

CHOICE V. EQUALITY:
THE LEGAL RECOGNITION OF UNMARRIED COHABITATION IN
CANADA

by

ANNE MOHS

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Abstract

Over the last 40 years, unmarried cohabitation has become one of the fastest growing family forms in Canada. This growth was accompanied by an increasing social acceptance and legal recognition, which was mainly implemented by expanding marital rights and responsibilities to unmarried cohabiting individuals. However, this legal development did not happen without dispute and many scholars argued that marital regulations should not be applied to unmarried cohabiting couples. This thesis is concerned with examining the debate and trying to answer the question of whether marriage and unmarried cohabitation should be legally assimilated. It not only looks at the arguments of the literature, but also examines the reasoning of the Supreme Court of Canada in *Miron v. Trudel* and *Nova Scotia v. Walsh*. These two decisions are key because the Supreme Court moved from an equality-based approach in *Miron* that treats married couples and unmarried couples the same to an autonomy-based approach in *Walsh* that emphasizes the importance of permitting unmarried partners the freedom to choose a relationship that is not regulated by marriage laws. These cases also reflect some of the arguments in the literature and illustrate how controversial the debate is. By looking at the history of unmarried cohabitation and its sociological background, I argue that equality should prevail over liberty of choice. Often, choice is not the sole parameter in the decision between marriage and unmarried cohabitation and it cannot be said that unmarried cohabiting couples always choose to avoid marital regulations. Furthermore, unmarried cohabiting couples are functionally similar to married couples and should therefore be treated equally from a legal perspective.

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DEDICATION

To my parents.

Chapter 1: Introduction

I. Transformation of Intimate Relationships

Whenever researching in the area of intimate relationships one will come across the term ‘family’. But what does ‘family’ really mean? What is its precise definition? Interestingly, modern Canadian law does not contain a definition for ‘family’. Although a whole area of law is named ‘Family Law’, it regulates individual rights and obligations instead of those of a family unit and therefore does not contain a definition for it.

Despite its missing legal definition, many have a clear image of what a family consists of. This leads to a multitude of possible descriptions for ‘family’: Some might connect family solely to marriage; for others the presence of children might be the key element to describe a family. Some might perceive their extended family consisting of grandparents, uncles, aunts, and cousins as ‘family’; others might even call close friends their ‘family’. These different characterizations of ‘family’ reflect a modern and diverse understanding and are a consequence of the changes within society over the last 40 years. Before this time, the understanding of family was quite different and consisted of a more ‘traditional’ picture: a man and a woman married to each other, and their children, all living under one roof.¹

The reason for such a narrow understanding of family was that marriage used to be the only legally and socially accepted form of intimate relationship in western culture. It was regarded as a nuclear heterosexual unit with a primary focus on reproduction. Sexual intercourse and

¹ S.R. Fodden, *Family Law* (Toronto: Irwin Law, 1999) at 1.

childbearing outside of marriage were not accepted and children born out of wedlock were considered illegitimate and had fewer rights than children born in wedlock. The understanding of marriage and family was based on a patriarchal perspective, where the husband was the head of the household and the wife was subsumed under the husband and would not only lose her property rights but also her legal existence through marriage.²

At the end of the 19th century, for example, marriage was considered the cornerstone of society and as “the bulwark of the social order.”³ It was believed to be the key to a healthy and stable society.⁴ The Church played an important role in advocating this idealized picture of marriage and emphasizing that marriage is a uniquely moral institution.⁵ As a consequence, federal divorce legislation did not exist and divorce was believed to bring evil “into the social fabric of the nation.”⁶ However, divorce was not completely impossible and in 1900, for instance, there were eleven registered divorces in Canada.⁷ The small number of divorces was mainly a result of the fact that in provinces that did not have divorce legislation, divorce required a Parliamentary act, which usually involved a lot of expenses and was therefore for most people simply not affordable.⁸

² K. Arnup, “Close Personal Relationships between Adults: 100 Years of Marriage in Canada” (Ottawa: Law Commission of Canada, 2001) at 4.

³ *Ibid.*

⁴ C. Backhouse, ““Pure Patriarchy”: Nineteenth-Century Canadian Marriage” (1985-1986) 31 McGill Law Journal 264 at 266.

⁵ *Ibid* at 271. The Catholic Church was particularly influential in Quebec. Consequently, French Canadian representatives condemned the idea of making divorce available in Canada.

⁶ *Ibid* at 272.

⁷ M. Eichler, *Family Shifts: Families, Policies and Gender Equality* (Oxford University Press, 1997) at 10.

⁸ Backhouse *supra* n. 4 at 278. Persons who sought divorce had to travel to Ottawa for Parliamentary relief and also provide for the costs of the Parliamentary divorce bill itself. See *ibid* at 273 n. 30.

Some provinces (e.g. Nova Scotia, New Brunswick, Prince Edward Island, British Columbia) had their own divorce legislation and divorce courts that allowed divorces in certain cases (e.g. adultery, cruelty, impotence). This was possible despite federal jurisdiction because there was no federal legislation until 1968 (see below).

In the early 21st century, the picture of marriage and family is extremely different. Heterosexual marriage is no longer the only accepted family form. Today, there are various socially acknowledged adult relationships and family forms: unmarried cohabitation (same-sex and opposite-sex), same-sex marriages, single parent families, married couples without children, remarried couples with children from former spouses, etc. However, marriage is still the predominant family form and its appearance has changed dramatically. Women have gained a stronger position in both society and intimate relationships. Consequently, the old patriarchal model of marriage has been abandoned and marriage is now characterized by more equal rights for both spouses. More and more women choose to work outside the home and some decide not to have children at all.⁹ Divorces have become more common due to both the implementation of the *Divorce Act* in 1968 and the introduction of “marriage breakdown” as the single ground for divorce in 1985.¹⁰ The most radical and progressive change concerning marriage was the introduction of same-sex marriage in Canada in 2005.¹¹

II. Unmarried Cohabitation: A New Phenomenon?

One of today’s most important alternative family forms is unmarried cohabitation. Over the last 40 years, unmarried cohabitation has become one of the fastest growing family forms in Canada and is therefore one of the most important alternatives to marriage. Yet, unmarried cohabitation is not a new phenomenon. Relationships outside and beside marriage have always existed and are better known under the term “concubinage”. In ancient Rome and China, for

⁹ For further information see below B. Historical Development of Unmarried Cohabitation.

¹⁰ *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 8; Marriage breakdown as a ground for divorce was originally introduced by s. 4 of the *Divorce Act*, S.C. 1967-1968, c. 24. However, s. 3 and 4 of the *Divorce Act*, 1968 are much more focused on fault based grounds than s. 8 of the *Divorce Act*, 1985, which clearly states that breakdown of marriage is the only reason for divorce (but it allows the establishment of the breakdown with fault based grounds and is therefore a combination of non-fault based and fault based grounds for divorce).

¹¹ *Civil Marriage Act*, S.C. 2005, c. 33.

example, concubinage was well established (especially between wealthy men and women of lower classes) and even in Western culture extramarital relationships were very numerous although unlawful.¹²

Furthermore, there were times when marriage and unmarried cohabitation were hardly different from each other because neither was officiated. Marriage has not always been a formalized institution recognized by law and it might have resembled more a simple contract than today's marriage. In ancient Rome, for example, marriage did not incorporate the approval of a governmental or religious institution and it was usually initiated by simple consent.¹³ Additionally, marriage could be easily dissolved since ancient Rome had a long-standing tradition of liberty of divorce. The idea was that marriage demanded an ongoing consent and could be easily dissolved if this consent ceased to exist.¹⁴ Traditions were very similar throughout all of Europe and marriage was mainly a private matter without any formalized legal requirements. Initially, Canon Law did not require an official ceremony for a valid marriage nor did the exchange of consent need any witnesses.¹⁵ This changed especially because of the growing influence of the Catholic Church and the Council of Trent in 1563. From then on, a priest had to give its blessing to the marriage.¹⁶ This, however, did not apply to England where simple consent was sufficient until 1753 when *Lord Hardwicke's Act*¹⁷ was enacted.¹⁸ As a

¹² Wu, Z, *Cohabitation: An Alternative Form of Family Living* (Oxford University Press Canada, 2000) at 41.

¹³ Other requirements for a valid marriage under Roman Law were for example: the couple was not allowed to be too closely related, the couple was not allowed to be of widely differing social classes, the couple had to be of a certain age. However, the marriage ceremony did not require approval from the state or the church. M. Kuefler, "The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law" (2007) 32 *Journal of Family History* at 347 – 348.

¹⁴ Ending consent simply required returning the dowry and sometimes women needed their father's approval. Kuefler supra n. 13 at 355. Please note that this liberty of divorce was changed by the laws of the later Roman Empire.

¹⁵ C. Donahue, "The Canon Law On the Formation of Marriage and Social Practice in the Later Middle Ages" (1983) 8 *Journal of Family History* at 145.

¹⁶ *Ibid* at 144 – 145.

¹⁷ *Lord Hardwicke's Act*, (1753) 26 Geo. II, c. 33.

¹⁸ Donahue supra n. 15 at 144..

consequence of this *Act*, not only was a religious ceremony required for a legal marriage, but it also demanded parental consent and registration of the union.¹⁹ This was the birth of a formalized marriage similar to what we have today. However, this short review of marriage history shows that intimate relationships have a longer tradition of being commenced through simple consent without any official act or recognition than through an official ceremony and registration. Consequently, one might ask the bold question of whether today's relationship form of unmarried cohabitation is identical to historical marriage and has therefore a longer tradition than modern day marriage. One scholar even proposes that the current system (i.e. marriage beside unmarried cohabitation) is a "two-marriage system": Christian (or modern) marriage beside Roman marriage.²⁰

III. Facts and Statistics

Once formal marriage became the norm in western culture, unmarried cohabitation became somewhat unpopular and only a small number of couples decided to live together unmarried. However, the numbers of unmarried cohabitants have increased rapidly over the last three decades. Since the first recognition of unmarried cohabitation in the 1981 Census, more and more couples choose to live together without being married and the numbers are increasing every year. This section gives an overview of the most important numbers starting with the 1981 Census.

¹⁹ Arnup *supra* n. 2 at 8.

²⁰ Unmarried cohabitation is described as "Roman marriage" because its characterizations are identical of those of marriages in the Roman Empire. See B. Laplante, "The distinct society: Cohabitation and recent questions on the prevalence and meaning of cohabitation in Quebec" (2008) online LabEP – Laboratoire d'études de la population <http://labep.ucs.inrs.ca/laplanteb/LaplanteB_2008c-2.pdf>. However, Laplante only refers to Quebec and does not make a similar conclusion for the rest of Canada.

1) General Numbers

In 1981, the Canadian census recorded 713,210 cohabiting persons (or 356,605 cohabiting couples) in Canada. The number of cohabiting persons rose to 973,880 in 1986, 1,438,550 in 1991, and 1.84 million in 1996.²¹ In 2001, the census recorded 2,316,820 cohabiting persons (or 1,158,410 cohabiting couples) compared to 2,753,730 (1,376,865 couples) in 2006.²² Stated in percentages: between 1981 and 2001 common-law families increased from 5.6 percent to almost 14 percent.²³ In 2006, the number of common-law families was 15.5 percent of all census families.²⁴

Very interesting is the distribution of these numbers within the Canadian provinces. If the province of Quebec were excluded from the statistics, the percentage of common-law couples would only be around 12 percent.²⁵ In 2006, 28.8 percent of all families in Quebec were common-law families. However, the Canadian territories have very high percentages as well: Yukon with 23.6 percent, Northwest Territories with 27.5 percent, and Nunavut with 31.3 percent.²⁶ Since the population of these territories is very low, their influence on the nation-wide statistics is very limited. In British Columbia, 12.2 percent of all census families were common-law families.

²¹ Wu supra n. 12 at 43.

²² Statistics Canada, *Family portrait: Continuity and change in Canadian families and households in 2006: Findings* (Ottawa, Statistics Canada, 2007) at 8.

²³ Statistics Canada, *Profile of Canadian families and households: Diversification continues* (Ottawa: Analysis Series, 2002) at 3.

²⁴ Statistics Canada supra n. 22 at 8; For the definition of census family see *ibid* at 10: “A census family is composed of a married couple or a common-law couple, with or without children, or of a lone parent living with at least one child in the same dwelling. A couple can be of the opposite sex or the same sex”. The total of Canadian census families in 2006 was 8,371,020 (*ibid* at 8).

²⁵ Ambert, AM, *Cohabitation and Marriage: How are they related?* (Ottawa: The Vanier Institute of the Family, 2005) at 6.

²⁶ Statistics Canada supra n. 22 at 30. For a possible explanation of these higher numbers in the Canadian territories please cf. Chapter 5, II. 1) c).

Between 2001 and 2006 unmarried couples have increased 18.9 percent (whereas married couples have only increased 3.5 percent)²⁷ and it seems that this trend will continue in the coming years. However, even though unmarried cohabitation is widely accepted and becomes more and more important, marriage continues to be the predominant family form with 68.6 percent of census families in 2006, compared to 15.5 percent for unmarried cohabitation.

2) Same-Sex Couples

In 2006, the census counted 45,300 same-sex couples in Canada. 16.5 percent (7,465) of these couples were married while the rest lived in unmarried cohabitation. Same-sex common-law couples make up 0.5 percent of *all* couples in census families (lone-parent families not included). Between 2001 and 2006, the number of same-sex common-law couples rose from 34,200 to 37,885.

3) Children Living in Common-Law Households

In 2001, 8.2 percent of children (age 0 to 14) in Canada outside Quebec lived in a common-law household. In Quebec, 29 percent of children lived in such households. Including Quebec, the Canadian rate increases to 13 percent of children aged 0 to 14.²⁸

²⁷ Statistics Canada supra n. 22 at 8.

²⁸ *Ibid* at 11.

4) Reasons for Demographic Differences

The above statistics show that there is an immense difference between cohabiting numbers in Quebec and elsewhere in Canada. While the overall Canadian percentage of unmarried cohabitants is consistent with Northern American numbers, Quebec seems to follow a Northern European pattern (Sweden, Norway, Denmark) where marriage and cohabitation seem to have become more indistinguishable.²⁹ Sociological studies show that cohabiting couples in Quebec tend to have the same characteristics as *married* couples in the rest of Canada: they show strong labor force participation, higher incomes and therefore lower rates of poverty.³⁰

However, this does not answer the question of why the number of cohabiting couples is so much larger in Quebec than anywhere else in Canada. One possible explanation is the religious background of Quebec. In 1960, most of the population of Quebec used to belong to the Catholic Church.³¹ A change in the Quebecers attitude towards the Catholic Church started with its refusal to change its doctrine on sexuality, marriage, and divorce in the late 1960s. Furthermore, the Catholic Church lost a lot of its power because of the “Quiet Revolution” during the 1960s.³² However, instead of leaving the Catholic Church many decided to simply stop using Catholic doctrines and therefore abandoned traditional ceremonies altogether.³³ The consequence was the rise of unmarried cohabitation as an alternative to traditional marriage.

²⁹ D. Kerr, M. Moyser, R. Beaujot, “Marriage and Cohabitation: Demographic and Socioeconomic Differences in Quebec and Canada” (2006) 33 *Canadian Studies in Population* at 85 and 91.

³⁰ *Ibid* at 108. For more information on the economic situation of cohabiting couples please see below Chapter 5, II.

³¹ B. Laplante, “The rise of cohabitation in Quebec: Power of religion and power over religion.” (2006), online INRS – Institut national de la recherche scientifique <http://www.ucs.inrs.ca/Cours/laplante/LaplanteB_2006a.pdf> at 3.

³² *Ibid* at 6.

³³ Laplante claims that changing religion was not an option in Quebec (as it was for example in Northern Ireland) because of the “centralized nature of Church authority”. The only logical consequence was therefore “disaffiliation rather than reformation (...) or secularization.” *Ibid* at 13.

IV. Research Question and Approach

Ever since the rise of unmarried cohabitation 40 years ago, Canadian lawmakers and judges have had to deal with the question of whether married and unmarried cohabiting couples should be legally treated the same. Although many marital rights and responsibilities have been given to unmarried cohabiting couples over the last 4 decades, the debate is continuing today because there are still areas of law where unmarried couples are treated differently from married ones. This thesis takes a closer look at the debate and aims at answering the question of whether marriage and unmarried cohabitation should be completely assimilated from a legal perspective. Since the legal regulation of marriage (and unmarried cohabitation) is very diverse and extends into various fields of law, a discussion of all these areas would go beyond the scope of this thesis. The main emphasis is therefore on the economic consequences of cohabiting relationships after the breakdown of their relationship. The division of property at the end of a relationship is a particularly important area of law in the context of unmarried cohabitation because in most Canadian provinces marital property rights are still not extended to unmarried cohabiting couples. At the same time, matrimonial property rights are at the center of discussions for legislative reforms in several provinces despite the decision of the Supreme Court of Canada in *Nova Scotia v. Walsh* where it ruled that it is not unconstitutional to exclude unmarried cohabiting couples from provincial matrimonial property regimes.³⁴ This shows the importance of the topic and also its controversial nature.

The goal of this thesis is not only to contribute to the debate on property rights but also to offer a broader understanding for unmarried cohabitation. By taking a closer look at the history and development of unmarried cohabitation it is easier to understand the different arguments of

³⁴ *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325.

the debate. A historical approach is furthermore beneficial because it provides an overview of the legal and social development of cohabiting relationships and makes it possible to detect trends in history towards or against the legal assimilation of marriage and unmarried cohabitation, which may be supportive or contradictory of recent developments. Additionally, this thesis also applies a sociological and feminist approach. Many of the arguments against the legal assimilation of unmarried cohabiting and married couples are based on the assumption that they are considerably different from each other. By applying a sociological approach it is possible to get an authentic picture of cohabiting relationships and to determine whether or not they are truly different from married couples. The combination of a sociological and feminist approach provides a different perspective on the topic because it takes into consideration the needs of women. At the end of a relationship, women usually suffer greater economic disadvantages as compared to men and they are often left with the primary care of the children. Any discussion on the economic consequences of cohabiting relationships is therefore incomplete if it does not reflect on women's experiences.

V. Outline

After a short introduction in chapter one, chapter two looks at the historical development of unmarried cohabitation in the 20th century. It provides an overview of the changes within society that had an influence on the increase of unmarried cohabitation in the 1970s. It also describes the legal recognition of unmarried cohabitation and how an increasing number of rights and regulations were given to unmarried cohabiting couples between the early 1970s and today. The main focus is on regulations on spousal support and property rights, since they reflect the economic situation of cohabiting couples after the breakdown of their relationship. However, this

chapter also shortly touches on the rights on the death of a partner and other legal regulations that are not necessarily connected to the breakdown of a relationship. Finally, it provides a brief overview of the legal development of same-sex cohabitation, because it differs somewhat from the history of opposite-sex cohabitation.

The third chapter summarizes the debate in the literature regarding the question of whether marital regulations should be extended to unmarried cohabiting couples. It primarily includes arguments of two different time periods: the late 1970s/early 1980s and the early 2000s. Both of these periods are important because they mark crucial events in the development of unmarried cohabitation. In the late 1970s and early 1980s unmarried cohabitation became a more frequent phenomenon and began to be legally recognized. As a consequence, a large number of scholars engaged in the debate of how much recognition should be given to this new relationship form. The early 2000s, on the other hand, are characterized by an important decision of the Supreme Court of Canada where it decided that it is not discriminatory to exclude unmarried cohabitants from matrimonial property legislation.³⁵ This conclusion was rather unexpected for most scholars and has therefore revived the original debate of how many rights should be given to unmarried couples. Although the arguments of these two different time periods vary somewhat from each other, it is also interesting to see that some arguments of the earlier debate are brought up again later on. The chapter furthermore distinguishes between three different approaches to the debate: feminist, legal, and sociological approach. This shows that the legal regulation of unmarried cohabitation is not solely an issue of the legal field but also of other scholarly areas.

³⁵ *Ibid.*

In the fourth chapter, I look at the different arguments of the Supreme Court of Canada for and against the similar treatment of married and cohabiting couples. Two important decisions of the Supreme Court best illustrate its arguments: *Miron v. Trudel*³⁶ and *Nova Scotia v. Walsh*.³⁷ Interestingly, these two decisions seem very contrary to each other because they use similar arguments but come to different outcomes. The two decisions also reflect the various arguments of the literature mentioned in chapter three. In my analysis of these judgments, I try to find a possible explanation for why the Supreme Court of Canada used a different approach in *Nova Scotia v. Walsh* and did not uphold its reasoning from *Miron v. Trudel*.

Chapter five provides a sociological and feminist analysis of unmarried cohabitation in comparison to marriage. The main goal of this chapter is to illustrate the social realities of unmarried cohabiting relationships. I do this by consulting sociological studies on unmarried cohabitation that provide information on who cohabits, how many children live with unmarried parents, and how long such relationships usually last. The findings reveal that while unmarried cohabiting couples are somewhat different from married couples, the differences are not as great as some scholars claim. From a feminist perspective it is interesting to see that unmarried cohabitation is not a relationship form that can be characterized as one that is free of legal oppression and gender inequalities. On the contrary, the analysis of unmarried cohabitation in this chapter clearly demonstrates that unmarried cohabitation is not as liberal and equal as it is often believed to be.

In the final chapter, I come to the conclusion that unmarried cohabiting couples should indeed be legally treated the same as married couples. I argue that the liberty of choice argument might

³⁶ *Miron v. Trudel*, [1995] 2 S.C.R. 418.

³⁷ *Nova Scotia v. Walsh* supra n. 34.

be strong and very appealing but that it fails in the context of intimate relationships because the decision between marriage and unmarried cohabitation is sometimes not the consequence of free choice. The main focus should be on the protection of the weak rather than on the preservation of individual property. I furthermore assert that there is a strong tradition in Canada to extend marital regulations to cohabiting couples and that it would be the next logical step to extend marital property rights regulations. This is supported by the fact that some provincial governments have chosen to extend their marital property statutes to include cohabiting couples. I finally make a proposition for a possible way to regulate unmarried cohabitation through combining two different regulation models.³⁸

³⁸ I.e. the ascription model and the registration model. For an explanation of these models please cf. Chapter 6.

Chapter 2: Historical Development of Unmarried Cohabitation in the 20th Century

I. Introduction

In order to be able to discuss a possible and desirable future development of unmarried cohabitation and decide whether married and unmarried couples should be legally treated the same, it is beneficial to first look at the history of unmarried cohabitation. By answering questions like ‘When did unmarried cohabitation become popular in the last century?’, ‘What factors influenced the increase of couples deciding to cohabit instead of getting married?’ and ‘What legal rights and responsibilities were given to unmarried couples over time and why?’ it is possible to better understand the current legal circumstances of unmarried couples. It also makes it easier to predict future growth of cohabitation numbers and changes with regard to legal recognition. Additionally, it will be helpful to consider arguments for or against the legal assimilation of marriage and unmarried cohabitation.

This chapter describes the historical development of unmarried cohabitation during the 20th century and its convergence with marriage over time. First, I examine the changes in society over the past 50 years that had an impact on the establishment and acceptance of unmarried couples. I explain how the increasing number of women participating in the labor force and the women’s liberation movement changed women’s perception about marriage and led to an increasing number of common-law relationships. Second, I illustrate the legal development of common-law relationships in Canada and the rights and obligations that partners have gained between 1972 and today. I discuss the changes in legislation and the judgments of the Supreme Court of Canada

that led towards more rights and obligations for unmarried couples. Finally, I examine the history of same-sex cohabitation and illustrate that unmarried same-sex couples had to wait much longer until they were legally recognized.

II. Social Changes towards Unmarried Cohabitation

As mentioned above, the number of unmarried cohabiting couples has dramatically increased over the last 40 years. Because this growth is unique in history since marriage has become institutionalized, the logical questions are: What has caused this dramatic increase in cohabitation and what are the reasons that more and more people choose to live in common-law relationships?

Several factors have influenced this development, which are almost all connected to the changed role of women in family and society. I will illustrate the most important factors and explain how they influenced the perception of intimate relationships over time.

1) Women and the Work Force

a) World War II and Before

Women have always worked, but most of the time, this work was not outside their home and they would receive little or no payment.³⁹ In the few cases where women worked outside home in

³⁹ The work women performed was mostly housework, child-rearing, and farm work. B.L. Friedman and M. Rein, "The Evolution of Family Policy in the United States after World War II" in S.N. Katz, J. Eekelaar, and M. Maclean (ed), *Cross Currents: Family Law and Policy in the U.S. and England* (New York, Oxford University Press, 2000), 101 at 102 – 103.

paid jobs, they often left their jobs as soon as they got engaged.⁴⁰ Nevertheless, even married women were forced to work outside home whenever their family had to rely on women's income (i.e. in the case of poverty or if the woman was widowed), but their income was much lower and their access to work much more difficult than for men.

The numbers of women participating in the work force outside their homes increased dramatically during the Industrial Revolution in the late 18th and early 19th century.⁴¹ Especially lower class women were forced to work in the newly built factories in order to make a living or support their families financially. Work conditions were usually very poor and wages very low. Eventually, protective legislation was introduced to reduce female and child labor, which, for example, reduced hours for women and children to 10 per day and prohibited women and children to work in mines.⁴² On the one hand this meant more protection for women and their health, but on the other hand it also meant that men's jobs were protected and women were less able to compete for such jobs.

The situation of women with regard to work changed again during World War II, when a lot of men left their home and joined the army. Due to the lack of men in the labor force, women had to take over their jobs. These jobs had been inaccessible to women before, because they were believed to be too weak and these jobs were considered as men's work. However, in 1945, 33.2

⁴⁰ M. Baker, *Families: Changing Trends in Canada*, 4th ed. (Toronto: McGraw-Hill Ryerson Limited, 2001) at 17.

⁴¹ J. Burnette, "Women Workers in the British Industrial Revolution" online EH.net – Economic History Services <<http://eh.net/encyclopedia/article/burnette.women.workers.britain>>.

⁴² So called *Factory Acts*. See C. Tuttle, "Child Labor during the British Industrial Revolution" online EH.net – Economic History Services <<http://eh.net/encyclopedia/article/tuttle.labor.child.britain>>

percent of women in Canada were employed with a wage that was 2/3 of the wage of male workers.⁴³

b) Development After the War

As soon as the war was over, women were forced to hand over their jobs to returning men and the participation of women in the labor force plummeted.⁴⁴ However, not all women left the work force and an increasing number of women stayed in clerical jobs. Throughout the 1950s and 1960s the number of women in the labor force rose again, which was mainly caused by the high demand for labor in the educational, medical, and textile sectors.⁴⁵ Additionally, the automation of domestic appliances in the 1960s⁴⁶ enhanced this process, because women had to spend less time at home doing housework and could focus more on pursuing their own careers. This became increasingly possible with the rising availability of higher education for women and the decreasing birth rates, which was connected to the increasing availability of birth control.⁴⁷ However, the increase of women working outside their homes was not solely caused by economic reasons. It was also caused by a change of attitude and expectations. Women wanted to work, because it meant more freedom and independence for them. After being sent back to household work after the Second World War, lots of women felt frustrated and trapped in their homes. More and more women questioned their traditional role and wanted to go back to the labor force.

⁴³ The Ontario Federation of Labour and The Workers Arts and Heritage Centre, “A History of Women and Work: Draft Proposal for Decades 1900 – 2000 and Beyond”, online <[http://www.ofl.ca/uploads/misc/womenandwork/A_HISTORY_OF_WOMEN_AND_WORK_amended_Jan_11_\(2\).pdf](http://www.ofl.ca/uploads/misc/womenandwork/A_HISTORY_OF_WOMEN_AND_WORK_amended_Jan_11_(2).pdf)> at 9.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* at 10.

⁴⁶ A. Coote, H. Harmon, and H. Hewitt, “The family way” in J. Eekelaar and M. Maclean (ed), *Family Law* (New York, Oxford University Press, 1994) 31 at 44.

