Canada

POLYGAMY AND UNMARRIED COHABITATION

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Résumé

L'interdiction et la criminalisation de la polygamie, définie comme le fait de vivre dans une relation conjugale, font l'objet de discussions dans la province canadienne de la Colombie-Britannique. Le gouvernement provincial a saisi les tribunaux de la question de la constitutionnalité de l'article du Code criminel qui interdit la ploygamie, après que ses experts juridiques eurent exprimé des doutes à ce sujet. La Colombie-Britannique est la terre d'accueil du groupe fondamentaliste mormon le plus connu au Canada et dont les membres pratiquent le «mariage» multiple, en conformité avec leurs croyances religieuses. Des préoccupations relatives à des abus et à l'exploitation au sein de ce groupe, ont provoqué des appels pour une application plus rigoureuse de la loi. Le résultat de cette contestation constitutionnelle, pavera la voie soit à des poursuites criminelles soit à la mise en place de stratégies différentes visant à répondre aux problèmes rencontrés au sein de cette communauté fondamentaliste.

La Cour suprême du Canada a rendu deux décisions importantes en matière d'union de fait. La première est un arrêt portant sur le droit des fiduciesrésultoireset par interprétation. Ces mécanismes sont particulièrement intéressantes pour les conjoints de fait qui, dans la plupart des provinces canadiennes, ne bénéficient pas des droits patrimoniaux découlant du mariage. La deuxième décision est l'autorisation de pourvoi accordée par la Cour dans une affaire provenant du Québec et concernant l'obligation alimentaire entre conjoints de fait. Pour l'heure, le Québec est la seule province canadienne à ne pas reconnaître une telle obligation.

I INTRODUCTION

Canada's criminal prohibition against polygamy, defined as living in a conjugal relationship with multiple parties, came under scrutiny in the province of British Columbia. The government of that province asked its courts to rule on the constitutionality of the Criminal Code provision after its legal experts expressed doubt on that issue.[1] British Columbia is home to Canada's most notorious group of fundamentalist Mormons, who practice plural 'marriage' in

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1 Criminal Code, RSC 1985, c C-46.

accordance with their professed religious beliefs. Concerns about abuse and exploitation within the fundamentalist group have led to calls for more assertive enforcement of the law. The ruling on the constitutionality of the criminal prohibition against polygamy will either clear the way for prosecutions under that law or lead to formulation of a different strategy to address the problems.

In early 2011, the Supreme Court of Canada made two important decisions in relation to unmarried cohabitation. In *Kerr v Baranow*,[2] the law relating to resulting and constructive trusts was determined. These trust doctrines are significant for unmarried parties, who do not enjoy statutory marital property rights in most provinces. In addition, the Supreme Court of Canada granted leave to appeal in a case from Quebec dealing with the support for parties who are not either married or a member of a civil union. Quebec is the only province in Canada that does not extend support rights and obligations to unmarried parties.

II POLYGAMY

The Canadian province of British Columbia is home to a community of fundamentalist Mormons that practice plural marriage. This community has attracted extensive negative media coverage, and there have been calls to address identified problems in the community in part by enforcing the criminal law prohibition of polygamy.[3] Charges eventually were laid against two patriarchs of the fundamentalist group. However, after the appointment of a special prosecutor to pursue the charges were quashed because of irregularities, these charges were stayed.[4] Rather than attempting again to lay criminal charges, the British Columbia government instead sought an advisory opinion from its Supreme Court,[5] a trial court that also has jurisdiction to hear and consider questions referred to it by the provincial government.[6]

Two questions have been put to British Columbia's Supreme Court:

(1) Is s 293 of the Criminal Code of Canada consistent with the Canadian Charter of Rights and Freedoms?[7] If not, what particular or particulars and to what extent?

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2 2011 SCC 10.

3 In particular, Daphne Bramham, a columnist for the *Vancouver Sun*, has written extensively about the fundamentalist community and published *The Secret Lives of Saints: Child Brides and Lost Boys in a Polygamous Mormon Sect* (Random House Canada, 2008).

4 *Blackmore v British Columbia (Attorney General)* (2009), 247 CCC (3d) 544.

5 *Reference re: Criminal Code*, s 293, 2009 BCSC 1668.

6 See British Columbia's Constitutional Question Act, RSBC 1996, c 68.

7 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Sch B of the Canada Act 1982 (UK), 1982, c 11, s 15.

(2) What are the necessary elements of the offence in s 293 of the Criminal Code of Canada? Without limiting this question, does s 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power or undue influence?

