one considers that with married couples, there is a permanent and reciprocal life commitment, to which the legislature has attached, among other things, a presumption of equal division of matrimonial assets. Unmarried couples do not

[265] *Ibid.*
[266] *Ibid.* at 17.

make that same commitment, and rights and duties akin to marriage should not as a result follow.[267]

The Supreme Court noted that opposite-sex individuals in conjugal relationships of some permanence sometimes have chosen to avoid marriage and the legal consequences that flow from it. In other words, common-law couples who do not want to be bound by marriage obligations, do it deliberately and their position emanates from an informed and unconditional choice.

However, L'Heureux-Dubé J. in dissent does not agree with this position to the extent that she believes that people are often unaware of their legal rights and obligations and do not organize their personal relationships in a way to achieve specific legal consequences. She also makes clear that many common-law spouses cohabit not out of choice but necessity. The decision not to marry and to avoid being bound by the marriage obligations and consequences is often unilateral where the other party to the relationship is not responsible. Here she emphasized that: "For many, choice is denied to them by virtue of the wishes of the other partner. To deny them a remedy because the other partner chose to avoid certain consequences creates a situation of exploitation".[268]

She also maintained that: "Even if research were to show that unmarried cohabitants choose to cohabit in order to avoid the legal consequences of marriage, those findings would be irrelevant as it is the reality of the relationship at its termination that the *Matrimonial Property Act* addresses, not the intentions of the parties at its outset".[269]

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[267] *Ibid.* at 81.
[268] *Ibid.* at 76.
[269] *Ibid.* at 70.

Furthermore she argued that the exclusion of common-law spouses from the definition of the term "spouse" under the *Matrimonial Property Act* is discriminatory and that this discrimination is not justified under section 1 of the *Charter*. She emphasized that any system or piece of legislation that establishes a sufficient distinction between individuals or groups on an enumerated or analogous ground in such away as to reflect the stereotypical application of presumed or personal characteristics or so as to create the effect of perpetuating or promoting the view that the claimant as less capable, or less worthy, is against the fundamental principle of equality and encroaches on human dignity.[270] Hence she made the following remarks:

> Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.[271]

A similar position was upheld on appeal by Flinn J.A in his bid to establish whether a reasonable person in the circumstances similar to those of the claimant Walsh would find that the *Matrimonial Property Act (MPA)* that imposes differential treatment upon relationships that have functional similarities has the effect of demeaning her dignity. He concluded that:

> a reasonable person in circumstances similar to those of the respondent would find that the *MPA*, which imposes differential treatment, has the effect of demeaning the respondent's dignity, resulting in a violation of s. 15(1)... the *MPA*

[270] *Ibid.* at 40.
[271] *Ibid.* at 41.

> perpetuated the view that unmarried spouses are less worthy of value as members of Canadian society, sufficient to establish an infringement of s. 15(1).[272]

He also observed that:

> ...the respondent's relationship had all the hallmarks of a marriage with the exception of a formal ceremony, that provisions in other legislation provide for support and occupation rights for unmarried spouses, and that the loss suffered by unmarried cohabitants of the presumption of equal sharing of property was by reason only of their marital status.[273]

According to L'Heureux-Dubé J., the claimant, Walsh was a victim of differential treatment that culminated to the deprivation of her rights and fair treatment, all based on her marital status. On appeal, the Crown conceded that the *Matrimonial Property Act* had the effect of depriving individual rights basing on the personal characteristic of marital status which constitutes an analogous ground of discrimination under section 15(1) of the *Charter*.[274]

In one of her concluding remarks she wrote that:

> ...the *MPA* infringes s. 15(1). This infringement cannot be saved by s. 1 of the *Charter*. There does not appear to be a pressing and substantial objective for the omission of heterosexual unmarried cohabitants from the *MPA*. Taken as a whole, the true objective of the *MPA* is the protection of married individuals from the harmful effects following the breakdown of the marriage to the exclusion of all non-married cohabitants. This is not a constitutional objective. Assuming that the objectives of the *MPA* are pressing and substantial and justify a breach of a constitutional right, the means chosen are not proportional to the objectives considered due to the absence of any rational connection between the exclusion of heterosexual unmarried cohabitants from the *MPA* and the purported purpose of the statute.[275]

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[272] *Ibid.* at 20.
[273] *Ibid.*
[274] *Ibid.* at 43.
[275] *Ibid.* at 19.