⁴⁷ *Ibid.*

The increase of women in the labor force continued throughout the following years. Between 1965 and 1975 the rate of employed women rose by 75 percent.⁴⁸ This development was intensified by the women's movement throughout the 1960s and 1970s (see below). By 2007, approximately 47 percent of all employed Canadians were women.⁴⁹ This development was accompanied by an increase in pay for women, which made the labor force even more attractive for them.⁵⁰

c) Consequences

Women's participation in the workforce is a significant factor that influenced the development of unmarried cohabitation. The increase of women working outside of their homes had a massive impact on the economic situation of women. Women became less dependent on their husbands and men in general. Being able to provide for themselves, women began to have a choice about how they wanted their relationships to look like. Marriage ceased to be the only option for women and an increasing number of women wanted to express their new found liberty and independence in their relationships. Consequently, fewer women chose to get married and more women decided to live in unmarried cohabitation. After divorce became more available in the late 1960s, fewer women remarried after divorce. The increase of women's wages over time

⁴⁸ The Ontario Federation of Labour and The Workers Arts and Heritage Centre, "1900 – 2000: A Century of Women and Work", online <<http://www.ofl.ca/uploads/library/women/WW-FINAL-layout-2007.02.28.pdf>> at 37.

⁴⁹ Statistics Canada, *Labour force and participation rates by sex and age group*, online: <<http://www40.statcan.ca/101/cst01/labor05.htm>>.

⁵⁰ However, it is important to mention that even today women make on average only 70 percent of what men earn. Also, a high percentage of women work only in part time jobs, which are usually paid poorly and have few benefits such as pension. See M. Drolet, "The male-female wage gap" in Statistics Canada, *Perspectives on Labour and Income*, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/75-001-x2001012-eng.pdf>> (December 2001) at 5.

and the growing availability of day care facilities for children, made it easier for women to stay unmarried.⁵¹

2) Women's Movement in the 1960s and 1970s

The second wave⁵² of the women's liberation movement and the sexual revolution in the 1960s and 1970s are important factors that changed the perception of marriage and enhanced the development of unmarried cohabitation.

As a consequence of the regression of women's rights and independence in the 1950s, more and more women became unsatisfied with their role in a patriarchal family model and started to publicly articulate their disagreement with their place in society in the 1960s and 1970s. They began to fight for equality rights, for abortion rights and the right to use contraceptives. They called for more women in important governmental positions, for equal opportunities in education and jobs as well as equal payment.⁵³ Women wanted not only more freedom and respect, but also a fulfilled life.⁵⁴ They stopped defining themselves in terms of husbands and families and started to emphasize their rights as individual identities.⁵⁵ Feminists encouraged women to rethink their traditional roles in families and to achieve independence both economically and socially, as well

⁵¹ Although women's economic situation has changed between the 1960s and today, women are still not completely independent economically. There would be no need of support and property laws, if women could provide for themselves after divorce.

Furthermore, even though day care facilities are more available today many women/families cannot afford them because they are too expensive.

⁵² R. Baxandall and L. Gordon, *Dear Sisters: Dispatches from the Women's Liberation Movement* (New York: Basic Books, 2000) at 10.

⁵³ J. Somerville, *Feminism and the Family: Politics and Society in the UK and USA* (New York: Macmillan Press, 2000) at 95.

⁵⁴ T. Gianoulis, "Women's Liberation Movement" (2004), online <http://www.glbtc.com/social-sciences/womens_liberation_movement.html> at 1.

⁵⁵ *Ibid.*

as sexually.⁵⁶ Marriage itself and its benefits for women were questioned, and an increasing number of women realized that neither marriage nor motherhood could fully satisfy their need for self-fulfillment.

With the introduction of the birth control pill and the legalization of abortion,⁵⁷ women gained more sexual freedom. Sexuality ceased to be connected primarily with reproduction, and sexuality outside of marriage became a more available option. Many women chose cohabitation over marriage, because it meant freedom from a patriarchal institution that represents (sexual) suppression and the dependency of women. Marriage was believed to be a discrimination against women⁵⁸ and it was linked with women's loss of individuality. Married women were often categorized by their marital status and were judged and criticized, if their behavior did not fit into the norm.⁵⁹ Cohabitation, on the other side, was understood as liberation from patriarchal structures⁶⁰ and as a relationship that is free from legal oppression and inequality.

Even today, in the early 21st century, many women choose to not get married because of the traditional picture that is still attached to marriage. They still perceive marriage as a patriarchal institution and want to object to it by choosing to cohabit outside of marriage. The increased availability of contraceptives and child-care, and the rising number of job opportunities have created more independence for women and also changed their expectations regarding their

⁵⁶ MDA Freeman and CM Lyon, *Cohabitation without Marriage* (Aldershot, Hants., England: Gower, 1983) at 47.

⁵⁷ In Canada, abortion was first legalized in 1969 through the inclusion of a therapeutic exception to the abortion provision in the criminal code. This provision was struck down by the Supreme Court in 1988 and since then, abortion is not a crime in Canada. See *Criminal Code*, R.C. 1985, c. C-46, also see *The Honourable Madam Justice B.M. McLachlin*, "Crime and Women – Feminine Equality and the Criminal Law" (1991) 25 U.B.C. L. Rev. at 9 – 10.

⁵⁸ H. Brook, *Conjugal Rites: Marriage and Marriage-like Relationships before the Law* (New York: Macmillan Press, 2007) at 157.

⁵⁹ L. Fels, *Living Together: Unmarried Couples in Canada* (Toronto: Personal Library, 1981) at 39.

⁶⁰ Brook, *supra* n. 58.

lifestyle and their relationships. The factor of financial security through marriage has become less important for women and they now seek different qualities within relationships: mutual respect and understanding, companionship and friendship, communication, acceptance and support of individual working careers, respect for each other's individuality, etc. For many women, these qualities are more likely to be found outside of marriage and within unmarried cohabitation.

3) Miscellaneous Factors

As mentioned above, the perception of marriage has changed over time and most women and also men now seek different qualities within marriage. However, in order to find out if the partner is compatible and meets expectations, some people enter into unmarried cohabitation as a “trial marriage”.⁶¹ Unlike many feminists, these couples don't refuse marriage itself and what it stands for. For them cohabitation is just the logical step before marriage and most of them think that cohabitation before marriage makes a marriage last longer.⁶²

For others, cohabitation before marriage is a possibility to gain (sexual) experience. The increased availability of contraceptives makes it easier for both men and women to have short-term relationships without any commitments and without the intention of getting married. Both partners can remain independent and pursue their own careers and yet enjoy the intimacy of a relationship.

⁶¹ Wu *supra* n. 12 at 3.

⁶² However, some claim that cohabitation before marriage actually raises the risk of getting divorced in a subsequent marriage. *Ibid.* See also Ambert *supra* n. 25 at 9 – 10.

For some, cohabitation is a welcome option after marriage. After the disappointment of a failed marriage, some might choose cohabitation over re-marriage, because they have lost faith in marriage. Sometimes cohabitation is the only option after a divorce, if re-marriage is impossible because of religious reasons. Cohabitation is also the only alternative if the divorce is not complete, but one of the spouses wants to live in a new relationship.

Others may choose unmarried cohabitation over marriage, because they want to escape the financial obligations that are connected to marriage. Even today, marriage usually imposes more rights and obligations on married spouses than unmarried cohabitation, especially with regard to the division of assets (see below). As a result, some couples might prefer to remain unmarried, because they want to stay financially independent.

Over time, unmarried cohabitation has become an increasingly accepted family form in Canada. Consequently, couples that choose not to get married are less socially stigmatized and unmarried cohabitation has become a much easier option for many people.⁶³ Statistics show that the percentage of unmarried couples is much higher between younger couples.⁶⁴ This might be caused by the fact that many younger people choose a way of life that is contrary to the morals and the religious beliefs of their parents and are therefore often less conservative.

However, it must be mentioned that although it seems that the decision between marriage and unmarried cohabitation is mostly a question of choice, not all unmarried couples “choose” to live

⁶³ A good example for this development is the abolition of illegitimacy as a status for children that were born outside of marriage. This happened primarily during the 1970s and 1980s on a provincial level. In Ontario, for example, the *Children's Law Reform Act*, R.S.O. 1980, c. 68 abolished the distinction between children born in wedlock and born out of wedlock.

⁶⁴ Wu supra n. 12 at 44.

as common-law spouses. Some couples live in unmarried cohabitation because one of the partners does not want to marry, whereas the other partner would like to.⁶⁵ Or there might be religious reasons why a couple is forced to live in unmarried cohabitation and cannot choose to get married.⁶⁶ Many couples choose unmarried cohabitation not because they want to avoid marriage; for them a common-law relationship is much easier to perform than marriage since unmarried cohabitation involves usually no formalities. Additionally, the marriage ceremony includes too many expenses for many couples and they might just postpone marriage in the hope that it gets more affordable later.⁶⁷

4) Conclusion

As stated above, various different factors explain why cohabitation rates have been continuing to go up over the last three decades. However, most of these factors correlate and cannot be seen as single or separate factors. Almost all of these factors are still relevant today and influence the increased existence of unmarried cohabitation. The main difference between the decision to cohabit in the 1970s and 1980s compared with that same choice today is that the choice between marriage and unmarried cohabitation is a much easier one today. Unmarried cohabitation is now accepted throughout much of society and the choice to not marry is less questioned and criticized.

⁶⁵ As for example in *Pettkus v. Becker*, [1980] 2 S.C.R. 834. (See below Chapter 2, III. 2) c.)

⁶⁶ *Miron v. Trudel* supra n. 36 at para 150 – 153.

⁶⁷ This is confirmed by the fact that the income and education of unmarried couples is of a lower level than that of married ones. See *Ambert* supra n. 25 at 8.

III. Legal Recognition of Unmarried Cohabitation

For a long time, unmarried cohabitation was not legally recognized and children born in these relationships were considered illegitimate and had fewer rights than “legitimate” children. Unmarried spouses were not able to make cohabitation agreements that would regulate spousal support or the division of property, because these agreements were based on an immoral consideration and were void, since they were contrary to public policy.⁶⁸ However, from the 1970s on, due to the changes in society and the increasing number of unmarried couples and children born out of wedlock, unmarried spouses were given an increasing number of rights and obligations.

1) Spousal Support

The first step towards a comprehensive legal recognition of unmarried cohabitation was the introduction of spousal support in the 1970s on a provincial level. In 1972, British Columbia was the first province to include unmarried cohabitants into its spousal support provision of the *Family Relations Act*. The definition of spouse was extended for the purpose of spousal support to include

a man or woman not married to each other, who lived together as husband and wife for a period of not less than two years, where an application under this part is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.⁶⁹

⁶⁸ J.D. Payne and M.A Payne, *Canadian Family Law*, 2nd ed. (Toronto: Irwin Law, 2006) at 50.

⁶⁹ *Family Relations Act*, S.B.C. 1972, c. 20, s. 15 (e)(iii).

The debate of the Legislative Assembly shows that the *Family Relations Act* was perceived as one of the most important pieces of legislation of that year.⁷⁰ One major reason for the revision of legislation at this point in time was the enactment of the *Divorce Act* in 1968 and the major changes it brought with it.⁷¹ Additionally, the *Family Relations Act* was said to be a great development away from an old and archaic statute that originated in the 1850s.⁷² The main goal for the recognition of unmarried cohabitants in the *Family Relations Act* was to increase the financial security of unmarried cohabitants.⁷³ However, it was criticized that other provincial or federal laws that do not recognize unmarried cohabitants might counteract this financial security.⁷⁴

One year before the introduction of the *Family Relations Act*, the Legislative Assembly had already discussed a similar topic. The debate dealt with a proposed amendment to the *Wives' and Children's Maintenance Act*, which would include the recognition of maintenance in common-law relationships.⁷⁵ Although this amendment was never passed (the bill was referred to the committee on social welfare and education, but the committee did not recommend whether the bill should proceed or not, because there was not sufficient time), the debate includes some valuable statements that indicate some of the reasoning behind these proposed changes. First, it was acknowledged that single mothers (divorced or never married) face many more difficulties and responsibilities when raising children, and therefore financial support is more important to

⁷⁰ British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 3rd Session, 29th Parliament (28 February 1972), online <http://www.leg.bc.ca/hansard/29th3rd/29p_03s_720228p.htm> at 652.

⁷¹ *Ibid* at 649; The revision of legislation was not done immediately in 1968, because the provincial government was not sure if all of the new provisions in the *Divorce Act* would be constitutional and therefore wanted to wait a couple of years.

⁷² *Deserted Wives' Maintenance Act*, S.B.C. 1901, c. 18.

⁷³ British Columbia, Legislative Assembly supra n. 70 at 651 – 652.

⁷⁴ *Ibid* at 652.

⁷⁵ British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 2nd Session, 29th Parliament (22 March 1971), online <http://www.leg.bc.ca/hansard/29th2nd/29p_02s_710322p.htm> at 738.

them.⁷⁶ Second, it was argued that men should accept their responsibilities towards common-law wives.⁷⁷

Many other provinces followed with similar provisions in the course of the 1970s. In Ontario, for example, unmarried cohabitants were first recognized in 1978 when a statute was enacted that extended spousal support obligations to partners that cohabited in a relationship for five years or in a relationship of some permanence if they have a child together.⁷⁸ “Cohabit” was defined as to “live together in a conjugal relationship, whether within or outside marriage”.⁷⁹ The length of cohabitation was changed in 1986 from five to three years.

Alberta amended its provisions to include unmarried cohabitations as late as 2002.⁸⁰ This was a reaction to the decision of the Alberta Court of Appeal in 1998, where it ruled that ss. 15 and 22 of the *Domestic Relations Act* offended the *Canadian Charter of Rights and Freedoms* by excluding unmarried cohabitants.⁸¹

At the time of writing, Quebec is the only province that does not provide spousal support provisions for unmarried couples.⁸² This is especially interesting, because Quebec is the province with the highest percentage of unmarried couples within Canada (34.6 percent compared to an

⁷⁶ *Ibid* at 741.

⁷⁷ *Ibid* at 742.

⁷⁸ *The Family Law Reform Act*, S.O. 1978, c. 2, s. 14.

⁷⁹ *Ibid* s. 1(b).

⁸⁰ Alberta enacted the *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5 and amended the *Domestic Relations Act*, R.S.A 1980, c. D-37 to include support obligations for adult interdependent partners.

⁸¹ *Rossu v. Taylor*, 1998 ABCA 193, [1999] 1 W.W.R. 85.

⁸² This was challenged in a court case. The challenge was based on the *Canadian Charter of Rights and Freedoms*. The Superior Court of Quebec rejected the challenge in July 2009. *Droit de la famille – 091768*, 2009 QCCS 3210 (CanLII) (french version). The identities of the of the couple are not revealed (the respondent is a famous billionaire) and they are referred to as “Lola and Eric.”

average of 13.4 percent in the rest of Canada).⁸³ However, since 2002, unmarried couples have the possibility to register their union and obtain many of the rights and obligations that come with marriage.⁸⁴

2) Property Rights

In most Canadian provinces, statutes that regulate family property do not apply to unmarried couples. For example, in British Columbia, the *Family Relations Act*⁸⁵ extends the definition of “spouse” to unmarried cohabitants in s. 1(1)(b), but excludes them from Parts 5 and 6 of the provision, which regulate property and pensions.⁸⁶ Consequently, the division of property after the breakdown of a common-law relationship is generally determined by the doctrine of separate property⁸⁷ and the crucial questions for the division are: who is registered as the owner and who paid for the property?⁸⁸ This may result in a dissatisfying situation, where one partner contributes to the acquisition of property by the other partner or to its increased value, but is not rewarded upon separation unless a resulting or constructive trust can be established. In appropriate circumstances, e.g. unjust enrichment, the separate property doctrine is modified by the resulting trust and constructive trust doctrines, which may lead to the division of property between both spouses even though only one spouse is registered as the owner.

⁸³ Statistics Canada supra n. 22 at 7.

⁸⁴ *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6. See N. Bala, “Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships”, (2003), 29 Q’s.L.J. 41 at 49.

⁸⁵ *Family Relations Act*, R.S.B.C. 1996, c. 128.

⁸⁶ Unmarried cohabitants are excluded unless they make a contract about property, s. 120.

⁸⁷ H. Conway and P. Girard, ““No Place Like Home”: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain” (2005), 30 Q.L.J 715 at 725.

⁸⁸ B.E. Stalbecker-Pountney and W.H. Holland, *Cohabitation: The Law in Canada* (Toronto: Carswell, 1990) at 2-5.

The separate property regime was originally introduced in the late 19th century to allow married women to hold property in their own names. It started to be challenged for its lack of consideration of unpaid work like childcare and household work and its contribution to the acquisition and maintenance of property given that in most families, husbands held exclusive title to the property.⁸⁹ These changes within society are well reflected by two decisions of the Supreme Court of Canada: *Murdoch v. Murdoch*⁹⁰ and *Rathwell v. Rathwell*.⁹¹

Although these two decisions are within the field of marriage and therefore not directly related to unmarried cohabitation, they nonetheless had an important impact on its development. The decision of the Supreme Court in *Murdoch* had a massive influence on matrimonial property reforms. Irene Murdoch's story helped to raise the public's awareness of the need for a law reform. The *Murdoch* narrative was retold many times not only in legal journals and legislative debates but also in popular magazines and newspaper all around Canada.⁹² Especially in the women's movement, such narratives were used to increase women's understanding of their problems and to share women's experiences.⁹³ Even though the *Murdoch* case directly only led towards the reform of matrimonial property regimes, its indirect influence was much larger: it helped changing women's role and status not only within the family but also within society.⁹⁴

⁸⁹ F.M. Steele, "The Ideal Marital Property Regime – What would it Be?" in E. Sloss (ed.), *Family Law in Canada: New Directions* (Canadian Advisory Council on the Status of Women, 1985), 127, at 128 – 131.

⁹⁰ *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423.

⁹¹ *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

⁹² M.S. Clapton, "Murdoch v. Murdoch: The Organizing Narrative of Matrimonial Property Law Reform" (2008) 20 *Canadian Journal of Women and the Law* at 207.

⁹³ *Ibid* at 205.

⁹⁴ These changes ultimately also influenced the development of unmarried cohabitation and its social acceptance. For more general information on the influence of the women's liberation movement on unmarried cohabitation please cf. above Chapter 2, II. 2).

Although the *Rathwell* decision was not as important to the public as was the *Murdoch* decision, it nonetheless had an important influence on subsequent cases and therefore on legal development, especially concerning unmarried cohabitation. In *Pettkus v. Becker*,⁹⁵ the majority of the Supreme Court relied on the reasons of the minority in *Rathwell* and started to apply the principle of unjust enrichment and the constructive trust doctrine to unmarried cohabiting couples.⁹⁶

a) Murdoch v. Murdoch

Mr. and Mrs. Murdoch got married in 1943 and separated after 25 years of marriage in 1968. In the course of their marriage, the couple bought and sold several properties. Although Mrs. Murdoch contributed financially and through labor to the acquisition of properties, cattle, and farm machinery, all the property was solely held in Mr. Murdoch's name. During their time of marriage, Mrs. Murdoch not only took care of the household work and childcare but she also played an essential part in the work on the farm properties and did basically any labor that needed to be done.⁹⁷ Mrs. Murdoch claimed an undivided one-half interest in several of her husband's properties on the ground that Mr. and Mrs. Murdoch were equal partners and that Mr. Murdoch held the property and other assets as trustee for Mrs. Murdoch.

The Supreme Court of Canada dismissed Mrs. Murdoch's appeal and did not award her with a share in Mr. Murdoch's property because the majority did not find that a resulting trust arose. In his dissent, Laskin J (as he then was) promoted the use of the constructive trust. He pointed out

⁹⁵ *Pettkus v. Becker* supra n. 66.

⁹⁶ B. Ziff, *Principles of Property Law* (Toronto: Thomson Carswell, 2006) at 215.

⁹⁷ I.e. haying, raking, driving machinery, moving cattle, dehorning, vaccinating, branding, etc. On top of this work, Mrs. Murdoch managed the farm properties all by herself for 5 months every year when her husband worked for the Stock Association in the Forestry Service and was away from the farm.

the importance of the constructive trust doctrine as opposed to the resulting trust as a remedy because it does not require the element of common intention to share economic gains. He also generally emphasized that a contribution of physical labor to the acquisition of property can establish a right to an interest in the property.

The appropriate mechanism to give relief to a wife who cannot prove a common intention or to a wife whose contribution to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend on evidence of intention. Perhaps the resulting trust should be as readily available in the case of a contribution of physical labour as in the case of a financial contribution, but the historical roots of the inference that is raised in the latter case do not exist in the former. It is unnecessary to bend or adapt them to the desired end because the constructive trust more easily serves the purpose.⁹⁸

As a consequence of the *Murdoch* case, many Canadian provinces started to enact property legislation that considers indirect contribution to property when married couples separate. This was mainly contributed to the public reaction on *Murdoch* and the demands of most commentators on the case for immediate legislative action.⁹⁹ *Murdoch* therefore became a “cause célèbre”, and was a catalyst in the process of family property reform that was already underway in Canada.”¹⁰⁰

b) Rathwell v. Rathwell

In *Rathwell v. Rathwell*, the Supreme Court of Canada made a different decision although the facts were very similar to the *Murdoch* case: Mr. and Mrs. Rathwell married in 1944 and separated in 1967 after 23 years of marriage. Shortly after their marriage, both spouses gave up their jobs and decided to make a living through farming. Between 1946 and 1958 the couple

⁹⁸ *Murdoch v. Murdoch* supra n. 90.

⁹⁹ M. J. Mossman, W. F. Flanagan, *Property Law, Cases and Commentary* (Toronto: Emond Montgomery Publications, 2004) at 691.

¹⁰⁰ Ziff supra n. 96 at 215.

purchased three farm properties with money from their joint bank account. However, the title to all properties was held solely by Mr. Rathwell. During their marriage, Mrs. Rathwell contributed considerably to the work on the farm and also raised and educated four children. When her husband was busy in the fields, Mrs. Rathwell took over most of the chores like looking after the garden, milking cows and selling cream, driving machinery, bailing hay, keeping the books etc. On top of this, she fulfilled Mr. Rathwell's obligations under a contract to drive the school bus. After the separation, Mrs. Rathwell claimed an interest in one-half of all real and personal property owned by Mr. Rathwell.

In *Rathwell*, the majority of the Supreme Court of Canada was able to find a resulting trust because the properties were paid for with the money from their joint bank account.¹⁰¹ Mrs. Rathwell was granted one-half of the farmland she had worked on with her husband during their marriage.¹⁰² However, the majority did not grant Mrs. Rathwell a share of the property that Mr. Rathwell purchased from his mother in 1971 because no common intention to share this property could be found.

A three-member minority held that a resulting trust was not applicable, but that a finding of a constructive trust, where no common intention existed, was needed.¹⁰³ The first step in the application of the constructive trust doctrine is to find unjust enrichment, which consists of three elements: "an enrichment, a corresponding deprivation and the absence of any juristic reason – such as a contract or disposition of law – for the enrichment."¹⁰⁴ The remedies in cases of unjust

¹⁰¹ *Rathwell* supra n. 91 at 460. The Supreme Court emphasizes that "[i]n the absence of an agreement to the contrary, a one-half interest in any investment purchased by a husband from a common pool of funds [...] will be considered to be held by him for the benefit of his wife. Legal title will be held in trust for both parties jointly."

¹⁰² *Ibid.*

¹⁰³ *Ziff* supra n. 96 at 215.

¹⁰⁴ *Rathwell* supra n. 91 at 455

enrichment are then the application of a constructive trust or a monetary award. However, a constructive trust can only be applied if there is a causal connection between the plaintiff's contribution and the asset.

c) *Pettkus v. Becker*

In *Pettkus v. Becker*,¹⁰⁵ Mr. Pettkus and Ms. Becker lived together as husband and wife for 19 years from 1955 to 1974 (with a short interruption in 1972) without being married. Ms. Becker expressed her desire to get married shortly after the two of them moved in together, but Mr. Pettkus answered that he might consider marriage after they knew each other better. Nonetheless, shortly after starting to live together Mr. Pettkus started to introduce Ms. Becker as his wife and also claimed her as such for income tax purposes. During the first five years of their relationship, Becker would financially support Pettkus by paying rent, buying food and clothes, and taking care of other living expenses. This enabled Pettkus to save his entire income and deposit in a bank account in his name. In 1961, the couple purchased a farm property with the money from Pettkus' bank account. The title to the property was taken solely in his name. The couple started to establish a beekeeping business on the farm. Ms. Becker participated in the business through physical work for over fourteen years and also provided financial support by paying for renovations on the farm and parts of the household expenses. The couple bought two more properties in 1971 and 1973, which were both in Mr. Pettkus' name. Ms. Becker left Mr. Pettkus permanently in 1974, claiming that Mr. Pettkus had abused her.

¹⁰⁵ *Pettkus v. Becker* supra n. 66.

The Supreme Court awarded Becker a one-half interest in Pettkus' farm property. The majority found that Mr. Pettkus was enriched through the benefit of 19 years of unpaid labor, while Ms. Becker received almost nothing in return. It also ruled that Ms. Becker had reasonable expectations of receiving an interest in the property, while Mr. Pettkus freely accepted those benefits and knew or should have known of these expectations. "It would [therefore] be unjust to allow the recipient of the benefit to retain it."¹⁰⁶

However, Justice Dickson did not create a presumption of equal sharing of property between the unmarried spouses, as might happen for married spouses under matrimonial property statutes. He stressed that Becker was awarded with a share equivalent to her contribution (which happened to be one-half interest of the property). He further emphasized that the contribution has to be sufficiently substantial and direct in relation to the property.

With regard to the question of whether the constructive trust doctrine is applicable, Justice Dickson justified the use of constructive trust in the case of unmarried couples as compared to married couples by arguing that there is

no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. This was not an economic partnership nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived as man and wife for almost twenty years. Their lives and their economic well-being were fully integrated. The equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.¹⁰⁷

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* at 850.

d) *Sorochan v. Sorochan*

In 1986, the Supreme Court of Canada further developed the concepts of unjust enrichment and constructive trust in relation to unmarried couples in *Sorochan v. Sorochan*.¹⁰⁸ Mary and Alex Sorochan lived together without getting married for 42 years from 1940 to 1982. The couple lived on a farm that was originally owned by Mr. Sorochan and his brother but was divided in 1951 and Mr. Sorochan became registered owner of one-half of the farmland. Both parties worked jointly on the farm. While Mary Sorochan took care of all domestic labor associated with running the household and caring for their six children, she also worked long hours on the farm. From 1942 to 1945 and 1968 to 1982 Alex Sorochan worked as a traveling salesperson and Mary Sorochan took care of all farm chores on her own. The relationship ended in 1982 when Mary Sorochan moved to a senior citizen's home because of health issues and the deteriorating relationship between the parties.

In this case, the Supreme Court clearly differentiated for the first time between unjust enrichment and the remedy of constructive trust.¹⁰⁹ It broadened the application of constructive trust by saying that the contribution does not have to be connected to the acquisition of property. A contribution relating to the preservation, maintenance or improvement of property may suffice.¹¹⁰ The Supreme Court also further defined the third element of unjust enrichment by emphasizing:

A reasonable expectation of benefit is part and parcel of the third pre-condition of unjust enrichment (the absence of a juristic reason for the enrichment). At this point, however, in assessing whether a constructive trust remedy is appropriate, we must direct our minds to the specific question of whether the claimant expected to receive an actual interest in property

¹⁰⁸ *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38.

¹⁰⁹ *Stalbecker-Pountney and Holland* supra n. 88 at 2-7.

¹¹⁰ *Sorochan v. Sorochan*, supra n. 108 at para 26.

and whether the respondent was or reasonably ought to have been cognizant of that expectation.¹¹¹

Finally, the Supreme Court stressed that in this case the longevity of the relationship played an important role in assessing whether the granting of proprietary relief is appropriate¹¹² and Mary Sorochan was awarded a one-third interest in the disputed property.¹¹³

e) *Peter v. Beblow*

The last step in the development of constructive trust as a remedy for unjust enrichment took place in 1993 with *Peter v. Beblow*.¹¹⁴ Ms. Peter and Mr. Beblow lived in a common-law relationship for 12 years between 1973 and 1985. In 1973, Ms. Peter moved with her four children into Mr. Beblow's house, which he occupied at that time with two of his children. During the time of their relationship, Ms. Peter did all the household work and raised the children of their blended family without receiving any compensation. She also took care of the property and did projects like painting, planting a hedge, buying plants and building a rock garden. During their relationship, Mr. Beblow was able to pay off the mortgage on the house, buy a houseboat and a van. In contrast to the preceding cases (*Pettkus v. Becker* and *Sorochan v. Sorochan*), the couple did not own a business or a farm, but was more of an 'ordinary' couple with one spouse working outside the home and the other spouse taking care of the children and the family home. The relationship ended in 1985, when Ms. Peter moved out of the house because of Mr. Beblow's heavy drinking and abusive behavior towards Ms. Peter.

¹¹¹ *Ibid* at para 31.

¹¹² *Ibid* at para 32.

¹¹³ Ziff *supra* n. 96 at 216.

¹¹⁴ *Peter v. Beblow*, (1993) S.C.J. No. 36.

In this case, the Supreme Court of Canada asserted that a constructive trust should only be imposed if a monetary award is insufficient and if there is a special link between the claimant and the property.¹¹⁵ Furthermore, the value of the trust is to be determined on the basis of the “value survived” approach and not the “value received” approach. Consequently, the crucial factor for the value of the trust is the amount by which the property has been improved.¹¹⁶ In *Peter v. Beblow*, Justice McLachlin held that the childcare and homemaking services contributed by the claimant could neither be considered as a gift nor as a contribution pursuant to a legal or contractual obligation.¹¹⁷ In the end, Ms. Peter was awarded the (undivided) family home.

f) Inclusion of Unmarried Cohabitation in Provincial Statutes

Due to the judgments of the Supreme Court of Canada and various other courts,¹¹⁸ several provinces decided to amend their statutes to include unmarried couples in their property rights regimes.

In 2001, Saskatchewan was the first province to change its matrimonial property laws to include unmarried couples. The Saskatchewan government enacted the *Miscellaneous Statutes (Domestic Relations) Act*, 2001. As a result, the *Matrimonial Property Act* was renamed the *Family Property Act* and its scope was expanded to include unmarried spouses that cohabit for at least two years.¹¹⁹ The legislation was a reaction to the decision of a Saskatchewan court in 1999, in which it was stated that the *Matrimonial Property Act*, 1997 violates s. 15(1) of the *Charter of*

¹¹⁵ *Ibid* at para 25.

¹¹⁶ *Ibid* at para 28 – 31.

¹¹⁷ *Ibid* at para 10 – 19.

¹¹⁸ E.g. the decision of the Supreme Court in *Miron v. Trudel* and the decision of a Saskatchewan court in *Watch v. Watch*, 182 Sask.R. 237 had a substantial influence on the legislature in Saskatchewan. The decision of the Nova Scotia Court of Appeal in *Walsh v. Bona* affected the legislature in Nova Scotia.

¹¹⁹ Bala supra n. 82 at 50.

Rights and Freedoms by excluding unmarried spouses from its provisions.¹²⁰ The court applied the Supreme Court of Canada decision in *Miron v. Trudel* (see below). At the time of writing, Saskatchewan is one of three provinces and territories that have opened their matrimonial property regime to unmarried cohabitants without the requirement of registration. The Northwest Territories and Nunavut are the two territories that have extended their property regime to cohabitants.¹²¹

Other provinces have opened their matrimonial property regime to unmarried cohabitants only if they register their relationship. Manitoba, for example, introduced its *Common-Law Partners' Property and Related Amendments Act*,¹²² which took effect in June 2004. The Act amended several statutes in order to allow cohabiting couples to register their relationships under the *Vital Statistics Act* and also to include registered unmarried couples into the matrimonial property regime.¹²³ Similarly, in Nova Scotia the *Matrimonial Property Act*¹²⁴ only applies to unmarried couples that have their relationship registered.¹²⁵

In February 2006, the Ministry of Attorney General of British Columbia declared the review of the *Family Relations Act* starting in 2007. In February 2007, the Civil and Family Law Policy Office published a Discussion Paper on the Division of Family Property where it encourages

¹²⁰ *Watch v. Watch* supra n. 118 at para 16 – 17; also see Bala supra n. 82 at 50.

¹²¹ Both Nunavut and the Northwest Territories expanded their definition of spouse in their *Family Law Act* to include unmarried cohabiting persons that have cohabited for at least two years or that have cohabited in a relationship of some permanence and are together the natural or adoptive parents of a child. As a consequence, Part III (Family Property) and Part IV (Family Home) of the Act apply to unmarried cohabitants. *Family Law Act*, S.N.W.T. 1997, c. 18.

¹²² *Common-Law Partners' Property and Related Amendments Act*, S.M. 2002, c. 48.

¹²³ *Vital Statistics Act*, s. 13.1

¹²⁴ The *Matrimonial Property Act*, R.S.N.S. 1989, c. 275. Nova Scotia was the first province to introduce registered domestic partnerships. This was partly because of the decision of the Nova Scotia Court of Appeal in *Walsh v. Bona*, [2000] N.S.J. No. 117. See Hovius infra n. 125 at 197.

¹²⁵ B. Hovius, "Property Division for Unmarried Cohabitees in the Common Law Provinces" (2003) 21 Canadian Family Law Quarterly 175 at 199.

discussion on the question of whether unmarried couples should be included in the family property regime of the *Family Relations Act*.¹²⁶

g) Conclusion

As seen above, in most Canadian provinces, unmarried couples are still excluded from the matrimonial property regime. However, unmarried couples have the option to contract into the matrimonial property regimes by signing a cohabitation agreement. In British Columbia for example, s. 120.1 of the *Family Relations Act*¹²⁷ stipulates that Part 5 (and 6) of the Act apply to property agreements between unmarried couples. As a result, the provisions on matrimonial property apply to unmarried couples who enter into a cohabitation agreement and s. 65 of the Act allows the judicial reapportionment of their property on the basis of fairness.

It is doubtful whether the option of contracting into a regime is an ideal solution for the situation of unmarried couples. When entering relationships, most individuals do not think about the legal rights and consequences when their relationship comes to an end. Furthermore, many unmarried spouses do not even know what rights and obligations they really have and many might have misconceptions about the latter.¹²⁸

¹²⁶ British Columbia, Ministry of Attorney General, *Family Relations Act Review: Chapter 2: Division of Family Property*, online <<http://www.ag.gov.bc.ca/legislation/pdf/Chapter2-Property.pdf>> at 4 – 6.

¹²⁷ *Family Relations Act*, supra n. 85.

¹²⁸ e.g. The Law Reform Commission of Nova Scotia mentions in its final report that “[t]here was anecdotal evidence before the Commission to the effect that some unmarried parties believe, incorrectly, that the *Matrimonial Property Act* applies to them after one year.” See Nova Scotia, Law Reform Commission, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, online <http://www.lawreform.ns.ca/Downloads/MPA_FIN.pdf> at 22; A study in the UK shows that 56 per cent of unmarried couples thought that they have the same legal rights as marriage after a certain period of time. See G. Douglas, J. Pearce, and H. Woodward, “A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown”, online <<http://www.law.cf.ac.uk/researchpapers/papers/1.pdf>> at 14 – 15.

Although the constructive trust can be used for unmarried spouses as a remedy for the division of property at the breakdown of the relationship, they are far from being treated the same as married persons. The concept of the constructive trust means much more uncertainty, because it does not include a presumption of equal sharing of property and the actual share of property that is given to the claimant involves judicial discretion and thus might vary immensely from case to case. Furthermore, the constructive trust is generally more difficult to prove than the statutory remedy¹²⁹ and it is often especially hard to prove the causal connection between the property and the contribution.¹³⁰

3) The *Charter of Rights and Freedoms* and its Influence on the Development of the Laws Related to Unmarried Cohabitation

The *Canadian Charter of Rights and Freedoms*¹³¹ was enacted in 1982. Although the *Charter* does not contain any sections on the right to family, it has gained an increasing importance in family law and particularly in the field of unmarried cohabitation over time. In the beginning, the application of the *Charter* in the field of family law was unsure, because it requires an element of governmental action implicated in the litigation.¹³² Moreover, there was some concern about applying “a simple rights analysis to the family”.¹³³ Consequently, courts refused to give familial

¹²⁹ In British Columbia, for example, s. 60 of the *Family Relations Act*, which only applies to married couples and not to cohabiting couples, stipulates that the onus is on the spouse *opposing* a property claim under s. 56 to prove that the property is not ordinarily used for a family purpose.

¹³⁰ These problems are discussed by the dissenting opinions in *Nova Scotia v. Walsh*. See below Chapter 4. III.

¹³¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK) 1982, c. 11.

¹³² S.B. Boyd, “The Impact of the Charter of Rights and Freedoms on Canadian Family Law”, (2000) 17 Can. J. Fam. L. 293 at 297.

¹³³ A.H. Young, “The Changing Family, Rights Discourse and the Supreme Court of Canada”, (2001) 80 Can. Bar Rev. 749 at 768.

relationships recognition or protection under the *Charter*.¹³⁴ Between the enactment of the *Charter* and the early 1990s, constitutional challenges from unmarried couples were rejected by Canadian courts. The courts argued that unmarried couples were not discriminated against, because they could choose to marry, if they wanted.¹³⁵

However, in 1995, this trend came to an end with the decision of the Supreme Court of Canada in *Miron v. Trudel*.¹³⁶ In this decision, the Supreme Court of Canada had to deal with the question of whether the exclusion of unmarried couples from an automobile insurance policy violates s. 15(1) of the *Charter*, which guarantees equality rights in relation to factors such as sex, race and religion. John Miron and Jocelyne Valliere started to live in a common-law relationship in May 1983. The couple had two children together, born in 1981 and 1984. In 1987, Miron suffered injuries while a passenger in a motor vehicle (both the vehicle and the driver were uninsured). As a consequence, Miron claimed accident benefits for loss of income and damages against Valliere's insurance policy. Under the policy, accident benefits were extended to the "spouse" of the policy holder. The insurer rejected the claim, arguing that Miron and Valliere were not legally married and therefore not "spouses".

The main problem of the case was that marital status, as a basis for the distinction between married and unmarried couples, is not mentioned as a ground for discrimination in s. 15(1) of the *Charter*. Nonetheless, McLachlin J.¹³⁷ held that marital status is an analogous ground of discrimination. First, she mentioned that discrimination on the basis of marital status touches the

¹³⁴ N. Bala, "The Charter of Rights & Family Law in Canada: A New Era", (2001) 18 Can. F. L. Q. 373 at 374

¹³⁵ Bala, supra n. 82 at 47.

¹³⁶ *Miron v. Trudel* supra n. 36.

¹³⁷ Justice McLachlin wrote for herself and three other members of the court. Justice L'Heureux-Dubé concurred with separate reasons.

dignity of the individual and also affects the liberty to choose between different kinds of intimate relationships. Second, she argued that unmarried couples form a historically disadvantaged group. Finally, McLachlin J. emphasized that individuals are only theoretically free to choose between marriage and unmarried cohabitation. In reality, many individuals would like to marry, but cannot because of financial, religious or social reasons, or because the other partner is not willing to get married.¹³⁸ As a remedy, unmarried spouses who had cohabited for at least three years were read into the definition of spouse under the *Insurance Act*, R.S.O. 1980, c. 218.

The decision of the Supreme Court of Canada in *Miron v. Trudel* had a great impact on the development of rights for unmarried couples throughout Canada. An increasing number of courts started to apply s. 15(1) of the *Charter* in their judgments and as a consequence several provincial statutes were amended to include unmarried spouses. However, the convergence of marriage and unmarried cohabitation, which was crucially influenced and amplified by *Miron v. Trudel*, came to an end with the decision of the Supreme Court of Canada in *Nova Scotia v. Walsh*. In *Walsh*, the Supreme Court of Canada moved away from the functional approach to the definition of family in *Miron* and towards a formal distinction of unmarried cohabitation and marriage.

4) The Supreme Court of Canada in *Nova Scotia v. Walsh*

In 2002, the assimilation of unmarried cohabitation and marriage came to an unexpected end, when the Supreme Court of Canada decided in *Nova Scotia v. Walsh* that the exclusion of unmarried cohabiting persons of the opposite sex from the *Nova Scotia Matrimonial Property Act* is not discriminatory within the meaning of s. 15(1) of the *Charter*. The majority held that the

¹³⁸ *Ibid* at 498.

distinction between married and unmarried couples does not affect the dignity of unmarried individuals but rather reflects the differences between marriage and unmarried cohabitation.¹³⁹

5) Rights on the Death of a Partner

In Canada, cohabiting couples are still treated differently with regard to rights on the death of their partner as compared to married couples.¹⁴⁰ However, some provinces have expanded their succession legislation in order to give cohabitants selective rights (e.g. under the dependant's relief legislation). In British Columbia, for example, the *Wills Variation Act*¹⁴¹ includes persons who cohabit with another person for at least two years in the definition of spouse. As a consequence, a common-law spouse might be granted maintenance from the estate, "if the testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children."¹⁴²

In some jurisdictions, unmarried cohabitants are even entitled to inherit from their deceased spouse in the case of intestacy.¹⁴³ In British Columbia, the *Estate Administration Act*¹⁴⁴ contains a definition of spouse that considers common-law spouses, which are defined as

1. a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or
2. a person who has lived and cohabited with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least 2 years immediately before the other person's death[.]¹⁴⁵

¹³⁹ For a comprehensive overview of the decision of the Supreme Court of Canada on *Nova Scotia v. Walsh* please cf. below Chapter 4. III.

¹⁴⁰ Stalbecker-Pountney and Holland supra n. 88 at 4-1.

¹⁴¹ *Wills Variation Act*, R.S.B.C. 1996, c. 490.

¹⁴² *Wills Variation Act*, R.S.B.C. 1996, c. 490, s. 2.

¹⁴³ A.H. Osterhoff, *Osterhoff on Wills and Succession: Text, Commentary and Materials* (Toronto: Thomson Carswell, 2007) at 70.

¹⁴⁴ *Estate Administration Act*, R.S.B.C. 1996, c. 122.

¹⁴⁵ *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 1.

As a result, common-law spouses in British Columbia are entitled to inherit from their partner in the case of intestacy.¹⁴⁶

Other provinces that give cohabiting persons certain rights on the death of a partner are Alberta, Manitoba, New Brunswick, Northwest Territories and Nunavut, Saskatchewan and Yukon.¹⁴⁷ Interestingly, some of the provinces that do give cohabitants rights on the death of their partner do *not* include them in their matrimonial property regime (e.g. British Columbia), which shows that property is treated differently after death of a common-law spouse as after the separation of two common-law spouses.¹⁴⁸

6) Miscellaneous

As mentioned above, cohabitation agreements used to be considered illegal and were therefore not recognized or enforced by the courts. However, this attitude towards contracts between unmarried couples changed over time and cohabitants are now free to enter into agreements. In order to be valid, these contracts must comply with the common-law rules and

¹⁴⁶ *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 83 stipulates that if an intestate dies leaving a spouse but no issue, the person's estate goes to the spouse.

¹⁴⁷ Alberta: *Dependants Relief Act*, R.S.A. 2000, c. D-10.5, s. 1(d)(ii). The definition of dependant includes the adult interdependent partner of the deceased. Adult interdependent partners are also included in the *Intestate Succession Act*, R.S.A. 2000, c. D-14. Manitoba: *Dependants Relief Act*, C.C.S.M. c. D 37, s. 1. New Brunswick: *Provision for Dependants Act*, R.S.N.B. 1973, c. P-22.3. Northwest Territories and Nunavut: *Dependants Relief Act*, R.S.N.W.T. 1988, c. D-4.

¹⁴⁸ There are currently plans to reform the *Wills Act*, the *Estate Administration Act*, the *Probate Recognition Act*, and several other Acts that deal with the passage of property on death in British Columbia. The proposed Act (*Bill 4 – 2009: Wills, Estate and Succession Act*), which will be a combination of these Acts, will apply to both married and unmarried cohabiting individuals. The planned reform will therefore not change that fact that property is treated differently after death of a common-law spouse as after a relationship breakdown. See *Bill 4 - 2009* online Legislative Assembly of British Columbia <http://www.leg.bc.ca/39th1st/1st_read/gov04-1.htm#section2>.

statutory provisions.¹⁴⁹ Several provinces have enacted legislation that allows unmarried couples to make cohabitation agreements. However, the scope of these provisions varies from province to province.¹⁵⁰

Many other provincial and federal statutes were amended in order to include unmarried couples. In 1993, the federal *Income Tax Act* was amended to include unmarried couples that cohabit for at least 12 months or are the natural or adoptive parents of the same child.¹⁵¹ In 2000, the federal government enacted the *Modernization of Obligations and Benefits Act*,¹⁵² which gave various rights and obligations to unmarried couples by amending sixty federal statutes and therefore eliminated the distinction between unmarried and married spouses in many areas.¹⁵³ The *Act* also had an immense impact on same-sex cohabitants and it is widely viewed as a response to the Supreme Court decision in *M. v. H*, which extended spousal support obligations to same-sex partners.¹⁵⁴

British Columbia has extended the definition of “spouse” in various laws or enacted new laws that include both married and unmarried couples, e.g. the *Employment and Assistance Act*,¹⁵⁵ the *Crime Victim Assistance Act*,¹⁵⁶ the *Workers Compensation Act*¹⁵⁷ and the *Family Compensation Act*.¹⁵⁸

¹⁴⁹ Stalbecker-Pountney and Holland supra n. 88 at 5-1.

¹⁵⁰ *Ibid* at 5-10.

¹⁵¹ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

¹⁵² *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

¹⁵³ Payne and Payne, supra n. 35 at 49.

¹⁵⁴ *M. v. H.*, [1999] 2 S.C.R. 3. For further information see Chapter 2. III. 7).

¹⁵⁵ *Employment and Assistance Act*, S.B.C. 2002, c. 40; s. 1(1) includes couples that cohabit in a marriage-like relationship.

¹⁵⁶ *Crime Victim Assistance Act*, S.B.C. 2001, c. 38.

¹⁵⁷ *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

¹⁵⁸ *Family Compensation Act*, R.S.B.C. 1996, c. 126.

7) Same-Sex Cohabitation: A Different Story?

The history of unmarried same-sex cohabitation is somewhat different from that of opposite-sex cohabitation and developments in this area proceeded much slower. Originally, same-sex couples were not socially or legally recognized. Not only were they excluded from family law legislation and statutory benefits that were given to married and opposite-sex cohabiting couples, but also was it unclear if they were permitted to enter into cohabitation agreements.¹⁵⁹

The first changes happened in the late 1970s and early 1980s when many Canadian provinces changed their Human Rights Codes to include provisions prohibiting discrimination on the basis of sexual orientation.¹⁶⁰ As a consequence of these changes and also after the introduction of the *Charter of Rights and Freedoms* in 1982, same-sex couples started to become more socially accepted in Canada and with it came a growing demand for legal recognition of same-sex cohabitation.¹⁶¹ Eventually, law courts started giving limited recognition to same-sex couples. In 1986, for example, a BC court decided that the constructive trust doctrine is applicable to both opposite-sex and same-sex cohabiting couples.¹⁶² However, major change for same-sex couples did not happen until the 1990s, when *Charter* challenges were successfully used against discriminatory laws.

¹⁵⁹ W. Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 Canadian Journal of Family Law at 133

¹⁶⁰ Bala supra n. 82 at 60. Discrimination claims under the Human Rights Code occurred mainly in the employment context (e.g. dismissal from employment or denial of promotion). See S.B. Boyd and C.F.L. Young, "'From Same-Sex to No Sex?': Trends Towards Recognition of (Same-Sex) Relationships in Canada" (2003) 1 Seattle Journal for Social Justice at 761.

¹⁶¹ Bala supra n. 82 at 60. The *Charter* did not (and still does not) list sexual orientation as a prohibited ground of discrimination under s. 15 (1). It was not until 1995 that it was confirmed as an analogous ground.

¹⁶² Bala supra n. 82 at 60 - 61; *Anderson v. Luoma*, [1986] B.C.J. No. 3000.

One important cornerstone of these *Charter* challenges was the decision of the Supreme Court of Canada regarding *Egan v. Canada*.¹⁶³ The appellants were a gay couple living since 1948 in a same-sex relationship, which was characterized by commitment and interdependence. From 1986 on, one partner received old age security and guaranteed income supplements under the *Old Age Security Act*.¹⁶⁴ When his partner applied for the spousal allowance he was rejected because the same-sex relationship did not fall within the *Act*.¹⁶⁵ Although the Supreme Court of Canada dismissed the claim, its decision was nonetheless a significant victory in the development of same-sex cohabitation and had an important influence on subsequent *Charter* challenges: The entire Supreme Court confirmed sexual orientation as an analogous ground of discrimination under s. 15 (1) of the *Charter*.¹⁶⁶ While four dissenting judges held that s. 15 (1) of the *Charter* is infringed and that the violation could not be saved by s. 1, four judges of the majority ruled that the *Charter* is not violated because the differential treatment was not discriminatory.¹⁶⁷ It was therefore the judgment of Sopinka J. that influenced the outcome: he held that s. 15 (1) was infringed but that the violation could be saved under s. 1 of the *Charter*.

Egan v. Canada cleared the way for many other *Charter* challenges, which successfully challenged discriminatory statutes. One of the most important cases is the Supreme Court of Canada judgment in *M. v. H.*¹⁶⁸ Here, the Supreme Court had to determine whether a lesbian could claim spousal support from her former partner under Part III of the Ontario *Family Law*

¹⁶³ *Egan v. Canada*, [1995] 2 S.C.R. 513

¹⁶⁴ *Old Age Security Act*, R.S.C., 1985, c. O-9, ss. 2, 19(1).

¹⁶⁵ *Egan v. Canada* supra n. 163 at 528.

¹⁶⁶ Holland supra n. 159 at 134.

¹⁶⁷ Bala supra n. 82 at 62. The four judges of the majority held that “none of the couples excluded from benefits under the Act are capable of meeting the fundamental social objectives thereby sought to be promoted by Parliament.” See *Egan v. Canada* at 516.

¹⁶⁸ *M. v. H.* supra n. 154.

Act.¹⁶⁹ The problem was that the definition of “spouse” only included married couples and opposite-sex couples that had cohabited for at least 3 years but not same-sex couples.¹⁷⁰ The Supreme Court held that it is discriminatory to exclude same-sex couples from the provision. It emphasized that the definition of “spouse” in s. 29 of the Ontario *Family Law Act* “violates the human dignity of individuals in same-sex relationships”¹⁷¹ and is therefore unconstitutional. The court further stated:

The exclusion of same-sex partners from the benefits of s. 29 promotes the view that [...] individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. Such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.¹⁷²

Although the decision in *M. v. H.* directly affected only Ontario, the judgment had a major impact on both provincial and federal legislation throughout Canada. The Supreme Court clearly expressed that any Canadian law that denied same-sex couples rights that were given to opposite-sex cohabiting couples was unconstitutional.¹⁷³ The consequence was a flood of legislative changes that expanded the definition of “spouse” to include same-sex couples on a federal and provincial level. The biggest federal change was brought by the *Modernization of Benefits and Obligations Act*,¹⁷⁴ which amended 68 federal statutes in order to include same-sex couples.¹⁷⁵ Many provinces followed with similar amendments and British Columbia, for example, enacted the *Definition of Spouse Amendment Act*, S.B.C. 1999, c. 29 and the *Definition of Spouse*

¹⁶⁹ *Family Law Act*, R.S.O. 1990, c. F-3.

¹⁷⁰ *Ibid* s. 29.

¹⁷¹ *M. v. H.* supra n. 154 at para. 3.

¹⁷² *Ibid* at para. 73.

¹⁷³ Bala supra n. 82 at 65 – 66.

¹⁷⁴ *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12.

¹⁷⁵ Boyd and Young supra n. 160 at 764.

Amendment Act, S.B.C. 2000, c. 24, which expanded the definition of spouse to same-sex couples for various areas.¹⁷⁶

Today, same-sex unmarried cohabitants have virtually the same rights and obligations as opposite-sex unmarried cohabitants. However, it should be mentioned that the biggest success for same-sex couples happened outside unmarried cohabitation: the introduction of same-sex marriage in Canada in 2005.¹⁷⁷

IV. Conclusion

The development of unmarried cohabitation started as an alternative to marriage. Initially, unmarried couples were treated differently and received less legal recognition than married couples. Over time, however, they were granted an increasing number of rights and obligations. Many provincial statutes were amended to include unmarried cohabitants in the definition of “spouse” and thus the assimilation of unmarried cohabitation and marriage commenced. However, the convergence of marriage and unmarried cohabitation has not yet fully taken place. In British Columbia, for example, unmarried couples are excluded from Parts 5 and 6 of the *Family Relations Act*,¹⁷⁸ which regulates matrimonial property and pensions.

Before 2002, it looked like marriage and unmarried cohabitation were on their path to full convergence. However, after the Supreme Court decision in *Walsh* in 2002,¹⁷⁹ this development might have come to a halt. It is now in the hands of the legislators to continue the advancement of

¹⁷⁶ *Ibid* at fn. 37.

¹⁷⁷ *Civil Marriage Act*, S.C. 2005, c. 33.

¹⁷⁸ *Family Relations Act*, R.S.B.C. 1996, c. 128.

¹⁷⁹ *Nova Scotia v. Walsh*, supra n. 34.

the last 38 years. Some Canadian provinces have already taken that step and amended their matrimonial property regimes to include unmarried spouses. Others might follow this lead and maybe in ten years from now, when the number of unmarried cohabitants will likely have increased even more, the Supreme Court of Canada might have to rethink its judgment on unmarried cohabitation and property. It is therefore important to now look at the question of whether married and unmarried couples should be legally treated the same.

Chapter 3: Overview of the Debate of whether Married and Unmarried Cohabiting Couples Should be Legally Treated the Same

I. Introduction

The Question of whether married and unmarried couples should be treated equally is not a new controversy. In Canada, its first peak was during the late 1970s and early 1980s when unmarried cohabitation started to become a more frequent phenomenon and was increasingly legally recognized. A second peak arose around the early 2000s when the Supreme Court of Canada decided in *Nova Scotia (Attorney General) v. Walsh*¹⁸⁰ that it is not discriminatory to exclude unmarried cohabitants from matrimonial property legislation. This decision was somewhat unexpected since the development of case law and statutory law seemed to have moved towards the extension of the matrimonial property regime to include unmarried couples.¹⁸¹

Over the years, many have written about the question of whether married and unmarried couples should have the same rights and obligations. Not only legal scholars but also scholars from the feminist and sociological fields (or a combination of these) have contributed to the debate. This chapter aims at giving an overview of the arguments and the different approaches to the matter. It does not provide a comprehensive literature review but provides an overview of a selected number of authors that have an original approach to the topic. It incorporates authors from other common-law countries like the UK, because the debate is not restricted to Canada.

¹⁸⁰ *Nova Scotia v. Walsh*, 2002 supra n. 34.

¹⁸¹ For example, *Miron v. Trudel* supra n. 36. For information on which provinces have already extended their matrimonial property laws please see above Chapter 2. III. 2) f).

Furthermore, it contrasts authors from the early 1980s as well as from the late 1990s and early 2000s and highlights the different arguments of these two eras.

II. Feminist Approach

The feminist approach to the debate regarding the legal recognition of unmarried cohabitation is diverse and controversial. Since the rights and responsibilities of unmarried couples in Canada were expanded by including them within the matrimonial regime rather than creating new laws, the more general feminist discourse concerning the desirability of matrimonial law and marriage in general also applies to unmarried cohabitation.

In the 1970s and early 1980s, the focus of the second wave feminism was mainly on equal opportunities: women fought for the removal of restrictions and penalties that constrained their lives.¹⁸² It was criticized that women were only perceived as wives and mothers in society and that marriage was the only “socially acceptable career” without any alternatives.¹⁸³ Many feminists furthermore condemned the State for its involvement in marriage and the privileges it is given through for example social policy and taxation.¹⁸⁴ Many feminists adopted the opinion that spousal support is a “sexist concept that ha[s] no place in a society in which men and women [are] to be treated as equals.”¹⁸⁵ With growing numbers of unmarried cohabiting couples the important question for many feminists was whether they should support the extension of marital

¹⁸² R. Auchmuty, “The Married Women’s Property Acts: Equality Was Not the Issue” in R. Hunter (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Portland: Hart Publishing, 2008) at 13.