IV: Cohabitation Agreements

During the past thirty years, the number of persons opting to live common-law has steadily and consistently increased.[276] And for many years, most of the issues arising from common-law relationships were largely unrecognized in Canadian family law, with consequential difficulties arising from the legal or equitable ramifications of the breakdown of these relationships.[277]

As a result, some common-law spouses turned to private ordering of their economic affairs through cohabitation agreements. In the same way some married spouses choose to guard themselves and their individual assets by formulating pre-nuptial agreements, common-law spouses may also choose to limit each other's rights. For that matter, common-law spouses reserve their right to draw up cohabitation agreements that stipulate the property rights of either spouse upon the dissolution of their relationship.[278]

A cohabitation agreement can be defined in simple terms to mean a private contract between common-law spouses, which typically tries to establish contractually for the parties the rights and obligations that married people obtain by custom, statute, and agreement.[279]

Historically, cohabitation agreements had been held to be unenforceable by courts as against public policy aimed at maintaining the sanctity of marriage.[280] However there

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[276] *Supra*, note 63.
[277] Zheng Wu, "Premarital Cohabitation and the Timing of First Marriage," (1999) 36 Canadian Review of Sociology and Anthropology, 109; Jennifer Dixon & Alison Ross, (2001) "Cohabitation and Separation Agreements" online: <http://www.hopgoodganim.com.au/html/services/cohabitation.pdf>.
[278] *Ibid.*
[279] Chris Barton, *Cohabitation Contracts: Extra- marital Partnerships and Law Reform* (Aldershot: Gower, 1985).
[280] Terry Beley, "Agreements-Cohabitation Agreements" online: Manitoba Family Law <http://www.fbfamilylaw.mb.ca/agreements_Cohabitaion.htm>.

have been fundamental changes in social attitudes over the last twenty years, courts have abandoned their former stance by upholding the validity and enforceability of these agreements entered into by common-law spouses.[281] The relevant case is *Chrispen v. Topham*[282] where common-law spouses entered into a written agreement respecting the sharing of household expenses and a collateral oral agreement respecting the performance of domestic chores. Both agreements were found to be in default and were held enforceable by way of damages or monetary compensation.[283]

It is advisable that common-law spouses wishing to enter into a cohabitation agreement should seek legal advice; otherwise they may find that the court sets it aside on the basis of some vitiating factor, such as duress, undue influence, and inequality of bargaining power, lack of informed consent on either party, misrepresentation, or failure to make full and frank disclosure.[284]

For example in *Kim v. De Camillis Estate*[285], the plaintiff, a 45 year Korean immigrant lived common-law with the deceased for three and a half years, during which time she provided cooking and cleaning services and nursing care to the deceased. The parties signed a cohabitation agreement because the deceased told the plaintiff that she could not live with him unless she signed the agreement. The deceased even told her that the agreement was the usual document signed when people lived together in Canada. Considering that the plaintiff did not have independent legal advice, the court found that

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[281] *Ibid.*
[282] *Chrispen v. Topham* (1986), 28 D.L.R. (4th) 754.
[283] Julien D. Payne & Marilyn A. Payne, *Canadian Family Law* (Toronto: Irwin Law Inc., 2001).
[284] Kate Standley, *Family Law*, 3rd ed. (New York: Palgrave, 2001).
[285] *Kim v. De Camillis Estate* (1999), 47 R.F.L. (4th) 335.

the agreement was not freely negotiated and set it aside as fraudulent whose only purpose was to defeat the plaintiff's claim.[286]