¹⁸³ R. Auchmuty, “What’s so special about marriage? The impact of *Wilkinson v. Kitinger*” (2008) Vol. 20, No. 4, *Child and Family Quarterly* at 493, 494.

¹⁸⁴ *Ibid* at 491 – 492.

¹⁸⁵ J Hough, “Mistaking liberalism for feminism: Spousal support in Canada” (1994) Vol. 29, Issue 2, *Journal of Canadian Studies* 147 – 164.

rights and responsibilities to unmarried cohabiting couples. For many, unmarried cohabitation was only then a true alternative to marriage if it was an area free of regulations.

Later on, many feminists realized that equal opportunities do not necessarily lead towards equal outcomes but rather reinforces the status quo.¹⁸⁶ Consequently, the focus shifted from achieving formal equality towards substantive equality. Spousal support, for example, started to be seen as compensation for unpaid work (childcare, household work etc.) and was demanded by many feminists in order to mitigate disadvantages women may experience after the breakdown of a relationship.¹⁸⁷

1) Discourse of the Early 1980s

a) Individualism and Liberal Feminism

It is arguable whether Ruth Deech¹⁸⁸ is a feminist or rather an advocate of individualism. However, the way she approaches the question of convergence between marriage and unmarried cohabitation is very close to the ideologies of early liberal feminism.¹⁸⁹ It makes therefore sense to include Deech in this section.

Deech generally rejects the legal recognition of unmarried cohabitation – whether through expanding marital law or by creating new laws – with the argument that “women do not need and

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ R Deech, “The Case Against Legal Recognition of Cohabitation” in J Eekelaar, S Katz, (ed), *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Toronto: Butterworths, 1980) 300 – 312.

¹⁸⁹ Deech supports the idea of equality for women and promotes women’s independence. However, she does not favor substantive equality, which is concerned about equal *outcomes*. Liberal feminism on the other hand also focuses more on formal equality, i.e. for example equal opportunities for women, and not on substantive equality.

ought not to require to be kept by men after the conjugal relationship between them has come to an end”.¹⁹⁰ Her argument is based upon an individualistic standpoint. In general, individualism puts focus on single persons and supports independence, free choice and self-development.¹⁹¹ Applied to the family, individualism perceives the family as a gathering of individuals with separate rights and does not treat it as a union. From a feminist point of view, individualism can be a movement towards more equality for women within families. Historically, marriage – the only accepted family form – was a very patriarchal institution and women would lose their property rights and their personhood.¹⁹² Women were not perceived as individuals, but as property of their husbands. Individualism on the other side acknowledges the personal needs and desires of women and supports their self-development. It generally perceives women as individuals and not solely as wives and mothers in the context of family.

Deech’s first major argument against the convergence of marriage and unmarried cohabitation is the assumption that married spouses have different expectations and intentions when entering a marriage than unmarried couples when entering a common-law relationship.¹⁹³ Deech claims that it is irrelevant why two individuals have decided to live in unmarried cohabitation. In her opinion, the only relevant reason is why they did not marry.¹⁹⁴ She argues that if couples are unhappy with their legal situation, they could simply choose to marry.¹⁹⁵ This belief originates in the assumption that the decision to cohabit instead of marry is a decision of free choice. Deech also assumes that persons that enter unmarried cohabitation are well aware of

¹⁹⁰ *Ibid* at 300.

¹⁹¹ *Ibid*.

¹⁹² Arnup *supra* n. 2 at 5.

¹⁹³ Deech *supra* n. 188 at 301.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

their rights and obligations as compared to marriage.¹⁹⁶ She emphasizes that “[t]here ought to be a corner of freedom for such couples to which they can escape and avoid family law.”¹⁹⁷ Deech perceives unmarried cohabitation as a family form that gives women the opportunity to pursue a career, to have a life that is characterized by freedom and independence, and to escape the male-dominated institution of marriage.¹⁹⁸ This freedom that is offered by unmarried cohabitation would be destroyed through its assimilation to marriage. Deech therefore claims that cohabitation should only be converged with marriage if the legal regulation of marriage is cut back. She even goes further and states: “[M]arriage should become more like cohabitation and not the other way around.”¹⁹⁹

As a second main argument against the legal recognition of unmarried cohabitation, Deech claims that the extension of marital laws to cohabitants would contravene the idea of equality of women. For example, the award of spousal support to a woman after the breakdown of a relationship is based on the assumption that she is the weaker of the two partners, that she is not able to be self-supporting after the breakdown of the relationship, and that she needs to be protected by the law court against exploitation.²⁰⁰ Deech does not agree with these presumptions and argues that even in the cases where women give up their careers to stay at home and take care of the household, women do not experience any damage and are therefore not in a weaker position.²⁰¹ This argument is based on her notion that some women abandon their career with relief for the more “pleasant” work of housekeeping, while others pursue careers mainly because

¹⁹⁶ *Ibid* at 302.

¹⁹⁷ *Ibid*.

¹⁹⁸ *Ibid*.

¹⁹⁹ *Ibid* at 303.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid* at 304.

they want to meet or attract male cohabitants.²⁰² Deech emphasizes that a claim for compensation of the woman's sacrifices would make the relationship one of master and servant and would therefore be opposed to the idea of equality.²⁰³

Deech furthermore mentions the issue of a possible collision of several claims against one man. If unmarried partners were to be given spousal support claims or property claims, a man might have to face two different claims (one by his wife and one by his cohabitant) at the same time. Deech argues that “[s]ociety in general, and men in particular, cannot support two types of marital status.”²⁰⁴

How should cohabitants then be treated from a legal perspective? Should they be ignored completely by the law? Deech answers this question by proposing that unmarried couples should be treated no different from any other citizens. She argues that unmarried couples are able to regulate their relationship through contracts if they wish and should therefore not fall within the scope of family law.²⁰⁵ For Deech, family law itself is not desirable because it treats women as weaker and dependent on men.²⁰⁶ She further argues that former cohabitants should try to become self-sufficient. If they fail, the burden should be put on society in general and not on the ex-partner.²⁰⁷ “The need now is for family law and social security law to endorse the idea of the woman as self-supporting.”²⁰⁸

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid* at 306.

²⁰⁵ *Ibid* at 309.

²⁰⁶ *Ibid* at 307.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid* at 308.

b) Complete Abolition of Marriage?

O'Donovan²⁰⁹ writes about the question of a reform of marriage-law without taking unmarried cohabitation into account. Nevertheless, her article mentions some valuable considerations that are helpful for the debate of whether married and unmarried couples should be legally treated the same.

Not only does O'Donovan demand the abolition of spousal support, but also the elimination of marriage itself as a legal institution.²¹⁰ She claims that an increasing number of people believe that no financial burden should be put on spouses after the breakdown of a marriage.²¹¹ O'Donovan goes even one step further by arguing that it might be desirable to abolish financial support *during* marriage.²¹² This would be an important step towards equality between men and women and also towards more economic independence for women. O'Donovan enumerates several factors that would be necessary to achieve such goals: equal participation of partners in the work force, payment geared to persons as individuals and not as breadwinners, treatment of persons (especially women) as individuals by tax departments and social security.²¹³ Similarly to Deech (see above), O'Donovan claims that the burden to support women should not be put on their partners but on society. She also supports the idea of individualism and the treatment of spouses as individuals, not as a family unit. However, for those who wish to have further family obligations, the possibility to create private contracts should be still available.²¹⁴ O'Donovan argues that changes towards the abolition of the legal status of marriage are already taking place (e.g. children born out of wedlock are no longer regarded as illegitimate, wives do not have to

²⁰⁹ K O'Donovan, "Should all Maintenance of Spouses be Abolished?" (1982) 45 Modern Law Review 424 – 433.

²¹⁰ *Ibid* at 433.

²¹¹ *Ibid* at 425.

²¹² *Ibid* at 431.

²¹³ *Ibid* at 428.

²¹⁴ *Ibid* at 432.

take their husbands' names, there is no more obligation for spouses to live together, etc.) and that complete abolition is feasible.²¹⁵

With regard to children, however, O'Donovan acknowledges that there will always exist a dependence on the parents and argues that a legal institution for raising children is necessary.²¹⁶ She therefore demands that the legal institution of marriage be replaced with a legal institution of parenthood.²¹⁷ With this kind of institution the state would be able to indicate to parents how to behave as parents and "[b]oth parents will have to give equally their time, love and attention to their children."²¹⁸ O'Donovan further argues that the legal institution of parenthood would lead to an elimination of dependence between the spouses:

It is the dependency of the children that is the predominant material cause of dependency in marriage-type relationships. Only when the cost of that dependency is equally shared by the parents will the dependency of one spouse on the other be eliminated.²¹⁹

c) Other Feminist Approaches

Carol Smart is not only a very important scholar in the field of sociology (see below *IV. Sociological Approach*) but also in the feminist realm. In one of her early books, Smart gives a good overview of the early feminist debate in the context of family law by portraying different viewpoints.²²⁰ Smart states that in the early 1980s most feminists favored the idea of abolishing spousal support.²²¹ However, she points out that one major problem of eliminating spousal support would be that women would have to rely on a insufficient welfare system. She further

²¹⁵ *Ibid* at 431 – 432.

²¹⁶ *Ibid* at 432.

²¹⁷ *Ibid* at 433.

²¹⁸ *Ibid*.

²¹⁹ *Ibid*.

²²⁰ C Smart, *The Ties that Bind: Law, marriage and the reproduction of patriarchal relations* (London, Boston: Routledge & Kegan Paul, 1984) at 220 – 240.

²²¹ *Ibid* at 227.

argues that the first step would be to reform the welfare system on which women in need could rely.²²² Only then could women achieve the economic independence many feminists hope to reach through the abolition of spousal support.²²³ However, Smart also acknowledges that it might not be a good solution to let individual men pay for women, because this approach would deny the fact that men often cannot afford to pay for spousal support.²²⁴

Smart also argues that changes within family law are not possible without also making changes in other legal areas. She admits that the complete abolition of marriage might sound attractive, but she emphasizes that such a request would be both unpopular and unrealistic.²²⁵

It would be far more effective to undermine the social and legal *need* and support for the marriage contract. This could be achieved by withdrawing the privileges which are currently extended to the married heterosexual couple.²²⁶

2) Discourse of the Late 1990s and Early 2000s

a) Dichotomy between Marriage and Unmarried Cohabitation

Although Brook²²⁷ does not explicitly engage in the debate over whether marriage and unmarried cohabitation should be legally converged, she addresses issues and questions in her work that contribute to the general debate. She does not make an explicit decision in favor of marriage or unmarried cohabitation but argues that the dichotomy between marriage and cohabitation cannot be upheld easily any more.

²²² *Ibid.*

²²³ *Ibid* at 224.

²²⁴ *Ibid.*

²²⁵ *Ibid* at 225.

²²⁶ *Ibid.*

²²⁷ Brook *supra* n. 58.

i. Cohabitation as Freedom?

Brook mentions several arguments against the legal recognition of unmarried cohabitation: First, cohabitation means freedom from the patriarchal institution of marriage; second, the legal recognition of unmarried cohabitation devalues marriage; and third, cohabitation (without legal recognition) allows freedom from state incursion into private life.²²⁸

The reasoning that cohabitation offers the liberation of women from a patriarchal institution seems to be a very strong feminist argument. However, Brook argues that most of the legislation that was enacted to regulate cohabitation was a consequence of feminist demands to end sexual and economic exploitation of women in common-law relationships.²²⁹ She also questions the ability of cohabitation per se to accomplish the liberation of women and argues that it is more likely to be accomplished through the refusal to adopt traditional roles within marriage than through an alternative relationship form outside of marriage.²³⁰

Brook also questions the argument that cohabitation should be a private sphere that is free from state intervention. She argues that

if the personal does not exclude the political, and if lives are regulated through disciplinary ephemera as well as by laws and their police, there is little reason to assume that the absence of legislative regulation imputes or implies any necessary increase in freedom. The division of public and private levels of relationship (where – ostensibly – marriage is public and non-marriage is private) accomplishes little more than to attempt to underline an already problematic and unstable theoretical distinction.²³¹

²²⁸ *Ibid* at 157.

²²⁹ *Ibid* at 159.

²³⁰ *Ibid*.

²³¹ *Ibid* at 162.

Brook furthermore challenges the assumption that cohabitation has historically been an area free of regulation by mentioning that at the beginning of the twentieth century in the United States ‘common-law marriages’ were granted the same rights and obligations as legal marriage in most cases.²³²

ii. Separation between Marriage and Unmarried Cohabitation?

Brook claims that the distinction between marriage and unmarried cohabitation cannot be made easily any more.²³³ Divorce reform and the introduction of the no-fault divorce have changed the definition of breakdown and separation. In order to determine these terms, it is necessary to look at whether the parties continued to live together under one roof, to have sexual intercourse, or to appear in public as husband and wife.²³⁴ Most of these features are also used to characterize a relationship as unmarried cohabitation, which proves that marriage and unmarried cohabitation have become more and more alike. Brook emphasizes

Certified marriage and cohabitation constitute performances whose steps and rhythms are more or less identical. One is biopolitically registered, the other is not. One is brought into being, in the first instance, with explicit, instantly transformative speech acts (and sex acts), while the other tends to congeal as “marriage” over time. But neither is more or less authentic than the other.²³⁵

She furthermore states that even though the intention of a couple at the beginning of a relationship might be clearly aimed at financial and social independence, these intentions might fade over time and the relationship might more and more resemble a marriage. Brook calls this phenomenon “marriage creep”.²³⁶

²³² *Ibid* at 161 – 162.

²³³ *Ibid* at 199.

²³⁴ *Ibid* at 163.

²³⁵ *Ibid* at 173 – 174.

²³⁶ *Ibid* at 158.

b) The Rejection of Marital Regulations and Marriage itself

Similar to scholars of the early 1980s, Auchmuty²³⁷ questions the desirability of extending marital rights to other intimate relationship forms. Although she primarily looks at the question of whether same-sex marriage should be introduced in the UK, her feminist approach is applicable to any (same-sex or opposite-sex) intimate relationship outside of marriage and the question of whether they should be legally treated the same.

Auchmuty is generally opposed to marriage because of its history of women's oppression and gendered exploitation and abuse.²³⁸ She criticizes the idea of a legal regime for marriage with the argument that many people, in particular women, do not know about the legal consequences of marriage when they enter it.²³⁹ As a reason for this lack of knowledge, Auchmuty mentions the missing legal education for teenagers at school as well as the insufficient legal training in family law at law schools.²⁴⁰ She argues that the "failure to dispel misconceptions about the law is an efficient mechanism for social control" and suggests that any teenager should receive practical legal information at school.²⁴¹

Auchmuty emphasizes that one major difference between marriage and other intimate relationship forms like unmarried cohabitation is that only marriage laws impose a formal legal

²³⁷ R. Auchmuty, "Same-sex Marriage Revived: Feminist Critique and Legal Strategy" (2004) 14 *Feminism & Psychology* 101 – 126.

²³⁸ *Ibid* at 103, 105.

²³⁹ *Ibid* at 112. Auchmuty mentions that 41 percent of interviewed persons did not know that marriage would change the nature of the legal relationship with their partner.

²⁴⁰ *Ibid*.

²⁴¹ *Ibid*. Auchmuty suggests legal education for teenagers in the field of family law, housing law and consumer law.

procedure for the dissolution of the relationship (i.e. divorce).²⁴² She argues that arrangements between the couple (i.e. contracts) regarding the distribution of property are preferable to the marital regulations because they are less likely to be changed by courts. At the breakdown of a marriage, however, the “divorce court has an unlimited discretion to redistribute property as it thinks fit.”²⁴³ Auchmuty therefore favors individual contracts over legal regulation of intimate relationships. She even states that there is no reason to privilege any couple (married or unmarried) at all:

Couples, after all, are already privileged: happily coupled people enjoy love, company, mutual support, extra money and higher status than single people. They have someone to share the housework and childcare, someone to go on holiday with, someone to care for them when ill; they can afford nicer homes, indeed, they can afford to buy a home when many single people cannot. Most of all, they live each day with the comfortable assurance that they have succeeded in finding love and *being chosen* – in contrast to the undesirable uncoupled or unfortunate de-coupled. Do they deserve extra privileges when they are so richly served?²⁴⁴

Even though Auchmuty’s statement might be rather cynical and exaggerated, it nonetheless incorporates a significant argument against privileging certain relationship forms: Why does the state favor those that are already privileged by being in a stable and supportive relationship over individuals like, for example, single mothers who often lack a supportive system and might therefore have to face worse economic hardship than most couples do.²⁴⁵

Finally, Auchmuty warns about the assimilation of other intimate relationship forms with marriage. Using the example of introducing same-sex marriage in the UK, she states that simply extending the rights and regulations of opposite-sex marriage to same-sex couples might not be

²⁴² *Ibid* at 113.

²⁴³ *Ibid* at 115. Please note that private contracts also underlie judicial review and can be declared (partly) null and void if they are unlawful.

²⁴⁴ *Ibid* at 122.

²⁴⁵ However, it is also important to note that not all couples live in relationships that are characterized by companionship, mutual support, love and respect. There are many relationships (married and unmarried ones) where poverty, physical and/or mental abuse, and violence are predominant.

the best solution because it assumes that heterosexual values are the norm.²⁴⁶ More generally spoken: the legal assimilation of other intimate relationship forms to marriage overlooks the fact that those relationships can be different from marriage. Applying marital regulations to other relationship form will lead to the assumption that marriage is the norm and might result in a suppression of other values and in a loss of relationship diversity.

III. Legal Approach

1) Discourse of the Early 1980s

a) The Social and Political Perspective

MacDougall²⁴⁷ approaches the issue of legal recognition of unmarried cohabitation from a very different angle. He is not so much concerned about the rights of one particular group (e.g. women), but discusses the issue from a social and political perspective. He argues that a decision has to be made within “the context of some broader conceptualization of what sort of society we wish to have.”²⁴⁸ In his article, MacDougall gives a short overview of factors favoring legal recognition of unmarried cohabitation and of factors favoring non-recognition.

²⁴⁶ Auchmuty supra n. 237 at 124.

²⁴⁷ D MacDougall, “Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage” in J Eeklelaar, S Katz (ed), *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Toronto: Butterworths, 1980) 313 – 322.

²⁴⁸ *Ibid* at 320.

i. Factors Favoring Legal Recognition

He argues that one main motivation of the state to recognize unmarried cohabitation is to put the burden of financial support away from the community and on to the spouse.²⁴⁹ The law generally imposes responsibilities on family members that would otherwise be carried by the community. By broadening the definition of family to include other relationship forms (e.g. through the inclusion of unmarried couples into spousal support provisions), the state can relieve the community from the burden to support those that would otherwise be dependent on welfare.²⁵⁰

MacDougall further emphasizes that the image of marriage has changed over time. With the availability of divorce and the changing roles of spouses within marriage, there is no qualitative difference between marriage and unmarried cohabitation.²⁵¹ A different treatment of those two family forms could only be justified if the parties had different intentions. However, in most cases there might be only little evidence of intentions available.²⁵² MacDougall also claims that there is little difference between married and unmarried couples with regard to material and financial aspects. This point of view was affirmed by the decision *Pettkus v. Becker*²⁵³ where the concept of the constructive trust with regard to marital property claims was expanded from married couples to unmarried couples.²⁵⁴

²⁴⁹ *Ibid* at 316.

²⁵⁰ *Ibid*. This exact argument was later used by the Supreme Court of Canada in *M. v. H.*, [1999] 2 S.C.R. 3 in the case of same-sex couples: “The impugned legislation has the deleterious effect of driving a member of a same-sex couple who is in need of maintenance to the welfare system and it thereby imposes additional costs on the general taxpaying public.” (see para. 115)

²⁵¹ *Ibid*.

²⁵² *Ibid*.

²⁵³ *Pettkus v. Becker*, [1978], 87 D.L.R. (3d) 101. The decision of the Ontario Court of Appeal was later confirmed by the Supreme Court of Canada in *Pettkus v. Becker* supra n. 66.

²⁵⁴ MacDougall supra n. 247 at 317.

ii. Factors Favoring Non-Recognition

One argument against the legal recognition of unmarried cohabitation is based on the antiquated idea that cohabitation compared to marriage is unethical and contrary to religious doctrines. Until the 1950s, courts denied rights to persons who had lived as cohabitants on the grounds that such relationships are against the law and Christian morality.²⁵⁵ Another major concern of law courts was that it would appear that unmarried couples are favored over married couples and they were therefore very reluctant to give cohabitants similar rights to married persons.²⁵⁶ MacDougall argues that this behavior is also reflected in provincial legislation, where only limited rights were given to unmarried cohabitants.²⁵⁷

Those favoring non-recognition of unmarried cohabitation argue that laws should only be applied to unmarried couples if their intentions and expectations of the relationship are taken into account.²⁵⁸ However, MacDougall objects to this viewpoint by saying:

This argument is not particularly persuasive in cases like *Becker v. Pettkus* where there was no decisive evidence of intention and the parties had lived together for almost 20 years. Where the relationship has endured for many years a court may decide to attach more weight to the facts of the relationship than to any evidence of the parties' original intentions or expectations.²⁵⁹

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* This argument is still valid today since many provinces, e.g. British Columbia, have given only limited rights to unmarried cohabitants.

²⁵⁸ *Ibid* at 318.

²⁵⁹ *Ibid.*

iii. MacDougall's Conclusion

MacDougall is somewhat unclear about his own opinion and states that it is not his purpose to choose between two different systems.²⁶⁰ However, he discusses possible issues that might arise if the definition of family is broadened and unmarried cohabitation is legally recognized.²⁶¹ MacDougall argues that the decision has to be made between two different models: a movement towards more individual rights and a decline in the role and function of the family (and the development of other social institutions (i.e. unmarried cohabitation) at the same time) or a continuing of the family as the primary social unit that excludes other family-like relationships.²⁶² MacDougall furthermore emphasizes that there is a need for a comprehensive social policy:

[T]he decisions about the legal recognition of cohabitation raise fundamental social and political issues. Thus decisions about particular situations need to be made in the context of some broader conceptualization of what sort of society we wish to have.²⁶³

b) The Debate in the UK

Even though Freeman and Lyon²⁶⁴ discuss the matter mostly from a UK perspective, their arguments reflect a debate that is not restricted to the UK but is also important for the Canadian discourse. They mention important reasons for and against the equivalent treatment of unmarried cohabiting persons and emphasize that in their opinion private autonomy of unmarried couples should be respected.

²⁶⁰ *Ibid* at 320.

²⁶¹ See *ibid* at 318 – 319.

²⁶² *Ibid* at 320.

²⁶³ *Ibid*.

²⁶⁴ Freeman and Lyon *supra* n. 56. Freeman and Lyon do not only talk about English law, but also about American and Swedish regulations. For the purpose of clarity, however, I will only discuss their comments on the legal development of cohabitation in England.

i. Justification for Equivalent Treatment

Freeman and Lyon argue that little attention was paid to policy reasons when cohabitants were first included in English laws and almost no debate had taken place in Parliament.²⁶⁵ However, especially in public law statutes, equivalent treatment of married and unmarried couples was introduced with the argument that unmarried couples should not be placed in a better position than married couples. Consequently, most statutes that were extended to cohabitants were not beneficial but punitive from a financial perspective.²⁶⁶ In the beginning, the “equivalence principle”²⁶⁷ was therefore used by the English legislature to protect married couples rather than unmarried ones.

However, later on the equivalence principle was also used to grant cohabiting couples marital benefits. This was often justified by arguing that unmarried couples fulfill exactly the same functions as married couples, e.g. raising children, building a home, etc.²⁶⁸ Since the state considers these functions as important factors for society, many of the provisions in the UK that grant financial benefits to families with children were extended to unmarried couples with children.²⁶⁹

Finally, Freeman and Lyon mention the desire to protect the economically and physically weaker spouse, which is normally the woman, as a justification to treat unmarried and married couples equally.²⁷⁰

²⁶⁵ *Ibid* at 146.

²⁶⁶ *Ibid* at 147.

²⁶⁷ *Ibid* at 145.

²⁶⁸ *Ibid* at 148.

²⁶⁹ *Ibid*.

²⁷⁰ *Ibid* at 161.

ii. Justifications for Differential Treatment

One main argument for treating married and unmarried couples differently is an argument of public policy and public morality. Freeman and Lyon emphasize that the predominant policy in England is to advocate marriage as the legitimate basis for family life in order to ensure family stability and contribute to the good order of society.²⁷¹ In the early 1980s, marriage was the family form that was thought to be more likely to create stable family relationships and it was therefore perceived as a lifelong commitment (which could not be performed by cohabitation).²⁷² Consequently, the courts and legislature in England were very reluctant to expand the benefits of marriage to unmarried cohabitation, believing it would undermine marriage.²⁷³

A second argument for differential treatment is the private autonomy approach. This theory emphasizes the fact that unmarried couples have chosen not to get married and that the law should respect this choice.²⁷⁴ Consequently, unmarried couples should not be treated as married ones. However, Freeman and Lyon argue that this freedom of choice is already seriously limited and it is therefore hard for unmarried couples to escape from marriage regulations.²⁷⁵ They emphasize that this approach does not support the idea of a superiority of marriage but is about a fundamental freedom. They argue,

marriage is a voluntary institution in which the parties express their willingness to commit themselves to each other for life. (...) Cohabiting couples do not make that same commitment, and rights and duties akin to marriage should not as a result follow.²⁷⁶

²⁷¹ *Ibid* at 184.

²⁷² *Ibid* at 185.

²⁷³ *Ibid*.

²⁷⁴ *Ibid* at 189.

²⁷⁵ *Ibid*.

²⁷⁶ *Ibid* at 191. It seems that at this point Freeman and Lyon express their own opinion about the topic. They also seem to agree what Deech writes in her article (see above). At 192 they even mention that the extension of rights for cohabitants would be a step backward for women's equality.

iii. Freeman's and Lyon's Conclusion

Freeman and Lyon are clearly supporters of the private autonomy approach. Both are concerned that there will be no escape from marriage if cohabitation is treated like marriage and argue that those who have decided not to marry should have their decision respected.²⁷⁷ They encourage unmarried couples to express their intentions within contracts, however, they acknowledge that contracts require equal bargaining power and that it will need some time until women have this equal power.²⁷⁸ For Freeman and Lyon (like Deech and Auchmuty) “the future lies with contract rather than status, autonomy instead of supposed protection.”²⁷⁹

2) Discourse of the Late 1990s and Early 2000s

a) Overview of Various Legal Arguments

Winifred Holland is one of the leading Canadian legal scholars in the field of unmarried cohabitation. She has written many articles and books on unmarried cohabitation between the early 1980s and today. I rely on one of Holland's article from the year 2000,²⁸⁰ in which she provides a comprehensive overview of the history and development of unmarried cohabitation. She also discusses the question of whether unmarried couples should be given more rights and responsibilities under the existing ascription model.

In her article, Holland gives an informative and comprehensive overview of the pros and cons of the legal assimilation of marriage and unmarried cohabitation. Holland herself supports the

²⁷⁷ *Ibid* at 206.

²⁷⁸ *Ibid* at 208 – 209.

²⁷⁹ *Ibid* at 212.

²⁸⁰ Holland *supra* n. 159.

idea of giving unmarried couples the same rights and responsibilities as married ones. She argues that today unmarried cohabitation is very similar to modern-day marriage. Both are characterized by various possible forms of dependence and both may or may not involve children.²⁸¹

Holland dismisses the argument of autonomy and individual choice by saying that it is not always obvious that unmarried couples have indeed chosen cohabitation in order to avoid the regulations associated with marriage.²⁸² In many cases, the couples might just have drifted into cohabitation or the choice to cohabit might have been made by one party without the agreement of the other who might have preferred marriage.²⁸³ Holland further states that most couples do not have a clear image at the beginning of a relationship of which obligations they are avoiding. She therefore suggests that it would be better to examine a relationship *ex post facto* instead of analyzing it at its commencement.²⁸⁴ Very often original intentions change over time and interdependence arises where there was independence at the beginning particularly if there are children. Furthermore, Holland explains that in the case of same-sex couples the argument of choice is invalid since they do not have the choice between marriage and unmarried cohabitation.²⁸⁵

By the time Holland was writing, all Canadian provinces had changed their laws concerning spousal support in order to include unmarried couples. Holland claims that it is therefore not a big step to also apply matrimonial property regulations to unmarried cohabitation.²⁸⁶ However, opponents of this idea argue that there are important distinctions between the regulation of

²⁸¹ *Ibid* at 151.

²⁸² *Ibid* at 152.

²⁸³ *Ibid*.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid* at 160. Holland's article was published before the introduction of same-sex marriage in Canada. On a federal level, same-sex marriage was introduced in 2005, *Civil Marriage Act*, S.C. 2005, c. 33.

²⁸⁶ Holland *supra* n. 159 at 154.

spousal support and matrimonial property. For example, the decision about support underlies judicial discretion and courts have a lot of flexibility in determining entitlement and quantity. Property on the other side is much less open to discretion because often a 50/50 division is applied.²⁸⁷ Holland responds to this argument by saying that even in the field of property law there is room for discretion because most provincial statutes include exceptions to the 50/50 division in special cases.²⁸⁸ On top of that, there is also the possibility to open the property regime only to those couples that have cohabited for at least five years, if shortness of the relationship is a concern.²⁸⁹ Holland furthermore argues that the use of unjust enrichment principles for unmarried cohabitation in the area of property claims is not an equivalent solution because it means much more uncertainty, is costly and time-consuming, and does not provide adequate relief for cohabitants.²⁹⁰

Another argument against the extension of rights and responsibilities for unmarried couples is that there are problems with the definition of cohabitation. It is argued that the definition varies from province to province and that it is often not clear whether a subjective or an objective test should be applied in order to determine the nature of the relationship.²⁹¹ Holland admits that it might be difficult to establish cohabitation in borderline cases but argues that this is not true in the majority of cases. She furthermore states that this issue could be easily solved by improving the definition of cohabitation. It is also important to ensure that the definitions are consistent and not arbitrary, because it is crucial to have the same definition of unmarried cohabitation in all related statutes.²⁹²

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid* at 155.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid* at 162 – 164.

²⁹² *Ibid* at 157.

A strong argument for the assimilation of marriage and unmarried cohabitation is the fact that there is a misconception in the public (and amongst cohabitants) about the rights and obligations that unmarried cohabitation involves.²⁹³ As the term “common-law marriage,” which is often used in public, indicates most people think that cohabitation attracts the same rights and obligations as marriage. Holland therefore recommends adapting the legal situation to the common perception and expanding the rights and responsibilities of unmarried cohabitants.²⁹⁴

Holland generally rejects the idea that cohabitants should have to sign a contract in order to receive the rights of married couples and claims that cohabitants would not enter such agreements because there is no such tradition in Canada except for separation agreements. She furthermore argues:

It is preferable to put the onus on those who wish to avoid obligations rather than on those who wish to create them. The reality is that the lives of many cohabitants are intertwined and we should assume that they have become interdependent once the criteria for cohabitation are satisfied. If one partner wishes to avoid such obligations the onus should be on that person to have a domestic contract drawn up so that they will not be going into the relationship with “eyes wide shut”.²⁹⁵

Holland clarifies that even if it would come to a legal assimilation between marriage and cohabitation, there would be still distinctions.²⁹⁶ First, marriage would still entail a more public form of commitment. Second, married couples will be able to enjoy marital rights and

²⁹³ *Ibid* at 157 – 158. A study from the UK, where there are very few rights for cohabitants, showed that 56 percent of the respondents thought that cohabitants have the same legal rights as married people after a certain time period of cohabitation. Among cohabitants the number even rose to 59 percent. See A Barlow, “Regulating Marriage and Cohabitation in 21st Century Britain” (2004) 67 *Modern Law Review* 143 – 176 at 161.

²⁹⁴ Holland *supra* n. 159 at 158.

²⁹⁵ *Ibid*.

²⁹⁶ *Ibid* at 167.

responsibilities from the moment they get married, whereas unmarried couples would have to cohabit for a certain amount of time before they would have the same rights and obligations.²⁹⁷

b) The Canadian Charter of Rights and Freedoms: the Equality Argument of s. 15(1)

Since the enactment of the *Canadian Charter of Rights and Freedoms*²⁹⁸ in 1982, the *Charter* has become an important tool within family law as well as unmarried cohabitation. For example in *Miron v. Trudel*,²⁹⁹ the Supreme Court of Canada decided that marital status is an analogous ground of discrimination under s. 15(1) of the *Charter*. As a consequence of *Miron*, many courts started to apply s. 15(1) in their judgments and decided that it is discriminatory towards unmarried couples to treat them differently from married couples. As a result, unmarried cohabitants were given many rights and obligations that used to apply only to married couples. Ferlisi argues that with the application of the equality argument to unmarried cohabitants courts moved from a traditional definition of spouse to a functional approach (as opposed to a normative approach to the definition of spouse).³⁰⁰ While a normative definition of spouse is more narrow and traditionally only include an opposite sex couple that form a nuclear family, a functional definition of spouse is much broader and includes also those social units that fulfill the same function or purpose as traditional families.³⁰¹ Ferlisi further opines that a shift towards a functional definition is not only necessary because of the increase of unmarried cohabitation in Canada, but also justified by s. 15(1) of the *Charter*. He argues that the remedy of the

²⁹⁷ *Ibid.*

²⁹⁸ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK) 1982, c. 11.

²⁹⁹ *Miron v. Trudel* supra n. 36.

³⁰⁰ O Ferlisi, "Recognizing a Fundamental Change: A Comment on *Walsh*, the *Charter*, and the Definition of Spouse", (2001) 18 *Canadian Journal of Family Law* at 160.

³⁰¹ *Ibid* at 163 – 164.

constructive trust, which is used for cohabiting couples to divide property after the breakdown of a relationship, is neither efficient nor does it resolve property disputes.³⁰²

Ferlisi also discards the choice argument by first saying that cohabitation is not always a question of choice because marriage might be prevented by variables that are not related to choice. Second, he states that the argument that cohabitants can rely on contracts to enter the matrimonial regime disregards the potential inequality of bargaining power between spouses. Third, he emphasizes that the limited access to domestic agreements makes contracts between cohabiting spouses difficult.³⁰³

IV. Sociological Approach

Statistics on the numbers of unmarried cohabitants in Canada were not available until 1981, when the Canadian census first began to collect data on cohabiting couples.³⁰⁴ Consequently, not many sociological studies and surveys are available from the early 1980s timeframe. By the year 2000, however, the rise in unmarried cohabitation meant that the situation had. Even the Supreme Court of Canada referred to sociological studies for its decision in *Walsh*,³⁰⁵ which demonstrates the importance of sociological arguments in the judicial decision-making process.

Both Wu³⁰⁶ and Smart³⁰⁷ look at unmarried cohabitation from a sociological perspective. They have both conducted comprehensive surveys of unmarried cohabitation, asking questions

³⁰² *Ibid* at 175.

³⁰³ *Ibid* at 177.

³⁰⁴ Wu *supra* n. 12 at 43.

³⁰⁵ *Nova Scotia v. Walsh* *supra* n. 34.

³⁰⁶ Wu *supra* n. 12.

like: Who cohabits? What are the intentions of the couples? How long do common-law relationships last on average? Are children involved in the relationship? Are both partners open to marriage? This has enabled both Wu and Smart to engage in the debate about whether married and unmarried couples should be treated the same with an extensive knowledge of unmarried cohabitation.

Wu's findings are often used to argue that unmarried couples should be treated differently from married couples.³⁰⁸ This is because Wu demonstrates "that cohabitators are a select group of people who differ from married people (...) [and] are less committed to long-term relationships and their partners than married people are."³⁰⁹ However, Wu himself recommends that married and cohabiting persons should have the same rights and responsibilities. He argues that the extension of rights and responsibilities would lead to economic stability for all family members, especially children.³¹⁰ However, Wu emphasizes that the increase of rights and responsibilities should only occur if the relationship is of some permanence. From Wu's point of view, a relationship is of permanence if the couple is cohabiting for at least one year, if the couple becomes the natural or adoptive parents of a child, or if the couple registers as 'domestic partners'.³¹¹

Smart on the other hand does not make such a clear statement for or against the legal recognition of unmarried cohabitation. Instead, she addresses the problem of poverty amongst unmarried couples. She criticizes other survey methods that blame unmarried cohabitation for

³⁰⁷ C Smart, "Stories of Family Life: Cohabitation, Marriage and Social Change" (2000) 17 Canadian Journal of Family Law 20 – 53.

³⁰⁸ See for example *Nova Scotia v. Walsh* supra n. 34 at para 40.

³⁰⁹ Wu supra n. 12 at 164.

³¹⁰ *Ibid* at 167.

³¹¹ *Ibid*.

‘poor outcomes,’ such as lower educational achievement in children. She argues that the cause for these outcomes is not cohabitation but poverty.³¹² Furthermore, Smart notes that “it is assumed that the choice to cohabit rather than marry is the main factor in causing poor outcomes.”³¹³ She argues that this approach fails to acknowledge that cohabiting instead of getting married might not be a question of choice but the consequence of poverty, deprivation, and poor housing.³¹⁴ Smart finally emphasizes that

[e]mpirical research does not, of course, tell us what to do in policy terms, but it can remind us of the diverse nature of family life and alert us to the problems of formulating policies based on over-simplified ideas that heterosexual relationships have become fully democratized. (...) Thus, in thinking of policy in relation to domestic partnership, I merely wish to re-emphasize the need to be aware that concepts of difference and diversity in ‘family practices’ must also include notions of poverty and inequality both within and between different family forms.³¹⁵

V. Summary of Main Arguments and Comment

This chapter shows that a multitude of arguments are used to both support and dismiss the legal assimilation of marriage and unmarried cohabitation. It also indicates that the arguments have changed in the course of time.

This is especially obvious within the feminist approach. Feminists of the early 1980s often not only demanded that unmarried cohabitation stay an area free of regulation but also called for the abolition of marriage itself. This was believed to lead towards more (formal) equality and financial independence for women. Cohabitation should stay free of regulations so that women could escape the male-dominated institution of marriage. Deech³¹⁶ and O’Donovan³¹⁷ also

³¹² Smart *supra* n. 307 at 33 – 34.

³¹³ *Ibid* at 34.

³¹⁴ *Ibid*.

³¹⁵ *Ibid* at 53.

³¹⁶ Deech *supra* n. 188.

believed in the concept of individualism, which treats the family not as a social unit but as a gathering of individuals with separate rights. Consequently, both proclaimed that the financial burden to support the ex-partner should be put on the public instead of the individual (i.e. the ex-spouse).

I agree with Smart³¹⁸ who points out that no economic independence could be achieved through the abolition of the legal regulation of marriage and unmarried cohabitation since women would then have to rely on insufficient welfare systems. Even today, 25 years later, the welfare system in Canada is not sufficient to help women make a living without having to rely on spousal support. I also concur with Smart's view that the complete abolition of marriage is not only unpopular but also unrealistic. Today, marriage is still the most popular family form³¹⁹ and this fact does not support the idea that the broad public would like to abolish marriage. Additionally, the recent development of giving unmarried cohabitation more and more marital rights and obligations proves that Canadian legislatures want to expand marital regulations to similar family forms rather than abolishing them completely.

Although Auchmuty³²⁰ is writing from a more contemporary perspective she argues against marriage and its legal consequences (like many of the feminists from the early 1980s) and generally favors private contracts over marital regulations. Despite her opposition to marriage, she emphasizes that same-sex marriage will inevitably come to the UK,³²¹ which demonstrates

³¹⁷ O'Donovan supra n. 209.

³¹⁸ Smart supra n. 307.

³¹⁹ In 2006, 68.6 percent of all Census families (lone-parents included) were married couples. See Statistics Canada supra n. 22 at 8.

³²⁰ Auchmuty supra n. 237.

³²¹ *Ibid* at 103.

the strong influence of marriage and that it might be too late to stop the process of assimilation of other intimate relationship forms to the legal regulations of marriage.

Brook,³²² who is one of the more contemporary feminists, points out correctly that it is questionable whether cohabitation can actually liberate women from a patriarchal institution. She also emphasizes that the legal recognition of unmarried cohabitation is mainly a consequence of feminist demands to end sexual and economic exploitation of women. The truth is that unmarried cohabitation can hardly be seen as liberation for women. Studies in this area show that women that live as unmarried cohabitants are more likely to experience violence and crime than married women.³²³ Also, there is hardly any difference between married women and cohabiting women with regard to gender inequalities concerning the division of household work and also with regard to their economic situation.³²⁴

This section shows that there are various arguments for and against the assimilation of unmarried cohabitation and marriage. While MacDougall³²⁵ tries to simply illustrate the arguments of the early 1980s without sharing his personal opinion on the debate, he nonetheless makes an important point regarding the intention of unmarried cohabitants at the beginning of their relationship. He emphasizes that it is problematic to rely on the intentions of the parties since in most cases it might be hard to find evidence of their intentions at the beginning of the relationship. However, the Supreme Court of Canada put great emphasis on the intention of cohabiting couples in *Nova Scotia v. Walsh* and argued that the simple decision to live together

³²² Brook supra n. 58.

³²³ D.A. Brownridge, "Understanding Women's Heightened Risk of Violence in Common-Law Unions: Revisiting the Selection and Relationship Hypotheses" (2004) 10 *Violence against Women* at 626 – 651. See also below Chapter E.

³²⁴ See C. Grant Bowman, "Social Science and Legal Policy: The Case of Heterosexual Cohabitation" (2007) 9 *Journal of Law and Family Studies* 1 – 52. See also below Chapter 5.

³²⁵ MacDougall supra n. 247.

does not indicate that the couple wants to pool their finances and share each other's assets and liabilities.³²⁶ It might be true that many cohabiting couples do not think about sharing their assets or do actively refuse the sharing of their finances. However, the truth is that intentions can change over time and unforeseen or unplanned events during the relationship, e.g. the birth of a child or the medical situation of one partner, might change the couple's mindset with regard to their financial situation. A couple that consisted of two economically independent individuals at the beginning of the relationship might become completely financially interdependent after such an event. In such cases, does it make sense to only look at the intentions at the beginning of the relationship? Would it not be better to analyze the relationship from an ex post perspective and make a decision on the basis of how the *overall* relationship looked like Holland³²⁷ suggests?

Freeman and Lyon³²⁸ who are strong supporters of the private autonomy approach argue that cohabitant's choice to not get married should be respected. They emphasize that cohabitants are free to express their intentions through contracts. The choice argument is a very popular argument against the assimilation of unmarried cohabitation and was, for example, used by the Supreme Court of Canada in *Nova Scotia v. Walsh*. Holland, however, points out correctly that the question of whether a couple gets married or not is not always a question of choice. She states that in many cases the couple might have drifted into cohabitation or the "choice" to cohabit might have been made by only one spouse without the agreement of the other spouse who might have wanted to get married. Furthermore, it is important to realize that couples can only *choose* cohabitation over marriage if they know that they have different rights and obligations. Holland emphasizes that there is a misconception in the public about the rights and obligations of

³²⁶ *Nova Scotia v. Walsh* supra n. 34 at para. 54.

³²⁷ Holland supra n. 159.

³²⁸ Freeman and Lyon supra n. 56.

cohabitants. This fact makes it difficult to argue that cohabitants *choose* cohabitation over marriage in order to avoid the legal consequences of marriage.

An important difference between the legal approach of the early 1980s and that of the late 1990s and early 2000s is that none of the early authors include same-sex couples in their arguments. Until the introduction of same-sex marriage, same-sex couples did not have the choice between marriage and cohabitation. Holland, whose article was written before the introduction of same-sex marriage in Canada, points out correctly that the argument of choice does not apply to same-sex couples. The question now is: Did the introduction of same-sex marriage change the situation in the debate on the assimilation of unmarried cohabitation and marriage?

I furthermore agree with Holland that it is more desirable to have cohabitants opt out of the regime if they would like to avoid legal recognition instead of having to contract in. Even Freeman and Lyon admit that contracts require equal bargaining power. The situation is not much different today: it is still questionable whether both spouses have equal bargaining power and women might often be the weaker spouse, especially when there are children in the relationship and the woman can only work part time or stays at home because of high childcare costs.

Both Wu³²⁹ and Smart,³³⁰ who approach the debate from a sociological background, mention very important arguments for the assimilation of marriage and unmarried cohabitation. Rather than denying cohabiting persons access to marital regulations because those relationships are unstable and involve less commitment, it makes more sense to include them in the regime in

³²⁹ Wu supra n. 12.

³³⁰ Smart supra n. 307.

order to create more stability and security for all family members, especially children. Smart emphasizes that it is crucial to take into consideration the poverty factor: cohabitation does not create poor outcomes but poverty itself does.

VI. Conclusion

As seen above, the arguments for and against the legal assimilation of marriage and unmarried cohabitation are very numerous and diverse. The main reason for this diversity is that the debate touches not only on legal problems but involves a wide range of questions in various areas (i.e. public policy, social issues, feminism etc.) and therefore attracts scholars from many different fields. However, the overview of the debate is only complete if the opinion of the Supreme Court of Canada is taken into consideration, particularly since the court's decisions reflect some of the debates in the literature. In its first key *Charter* decisions, the Supreme Court adopted an approach focusing on the functional equality of married and unmarried cohabiting couples and emphasizing that it is not always a question of choice whether a couple lives in a unmarried cohabiting relationship or marriage.³³¹ Later on, however, the Supreme Court changed its position and moved from an equality-based approach to an autonomy-based approach emphasizing that the freedom of choice between marriage and unmarried cohabitation must be respected.³³² Interestingly, the diversity of the debate is not only reflected by the two different majority decisions of the Supreme Court in *Miron v. Trudel* and *Nova Scotia v. Walsh*, but also by the majority and the dissenting opinions of the Supreme Court decision in *Nova Scotia v. Walsh*.

³³¹ See *Miron v. Trudel* supra n. 36.

³³² See *Nova Scotia v. Walsh* supra n. 34.

Chapter 4: The Arguments of the Supreme Court of Canada

I. Introduction

Several Supreme Court cases deal with the rights and responsibilities of unmarried cohabiting couples.³³³ In two of these cases, the Supreme Court developed arguments for and against the similar treatment of married and cohabiting couples that seem contrary to each other. In *Miron v. Trudel*,³³⁴ the Supreme Court developed a functional approach to the definition of family. However, in *Nova Scotia v. Walsh*,³³⁵ the Supreme Court changed its position and applied a formal approach. This chapter provides a short overview of these two decisions, the main opinions of the Supreme Court of Canada, and the contradictions between the two judgments. It also compares the majority and dissenting opinions of *Nova Scotia v. Walsh*, since they so closely mirror elements of the debate in the literature illustrated by the previous chapter. They also illustrate the differences between the majorities in *Miron v. Trudel* and *Nova Scotia v. Walsh*.

II. The Supreme Court of Canada in *Miron v. Trudel*

In *Miron v. Trudel*, the Supreme Court of Canada dealt with the question of whether the exclusion of unmarried couples from an automobile insurance policy violates s. 15(1) of the *Charter*. The terms of the policy were set by the Ontario Standard Automobile Policy as provided by the *Insurance Act*.³³⁶ John Miron and Jocelyne Valliere had lived in a common-law relationship for several years and had two children. After a motor vehicle accident, Miron was

³³³ See above Chapter 2. III.

³³⁴ *Miron v. Trudel*, supra n. 36.

³³⁵ *Nova Scotia v. Walsh*, supra n. 34.

³³⁶ *Insurance Act*, R.S.O. 1980, c. 218.

injured and claimed accident benefits for loss of income and damages against Valliere's insurance policy. The insurer rejected the claim by arguing that Miron and Valliere were not legally married and therefore not "spouses" as required under the policy. In its decision, the majority of the Supreme Court held that marital status is an analogous ground of discrimination.³³⁷ It furthermore came to the conclusion that the impugned statutory provisions of the *Insurance Act* violated s. 15 (1) of the *Charter*.³³⁸ As a remedy, the new definition of "spouse" adopted in 1990, which included heterosexual couples who have cohabited for three years or who have lived in a permanent relationship with a child, should be retroactively read in to the impugned legislation.

In her reasons, McLachlin J. writing for the majority, held that "legislators and jurists throughout our country have recognized that distinguishing between cohabiting couples on the basis of whether they are legally married or not fails to accord with current social values or realities."³³⁹ She emphasized that the functional value of the impugned legislation is to financially support families and reduce economic hardship when one of their members is injured in an automobile accident.³⁴⁰ McLachlin J. further argued that the goal of the benefits was to support *all* family units that can be characterized by financial interdependence and not solely those family units that include married couples.³⁴¹ Instead of simply looking at the formal status or structure of the family (i.e. married or unmarried) the court applied a functional approach to the definition of family and allowed unmarried couples that perform the same function as married couples (i.e. economic interdependence) to receive the same benefits.

³³⁷ Justice McLachlin wrote for herself and three other members of the court. Justice L'Heureux-Dubé concurred with separate reasons.

³³⁸ For reasons why marital status is an analogous ground please cf. above chapter B. ...

³³⁹ *Miron v. Trudel* supra n. 36 at 499.

³⁴⁰ *Ibid* at 503.

³⁴¹ See JT McClary, "A Different View of Nova Scotia (Attorney-General) v. Walsh" (2005) 22 Canadian Journal of Family Law at 48. See also *Miron* supra n. 36 at 505, 506 and 461.

A second important argument mentioned by the Supreme Court was the choice argument. McLachlin J. argued that individuals are only theoretically free to choose between marriage or unmarried cohabitation.³⁴² In reality, many individuals would like to marry, but cannot because of financial, religious or social reasons, or because the other partner is not willing to get married. These couples often function as a family unit (just like any married couple), however, “marital status often lies beyond [...] [their] effective control.”³⁴³

III. The Supreme Court of Canada in *Nova Scotia v. Walsh*

In 2002, the Supreme Court of Canada decided in *Nova Scotia v. Walsh* that the exclusion of opposite-sex unmarried cohabiting persons from the *Nova Scotia Matrimonial Property Act*³⁴⁴ is not discriminatory within the meaning of s. 15(1) of the *Charter*. The court held that the distinction between married and unmarried couples does not affect the dignity of unmarried individuals but rather reflects the differences between marriage and unmarried cohabitation.

1) The Facts

Mr. Bona and Ms. Walsh cohabited without being married for about 10 years, ending in 1995. After only a few years of cohabiting, Mr. Bona was transferred for work in a different location. Walsh quit her two jobs and moved with Bona to continue living with him. At the new location, the couples purchased a home together as joint owners. Shortly after, their first child was born in 1988 and the second was born in 1990. While Bona continued working, Walsh stayed at home to

³⁴² *Miron* supra n. 36 at 498.

³⁴³ *Ibid.*

³⁴⁴ *Nova Scotia Matrimonial Property Act*, R.S.N.S. 1989, c. 275.

take care of their two children. After the separation, Bona continued to live in the house, assuming the debts and expenses associated with the property. In 1983, Bona had received a cottage property as a gift from his father, which was put under his name and was sold after the separation for \$20,000. The total value of assets retained by Bona at the date of separation (including the house, cottage, lot, vehicle, pensions and RRSPs) was \$116,000 minus “matrimonial” debts of \$50,000. Walsh applied for spousal support, child support and the equal division of marital assets.³⁴⁵ In conjunction with this application, Walsh sought a declaration that the definition of “spouse” in s. 2(g) of Nova Scotia *Matrimonial Property Act*, which excluded unmarried partners from the statutory remedies in relation to matrimonial property, was unconstitutional in violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Nova Scotia Supreme Court dismissed Walsh’s application for equal division of marital assets at first instance, emphasizing that s. 15(1) of the *Charter* was not violated.³⁴⁶ At second instance, the Nova Scotia Court of Appeal allowed the appeal and declared s. 2(g) of the *MPA* to be of no force or effect since it violated the *Charter*.³⁴⁷ Finally, the Supreme Court of Canada dismissed Walsh’s application arguing that s. 2(g) of the *MPA* is not discriminatory and therefore does not infringe upon the *Charter*.³⁴⁸ In the meantime, Nova Scotia introduced a system of registration for domestic partners that would bring them into the matrimonial property regime.³⁴⁹

³⁴⁵ By applying for the equal division of all family assets, Walsh tried to achieve the equal division of those assets that were solely held under Bona’s name, e.g. the cottage.

³⁴⁶ *Walsh v. Bona*, [1999] N.S.J. No. 290.

³⁴⁷ *Walsh v. Bona*, [2000] N.S.J. No. 117

³⁴⁸ Interestingly, by the time leave to the Supreme Court of Canada was granted, Walsh and Bona had already settled the litigation between them respecting the division of property. See *Nova Scotia v. Walsh* supra n. 34 at para 7.

³⁴⁹ *Law Reform (2000) Act; Vital Statistics Act*, S.N.S. 2000, c. 29, s. 45, R.S.N.S. 1989, c. 494.

2) The Decision of the Majority

The decision of the Supreme Court of Canada, denying Walsh's *Charter* challenge, relies on two main factors. Firstly, Bastarache J. (writing for the majority) argued that the two comparator groups, married couples and unmarried couples, are significantly different. Bastarache J. admitted that there are certain functional similarities between these two relationship forms, but he emphasized that these similarities cannot outweigh the significant heterogeneity of the two.³⁵⁰ To support his argument, he relied on the findings of a sociological study by Wu³⁵¹ who came to the conclusions that relationships between unmarried cohabiting couples tend to last a much shorter time than married relationships, they are often "trial marriages", they can be an intentional substitute for marriage, and that cohabiting individuals often reject marriage.³⁵² Bastarache J. reasoned that:

[t]hese findings are indicative not only of the differences between married couples and cohabiting couples, but also of the many differences among unmarried cohabitants with regard to the manner in which people choose to structure their relationships.³⁵³

Secondly, Bastarache J. emphasized the importance of the liberty to choose between alternative family forms. He argued that this freedom of choice should be respected by the state especially where the applicable marital legislation dramatically alters the legal obligations of partners (e.g. matrimonial property legislation). He held that

[t]he decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantages and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some

³⁵⁰ *Ibid* at para 39.

³⁵¹ Wu *supra* n. 12

³⁵² *Nova Scotia v. Walsh* *supra* n. 34 at para 40.

³⁵³ *Ibid*.

permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it.³⁵⁴

Justice Bastarache further mentioned that the decision to marry incorporates the spouses' consensus to enter an economic partnership and also to the application of the property regime of the *Nova Scotia Matrimonial Property Act*. Consequently, those couples that have not consented to such a partnership are excluded from the statutory property regime. However, if unmarried couples want to access the benefits that married persons are given by the statutory regime, they are free to do so by marrying, entering into domestic contracts, owning property jointly or registering as domestic partners. Thus, the requirement of consent increases the respect for autonomy and self-determination of unmarried couples.³⁵⁵ In those cases where unmarried couples cannot find consensus, the law of the constructive trust is an adequate remedy to address inequities occurring at the time of dissolution.³⁵⁶

Justice Bastarache distinguished the decision in *Nova Scotia v. Walsh* from *Miron v. Trudel* by stressing that the couple in *Miron v. Trudel* could only get the insurance benefits by getting married (and not by contracting in or registering as domestic partners), whereas the couple in *Nova Scotia v. Walsh* had a number of ways in which to opt into the property regime. Furthermore, the challenged legislation in *Miron* affected the relationship of couples to third parties and had no impact on the rights and obligations of the spouses to one another.³⁵⁷

³⁵⁴ *Ibid* at para 43.

³⁵⁵ *Ibid* at para 50.

³⁵⁶ *Ibid* at para 61.

³⁵⁷ *Ibid* at para 53.