Duress and undue influence may be invoked as grounds for setting aside cohabitation agreements. Duress requires proof of actual or threatened physical violence to the person or property.[287] And undue influence requires proof of a more nebulous form of moral coercion resulting from the relationship between common-law spouses. Proof of either duress or undue influence in entering into a cohabitation agreement results in a finding that the agreement is not binding on the disadvantaged spouse.[288] This means that common-law spouses are in much greater need than their married counterparts of legal advice on the consequences of joint enterprises undertaken or proposed by them.[289]

IV.1 Necessity for cohabitation agreements

There is a need, depending on circumstances on the ground, for the creation of a cohabitation agreement when one chooses to live common-law. Even though he/she may regard his/her partner as a family member, the law usually does not.[290] By entering into a common-law relationship, it means that you are excluded from certain legal rights and protections that accrue to married couples.[291] The legal rights enjoyed by married couples may include the right to receive a property settlement and/or support in the event of divorce; receive distributions from estates free of estate tax; receive survivor's benefits

[286] Winifred H. Holland & Barbro E. Stalbecker-Pountney, eds., *Cohabitation: The Law in Canada* (Toronto: Carswell, 1990).
[287] *Ibid.*
[288] *Ibid.*
[289] Anne Barlow, *Cohabitants and the Law*, 3rd ed. (London: Butterworths, 2001).
[290] Courtney Knowles, "Are You Ready to Live Together?" online: Third Age <http://www.thirdage.com/news/archive/ALT03011109-02.html>.
[291] *Ibid.*

from retirement plans and social security; obtain family health insurance, dental insurance, and other employment benefits; and automatically share in his or her partner's property in the event he or she dies without a will.[292] Common-law spouses, on the other hand, generally acquire similar rights by expressly securing their benefits in cohabitation agreements.[293]

Common-law spouses have to be aware of when the proverbial strings may attach in a relationship and how to guard their assets from a former cohabitant's claims. As discussed in Part II above, courts are using equitable doctrines to apportion assets between former common-law spouses to prevent hardship and injustice. Since these doctrines are vague, they are difficult and expensive to prove.[294] Common-law spouses have to be proactive and define their relationships in legal contracts otherwise called cohabitation agreements. Cohabitation agreements can guarantee the financially less secure partner an equitable settlement; a spouse can be properly compensated for his or her role as a caretaker. Cohabitation agreements allow the financially more secure spouse to limit exposure in the event of a breakup. They also disclose expectations of the relationship, both financial and personal.[295]

In Canada, there has been considerable legislative activity insofar as cohabitation agreements are concerned. The provinces of Ontario, Newfoundland, Prince Edward Island, New Brunswick, Manitoba and the Yukon Territories, have enacted statutes specifically allowing cohabitation agreements.[296]

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[292] Equality in Marriage Institute, "Living Together and Cohabitation Agreements" online: < http://www.equalityinmarriage.org/bmagreements.html>.
[293] *Ibid.*
[294] *Ibid.*
[295] *Ibid.*
[296] Elizabeth Sloss, ed., *Family Law in Canada* (Ottawa: Canadian Advisory Council of Women, 1985).

The *Ontario Family Law Act* provides for the creation of agreements by common-law partners. Section 53 follows a sub-heading entitled "Cohabitation Agreement", and provides: that "two persons of the opposite sex or the same sex who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including, ownership in or division of property; support obligations; the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and any other matter in the settlement of their affairs".[297]

Section 53(2) provides that if the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract. Two persons of the opposite sex or the same sex who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including, ownership of property or its division; support obligations; the right to direct the education and moral training of their children; the right to custody of and access to their children; and any other matter in the settlement of their affairs.[298]

Section 54 of the same *Act* provides that common-law partners who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including, ownership in or division of property; support obligations; the right to direct the education and moral training of their children; the right

[297] *Ontario Family Law Act, supra* note 192, s. 53.
[298] *Ibid.* s. 54.

to custody of and access to their children; and any other matter in the settlement of their affairs.[299]