In his conclusion, Bastarache J. articulates that

[a]ll of these factors support the conclusion that the extension of the MPA to married persons only is not discriminatory in this case as the distinction reflects and corresponds to the differences between those relationships and as it respects the fundamental personal autonomy and dignity of the individual. In this context, the dignity of common law spouses cannot be said to be affected adversely. There is no deprivation of a benefit based on stereotype or presumed characteristics perpetuating the idea that unmarried couples are less worthy of respect or valued as members of Canadian society. All cohabitants are deemed to have the liberty to make fundamental choices in their lives. The object of s. 15(1) is respected.³⁵⁸

3) Justice L’Heureux-Dubé’s Dissenting Opinion

The only dissenting judge in this decision was L’Heureux-Dubé J. who opined that the *Nova Scotia Matrimonial Property Act* infringes s. 15(1) of the *Charter*. In her dissent, she expressed that both unmarried and married couples face the same needs at the end of a relationship and are therefore functionally equivalent.³⁵⁹ By limiting the application of the *Matrimonial Property Act* to married couples, the needs of unmarried couples are not mitigated. This unequal treatment of married and unmarried persons

implies that the needs of heterosexual unmarried cohabitants are not worthy of the same recognition solely because the people in need have not married. [...] Functionally, spouses contribute to various types of families. Failing to recognize the contribution made by heterosexual unmarried cohabitants is a failure to accord them the respect they deserve. This failure diminishes their status in their own eyes and in those of society as a whole by suggesting that they are less worthy of respect and consideration. Their dignity is thereby assaulted: they are the victims of discrimination.³⁶⁰

Justice L’Heureux-Dubé argued that the *Nova Scotia Matrimonial Property Act* has nothing to do with choice or consensus and everything to do with the recognition of the spouses’

³⁵⁸ *Ibid* at para 62.

³⁵⁹ *Ibid* at para 118.

³⁶⁰ *Ibid*.

needs at the end of the relationship.³⁶¹ She noted that most people that enter a relationship are unaware of their rights and obligations and some unmarried partners even think that the matrimonial regime applies to them after one year of cohabitation.³⁶² Consequently, it cannot be said that individuals enter into unmarried cohabitation specifically to avoid the legal consequences of marriage. Furthermore, the fact that a couple is not married is not always a result of choice. Especially in those cases where one partner wishes to marry and the other does not, the fact that these two partners live in unmarried cohabitation is not an expression of liberty of choice but may create a situation of exploitation.³⁶³

Finally, L'Heureux-Dubé J. stressed that the alternative remedies available to unmarried couples are far from adequate. The remedy of the constructive trust is a concept that is difficult to prove and creates uncertainty regarding its outcome.³⁶⁴ Moreover, the constructive trust is a remedy that was considered insufficient for married couples and was therefore abandoned by the legislature in the early 1980s. Nevertheless, this concept now applies to unmarried couples and puts them in the same unsatisfactory situation as married couples in the late 1970s.³⁶⁵

IV. Analysis

The comparison of these two Supreme Court judgments reveals that both decisions use similar arguments but come to different outcomes. Firstly, in *Miron*, McLachlin J. argued for the majority that the freedom to choose between marriage and cohabitation exists only in theory and

³⁶¹ *Ibid* at para 142.

³⁶² *Ibid* at para 143.

³⁶³ *Ibid* at para 152.

³⁶⁴ *Ibid* at 166.

³⁶⁵ *Ibid* at 168.

that marital status often lies beyond the individual's effective control. In *Walsh*, the majority held that couples are free to choose between marriage and cohabitation. The court emphasized that cohabiting couples have chosen to avoid the legal consequences of marriage and that this choice should be respected by the state. Only L'Heureux-Dubé J., in dissent, followed the reasons in *Miron* and argued that the fact that a couple is not married is not always a consequence of choice.

Secondly, McLachlin J., writing for the majority, applied in *Miron* a functional approach to the definition of family and emphasized that the impugned provision applied to both marital and non-marital intimate relationships that are characterized by financial interdependence. This highlights that both marriage and unmarried cohabitation are (functionally) similar and perform the same core functions. The majority in *Walsh* on the other hand argued that marriage and unmarried cohabitation are significantly different and should therefore be treated differently. With this decision, the majority came back to a more formal (or normative) approach to the definition of family/spouse that includes only marital relationships and excludes other (functional similar) relationships. Again, L'Heureux-Dubé J. in dissent followed the reasons in *Miron* and argued that both married couples and unmarried cohabitant couples perform the same valuable functions and should be therefore legally treated the same. She emphasized that unmarried and married couples face the same needs at the end of a relationship and are therefore functionally equivalent.

It is very interesting to see that although McLachlin J. wrote for the majority in *Miron v. Trudel*, and therefore supported the protection of unmarried cohabiting couples, she was also part of the majority in *Nova Scotia v. Walsh*, which denied the extension of marital property rights to cohabiting individuals. The same can be said for Iacobucci J. who was part of the majority in

both cases.³⁶⁶ What are the factors that made them change their mind? What is so different about the two cases?

One scholar argues that *Walsh* was not so much a decision against unmarried cohabitation but rather a decision towards same-sex marriage because the Supreme Court emphasized the fundamental importance of the ability to choose to marry:

A better understanding of *Walsh* is that it brings to the fore the fundamental importance of the ability to choose to marry, leading ineluctably to a finding that the common law definition of marriage unfairly restricts the liberty of unmarried homosexual cohabitants and is therefore unconstitutional.³⁶⁷

This would mean that a possible reason for a differential treatment of *Miron* and *Walsh* would be that the Supreme Court wanted to indirectly support same-sex marriage. However, it is very doubtful that this was indeed the intention of the majority in *Walsh*. Firstly, the couple in *Walsh* was heterosexual and not homosexual. Secondly, the Supreme Court did not mention anywhere in its decisions the words “same-sex marriage” or indicate that it wanted to support same-sex couples. Finally, the Supreme Court usually only decides the matter that is in front of it and refuses to decide anything that is not related to the application. The application in *Walsh* was not at all connected to any questions regarding same-sex marriage or same-sex cohabitation and it is therefore unlikely that the Supreme Court wanted to make any statements or express an opinion on same-sex marriage.

³⁶⁶ The other judges that decided in both cases were L’Heureux-Dubé, Gonthier, and Major. Unlike McLachlin and Iacobucci, they did not change their opinion. Gonthier and Major were dissenting judges in *Miron* but belonged to the majority in *Walsh*. L’Heureux-Dubé was part of the majority in *Miron* and was the only dissenting judge in *Walsh*.

³⁶⁷ McClary supra n. 341 at 45.

Looking at the decision in *Miron v. Trudel* and at other court decisions that extended the rights and obligations of unmarried cohabitants it seems very surprising that the Supreme Court did not extend the matrimonial property rights to unmarried cohabiting couples. Lessard points out correctly that there is a tendency in Canada to “transfer responsibility for the social welfare of individuals from the state to families.”³⁶⁸ The decision of the Supreme Court in *Walsh* seems to be contrary to this “neo-liberal familialization agenda” because it denies unmarried cohabitants at the end of their relationship access from an important private regime of economic support.³⁶⁹ Lessard further emphasizes that the paramount factor for the majority’s decision was the concept of choice: “Because of the overriding symbolic importance of choice in forming intimate relations, married and unmarried couples are not similarly situated.”³⁷⁰ According to this opinion, it is rather the element of choice that constitutes the differences between marriage and unmarried cohabitation than the potential qualitative differences between the two relationship forms. The consequence of such an approach is that the choice of two individuals at the beginning of a relationship is ultimately given more importance than subsequent changes within the relationship, e.g. a growing economically interdependence between the spouses or the (unplanned) birth of a child. With regard to matrimonial property, the Supreme Court therefore seems to put emphasis rather on the individual than on family.³⁷¹

A further reason for denying unmarried cohabitants access to matrimonial property rights could be the attempt to reaffirm the position of marriage within Canadian society.³⁷² The decision of the Supreme Court of Canada in *Nova Scotia v. Walsh* shows a very conservative and narrow

³⁶⁸ H. Lessard, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism” (2006) 33 Supreme Court Law Review at 303.

³⁶⁹ *Ibid* at 305.

³⁷⁰ *Ibid* at 306.

³⁷¹ The Supreme Court therefore follows some of the demands of the Individualism as described above in Chapter C.

II.

³⁷² Lessard *supra* n. 368 at 305.

approach to the definition of family. By applying a formal definition of spouse and emphasizing the importance of the choice between unmarried cohabitation and marriage, the court ultimately supported the institution of marriage. Especially Gonthier J's concurring opinion reflects this marriage fundamentalism:

The fundamental nature of marriage inheres in, among other things, its central role in human procreation, and its ability to offer both children and parents a framework for the development of values within the family. Living together as a family and rearing children in this context is foundational to our society. Marriage and family life are not inventions of the legislature; rather, the legislature is merely recognizing their social importance.³⁷³

A further explanation for the differences between *Miron v. Trudel* and *Nova Scotia v. Walsh* might be the Supreme Court's intention to protect property rights. While *Miron* dealt with the question of whether benefits from an insurance policy should be extended to unmarried cohabiting couples, *Walsh* addressed whether property purchased and held by an individual should be redistributed under the *Matrimonial Property Act*. By denying the application of the matrimonial property regime, the Supreme Court confirmed "a very deep-rooted tendency in the common law to privilege "property" over "family," an attitude so pervasive that it may appear to be common sense."³⁷⁴ The court emphasized that it wanted to protect the liberty of choice and the personal autonomy of cohabiting individuals. Thus, it assured that property remains an area of privacy and autonomy that can only be entered with consent (i.e. for example through marriage).³⁷⁵ This approach resembles the private autonomy approach or contract approach mentioned earlier, which tries to preserve unmarried cohabitation as an area free of regulation but allows the regulation through contract.

³⁷³ *Nova Scotia v. Walsh* supra n. 34 at para. 194. Gonthier's opinion furthermore contradicts the above mentioned theory that the decision in *Walsh* was not so much against unmarried cohabitation but towards same-sex marriage, because Gonthier mentions marriage as central role in human procreation.

³⁷⁴ Conway and Girard supra n. 87 at 719.

³⁷⁵ *Ibid* at 729.

V. Conclusion

Although many anticipated that the Supreme Court of Canada would extend the matrimonial property regime to include unmarried cohabitants in *Walsh*, it chose a different path. The court seems to not only privilege private autonomy over family, but also liberty of choice over protection. However, what the Supreme Court of Canada might have overlooked is the fact that not only the spouses who *choose* unmarried cohabitation over marriage are affected by their exclusion from matrimonial property regimes, but (indirectly) also their children. After a divorce or the breakdown of a relationship, the family home is often the only place that could give stability and continuity to the children of the relationship. However, very often the spouse who is awarded or left with the custody of the children is not the owner of the house and after the dissolution of the relationship both the custodial parent and the children might have to leave the family home. While it is true that the financial needs of the child and the spouse can be met through spousal and child support, the emotional and psychological needs of the child for stability and continuity cannot be fulfilled this way.

Rather than completely denying the application of matrimonial property regulations to unmarried cohabitants it might be a better solution to distinguish between those relationships that are in need of protection and those that are not. A possible characteristic might be the presence of children or a minimum relationship length (e.g. 5 years of cohabitation). It is furthermore important to take into consideration that the breakdown of a relationship is usually economically

more devastating for women than for men.³⁷⁶ The matrimonial property regime might be a helpful tool to counterbalance these economic disadvantages and to prevent an increase in women's poverty after the breakdown of a relationship. In *Nova Scotia v. Walsh*, the Supreme Court seems to be completely unconcerned about the "feminization of poverty, one of the leitmotifs of the Supreme Court's divorce jurisprudence over the last dozen years."³⁷⁷

Initially, the matrimonial property regime was introduced to mitigate the negative effects of divorce on women. Should not the same be applied to unmarried cohabiting women? Are they not in need of protection? Questions like these can only be answered if we take a closer look at unmarried cohabitation from both a sociological and feminist perspective. Only then is it possible to decide whether married and unmarried cohabiting couples face the same economic consequences at the breakdown of their union and whether they need the same legal protection.

³⁷⁶ For more information on that topic please see below Chapter 5. II.

³⁷⁷ Conway and Girard supra n. 87 at 729.

Chapter 5: Marriage and Unmarried Cohabitation: How Different are They? – A Sociological and Feminist Analysis

I. Introduction

The previous chapters have demonstrated the various arguments for and against the legal assimilation of marriage and unmarried cohabitation. They reveal that the scholars are far from being unanimous in their view on the legal recognition of unmarried cohabitation. They also highlight the degree to which the Supreme Court of Canada has changed its point of view over the years.

In order to make a decision for or against the legal assimilation of marriage and unmarried cohabitation it is important to take a closer look at unmarried cohabitation. By answering questions like ‘Who cohabits?’, ‘How long do cohabiting relationships last?’, and ‘Are the experiences of cohabiting couples at the end of a relationship different from married couples?’, it is possible to better understand unmarried cohabitation and make an informed decision about how different unmarried cohabiting couples truly are from married couples.

In this chapter, I use a sociological and feminist approach for the analysis of unmarried cohabitation. The economic consequences of the breakdown of a relationship are usually more severe for women than for men. This becomes obvious when looking at who claims spousal support after the breakdown of a relationship. A study of British Columbian spousal support claims revealed that well over 90 percent of support claims that go to court are brought by

women.³⁷⁸ Statistics furthermore show that the economic consequences for relationship breakdowns are much more severe for women than for men.³⁷⁹ It therefore makes sense to take a closer look at how women experience unmarried cohabiting relationships and how the breakdown of such relationships affects their lives.

II. The Appearance of Unmarried Cohabitation

1) Who Cohabits?

It is impossible to make an absolute statement about what unmarried cohabitation looks like. Every individual is unique and so is every relationship. However, when comparing marriage to unmarried cohabitation it is important to get a general idea of the appearance of common-law relationships. An argument towards the assimilation of marriage and unmarried cohabitation is only possible if they are actually (functional) similar. It is therefore necessary to find out what the average common-law relationship looks like and who lives in a common-law relationship.

a) Age

Unmarried cohabitation is most common amongst younger couples, especially in the age range between 25 and 29. In 2006, over 22 percent of Canadians in this age group were in a common-law relationship.³⁸⁰ But also the age range from 20 to 24 years and from 30 to 39 years is well represented and the percentage of individuals cohabiting in these age groups is over 15

³⁷⁸ S.B. Boyd, C.L. Baldassi, "Marriage or Naught?: Marriage and Unmarried Cohabitation in Canada" in A. Bottomley, S. Wong (eds.), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing*, Onati International Series in Law and Society (Oxford: Hart, 2009) at 111-129.

³⁷⁹ For more information please see below Chapter 5. II. 3).

³⁸⁰ Statistics Canada supra n. 22 at 20.

percent.³⁸¹ Although unmarried cohabitation is not particularly prevalent among older individuals, it is very interesting to notice that between 2001 and 2006 the age group of 60 to 64 had the highest growth rate in cohabitation of all age groups with just over 77 percent.³⁸² This might be because older cohabitants are often divorced and they might therefore prefer cohabitation to remarriage.

b) Children

The percentage of children under 14 living in a common-law family is increasing. In 2006, 14.6 percent of children lived with parents that were cohabiting, compared to 12.8 percent in 2001.³⁸³ However, these numbers are greatly influenced by the high number of children living within common-law families in Quebec. In 2001, for example, 29 percent of children in Quebec lived with cohabiting parents. As a consequence, the national percentage for 2001 would drop from 12.8 percent to 8.2 percent if Quebec were excluded.³⁸⁴ In 2006, 33.8 percent of children in Quebec lived with cohabiting parents.³⁸⁵ However, the majority of children (65.7 percent on a federal level) still live with married parents and a quite large percentage (18.3 percent on a federal level) live with lone parents.³⁸⁶

³⁸¹ *Ibid* at 20, Figure 8.

³⁸² *Ibid* at 21, Figure 9.

³⁸³ *Ibid* at 24.

³⁸⁴ Ambert *supra* n. 25 at 11.

³⁸⁵ Statistics Canada *supra* n. 22 at 39 Table 10.

³⁸⁶ *Ibid*.

c) Race

Unfortunately, the 2006 Census in Canada does not provide any information on the race of cohabiting couples. From an US perspective, Grant Bowman reports that unmarried cohabitation is more prevalent among African Americans and Latinos, especially Puerto Ricans.³⁸⁷ However, she also emphasizes that for Puerto Ricans cohabitation might have a different tradition than for other social groups in the United States, since historically it was regarded as a form of marriage. The question is, can similar assumptions be drawn for Canada? One could argue that the cohabitation rate amongst Aboriginals is higher than that of non-Aboriginal Canadians. The 2006 Census shows that the percentage of unmarried couples is relatively high in the Yukon, Northwest Territories, and Nunavut (23.6 percent, 27.5 percent, and 31.3 percent respectively).³⁸⁸ In these territories, the percentage of Aboriginals is comparatively high and many of the couples that are married under Aboriginal traditions might not be recognized as married couples (since they had no “official” ceremony) and might therefore fall under the category of unmarried cohabitation. However, further research is necessary with regard to this assumption and it is dangerous to make a generalization by just looking at the territories mentioned above.

d) Income

Census Canada reports that in 2005 the median income of cohabiting families was 63,811 CAD³⁸⁹ compared to 71,665 CAD³⁹⁰ for married couple families. Surprisingly, the income level

³⁸⁷ Grant Bowman supra n. 324 at 34.

³⁸⁸ Statistics Canada supra n. 22 at 30. However, the influence of these high provincial percentages on the federal level is relatively low since the population of these territories/provinces is very low.

³⁸⁹ Statistics Canada, 2006 Census, Family Income Groups: Common-law couple families, online <<http://www12.statcan.ca/>>

³⁹⁰ Statistics Canada, 2006 Census, Family Income Groups: Married couple families, online <<http://www12.statcan.ca/>>

of cohabitants in comparison to married couples seems to be much lower for male cohabitants but not for female cohabitants. Both Canadian and US studies mention that male cohabitators tend to have lower income.³⁹¹ The US study, however, clearly shows that the average income for cohabiting women is similar to that of married women.³⁹²

e) Length of Relationship

Whenever unmarried cohabitation and marriage are compared to each other it is argued that common-law relationships are less stable and dissolve more rapidly than marriages.³⁹³ A study from the United States reported that more than 50 percent of cohabiting relationships end within 5 years.³⁹⁴ A Canadian study revealed even worse numbers for Canadian cohabitation: 75 percent of relationships survive the first year, around 40 percent survive the third year, and only 28 percent of relationships are still intact after five years of cohabitation.³⁹⁵ It is further estimated that about 90 percent of first marriages are expected to last for 10 years, compared to a mere 12 percent of cohabiting relationships.³⁹⁶ On average, over 50 percent of cohabiting unions in Canada are expected to end within 3 years.³⁹⁷

However, when looking at these numbers it is important to understand that there are different types of relationship dissolutions. The two most important ones are separation and marriage.³⁹⁸ This means that not all couples that fall under the above statistics are actually separated. Their

³⁹¹ Ambert supra n. 25 at 8; W.D. Manning, D.T. Lichter, "Parental Cohabitation and Children's Economic Well-Being" (1996) 58 *Journal of Marriage and the Family*, 998 – 1010 at 1004.

³⁹² Manning, Lichter, supra n. 391 at 1004 Table 2.

³⁹³ E.g. Ambert supra n. 25 at 10.

³⁹⁴ *Ibid.*

³⁹⁵ Wu supra n. 12 at 108. The mentioned numbers are the percentages for women. The numbers for men are just slightly different with 76, 40, and 25 percent respectively.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ Widowhood would be a possible third type of dissolution. See Wu supra n. 12 at 109 figure 8.2 and 110.

relationships might have simply transformed from cohabitation to marriage. An American study revealed that about 60 percent of first cohabitations are likely to transform into marriage. When this fact is taken into account in the above statistics, roughly four out of ten couples are still together (married or still cohabiting) after ten years of cohabitation.³⁹⁹ A Canadian study that looked at the transition from cohabitation to marriage suggested that cohabiting individuals are actually more likely to get married than to separate.⁴⁰⁰ After five years of cohabitation, approximately 44 percent of women and 41 percent of men married their partners, whereas only 28 percent of women and 34 percent of men went through separation.⁴⁰¹

Furthermore, it is important to consider that the stability of a cohabiting relationship might depend on who cohabits and is therefore influenced by cultural and economical differences. For example, an American study showed that the duration of common law relationships is usually longer for persons that have been married before and also for persons that are 25 years of age or older at the beginning of the relationship.⁴⁰² This reveals that some of the divorces that would have resulted from early marriages have shifted into cohabitation.⁴⁰³ Additionally, the length of cohabiting unions is usually shorter in communities with higher unemployment rates like for example many African American or Hispanic communities in the United States.⁴⁰⁴ In summary, the chances of a successful and long lasting relationship are the highest for persons that “are older, a member of the dominant racial or ethical group, and have more money.”⁴⁰⁵

³⁹⁹ Grant Bowman *supra* n. 324 at 17.

⁴⁰⁰ Wu *supra* n. 12 at 116.

⁴⁰¹ *Ibid* at 116. See also at 110 figure 8.3 and at 116 figure 8.4.

⁴⁰² Grant Bowman *supra* n. 324 at 18.

⁴⁰³ *Ibid*.

⁴⁰⁴ *Ibid*.

⁴⁰⁵ *Ibid*.

Even after considering the above facts, it is undeniable that unmarried cohabitation is on average shorter and less stable than marriage. But maybe it is important to ask whether it is unmarried cohabitation itself that creates unstable or short-lived relationships or the circumstances that surround the individuals that live in such unions. Would a couple that is young, unemployed, and poor have a longer relationship only because they are married? Would they even be able to get married or would they have to “choose” unmarried cohabitation for monetary reasons because they cannot afford a wedding ceremony? Is it the institution of marriage itself that creates a more stable environment? Or is it the individuals and their economic, educational, and personal circumstances that can generate a long lasting and committed relationship (either marriage or cohabitation)?

2) Economic Situation of Women during a Relationship: Cohabitation as an Economic Partnership?

When two people marry, it is normally presumed that they have the intention to enter into an economic partnership.⁴⁰⁶ According to the Supreme Court of Canada this cannot be said for two persons that choose to live together as cohabitants, since the decision to simply live together does not include the intention to enter an economic partnership.⁴⁰⁷ This approach is consistent with early studies that report that cohabitants do not pool their resources and expenses and are therefore not economically interdependent.⁴⁰⁸ However, such an opinion might be much too simplistic, since it assumes that all cohabitants have a similar attitude towards financial matters. More recent studies from the United States confirmed that cohabitants are less likely to pool their

⁴⁰⁶ *Nova Scotia v. Walsh* supra n. 34 at para. 54.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Bowman* supra n. 324 at 23.

finances than married couples, but they also showed that the majority *does* pool their resources: about 55 percent of cohabitants in the United States maintain joint finances.⁴⁰⁹ Other studies even report that 75.3 percent of cohabitants are economically interdependent (compared to 83.2 percent of married couples) or that there are no differences between married and cohabiting couples if couples have children.⁴¹⁰ However, the contribution might be often a rather strict sharing of current expenses (fifty-fifty sharing) than a general pooling of *all* income.⁴¹¹

But what is the economic situation of *women* during unmarried cohabitation? As mentioned above, the income of cohabiting women tends to be the same as that of married women, but the *family* income of unmarried couples tends to be lower than that of married couples.⁴¹² Additionally, women that have high-income and a high standard of education are more likely to be married than entering into unmarried cohabitation.⁴¹³ However, whenever a couple decides to pool its expenses and/or income there is a risk that it worsens the economic situation of women.⁴¹⁴ If, for example, the couple agreed on a fifty-fifty sharing of expenses and the woman's income is smaller than that of her spouse, the woman invests a higher percentage of her income

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid* at 23 – 24.

⁴¹¹ *Ibid* at 24.

⁴¹² The family income is the combination of the incomes of both spouses. It is lower in comparison to the family income of married couples because unmarried cohabiting men tend to earn less than married men. Nonetheless, cohabiting women still earn on average considerably less than cohabiting men.

⁴¹³ *Ibid* at 23. The question around the educational level of cohabitants seems to be somewhat unclear and controversial. Bowman, for example, mentions at 14 – 15 that low education ceased to be connected with cohabitation, since it might be hard to make such a general assumption. This was confirmed in the UK by the British Social Attitudes (BSA) survey in 2000, which did not prove any educational difference between cohabiting and married couples. See A. Barlow, S. Duncan, G. James, and A. Park, *Cohabitation, Marriage and the Law – Social Change and Legal Reform in the 21st Century* (Oxford, Portland: Hart, 2005) at 17. However, Bowman also mentions at 15 that wealthier and more educated groups have the highest rate of eventual marriage. Furthermore, a US study in 1996 clearly shows that there are educational differences between cohabitation and marriage. See Manning, Lichter *supra* n. 391 at 1004.

⁴¹⁴ However, the pooling of expenses/income might be advantageous because it might be useful evidence for a support claim.

in the relationship than her spouse, which might leave her with less money to spend on herself.⁴¹⁵ Furthermore, although women usually earn less than men, they may nevertheless spend more on food and household needs than men do, which again leaves them with less money for themselves.⁴¹⁶ The fifty-fifty sharing may also lead to a presumption of equality in the relationship in the case of a support claim.

However, there is also a chance that unmarried cohabitation can result in an economic advantage especially for lone-parent women with one or more children. A US study from 1996 shows that poverty among children is reduced by 29 percent if the income of the cohabiting partner is added to the family income.⁴¹⁷ The decrease of child poverty is not only connected to an economic benefit for the child itself but also for the mother, since the financial pressure on her to provide for her child is decreased through the income of the spouse.

3) After the Breakdown of a Relationship: Different Experiences for Married and Unmarried Women?

Since the Supreme Court of Canada treats married couples and unmarried couples differently with regard to the matrimonial property regime, it seems that unmarried couples experience the breakdown of the relationships differently than married couples. Is this the truth? What does the situation look like from a feminist perspective? Do married and unmarried women experience the same inequalities after the breakdown of a relationship?

⁴¹⁵ See for example *Lye v. McVeigh*, [1991] B.C.J. No. 2008 (C.A.). In this case the (married) couple agreed on an equal contribution to their living expenses. The wife earned considerably less than the husband and therefore had less income left to spend on herself. As a result of the equal division, the wife felt like she was living beyond her means and the husband had considerably more money to spend on himself.

⁴¹⁶ Bowman supra n. 324 at 24 – 25.

⁴¹⁷ Manning, Lichter supra n. 391 at 1009.

a) Economic Consequences of Relationship Breakdown for Married Women

Many sociological studies have shown that the economic consequences of a marriage breakdown are much more severe for women than for men. While older studies sometimes reported a drop in women's economic well being of over 70 percent and an increase in men's of over 40 percent, newer studies showed a decrease in women's economic well being of about 40 percent and only a small increase for men.⁴¹⁸

A very recent Canadian longitudinal study⁴¹⁹ found slightly lower numbers and also revealed that these numbers change over time: while women's median income dropped by 29 percent in the year of the relationship breakdown, it slightly increased in the following two years to 20 percent under the pre-dissolution income level and then stayed stable at this rate.⁴²⁰ Men on the other side only experienced a slight decrease in their income of 6 percent in the dissolution year, whereas it then dropped to 7 percent in the year after and stabilized at a 5 percent decrease in the following years.⁴²¹ These results are somewhat different to previous surveys, which usually reported a slight increase in men's income.⁴²² A possible explanation for this might be that, unlike others, this study includes support payments not only on the recipient's side but also on the payor's side. Since statistically most support payments are made by men, the consideration of support payments should have a decreasing effect on men's median income.

⁴¹⁸ R. Finnie, "Women, men, and the economic consequences of divorce: Evidence from Canadian longitudinal data" (1993) 30 *Canadian Review of Sociology & Anthropology* at 211 and 206, 225.

⁴¹⁹ See T. M. Gadalla, "Impact of Marital Dissolution on Men's and Women's Income: A Longitudinal Study" (2009) 50 *Journal of Divorce & Remarriage* 55 – 65. The survey is based on data collected by Statistics Canada for the Survey of Labour and Income Dynamics (SLID) between 1998 and 2005. SLID is a longitudinal survey that uses information of the same persons for a period of 6 years with one preliminary interview and two follow-up interviews per year.

⁴²⁰ *Ibid* at 60.

⁴²¹ *Ibid*.

⁴²² *Ibid* at 62. Gadalla mentions that a previous survey reported a 10 percent increase of men's median income.

With regard to poverty numbers, a study using the same data showed that women's poverty increased from 6.3 percent before dissolution to a rate of 24.5 percent in the year of dissolution. The number then dropped in the following years to about 14 percent.⁴²³ Men on the other hand only experience an increase in poverty from a pre-dissolution rate of 6.8 to 10.2 percent in the year of marital dissolution and the following years.⁴²⁴

b) Economic Consequences of Relationship Breakdown for Unmarried Cohabiting Women

What do the statistics report about unmarried cohabitation? Are the experiences of cohabiting women after the breakdown of their relationship indeed different from those of married women or are they the same? An American longitudinal study⁴²⁵ examined the economic effects of the dissolution of cohabiting relationships and compared it to those of marriages. The results show that cohabiting women have similar experiences to married women. For example, cohabiting women were faced with a poverty rate of almost 30 percent following the end of the relationship.⁴²⁶ Furthermore, they experienced a 33 percent loss of household income after separation.⁴²⁷ Men on the other side were confronted with a poverty rate of 20 percent and a decrease in household income of approximately 10 percent.⁴²⁸ In comparison to married women,

⁴²³ T.M. Gadalla, "Gender Differences in Poverty Rates After Marital Dissolution: A Longitudinal Study" (2008) 49 *Journal of Divorce & Remarriage* at 231, 232.

⁴²⁴ *Ibid.*

⁴²⁵ S. Avellar, P.J. Smock, "The Economic Consequences of the Dissolution of Cohabiting Unions" (2005) 67 *Journal of Marriage and Family* 315 – 327.

⁴²⁶ *Ibid* at 324. The pre-dissolution level of poverty was around 20 percent.

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

it is argued that married women suffer from a more dramatic change but that both end up with comparable levels of household income and poverty after the dissolution of the relationship.⁴²⁹

Even though married women might suffer from more dramatic changes after the breakdown of the relationship this does not mean that cohabiting women do not have similar experiences. Their economic situation might not worsen as much as for married women but it nonetheless worsens significantly. Both married and cohabiting women are confronted with similar gender inequalities at the breakdown of their relationships: while the male spouse experiences only small drops in his economic well-being after dissolution, women are the ones that suffer most from the effects of relationship dissolutions no matter in what kind of relationship form they live. Why is it then that only married women have access to matrimonial property claims? Should not all women in need of protection at the end of a relationship be supported independently of what their relationship looked like? Do women who *choose* to live in unmarried cohabitation have to bear the consequences of their initial choices? Or should the state protect the weak, the disadvantaged, and the exploited regardless of how they have designed their lives?

III. Unmarried Cohabitation or Marriage: Does it Make a Difference from a Feminist Perspective?

The feminist movement, particularly the second wave, has had a significant influence on the perception of personal relationships. Marriage, which was for a long time the only socially and legally accepted family form, started to be criticized for its patriarchal structure. Women were encouraged to question the division of roles within marriage and escape from relationships that

⁴²⁹ *Ibid.*

promote gender inequalities. Unmarried cohabitation on the other side was perceived as liberation from patriarchal structures and as a relationship form that is free from legal oppression and gender inequalities. As a consequence, an increasing number of women rejected marriage and decided to enjoy relationships without getting married.

Despite the advanced legal convergence of marriage and unmarried cohabitation, even today gender inequalities within intimate relationships are often associated with the legal institution of marriage, whereas unmarried cohabitation is still perceived as a more liberal and equal relationship form. However, is this the truth or is it just a myth? Is unmarried cohabitation the better “choice” from a feminist perspective?⁴³⁰ Are gender inequalities really connected to the legal institution of marriage or are they independent from the chosen legal form and therefore a natural consequence of intimate (heterosexual) relationships?

1) Gender Equality within Intimate Relationships: Division of Roles between Men and Women

The division of household labor (i.e. caring for children, preparing meals, etc.) between two spouses is a strong indicator of any existing gender inequalities within intimate relationships. How are the roles divided between the spouses of unmarried cohabitation in comparison to married couples? Are there any differences? Do unmarried spouses divide household labor more equally than married couples?

⁴³⁰ It is important to emphasize again that for many couples the question of whether to live in a marital or an unmarried cohabiting relationship is not always a question of choice but a consequence of the circumstances in their lives. Please see above Chapter 3. III. 2).

a) Gender Inequalities within Marriage

Not too long ago, the division of roles within marriage was indisputable. Corresponding to the private/public divide, women were supposed to do the housework, care for children and also care for senior family members. Men on the other hand were supposed to be the breadwinners and work outside the house in paid jobs. Not only were women expected to stay at home and do unpaid work, but also to be completely satisfied with this lifestyle. This attitude was even adopted by the courts: in cases where a woman was injured and lost her capacity to do housework, the personal loss of the woman was identified as a non-economic loss of enjoyment of life.⁴³¹ On the other hand, the husband was believed to have suffered an economic loss by the injury of his wife: a loss of service and a loss of society, and companionship (sexual service included).⁴³² Consequently, damages awards for the loss or impairment of the capacity to do housework were granted to the husband as a third person.⁴³³

One would think that the division of roles within marriage started to change with the increasing participation of women in the labor force. However, the change within intimate relationships did not progress with the same speed. Even when women worked full time outside the home, household tasks were not shared equally between both spouses. As a consequence,

⁴³¹ R. Graycar, "Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages" in T. Brettel Dawson, *Women, Law and Social Change: Core Readings and Current Issues* (Toronto: Captus Press, 2008) 240 – 244 at 242.

⁴³² *Ibid.*

⁴³³ K. Brooks, "Valuing Women's Work in the Home: A Defining Moment" in T. Brettel Dawson, *Women, Law and Social Change: Core Readings and Current Issues* (Toronto: Captus Press, 2008) 247 – 251 at 248.

women working outside the house often had to “carry a double day of work.”⁴³⁴ Even in the early 1990s, women still performed two-thirds of the unpaid work.⁴³⁵

What is the situation today? Is there still such a clear gender inequality within the family? Do women still take care of most of the household tasks or are they shared equally? Statistics show that between 1986 and 2005 the participation of men in unpaid work has slowly increased while that of women has decreased due to the higher participation of women in paid work.⁴³⁶ Men’s participation in housework and other unpaid work like child care and shopping for goods has increased from 2.1 average hours per day in 1986 to 2.5 hours per day in 2005.⁴³⁷ Women’s participation on the other hand has decreased from 4.8 average hours per day in 1986 to 4.3 in 2005.⁴³⁸ The participation of men engaging in some daily housework (i.e. vacuuming, taking out the garbage...) increased from 54 percent to 69 percent, while that of women stayed stable at 90 percent. However, men’s participation rate for core housework (i.e. cleaning, laundry, meal preparation...) grew from 40 percent in 1986 to 59 percent in 2005, while that of women declined from 88 percent to 85 percent.⁴³⁹

The numbers specifically for married couples are slightly different. While in 1986, married men participated less in the household than single men (53 percent compared to 61 percent respectively), in 2005 about 70 percent of married men (with and without children) engaged in

⁴³⁴ S. Boyd, “Women, Men and Relationships with Children: Is Equality Possible?” in K. Busby, L. Fainstein and H. Penner, *Equality Issues in Family Law: Considerations for Test Case Litigation* (Winnipeg: University of Manitoba, Legal Research Institute, 1990), 69 – 91 at 71.

⁴³⁵ Graycar supra n. 431 at 243.

⁴³⁶ K. Marshall, “Converging gender roles” *Perspectives on Labour and Income* (Statistics Canada, catalogue no. 75-001-XIE) (July 2006) vol. 7 no. 7 at 7. The study includes men and women aged 25 to 54.

⁴³⁷ *Ibid* at 5, Chart A.

⁴³⁸ *Ibid*.

⁴³⁹ *Ibid* at 7.

housework.⁴⁴⁰ The involvement of married fathers in childcare with at least one child under 5 years has climbed from 57 percent in 1986 to 73 percent in 2005, whereas the involvement of mothers slightly increased from 92 percent to 94 percent.⁴⁴¹ Equal division of household work between husband and wife seems to be most likely when the wife earns \$100,000 per year and more. In dual-earning families where the wife earns \$100,000 or more, both partners spent on average 6.5 hours per day on paid work and 1.5 hours doing housework.⁴⁴²

These statistics clearly show that, although a development towards the equal sharing of household work between men and women is continuing to take place, there are still considerable gender inequalities within the family with regard to the sharing of (unpaid) household work. However, the inequalities do not stop there. The unequal sharing of childcare results in disadvantages for women with regard to full-time employment and equal pay in the labor force. This may reinforce the economic dependence of wives on their husbands, which might then lead to inequalities after the breakdown of relationships.

b) Gender Inequalities within Unmarried Cohabitation

What is the situation for unmarried cohabiting couples? Do they experience similar gender inequalities within their relationships? The Canadian sociologist Wu approaches the question of whether the division of household labor between unmarried couples is different from married couples with the presumption that it is shared more equally between unmarried couples.⁴⁴³ This corresponds with the myth that unmarried cohabitation is a more liberal and equal relationship

⁴⁴⁰ *Ibid* at 10.

⁴⁴¹ *Ibid* at 11.

⁴⁴² *Ibid* at 13.

⁴⁴³ Wu *supra* n. 12 at 137.

form than marriage. However, Wu's hypothesis is not supported by his findings.⁴⁴⁴ He emphasizes that the number of hours spent in housework does not really vary between cohabiting couples and married couples and that unmarried cohabitation has only a minimal effect on the division of housework.⁴⁴⁵

Ambert, on the other hand, argues that "there seems to be a more equal division of labour within cohabitation than within marriage."⁴⁴⁶ She tries to explain this phenomenon by arguing that cohabiting couples have fewer children than married couples and claims that the equal sharing of household work might rather be a consequence of childlessness than of cohabitation itself.⁴⁴⁷ She furthermore states that the equal division of roles might be connected to the fact that cohabiting women feel less secure in their relationship and are therefore less likely to give up their employment opportunities.⁴⁴⁸

It is important to note that although Ambert's work was published in 2005 her arguments are based on a survey from the United States from the year 1993.⁴⁴⁹ After taking a closer look at this survey, it becomes obvious that it actually does *not* provide proof that unmarried cohabitation is connected to a more equal division of household tasks. The data provides that cohabiting men spend 20.2 hours per week doing housework and cohabiting women 33.6 hours, whereas married men spend 18.9 hours and married women 40.0 hours.⁴⁵⁰ These numbers show that no equal

⁴⁴⁴ For his survey, Wu relies on both data from the 1990 General Social Survey (see Wu supra n. 12 table 9.3 and 9.5 on page 137/138) as well as from the 1995 General Social Survey (see Wu supra n. 12 table 9.4 on page 140/141).

⁴⁴⁵ Wu supra n. 12 at 143.

⁴⁴⁶ Ambert supra n. 25 at 13.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.* Ambert refers to B.A. Shelton and D. John, "Does Marital Status Make a Difference? – Housework Among Married and Cohabiting Men and Women" (1993) 14 *Journal of Family Issues* 401 – 420.

⁴⁵⁰ B.A. Shelton and D. John, "Does Marital Status Make a Difference? – Housework Among Married and Cohabiting Men and Women" (1993) 14 *Journal of Family Issues* at 409.

sharing of household work is taking place amongst cohabitants. Cohabiting women spend over 13 hours per week more on housework than their spouses. It is true that the gap is wider among married couples, with over 21 hours difference between men and women. However, the smaller gap is rather a consequence of women spending less time doing housework when cohabiting than men doing more housework.⁴⁵¹ It is therefore not a sign of equal division of household tasks. It is rather a consequence of the fact that women have less time available to do household tasks, since the fewer hours spent on housework by women might be connected to an increased participation in the work force.⁴⁵²

Cynthia Grant Bowman, on the other hand, does not make a clear statement about what she thinks of the division of labor within cohabitation. She mentions the assumption that “a gendered division of labor does in fact appear to be more characteristic of marriage, while cohabitation may be linked to a somewhat more equal division of labor within the household.”⁴⁵³ In a footnote, however, she refers to two different studies and argues that one study found that the gender gap is bigger among married couples than among cohabiting couples, whereas the other study reports that there is no difference between married and cohabiting couples.⁴⁵⁴

As shown above, the literature is inconclusive about whether there is at least some difference between married and unmarried couples with regard to the gendered division of household tasks or whether there is no difference at all. However, it can be clearly stated that neither marriage nor

⁴⁵¹ *Ibid* at 417.

⁴⁵² It is furthermore questionable if the reason for women’s participation in the work force is mostly connected to their relationship insecurities as Ambert stated. It might rather be a sign of women’s growing economic independence or a consequence of economic necessities in general. Furthermore, the same development happened for married women and is not supposed to be connected to relationship insecurities.

⁴⁵³ Grant Bowman *supra* n. 324 at 21.

⁴⁵⁴ *Ibid* at 21 footnote 117. The article that refers to the bigger gender gap among married couples is from 1994, whereas the other article that reports that there is no difference is from 1999.

cohabitation can be identified as relationships that promote the equal sharing of housework between men and women. It is interesting that, although there clearly is no gender equality with regard to the division of household tasks, many women perceive the distribution of household tasks as fair. A cross-country study shows that an average of 44.6 percent of women consider the housework to be shared equally.⁴⁵⁵ A possible explanation for this phenomenon might be that equality is perceived differently and its understanding might vary from person to person. Some women might therefore justify their enhanced contribution with regard to household work by arguing that they have more free time available than their spouses or that they economically depend on their spouses.⁴⁵⁶ More traditional women on the other hand might just accept the unfair division of household tasks and they might believe that it is women's role to take on most of the work at home.⁴⁵⁷ All of these attitudes are rather problematic, since women will only demand change if they feel treated unfairly. This might explain why change within this area happens only very slowly.

2) Domestic Violence within Unmarried Cohabitation

Domestic violence against women is a serious problem in all kinds of intimate relationships. However, it seems that women who live in common-law relationships are more at risk of experiencing domestic violence in their relationship than married women. The General Social Survey in Canada reported that especially younger women and women in common-law relationships are at greatest risk of being assaulted by a partner: About 4 percent of persons (men

⁴⁵⁵ M. Braun, N. Lewin-Epstein, H. Stier, and M.K. Baumgärtner, "Perceived Equity in the Gendered Division of Household Labor" (2008) 70 *Journal of Marriage and Family* 1145 – 1156 at 1150. Unfortunately, the study does not include Canada. However, Canada might be somewhere close to the numbers of the United States (41.0 percent), Great Britain (34.1 percent), and Australia (35.2 percent).

⁴⁵⁶ *Ibid* at 1146.

⁴⁵⁷ *Ibid* at 1147.

and women) who lived in common-law relationships reported spousal violence during the last 12 months prior to the survey, compared to 1 percent of married persons.⁴⁵⁸ If the timeframe is increased to 5 years, the percentage goes even up to 7.1 percent of common-law couples.⁴⁵⁹ Various studies from the United States have produced similar results. Waite even argues that not only is the assault rate highest amongst unmarried cohabitation, but also the intensity of the violence.⁴⁶⁰ She further states that the probability of women experiencing violence in marriage is 3.6 percent, whereas it is 9.9 percent for women in unmarried cohabitation without definite plans to marry.⁴⁶¹ In the UK, Smart, who questioned 40 individuals after the breakdown of their common-law relationship, mentions that in 9 of 40 relationships violence against the woman had taken place.⁴⁶²

One explanation for the higher rate of domestic violence within unmarried cohabitation might be the average age range of cohabitants. As mentioned above, the violence rate is much higher for younger women than for women aged 45 and older. Statistics also show that cohabitation is most popular among young people especially within the age range of 20 to 29.⁴⁶³ The question is therefore whether enhanced domestic violence is really a consequence of cohabitation itself or whether it is just a consequence of different demographic structures (esp. with regard to age). Grant Bowman for example warns that especially older statistics might be misleading and too generalized since they do not take into account the age problem. However, she also states that

⁴⁵⁸ *The Daily*, Tuesday, July 25, 2000 (Statistics Canada), online <<http://www.statcan.gc.ca/daily-quotidien/000725/dq000725b-eng.htm>>.

⁴⁵⁹ Brownridge supra n. 323 at 635.

⁴⁶⁰ L.J. Waite, "Trends in Men's and Women's Well-Being in Marriage" in L.J. Waite (ed.), C. Bachrach, et al. (co-editors), *The Ties that Bind: Perspectives on Marriage and Cohabitation* (New York: Aldine de Gruyter, 2000) at 379 – 380.

⁴⁶¹ *Ibid* at 382. The percentage for cohabiting couples that are engaged or have definite marriage plans is much lower at 4.7 percent

⁴⁶² Smart supra n. 307 at 42.

⁴⁶³ Wu supra n. 12 at 45.

there is evidence that femicide is more common amongst cohabitants than amongst married couples.⁴⁶⁴ This is also true for Canada: between 1991 and 2000 the femicide rate amongst cohabiting couples was 6 times the rate of femicide amongst married couples.⁴⁶⁵

The above findings suggest that unmarried cohabitation is not necessarily a relationship form that could be called a “feminist triumph”. Although it seems that the division of household work is somewhat fairer amongst cohabiting couples than married couples, the gender gap is still too big to call it equal. With regard to violence and homicide, however, cohabiting women are obviously in a worse situation than married women. From a feminist perspective it is therefore obvious that the belief that cohabitation is a family form which is free from oppression and gender inequalities, is just a myth. Gender inequalities within intimate relationships are therefore not simply a consequence of the chosen relationship. They are created by the people that live in the relationship and not by the relationship form itself.

IV. Conclusion

There is no denying that marriage and unmarried cohabitation are not exactly the same. But are they similar enough to demand equal treatment? The above findings show that unmarried cohabiting couples are actually not that different from married couples. Similar to married couples, a fairly large number of cohabiting couples are economically interdependent, have children together, live together for a significant number of years, and have serious intentions of sharing their lives. Does it matter that some cohabitants do not fall under the ideal image of a perfect relationship? Does that justify a differential treatment of *all* cohabiting couples?

⁴⁶⁴ Grant Bowman *supra* n. 324 at 27.

⁴⁶⁵ Brownridge *supra* n. 323 at 627.

Intimate relationships are very diverse. There are no two relationships that are exactly the same. It is the individuals in the relationship that give it its unique appearance. This is true for both marriage and unmarried cohabitation. Not every marriage is the same. With rising divorce rates over the last decades, marriage is on its way to losing its reputation as stable. Not only are marriages becoming shorter but they are also changing its appearance: an increasing number of married couples lives without children and/or choose to keep their finances separate. When we compare unmarried cohabitation to marriage, what do we compare it to? Do we still compare it to the ideal marriage that consists of two spouses with children that are economically interdependent? Or do we compare it to a more realistic picture of marriage, a more modern picture? Because if we do the latter, it might change the way we evaluate and understand unmarried cohabitation.

Chapter 6: Conclusion

The previous chapters have provided different perspectives and views on unmarried cohabitation. After a short introduction to the topic in chapter one, chapter two gave an overview of the social changes that had an influence on the development of unmarried cohabitation. It also illustrated its legal history and how an increasing number of marital rights and responsibilities were given to cohabiting couples. It clearly showed that it is a Canadian (common law) tradition to gradually assimilate marriage and unmarried cohabitation, a tradition which seemed to have come to a halt with the decision of the Supreme Court of Canada in *Nova Scotia v. Walsh*. Chapter three provided an overview of the debate of whether married and unmarried cohabiting couples should be legally treated the same. It not only discussed the legal approach to the debate but also included feminist and sociological perspectives, which revealed that the debate is very diverse and controversial. Chapter four discussed the different approaches to the debate by the Supreme Court of Canada and illustrated how the diversity of the debate in the literature is reflected by the two decisions of the majority in *Miron v. Trudel* and *Nova Scotia v. Walsh*. Chapter five provided a sociological and feminist analysis of unmarried cohabitation showing that unmarried cohabiting couples are actually not that different from married couples. In this last chapter, it is now time to look at the final questions: What can we make of the information from the previous chapters? What conclusion can be drawn from that information?

During the time I worked on this thesis I had the opportunity to discuss the topic with many different people. Some of them were in the legal field while others had a completely different background and area of expertise. What really struck me was their reaction towards my thesis: many of them responded very emotionally and from a highly subjective perspective. It is

therefore important to emphasize at this point that a decision in favor or against the legal assimilation of marriage and unmarried cohabitation should be made from an unbiased point of view. Personal preferences and lifestyle choices should be set aside and not influence the decision-making process. It does not matter whether we personally prefer marriage to unmarried cohabitation or whether we like the idea of sharing assets after the breakdown of the relationship. Instead we should focus on those that are in need of protection and decide whether we want to live in a society that protects the weak or in one that preserves assets for those who are lucky enough to have them.

Another important factor in the debate is the context of the discourse. Unmarried cohabitation is a phenomenon that exists virtually all around the world. However, not every country has the same tradition and the same history regarding the legal recognition of such relationships. In a country like Germany, for example, where unmarried cohabitants have almost no rights and responsibilities, a discussion on granting spousal support after the breakdown of a cohabiting relationship would cause resentment and would be impossible to implement. Canada, on the other hand, has a long tradition of giving rights and responsibility to unmarried cohabiting individuals. The complete assimilation of marriage and unmarried cohabitation would therefore be much more natural in Canada as compared to Germany. So far, the Canadian tradition has been to give more and more rights to unmarried cohabitants. To stop at this point and deny them complete assimilation would be inconsistent. This argument is supported by the fact that despite the decision of the Supreme Court in *Walsh v. Nova Scotia*,⁴⁶⁶ some provincial legislation was changed afterwards to include unmarried couples in the matrimonial property regime.⁴⁶⁷

⁴⁶⁶ *Nova Scotia v. Walsh* supra n. 34.

⁴⁶⁷ See above Chapter 2, III. 2) f).

As part of the debate, unmarried cohabitation is usually compared to marriage. While cohabitation is portrayed as unstable and short lasting, marriage is described as basis of society and foundation for a stable family life. This view of marriage is very abstract because it implies that by choosing marriage as a family form, stability and reliability follow automatically. However, it is not the institution of marriage itself that creates a better society. It is the individuals who live in a relationship that generate commitment and stability and not the relationship form per se. If a society wants to advocate stable relationships it should teach individuals respect towards each other instead of simply promoting marriage as the solution for all problems. A relationship that is characterized by violence, gender inequalities, and lack of commitment does not change its appearance only because the couple decides to get married. It is often the circumstances that surround a couple, i.e. unemployment, young age, low educational standard, etc., that have a bad influence on the length and stability of a relationship.

Not every marriage is a healthy marriage. On the contrary, increasing divorce rates indicate that marriages are increasingly unstable and new forms of marriages, e.g. same-sex marriages, marriages without children, marriages without financial interdependence, reveal that there is no such thing as an ideal marriage anymore. Instead of continuing to solely promote marriage the state should protect and support all kinds of intimate relationships and not just one type of it. Especially relationships that involve children should be the center of state protection no matter what relationship form their parents choose.

Those that are against the legal convergence of marriage and unmarried cohabitation often emphasize that these two family forms are considerably different.⁴⁶⁸ However, in British

⁴⁶⁸ See for example the Supreme Court of Canada in *Nova Scotia v. Walsh* supra n. 34

Columbia, the definition of unmarried cohabitation requires that the couple has lived in a *marriage-like* relationship for at least 2 years.⁴⁶⁹ This definition implies that there are indeed similarities between the two. It is somewhat difficult to argue that unmarried cohabitation is not like marriage when at the same time the definition of spouse demands a marriage-like relationship. Furthermore, a spousal support case study from British Columbia showed that pre-marriage cohabitation time is often treated as marriage time.⁴⁷⁰ Sometimes, judges even referred to the combined periods of cohabitation and marriage as total marriage time.⁴⁷¹ This shows again how unsound it is to argue that these two family forms are different from each other when in fact British Columbian judges and statutes underline their similarities.

The liberty of choice argument seems to be a very strong and appealing argument that attracts many supporters. It assumes that individuals who live in unmarried cohabitation made a conscious decision against marriage and its legal implications. As mentioned before, choice is not always the sole parameter in the decision between marriage and unmarried cohabitation.⁴⁷² It is therefore not only questionable whether unmarried couples choose to avoid marital regulations but also whether married couples consciously opt for the legal consequences of marriage. When two individuals decide to stay in a relationship – marriage or unmarried cohabitation – their decision is influenced by various different factors, e.g. love, the desire to start a family, religion, etc. At this time of the relationship, they usually do not think about the breakdown of their relationship nor the legal consequences they would have to face with it. It is also questionable whether couples even *know* that marriage or unmarried cohabitation is linked with legal consequences. A choice can only be made where all options are known.

⁴⁶⁹ *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1.

⁴⁷⁰ Boyd and Baldassi *supra* n. 378.

⁴⁷¹ *Ibid.*

⁴⁷² See above Chapter 3, III., 2.

A formal or normative approach to the definition of family, which was applied by the Supreme Court of Canada in *Walsh*,⁴⁷³ is too narrow and should not be implemented. Since the normative approach traditionally only consists of the nuclear family, it does not leave room for minorities that do not fit into the traditional family concept although they fulfill the same functions. It furthermore presumes that marriage is the ideal family form and implies at the same time that other family forms are not worth protecting. Instead of supporting those family forms that are supposedly more stable and committed it would be better to protect those that lack these characteristics.

I therefore come to the conclusion that unmarried cohabiting couples and married couples should indeed be legally treated the same. But how should this assimilation take place? What would a legal reform have to look like? What would be the best way to regulate unmarried cohabitation? There are basically three different ways of how to regulate unmarried cohabitation: Through the private law or “contract” model, through the ascription or “common-law” model or through the registration model. Many countries have chosen one of these three models to regulate their non-marital intimate relationships. In Canada, the situation is somewhat different since family law is mostly under provincial jurisdiction. As a consequence, all three models can be found in Canada and some provinces even have a combination of two different models.⁴⁷⁴

⁴⁷³ *Nova Scotia v. Walsh* supra n. 34.

⁴⁷⁴ In British Columbia, for example, the ascription model is prevalent (albeit mainly for support and custody). Since the matrimonial property regime does not apply to cohabiting couples, they have to rely on private law doctrines like the constructive trust or on private contracts for this particular legal area. Nova Scotia used to have only the ascription model (for support). However, in 2001, Nova Scotia introduced a partnership registration scheme that allows unmarried couples to register their partnerships. Quebec, which is a civil law province, used to have only the private law model. In 2002, a new law was passed that allowed unmarried couples to register their civil union.

1) The Private Law Model

The private law model, often referred to as the contract model, is usually prevalent in civil law countries, like Germany for example. Countries that use the private law model for the regulation of unmarried cohabitation normally do not have any laws that specifically regulate or recognize cohabiting couples.⁴⁷⁵ Whenever disputes arise between cohabiting individuals, they are treated like any other non-cohabiting or non-married individuals and only private law remedies are applicable. Marital regulations usually do not apply to cohabiting couples.

Under the private law model, cohabitants are free to sign contracts or cohabitation agreements. Thus, they can opt into the matrimonial regime and for example agree on spousal support or the equal division of property after the breakdown of the relationship.⁴⁷⁶ These agreements, however, can be reviewed by the law courts. In general, all contracts between cohabitants have to conform to the common law and statutory provisions that regulate the validity and enforceability of contracts.⁴⁷⁷ However, those contracts may also be subject to more specific regulations. In British Columbia, for example, s. 120.1 of the *Family Relations Act*,⁴⁷⁸ stipulates that parts 5 and 6 of the *FRA* apply to property agreements between two cohabiting spouses. As a consequence, s. 65 of the *FRA* applies, which gives law courts the possibility for reapportionment in order to ensure fairness and therefore the opportunity to change the terms of the cohabitation agreement.

⁴⁷⁵ However, those countries often have regulations concerning children born to cohabiting parents.

⁴⁷⁶ However, not all regulations are open for agreements: e.g. tax laws, pension laws.

⁴⁷⁷ *Stalbecker-Pountney and Holland supra n. 88 at 5-1.*

⁴⁷⁸ *Family Relations Act*, R.S.B.C. 1996, c. 128.