However the situation is different for common-law partners who are cohabiting together under one roof for they are prohibited from making agreements that contain provisions earmarking custody and access of their children. They can only be negotiated once the relationship breaks down. Moreover, no cohabitation agreement can affect the powers of a court to make maintenance and custody orders which are in the best interests of children.[300] This does not, however, provide a ground for denying enforceability to an agreement which regulates the parties' financial relationship.[301]

The creation of cohabitation agreements is an effective means of protection that can be supplemented by other legal documents. By creating cohabitation agreements, common-law spouses feel less powerless; their rights and properties are protected should their relationship cease to be, for example, the division of household properties in their common place of abode.[302]

Normally, a cohabitation agreement enlists all the properties owned by each of the common-law spouses before they commence living together as well as those properties acquired during their life together. Cohabitation agreements may also include such provisions relating to the division of financial and household responsibilities. Any

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[299] *Ibid.*
[300] New South Wales Law Reform Commission, "Report 36 (1983). De Facto Relationships: Cohabitation Agreements" online: Law Reform Commission Publications <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R36CHP11>.
[301] *Ibid.*
[302] Cohabitation Contracts (Common-law Contracts), 2001, online: The Law-Your Rights <http://www.educaloi.qc.ca/TLR_Law/F01A_Capsules/index.php3?no=164>.

available documents that concern debts must correspond to the division of financial responsibilities provided for in the agreements.[303]

What has become clear over the past few years is that, like a commercial contract, these cohabitation agreements must be specific in content. Also, like a commercial contract, there must be a clear joint intention by both parties to create legal relations. Like any other contract, cohabitation agreements ought to be drawn in respect to certain rules and regulations. Parties entering into a cohabitation agreement must show their intention to contact and the terms of the contract. To avoid any possible eventualities, the agreement itself should make it clear that the parties intend to create a legally enforceable agreement.[304] Agreements that do not respect some principles of consent, age and public policy or morals are usually considered as non-binding on the concerned parties. Consent is vital; it has to be an informed consent that backs up an informed decision.[305] If these legal requirements are not adhered to, they can in themselves cause difficulties for both spouses. In family or quasi family situations there is always the question whether the parties intended to create a legally binding contract between them.[306]

In the event of separation and one of the common-law spouses does not live up to the provisions of the agreements, the next recourse is to apply to court so that it can enforce the agreement.[307] Written cohabitation agreements have to be confirmed before the court. In case a question of unproportionality between the contributions made by the

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[303] *Ibid.*
[304] Holland & Stalbecker-Pountney, eds., *supra* note 286.
[305] *Ibid.*
[306] Gordon Dadds, Ann Northover & Grainne, (December 2002/January 2003) "Cohabitation With Strings Attached", Family Law Journal, online: Gordon Dadds Solicitors <http://www.gordondadds.com/iacontent/en/209.phtml>.
[307] *Ibid.*

spouses arises, the common-law spouse claiming a greater contribution can sue for unjust enrichment claims and seek for compensation.[308]

Agreements dealing with children will not be legally binding, as it is the interests of the child which are seen by the court to be paramount. However, the agreement can set out the parties' intentions regarding matters such as the mother agreeing to give the father parental responsibility, choice of child care and schooling, whether or not the mother intends to go back to work and so on.[309]

Despite the good intentions and the realized robust outcomes of cohabitation agreements, they have been a subject of controversy. Many have argued that it is inappropriate for the law to allow common-law spousal relationships to be regulated by cohabitation agreements. The danger in the agreements is that they may imperil the success of the relationship thereby creating an undesirable lack of trust in people who intend to live in common-law or are already in the system.[310] However, for some common-law spouses, cohabitation agreements have produced valuable psychological advantages. The process of discussing and settling the terms of the agreement may enable the parties to clarify their expectations, and the certainty provided by the agreement may help to improve their relationship.[311]

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[308] *Ibid.*
[309] Dadds, Northover & Grainne, *supra* note 306.
[310] New South Wales Law Reform Commission, *supra* note 300.
[311] *Ibid.*

IV.2 Enforceability

There is an outstanding argument forged against the enforceability of cohabitation agreements. People argue that hardship and injustice may crop up as the result of their enforcement. This argument is rooted in the idea that where the agreement is made between a couple before they live together, or while they are living together harmoniously, hardship may occur because there is a risk that one partner may induce the other to enter into an unfair or oppressive agreement. The strong love between both partners may well make it difficult for one partner to suspect the sinister or dubious intentions of the co-partner about the proposed arrangements.[312]

Exploitation of a woman who gets overshadowed by love for the male partner is common in cohabitation agreements.[313] It has been suggested that, from a woman's point of view, a contractual approach to living in common-law is likely to be dependent on her social class and education. If she is well-informed and self-assured, then she will be of equal bargaining power and not a potential victim of adverse differential treatment of the sexes during her upbringing. The possibility of such 'victims' entering in cohabitation agreements on bad terms would give rise to the problem of whether or not the court should be able to set the agreement aside.[314]

It is on record that an expression of doubt about a very close and intimate friend's activities may offend the bearer or it may be construed to mean lack of trust in him or her. Many who have placed too much trust in the judgment and honesty of their partners

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[312] *Ibid.*
[313] Chris Barton, *Cohabitation Contracts: Extra- marital Partnerships and Law Reform* (Aldershot: Gower, 1985).
[314] *Ibid.*

have been proved wrong only to discover later that the terms agreed upon are unfair and oppressive.[315]

Another disturbing aspect of the enforceability of cohabitation agreements entered into by common-law spouses is that these agreements may lead to exploitation. This is evident in circumstances where there are unexpected changes in the lives of these spouses. For instance common-law spouses may both agree in their agreement to make claims against each other's property if their relationship terminates. But in the event where they live together for a considerable amount of time and have several children, and one party makes substantial contributions to family resources outside the ambit of the agreement, it might prove difficult and unjust to enforce the agreement in question.[316] It is advisable to insert a "change of circumstances" clause in the cohabitation agreement and agree on what guidelines to invoke in times of uncertainty.

In a nutshell, irrespective of how dear a common-law relationship is, living together does not automatically entitle either spouse the rights and protections afforded to married couples. It is therefore important for common-law spouses to state their rights and obligations in a legal document in the event of a breakup or death. A cohabitation agreement will insure that both spouses are protected and at the same time that it clarifies the understanding of their relationship[317] It is also vital to have separation agreements and wills because common-law spouses may not inherit any property if one spouse dies interstate.

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[315] Equality in Marriage Institute, *supra* note 292.
[316] New South Wales Law Reform Commission, *supra* note 300.
[317] *Ibid.*

V: Conclusion: Lessons from the Canadian Experience

There are several lessons that can be learned from the Canadian experience of recognizing the rights of common-law spouses. Generally, legal reform has had a positive impact insofar as the legal recognition of the rights of common-law spouses is concerned. A functional view of the family has allowed for the growing legal recognition of common-law spousal relationships. The law in this domain increasingly reflects actual relationships rather than status or form.[318]

The Canadian experience also reveals that law reform in favor of common-law spouses followed legal reform to protect married women and their property. It would be difficult for common-law spouses' rights to be recognized if married women's rights were not respected. Thus it is important for legislators to enact laws protecting matrimonial property during and at the termination of marriage as a precursor to protecting common-law wives.[319] Provisions like these are just what are needed to realize women's equal rights to own, inherit, manage and dispose of property.