2) The Ascription Model

The ascription model automatically ascribes status to unmarried cohabitants and imposes rights and obligations on them, without any positive action on their part to be legally recognized.⁴⁷⁹ In Canada, the ascription of rights and obligations is usually connected to a certain length of cohabitation and the necessary time varies between one and three years.⁴⁸⁰ The basis for the ascription of rights and responsibilities is the law itself as opposed to consensual agreement.⁴⁸¹ However, there is often the possibility to contract out of the family law regime through a cohabitation agreement.⁴⁸²

In Canada, the tradition has been to extend laws that are specifically made for married couples in order to include cohabiting couples. As seen above, this development started as early as 1972 when British Columbia expanded the definition of spouse with regard to spousal support to include cohabiting couples that had lived together as husband and wife without being married for at least two years.⁴⁸³ Over the years, many marital rights and obligation were given to unmarried cohabitants. However, this development was not uniform in all Canadian provinces. While some were quick to expand marital laws to cohabitants other provinces were quite reluctant to grant rights and responsibilities to unmarried couples. Most provinces did not follow a comprehensive policy with regard to the legal regulation of unmarried cohabitation and

⁴⁷⁹ Law Commission of Canada, “Beyond Conjuality: Recognizing and supporting close personal adult relationships” (Ottawa: Law Commission of Canada, 2001) at 116.

⁴⁸⁰ On a federal level, i.e. for tax purpose or within immigration law, the time length is 1 year. In British Columbia, two years of cohabiting are necessary. In Ontario, unmarried couples need to continuously cohabit for three years unless the cohabitants become parents.

⁴⁸¹ C Davies, “The Extension of Martial Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods” (1999) 17 Canadian Family Law Quarterly 248 at 256.

⁴⁸² However, the option to contract out is limited, because there is no contracting out of the Income Tax Act, for instance.

⁴⁸³ *Family Relations Act*, S.B.C. 1972, c. 20, s. 15 (e)(iii). For more information on the legal history of unmarried cohabitation see above Chapter 2, III.

amendments were only initiated on a statute-by-statute basis and only when necessary. As a consequence, the regulation system of unmarried cohabitation now often resembles a patchwork.

In British Columbia, for example, a decision was made to *not* enact comprehensive legislation but to deal with the regulation of unmarried cohabitation on an individual basis.⁴⁸⁴ This resulted in delays in the amendment of legislation, lack of comprehensive regulation, and repetition of the same legislative debate over and over again.⁴⁸⁵ Since not all marital rights and responsibilities have been ascribed to cohabiting couples, those areas are regulated through the private law model. For example, in many provinces, the matrimonial property regime does not include unmarried cohabitation. Consequently, only the private law remedy of the constructive trust is applicable.

3) The Registration Model

Similar to marriage, the registration model is consensual and requires a public action. Under this model, cohabiting couples have the possibility to register their partnership and therefore publicly express their commitment to each other. The registration of relationships is often limited to a certain societal group. In European Countries, for example, it is usually restricted to same-sex cohabiting couples. In some Canadian provinces it is open to both same-sex and opposite-sex cohabitants but it is restricted to marriage-like relationships. Sometimes, it is also argued that non-conjugal personal adult relationships should be allowed to register their relationship.⁴⁸⁶

⁴⁸⁴ TG Anderson, “Comment on the Report of the British Columbia Law Institute on Recognition of Spousal and Family Status” (2000) 12 Canadian Journal of Women and the Law 439 at 441.

⁴⁸⁵ *Ibid* at 441 – 442.

⁴⁸⁶ E.g. the Law Commission of Canada recommended that registration should not be restricted to conjugal relationships. See Law Commission of Canada *supra* n. 479 at 122.

With the registration of their relationship, the partners not only publicly commit to each other but also voluntarily take on various legal rights and obligations.⁴⁸⁷ These rights are usually very similar to those of married couples, but often lag behind the regulations of marriage. The introduction of the registration model is often connected to the enactment of a complete regulatory regime that only applies to those registered relationships.

4) Advantages and Disadvantages

The arguments for and against the different models are very similar to the debate of whether unmarried cohabitation and marriage should be legally treated the same. The liberty of choice argument, for example, is used to justify the application of the private law model, while the argument of equality is drawn upon in the case of the ascription model as well as the registration model. In order to avoid repetition at this point, I will present only a short summary of the main arguments.

From a Canadian common-law perspective, the private law model is not a very appropriate model to regulate unmarried cohabitation. Canada has a strong tradition of ascribing marital rights and obligations to cohabiting couples both on a federal and provincial level. The abolition of the ascription model in favor of the private law model would be both unrealistic and unpopular. The development of slowly assimilating marriage and unmarried cohabitation might have come to a halt with the decision of the Supreme Court of Canada in *Nova Scotia v. Walsh* in 2002. However, there are no current signs that Canadian jurisprudence or legislature is on its way to decreasing the rights and obligations of unmarried couples. On the contrary, even after the

⁴⁸⁷ *Ibid* at 117.

decision of the Supreme Court of Canada in *Walsh* provincial legislatures have started to include cohabiting couples in their matrimonial property regimes.⁴⁸⁸

The private law model may respect private autonomy but it does not protect the vulnerable and weaker spouse (mostly women) from exploitation. It does not make sense to protect married women after the breakdown of their relationship and grant them spousal support and a share of the property, but not cohabiting women. Both cohabiting and married women experience the breakdown of a relationship similarly, especially when there are children involved. But even without children, cohabiting women should be protected through the ascription of marital laws.

The appearance of marriage has changed significantly over the last 50 years, especially in light of the introduction of no-fault divorce. With divorce readily available, divorce rates have increased dramatically and the average length of marriage has shortened. Furthermore, an increasing number of married couples are childless and choose a lifestyle where both spouses stay financially independent. Nonetheless, married persons are entitled to claim spousal support and the equal division of property regardless of how their relationships looked like. Rather than excluding cohabiting couples from the matrimonial regime it would be better to generally rethink what kind of relationships (e.g. relationships that are economically interdependent or relationships with children) are in need of protection without differentiating between marriage and unmarried cohabitation.

The ascription model is preferable to the private law model. All existing gaps in the Canadian system should be closed and marriage and unmarried cohabitation should be completely

⁴⁸⁸ See above Chapter 2, III. 2) f).

assimilated. In particular, the matrimonial property regime should be extended to unmarried cohabiting couples. The liberty of choice argument does not take into account that the division of property does not only affect the spouses but also their children.

Along with child support and spousal support, the division of property plays a critical role in redistributing the family's economic resources after separation. [...] In particular, the possession and disposition of the family home and its contents is often critical to the economic and social stability of children after separation.⁴⁸⁹

Moreover, most Canadian provinces allow couples to contract out of matrimonial property regimes and/or give judges some degree of discretion in deciding whether or not to order a sharing of assets.

A decision in favor of the ascription model does not necessarily exclude the registration model. While the private law model and the ascription model are somewhat exclusionary, the ascription model and the registration model can exist beside each other. Nova Scotia, for example, chose to have both systems in place, with ascription applying to spousal support and registration to matrimonial property rights. The registration system, on the other hand, cannot provide by itself enough protection for the vulnerable and weaker spouse. Similarly to marriage, the registration system requires the couple to make a conscious choice to enter the regime. Those that cannot make a choice are excluded from the system and are not protected from possible exploitation and inequalities experienced at the end of the relationship. Nova Scotia's remedy was not sufficient because it only applies matrimonial property rights to those couples that choose to have their relationship registered and therefore still retains choice as the key factor with regard to property rights.

⁴⁸⁹ TG Anderson, "Models of Registered Partnership and Their Rationale: The British Columbia Law Institute's Proposed Domestic Partner Act" (2000) 17 Canadian Journal of Family Law at 92.

A combination of the ascription and the registration model is the most favorable solution for the regulation of unmarried cohabitation in Canada. While the ascription model can provide a system that offers a good default system that also allows couples to opt out, the registration model can overcome the flaws of the ascription model and offers cohabiting couples more certainty.⁴⁹⁰ The registration model is also important for those that refuse marriage but still want to publicly commit to each other. However, a combination of the ascription and the registration model can only then avoid exploitation and inequalities if the ascription model applies to property rights instead of only the registration model. Otherwise choice would still be the key factor in relation to property rights.

There is never a perfect solution for the regulation of unmarried cohabitation. Even the combination of the ascription and the registration model does not prevent that couples or individuals from having to face obligations they would rather avoid. Ultimately, a decision has to be made as to whether we want to live in a society that puts private autonomy first and forces those that want commitment into cohabitation agreements or one that tries to protect those of our society that are most vulnerable and gives individuals that do not need protection the possibility to opt out of the system.

⁴⁹⁰ The main flaw of the ascription model is that cohabitants that want to make a claim, e.g. for spousal support, might have difficulties presenting evidence regarding the beginning and the end of the relationship. It might be furthermore difficult to provide proof that the relationship was marriage-like. Registered couples on the other hand do not have any issues with providing evidence for the beginning and end of their relationship. Similar to marriage, the registration of the relationship is connected with a public act and the couple receives a certificate that confirms their registration. The dissolution of the relationship happens similarly and is publicly recorded.

Bibliography

Legislation

Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5.

An Act Instituting Civil Unions and Establishing New Rules of Filiation, S.Q. 2002, c. 6

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK) 1982, c. 11.

Children's Law Reform Act, R.S.O. 1980, c. 68.

Civil Marriage Act, S.C. 2005, c. 33.

Common-Law Partners' Property and Related Amendments Act, S.M. 2002, c. 48.

Crime Victim Assistance Act, S.B.C. 2001, c. 38.

Criminal Code, R.C. 1985, c. C-46.

Definition of Spouse Amendment Act, S.B.C. 1999, c. 29.

Definition of Spouse Amendment Act, S.B.C. 2000, c. 24.

Dependants Relief Act, C.C.S.M., c. D 37.

Dependants Relief Act, R.S.A. 2000, c. D-10.5.

Dependants Relief Act, R.S.N.W. 1988, c. D-4.

Deserted Wives' Maintenance Act, S.B.C. 1901, c. 18.

Divorce Act, S.C. 1967-1968, c. 24.

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

Domestic Relations Act, R.S.A 1980, c. D-37.

Employment and Assistance Act, S.B.C. 2002, c. 40.

Family Compensation Act, R.S.B.C. 1996, c. 126.

Family Law Act, R.S.O. 1990, c. F-3.

Family Law Act, S.N.W.T. 1997, c. 18.

Family Relations Act, S.B.C. 1972, c. 20.

Family Relations Act, R.S.B.C. 1996, c. 128.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

Insurance Act, R.S.O. 1980, c. 218.

Lord Hardwicke's Act, (1753) 26 Geo. II, c. 33.

Modernization of Benefits and Obligations Act, S.C. 2000, c. 12.

Nova Scotia Matrimonial Property Act, R.S.N.S. 1989, c. 275.

Old Age Security Act, R.S.C., 1985, c. O-9.

Provision for Dependants Act, R.S.N.B. 1973, c. P-22.3.

The Family Law Reform Act, S.O. 1978, c. 2.

The Matrimonial Property Act, R.S.N.S. 1989, c. 275.

Vital Statistics Act, S.N.S. 2000, c. 29.

Wills Variation Act, R.S.B.C. 1996, c. 490.

Workers Compensation Act, R.S.B.C. 1996, c. 492.

Jurisprudence

Droit de la famille – 091768, 2009 QCCS 3210 (CanLII) (french version).

Egan v. Canada, [1995] 2 S.C.R. 513.

Lye v. McVeigh, [1991] B.C.J. No. 2008 (C.A.).

M. v. H., [1999] 2 S.C.R. 3.

Miron v. Trudel, [1995] 2 S.C.R. 418.

Murdoch v. Murdoch, [1975] 1 S.C.R. 423.

Nova Scotia (Attorney General) v. Walsh, 2002 SCC 83, [2002] 4 S.C.R. 325.

Peter v. Beblow, (1993) S.C.J. No. 36.

Pettkus v. Becker, [1978], 87 D.L.R. (3d) 101.

Pettkus v. Becker, [1980] 2 S.C.R. 834.

Rathwell v. Rathwell, [1978] 2 S.C.R. 436.

Rossu v. Taylor, 1998 ABCA 193, [1999] 1 W.W.R. 85.

Sorochan v. Sorochan, [1986] 2 S.C.R. 38.

Walsh v. Bona, [1999] N.S.J. No. 290.

Walsh v. Bona, [2000] N.S.J. No. 117.

Watch v. Watch, 182 Sask. R. 237.

Government Documents

British Columbia, Legislative Assembly, *Bill 4 – 2009: Wills, Estates and Succession Act*, online Legislative Assembly of British Columbia <http://www.leg.bc.ca/39th1st/1st_read/gov04-1.htm#section2>.

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 2nd Session, 29th Parliament (22 March 1971), online Legislative Assembly of British Columbia <http://www.leg.bc.ca/hansard/29th2nd/29p_02s_710322p.htm>.

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 3rd Session, 29th Parliament (28 February 1972), online Legislative Assembly of British Columbia <http://www.leg.bc.ca/hansard/29th3rd/29p_03s_720228p.htm>.

British Columbia, Ministry of Attorney General, *Family Relations Act Review: Chapter 2: Division of Family Property*, online Attorney General – Province of British Columbia <<http://www.ag.gov.bc.ca/legislation/pdf/Chapter2-Property.pdf>>.

Law Commission of Canada, “Beyond Conjuality: Recognizing and supporting close personal adult relationships” (Ottawa: Law Commission of Canada, 2001).

Nova Scotia, Law Reform Commission, *Final Report: Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, online Law Reform Commission of Nova Scotia <http://www.lawreform.ns.ca/Downloads/MPA_FIN.pdf>.

Statistics Canada, Census 2006, *Family Income Groups: Common-law Couple Families*, online Statistics Canada <<http://www12.statcan.ca/english/census06/data/topics/RetrieveProductTable.cfm?Temporal=2006&PID=96428&GID=837928&METH=1&APATH=3&PTYPE=88971%2C97154&THEME=81&AID=&FREE=0&FOCUS=&VID=0&GC=99&GK=NA&RL=0&TPL=RETR&SUB=0&d1=5>>

Statistics Canada, Census 2006, *Family Income Groups: Married Couple Families*, online
Statistics Canada

<<http://www12.statcan.ca/english/census06/data/topics/RetrieveProductTable.cfm?Temporal=2006&PID=96428&GID=837928&METH=1&APATH=3&PTYPE=88971%2C97154&THEME=81&AID=&FREE=0&FOCUS=&VID=0&GC=99&GK=NA&RL=0&TPL=RETR&SUB=0&d1=1>>

Statistics Canada, *Family portrait: Continuity and change in Canadian families and households in 2006: Findings* (Ottawa, Statistics Canada, 2007).

Statistics Canada, *Labour force and participation rates by sex and age group*, online: Statistics Canada <<http://www40.statcan.ca/l01/cst01/labor05.htm>>.

Statistics Canada, *Profile of Canadian families and households: Diversification continues* (Ottawa: Analysis Series, 2002).

The Daily, Tuesday, July 25, 2000, online Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/000725/dq000725b-eng.htm>>.

Secondary Material: Books

Ambert, Anne-Marie, *Cohabitation and Marriage: How are they related?* (Ottawa: The Vanier Institute of the Family, 2005).

Baker, Maureen, *Families: Changing Trends in Canada*, 4th ed. (Toronto: McGraw-Hill Ryerson Limited, 2001).

Barlow, Anne, Duncan, Simon, James, Grace, and Park, Alison, *Cohabitation, Marriage and the Law – Social Change and Legal Reform in the 21st Century* (Oxford, Portland: Hart, 2005).

Baxandall, Rosalyn, and Gordon, Linda, *Dear Sisters: Dispatches from the Women's Liberation Movement* (New York: Basic Books, 2000).

Brook, Heather, *Conjugal Rites: Marriage and Marriage-like Relationships before the Law* (New York: Macmillan Press, 2007).

Eichler, Margrit, *Family Shifts: Families, Policies and Gender Equality* (Oxford University Press, 1997).

Fels, Lynn, *Living Together: Unmarried Couples in Canada* (Toronto: Personal Library, 1981).

Fodden, Simon R., *Family Law*, (Toronto: Irwin Law, 1999).

Freeman, Michael D.A., and Lyon Christina M., *Cohabitation without Marriage* (Aldershot, Hants., England: Gower, 1983).

Mossman, Mary Jane, and Flanagan, William F., *Property Law, Cases and Commentary* (Toronto: Emond Montgomery Publications, 2004).

Osterhoff, A.H., *Osterhoff on Wills and Succession: Text, Commentary and Materials* (Toronto: Thomson Carswell, 2007)

Payne, Julien D., and Payne, Marilyn A., *Canadian Family Law*, 2nd ed. (Toronto: Irwin Law, 2006).

Smart, Carol, *The Ties that Bind: Law, marriage and the reproduction of patriarchal relations* (London, Boston: Routledge & Kegan Paul, 1984).

Somerville, Jennifer, *Feminism and the Family: Politics and Society in the UK and USA* (New York: Macmillan Press, 2000).

Stalbecker-Pountney Barbro E. and Holland, Winifred H., *Cohabitation: The Law in Canada*, looseleaf (Toronto: Carswell, 1990).

Wu, Zheng, *Cohabitation: An Alternative Form of Family Living* (Oxford University Press Canada, 2000).

Ziff, Bruce, *Principles of Property Law* (Toronto: Thomson Carswell, 2006).

Secondary Material: Articles

Anderson, Thomas G., “Comment on the Report of the British Columbia Law Institute on Recognition of Spousal and Family Status” (2000) 12 Canadian Journal of Women and the Law 439 – 453.

Anderson, Thomas G., “Models of Registered Partnership and Their Rationale: The British Columbia Law Institute’s Proposed Domestic Partner Act” (2000) 17 Canadian Journal of Family Law 89 – 113.

Arnup, Katherine, “Close Personal Relationships between Adults: 100 Years of Marriage in Canada” (Ottawa: Law Commission of Canada, 2001).

Auchmuty, Rosemary, “Same-sex Marriage Revived: Feminist Critique and Legal Strategy” (2004) 14 Feminism & Psychology 101 – 126.

Auchmuty, Rosemary, “The Married Women’s Property Acts: Equality Was Not the Issue” in Hunter, Rosemary, (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Portland: Hart Publishing, 2008) at 13 – 39.

Auchmuty, Rosemary, “What’s so special about marriage? The impact of *Wilkinson v. Kitzinger*” (2008) Vol. 20, No. 4, *Child and Family Quarterly* 475 – 498.

Avellar, Sarah, Smock, Pamela J., “The Economic Consequences of the Dissolution of Cohabiting Unions” (2005) 67 *Journal of Marriage and Family* 315 – 327.

Backhouse, Constance, ““Pure Patriarchy”: Nineteenth-Century Canadian Marriage” (1985-1986) 31 *McGill Law Journal* 264 – 312.

Bala, Nicholas, “Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships”, (2003) 29 *Queen’s Law Journal* 41 – 102.

- Bala, Nicholas, “The Charter of Rights & Family Law in Canada: A New Era”, (2001) 18 Canadian Family Law Quarterly 373 – 428.
- Barlow, Anne, “Regulating Marriage and Cohabitation in 21st Century Britain” (2004) 67 Modern Law Review 143 – 176.
- Burnette, Joyce, “Women Workers in the British Industrial Revolution” online EH.net – Economic History Services
<<http://eh.net/encyclopedia/article/burnette.women.workers.britain>>.
- Boyd, Susan B., “The Impact of the Charter of Rights and Freedoms on Canadian Family Law”, (2000) 17 Can. J. Fam. L. 293 – 331.
- Boyd, Susan B., “Women, Men and Relationships with Children: Is Equality Possible?” in K. Busby, L. Fainstein and H. Penner, *Equality Issues in Family Law: Considerations for Test Case Litigation* (Winnipeg: University of Manitoba, Legal Research Institute, 1990), 69 – 91.
- Boyd, Susan B., Baldassi, Cindy L., “Marriage or Naught?: Marriage and Unmarried Cohabitation in Canada” in Bottomley, Anne, Wong Simone (eds.), *Changing Contours of Domestic Life, Family and Law: Caring and Sharing*, Onati International Series in Law and Society (Oxford: Hart, 2009) at 111-129.
- Boyd, Susan B. and Young, Claire F.L., ““From Same-Sex to No Sex”?: Trends Towards Recognition of (Same-Sex) Relationships in Canada” (2003) 1 Seattle Journal for Social Justice 757 – 793.
- Braun, Michael, Lewin-Epstein, Noah, Stier, Haya, and Baumgärtner, Miriam K., “Perceived Equity in the Gendered Division of Household Labor” (2008) 70 Journal of Marriage and Family 1145 – 1156.

- Brooks, Kim, “Valuing Women’s Work in the Home: A Defining Moment” in T. Brettel Dawson, *Women, Law and Social Change: Core Readings and Current Issues* (Toronto: Captus Press, 2008) 247 – 251.
- Brownridge, Douglas A., “Understanding Women’s Heightened Risk of Violence in Common-Law Unions: Revisiting the Selection and Relationship Hypotheses” (2004) 10 *Violence against Women* 626 – 651.
- Clapton Mysty S., “*Murdoch v. Murdoch*: The Organizing Narrative of Matrimonial Property Law Reform” (2008) 20 *Canadian Journal of Women and the Law* 197 – 230.
- Conway, Heather and Girard, Philip ““No Place Like Home”: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain” (2005) 30 *Queen’s Law Journal* 715 – 771.
- Coote, A., Harmon, H. and Hewitt, H., “The family way” in Eekelaar, John and Maclean, Mavis, (ed), *Family Law* (New York, Oxford University Press, 1994) 31 – 62.
- Davies, Christine, “The Extension of Martial Rights and Obligations to the Unmarried: Registered Domestic Partnerships and Other Methods” (1999) 17 *Canadian Family Law Quarterly* 248 – 262.
- Deech, Ruth, “The Case Against Legal Recognition of Cohabitation” in J. Eekelaar, S. Katz, (ed), *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Toronto: Butterworths, 1980) 300 – 312.
- Douglas, Gillian, Pearce, Julia and Woodward, Hilary, “A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown”, online Cardiff Law School <<http://www.law.cf.ac.uk/researchpapers/papers/1.pdf>>.

- Drolet, Marie, “The male-female wage gap” in Statistics Canada, *Perspectives on Labour and Income*, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/75-001-x2001012-eng.pdf>> (December 2001) Vol. 2, No. 12, 5 – 13.
- Ferlisi, Onofrio, “Recognizing a Fundamental Change: A Comment on *Walsh*, the *Charter*, and the Definition of Spouse”, (2001) 18 *Canadian Journal of Family Law* 159 – 181.
- Finnie, Ross, “Women, men, and the economic consequences of divorce: Evidence from Canadian longitudinal data” (1993) 30 *Canadian Review of Sociology & Anthropology* 205 – 241.
- Friedman, Barry L. and Rein, Martin, “The Evolution of Family Policy in the United States after World War II” in Katz, Sanford N., Eekelaar John and Maclean, Mavis, (ed.), *Cross Currents: Family Law and Policy in the U.S. and England* (New York, Oxford University Press, 2000), 101 – 121.
- Gadalla, Tahany M., “Gender Differences in Poverty Rates After Marital Dissolution: A Longitudinal Study” (2008) 49 *Journal of Divorce & Remarriage* 225 – 238.
- Gadalla, Tahany M., “Impact of Marital Dissolution on Men’s and Women’s Income: A Longitudinal Study” (2009) 50 *Journal of Divorce & Remarriage* 55 – 65.
- Gianoulis, Tina, “Women’s Liberation Movement” (2004), online glbtq - gay, lesbian, bisexual, transgender & queer encyclopedia <http://www.glbtq.com/social-sciences/womens_liberation_movement.html>.
- Grant Bowman, Cynthia, “Social Science and Legal Policy: The Case of Heterosexual Cohabitation” (2007) 9 *Journal of Law and Family Studies* 1 – 52.
- Graycar, Regina, “Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages” in T. Brettel Dawson, *Women, Law and Social Change: Core Readings and Current Issues* (Toronto: Captus Press, 2008) 240 – 244.

- Holland, Winifred, “Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?” (2000) 17 *Canadian Journal of Family Law* 114 – 168.
- Hough, Janet, “Mistaking liberalism for feminism: Spousal support in Canada” (1994) Vol. 29, Issue 2, *Journal of Canadian Studies* 147 – 164.
- Hovius, Berend, “Property Division for Unmarried Cohabitees in the Common Law Provinces” (2003) 21 *Canadian Family Law Quarterly* 175 – 215.
- Kerr, Don, Moyser, Melissa, and Beaujot, Roderic, “Marriage and Cohabitation: Demographic and Socioeconomic Differences in Quebec and Canada” (2006) 33 *Canadian Studies in Population* at 83 – 117.
- Kuefler, Mathew, “The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law” (2007) 32 *Journal of Family History* 343 – 370.
- Laplante, Benoît, “The rise of cohabitation in Quebec: Power of religion and power over religion.” (2006) online INRS – Institut national de la recherche scientifique <http://www.ucs.inrs.ca/Cours/laplante/LaplanteB_2006a.pdf>.
- Laplante, Benoît, “The distinct society: Cohabitation and recent questions on the prevalence and meaning of cohabitation in Quebec” (2008) online LabEP – Laboratoire d’études de la population <http://labep.ucs.inrs.ca/laplanteb/LaplanteB_2008c-2.pdf>.
- Lessard, Hester, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism” (2006) 33 *Supreme Court Law Review* at 291 – 316.
- McClary, James T., “A Different View of Nova Scotia (Attorney-General) v. Walsh” (2005) 22 *Canadian Journal of Family Law* 43 – 56.

MacDougall, Don, “Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage” in J. Eeklelaar, S. Katz (ed), *Marriage and Cohabitation in Contemporary Societies: Areas of Legal, Social and Ethical Change* (Toronto: Butterworths, 1980) at 313 – 322.

Manning, Wendy D., and Lichter, Daniel T., “Parental Cohabitation and Children’s Economic Well-Being” (1996) 58 *Journal of Marriage and the Family*, 998 – 1010.

Marshall, Katherine, “Converging gender roles” *Perspectives on Labour and Income* (Statistics Canada, catalogue no. 75-001-XIE) vol. 7, no. 7 (July 2006): 5 – 17, online: Statistics Canada <<http://www.statcan.gc.ca/pub/75-001-x/10706/9268-eng.pdf>>.

O’Donovan, Katherine, “Should all Maintenance of Spouses be Abolished?” (1982) 45 *Modern Law Review* 424 – 433.

Shelton, Beth Anne, and John, Daphne, “Does Marital Status Make a Difference? – Housework Among Married and Cohabiting Men and Women” (1993) 14 *Journal of Family Issues* 401 – 420.

Smart, Carol, “Stories of Family Life: Cohabitation, Marriage and Social Change” (2000) 17 *Canadian Journal of Family Law* 20 – 53.

Steele, Freda M., “The Ideal Marital Property Regime – What would it Be?” in Elizabeth Sloss (ed.), *Family Law in Canada: New Directions* (Canadian Advisory Council on the Status of Women, 1985), 127 – xyz.

The Honourable Madam Justice B.M. McLachlin, “Crime and Women – Feminine Equality and the Criminal Law” (1991) 25 *U.B.C. L. Rev.* 1 – 22.

The Ontario Federation of Labour and The Workers Arts and Heritage Centre, “A History of Women and Work: Draft Proposal for Decades 1900 – 2000 and Beyond”, online The Ontario Federation of Labour

<[http://www.ofl.ca/uploads/misc/womenandwork/A_HISTORY_OF_WOMEN_AND_WORK_amended_Jan_11_\(2\).pdf](http://www.ofl.ca/uploads/misc/womenandwork/A_HISTORY_OF_WOMEN_AND_WORK_amended_Jan_11_(2).pdf)>.

The Ontario Federation of Labour and The Workers Arts and Heritage Centre, “1900 – 2000: A Century of Women and Work”, online The Ontario Federation of Labour
<<http://www.ofl.ca/uploads/library/women/WW-FINAL-layout-2007.02.28.pdf>>.

Tuttle, Carolyn, “Child Labor during the British Industrial Revolution” online EH.net – Economic History Services <<http://eh.net/encyclopedia/article/tuttle.labor.child.britain>>

Waite, Linda J., “Trends in Men’s and Women’s Well-Being in Marriage” in Waite, Linda J. (ed.), Bachrach, Christine et al. (co-editors), *The Ties that Bind: Perspectives on Marriage and Cohabitation* (New York: Aldine de Gruyter, 2000) at 368– 392.

Young, Alison Harvison, “The Changing Family, Rights Discourse and the Supreme Court of Canada”, (2001) 80 Can. Bar Rev. 749 – 792.