Law reform in jurisdictions where common-law spouses' rights are not highly recognized should have the ultimate objective of enacting laws that protect common-law spouses from discrimination on the basis of marital status. In many contexts, such protection effectively advances women's rights to equal treatment with men, including access to and control over property entitlements. Law reform should be bent on

[318] Nancy E. Dowd, Changing Family Realities, Non-Traditional Families and Rethinking the Core of Family Law, online:< http://www.law.ufl.edu/centers/childlaw/pdf/dowdtroxel.pdf>.
[319] As noted below, this lesson is particularly important to some countries in sub-Saharan Africa.

eliminating any law, culture or tradition that undermines women's dignity, welfare, interest or status.[320]

Canadian legal developments reveal three principal approaches to protecting common-law spouses. First, unjust enrichment and the constructive trust have been relied upon by common-law spouses, though sometimes it can be expensive to access justice through these legal mechanisms. The Canadian models of unjust enrichment and constructive trust are used by courts to claim compensation for a contribution to the acquisition or maintenance of property of a former spouse; they consider the non-financial or domestic contributions of the female spouses, for instance, accomplishing house chores, taking care of the children, and unpaid work for the family business.

Intimate relationships are first and foremost relationships of trust. Family building demands the surrender of individual autonomy in favor of mutual reliance and care. The equitable remedy of constructive trust emerged as an alternative to a more rigid, privacy and autonomy-based contractual model.[321] Constructive trust allows courts to respond an inclusive notion of family based on the rights and responsibilities that the parties to an intimate relationship exercise with respect to one another. The current model of equitable distribution of assets in Canada considers spouses' contributions to marriage and to the marital property, as well as projected incomes and need. It integrates the traditional functions of property, the division and support payments into a single award. This has been achieved in part through the division of intangible property including educational degrees, pensions, and professional goodwill.[322]

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[320] *Ibid.*
[321] Weinrib, *supra* note 141.
[322] *Ibid.*

The remedy of constructive trust, if applied carefully, has several advantages unlike the more restrictive schemes like equal property division in that it allows court to allocate property more fairly on a case-by-case basis.[323] Second, it has a number of advantages over the contractual distribution of property at the dissolution of intimate relationships. It is a flexible, equitable doctrine amenable to judicial manipulation in the interest of just results. It is less susceptible to disparities between partners with respect to wealth, legal sophistication, and emotional involvement. It recognizes that relationships inevitably change overtime, whether through the birth of children, the onset of illness, or simply new life aspirations and experiences, and it accommodates those changes.[324]

Secondly, the Canadian experience with 'ascribed spousal status' or 'presumed marriage' might prove to be one of the most rewarding notions to women who live with men for a long time and bear children with them without being legally married. It can also remedy the injustice such men may inflict upon such women when their union falls apart. Common-law spousal families deserve protection and recognition but a clear standard should be set insuring that only those who have meaningful, substantial relationships are supported rather than simply "any" person.[325]

Lessons can also be learnt from the third approach to regulating common-law spouses: cohabitation agreements are drawn to protect the rights and interests of common-law spouses. In Canada, it is common, for a variety of reasons, for a common-law home to be governed by a cohabitation agreement if a common-law couple live together in a relationship of some permanence. In this case, the conveyancing documents should contain an express declaration as to the nature of the parties' beneficial

[323] *Ibid.*
[324] *Ibid.*
[325] *Ibid.*

interests.[326] If there is a written agreement with an express declaration of trust which comprehensively declares the beneficial interests then that is conclusive between the parties, unless that document is set aside or rectified, for example as a result of fraud or mistake.[327] Cohabitation agreements should be encouraged in order to alleviate the plight of persons who chose to live together in common-law relationships. It is desirable that common-law spouses be free to regulate their own financial affairs if they wish to do so.

In countries where there has not been any legal recognition of common-law spousal relationships,[328] law reform should be implemented to address the issue of common-law spouses and particularly to achieve an equitable outcome in financial matters. There are two main areas relating to the financial consequences: property distribution on dissolution and the duty of support financially. Common-law spouses are compelled to use existing legal remedies or to completely abandon their cause when faced with cohabitational property problems when their relationships terminate, and the duty to support has not been extended to them through case law. I recommend that property distribution at the end of their relationships should be addressed through law reform and not litigation. Regulatory statutes addressing all aspects of common-law relationships with a wide discretion as to which relationships qualify for protection should be put in place.

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[326] Peter D. Reekie & Richard Tuddenham, *Family Law and Practice* (London; Sweet & Maxwell, 1988).
[327] Stephen Parker, *Cohabitees*, 2nd ed. (London: Kluwer Law, 1987).
[328] Many Sub-Saharan African countries have constitutions and/or established laws that don't provide for the rights of common-law spouses. Even the rights of married women are commonly abused. In Kenya, for instance, the current constitution freely licenses men to trample on women's property rights. The constitution fails to protect the many women excluded from inheritance. They are evicted from their lands and homes by in-laws, stripped of their possessions when their husbands die or when they divorce, and forced to engage in risky sex to keep their property. In Rwanda (my country), the Law only provides for the institution of marriage and sanctions only monogamy. All other familial arrangements are null and void before the law. It is very crucial for the governments, courts and legislatures in these countries to identify where legal protection/regulation does not exist; where legal protection/regulation exists but is inadequate; where legal protection/regulation exists but has not been used/tested; and to identify any law reform models that may be appropriate for these countries.

It is imperative to note that both the legal and social nature of the family and marriage have always been evolving concepts not only in Canadian societies but also in other jurisdictions of the world. Persons of majority age should be totally allowed the freedom to enter into any type of family relationship that suits best their life styles and economic capacities. The social, psychological and economic nature of the "family" has changed, and the legal regime that governs and supports the family must change. The increasing diversity of family forms and behaviors suggests a need for a greater range of institutions, as well as for greater flexibility within institutions.[329]

Important to note also is that Canadian developments of legal recognition of common-law spousal relationships are reflective of what has been happening in other jurisdictions. It is useful to situate the recognition of common-law spouses in a comparative perspective by briefly highlighting a few developments in other countries.[330] Different European countries have responded in different ways to the developments pertaining to the rise in common-law unions, and children that are born or reared in these households. Many European countries are recognizing the changes in union formation behavior and marriage laws, practices, assumptions and values on which public policies are built are being evaluated. A variety of policy responses to the emergence of common-law unions in different European countries has been registered.

In 1998, the Netherlands, which is considered to be a country with intermediate levels of persons living in common-law and low rates of non-marital childbearing, made legally registered common-law unions functionally equivalent to marriage. It instituted

[329] Bala, *supra* note 5.
[330] However a full comparative study of these developments is beyond the scope of this thesis.

the formal registration of partnerships for both heterosexual and homosexual couples.[331] In the same vein, Denmark had instituted the legal registration of homosexual partnerships in the early 1990s, but the Netherlands was the first country in Europe to formalize common-law relationships.[332] However, Registered Partnerships in the Netherlands were primarily instituted to meet the needs of same-sex couples that did not have the option of marriage.[333]

In 1999, the French government instituted Civil Solidarity Covenants (PACS). These Pacts pave way for homosexual and heterosexual couples who have co-resided for a minimum of three years, to enter into legal agreements and accord them rights broadly equivalent to those exercised by married spouses in inheritance, tax, health and tenancy.[334] Similar to Registered Partnerships in Netherlands, PACS in France were originally conceived as meeting the demands of same-sex organizations for a form of legally recognized marriage ceremony.[335] This undertaking, entered into of their own free will, provides a more solid legal basis for their relationships.

The PACS (Civil Solidarity Covenants), a flexible response to changes in society and the nature of couples, allow those who can't or do not wish to marry the freedom to live together under more stable and secure conditions. Individuals bound by the PACS agreement are entitled to new rights under tax, social welfare and labor law, for example, common-law partners may file a joint income tax return three years after registration of the PACS agreement with the clerk of the court. From 2000, common partners in France

[331] W. M Shrama, "Registered Partnerships in the Netherlands" (1999) 13 International Journal of Law, Policy and the Family, 315.
[332] *Ibid.*
[333] *Ibid.*
[334] Claude Martin & Irene Thery, "Marriage, Cohabitation and the PACS in France" (2000) 14:3 International Journal of Law, Policy and the Family.
[335] *Ibid.*

are assessed jointly on the basis of all their assets for the high-wealth tax.[336]As a legal consequence of these agreements, common-law partners in France must fulfill certain obligations in particular to provide mutual and material support in accordance with the terms of the agreement. They are also jointly and severally liable for each other's debts, for everyday expenses and shared accommodation.[337]

A more pragmatic approach has been taken vis-à-vis common-law spouses in Sweden, Finland and Denmark. Over time, common-law spouses have been placed on the same footing as married spouses in as far as the application of family law in these countries is concerned. They have recognized that the legislation developed to meet the needs of married couples is also suited to the needs of unmarried couples.[338]

The German position indicates that the protection of the family enshrined in the Constitution applies only to marriage and not to common-law unions, which implies a principled commitment not to accord equal status to married and cohabiting relationships, although private law could be changed. The phenomenon of common-law relationships is diverse and complex the responses thereto have been equally variable, suggesting that there are few simple straightforward solutions to this development in family life.[339]

In South Africa, unlike the marriage relationship, there are no special consequences that flow from a common-law spousal relationship, despite the nature and length of the relationship. However there are exceptions. Common-law spouses as

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[336] Elisabeth Guigou, (2001) "PACS Cohabitation Agreements" online: Prime Minister of France <http://www.archives.premier-ministre.gouv.fr/jospin_version3/en/ie4/contenu/29969.htm>.
[337] *Ibid.*
[338] David Bradley, *Family Law and Political Culture: Scandinavian Laws in Comparative Perspective* (London: Sweet and Maxwell, 1996).
[339] Ditch H. Barnes & J. Bradshaw, *A Synthesis of National Family Policies, 1995* (Brussels: Commission of the European Communities, 1996).

married spouses, enjoy the benefits and protections of the *Domestic Violence Act*, and the *Compensation for Occupational Injuries and Diseases Act*, and the *Medical Schemes Act.* Predictably, a common-law relationship is also recognized for the purpose of creditors in an insolvency situation. These instances of recognition are limited to the specific purposes of each statute.[340]

The only general statutory recognition afforded to common-law spouses is the *Natural Fathers of Children Born out of Wedlock Act* 86 of 1997. While this is a useful statutory instrument that provides clarity for unmarried fathers on their rights of access and custody, it is not insignificant that it provides protection for men only. It is men who are generally more secure and financially independent during and after relationships, while women take on more family responsibility, thereby becoming more vulnerable, and in need of protection.[341]

The Tanzanian government in 1971 took proactive steps to recognize rights for common-law spouses. To this end, Tanzanian family law provides for the notion of presumed marriages, and it stipulates that where is it proved that a man and woman have lived together for two years and upwards, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married. However, this legal position has been attacked by the majority of the people criticizing it as being superfluous and contradictory to the whole spirit of the institution of marriage. The have asserted that this presumption of marriage diminishes

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[340] Women's Legal Center, "Developing Strategies for Litigation and Law Reform: Domestic Partnerships" online: <http://www.wlce.co.za/doc_dom_partnership.html>.
[341] *Ibid.*

the sanctity of the marriage institution and a mockery to those who marry according to established rites, religious or otherwise.[342]

It is also worth noting that spouses living in common-law relationships reserve their right to be accorded protection from the state. The state is duty bound to recognize the fact that people structure their lives around a set of reasonable expectations formed in adult personal relationships. Persons living in a common-law relationship reasonably expect the state to provide them with some protection in meeting their needs if they suffer a sudden deprivation of emotional and economic support. The state should promote the security of common-law spouses by providing them with an identifiable and accessible set of legal protections to respond to these reasonable expectations.[343] However, it does not mean that the state should respond to all expectations formed in personal relationships. It is important to only respond to reasonable expectations determined by an objective standard.[344]

The erosion of the centrality of marriage in family relations can make room for more useful new approaches allowing us to examine relationships, through the lens of function and dependency. The network of relationships which constitute a family are important and valuable to society, as these are the spaces where we seek love, security and self-actualization, develop our children, retain our mental health, and energize ourselves to make an ongoing contribution to our local and global communities.

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