The hearing began on 22 November 2010 and closing arguments were scheduled to begin at the end of March 2011. It is likely that the decision of the British Columbia Supreme Court will be appealed, ultimately to the Supreme Court of Canada.

To put this constitutional reference in context, it should be emphasised that Canada is a monogamous country and will remain so regardless of the outcome. Only monogamous marriages may take place in Canada. The Civil Marriage Act defines marriage as between two people.[8] A married person cannot marry again unless the existing marriage is dissolved by death or divorce. Any marriage by a person who has a prior subsisting marriage is void. Bigamy is a crime. Canada's 'cultural commitment to monogamous marriage' is protected by the civil laws of marriage and the criminal prohibition of bigamy.[9] In the extensive media debate, supporters of Canada's criminal provision on polygamy have suggested that without this provision Canada would become a polygamous country or would somehow be endorsing polygamy.

Canada's criminal provision on polygamy is broadly worded and not clearly consistent with the general approach in Canada to moral offences. Canada has never had much appetite for criminalising private sexual activity.[10] Neither adultery nor fornication was criminalised here,[11] except insofar as such activity harms children.[12] And back in 1968, Parliament, agreeing with Pierre Trudeau

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[8] Civil Marriage Act 2005, c 33, C-31.5, s 2 provides: 'Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.'

[9] Benjamin L Berger describes the criminalisation of polygamy as 'a use of the criminal law to protect a cultural commitment to monogamous marriage' in 'Moral Judgment, Criminal Law and the Constitutional Protection of Religion' (2008) 40 SCLR (2d) 513 at 549.

[10] This is in contrast to at least some US states – for a thorough review of the many sexual offences in the USA, see Harriet F Pilpel and Theodora Zavin 'Sex and the Criminal Law' (1952) 14 *Marriage and Family Living* 238.

[11] On the failed attempt in 1882 by John Charlton, a Liberal Member of Parliament, to have adultery criminalised, see Patrick Brode *Courted and Abandoned: Seduction Law in Canada* (Toronto: The Osgoode Society and U of Toronto P, 2002) pp 81 et seq. On adultery as an 'ecclesiastical' but not criminal law offence, see *Smith v Smith* [1952] 2 SCR 312, where Locke J said: 'In Fairman's case Lord Merriman's expression is that adultery is a "quasi-criminal" offence. It is true that in many of the proceedings before the ecclesiastical courts reference is made to the "crime" of adultery, this, I must assume to be, due to the fact that adultery was an ecclesiastical offence but, as pointed out by Lindley LJ, it was not an offence at common law and it was not a criminal offence in England and is not in the Province of British Columbia.'

[12] Canada's Criminal Code, RSC 1985, c C-46 ('Criminal Code'), s 172 (1) provides: 'Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.' When first enacted in 1918 this provision, titled 'Corrupting Children', did not include the term 'adultery' but only 'indulgence

that 'There's no place for the state in the bedrooms of the nation',[13] repealed the old criminal prohibition of sodomy.[14] For the most part, Canada does not criminalise non-commercial sexual activities carried out between two consenting adults in private.[15]

As for non-commercial private sexual activities involving *more* than two consenting adults, the only explicit prohibition is in regard to anal intercourse, which must involve the presence of only two people to avoid sanction under s 159 of the Criminal Code. Even this limitation must be viewed in light of the Supreme Court of Canada ruling that group sex (perhaps involving anal intercourse?) among consenting adults who had joined a private swingers club for the purpose of exchanging partners and participating in group sex was not 'indecent' and therefore the operator of the club was not guilty of keeping a 'common bawdy-house'.[16] The Chief Justice described the club activities as follows:[17]

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in sexual immorality, in habitual drunkenness or in any other form of vice': SC 1918, c 16, s 1. The specific reference to adultery was added by SC 1932–33, c 53, s 3. Debates in the House of Commons indicate that the provision was originally taken from Ontario's Juvenile Delinquents Act, that it was considered ultra vires Ontario and therefore required parliamentary adoption if it were to be valid law, and that it was aimed at protecting and 'forming the character of' children: Canada, Parliament, House of Commons, *Debates,* 13th Parliament, 1st Session, 1918, vol 2 (10 May 1918) (Ottawa: J de Labroquerie Taché, 1918) at 1704–1710. In *R v E (L)* 1997 Carswell Ont 5530, the court provided an extensive review of the history and case-law relating to s 172, it commented at para 12: 'The jurisprudence has clearly established that mere acts of the enumerated offences are not sufficient in and of themselves. The Crown must prove that these acts, in the home of the child, endanger the morals of children or that they render the home of the child unfit.'

13 CBC Television (21 December 1967), online: CBC Archive available at http://archives.cbc.ca/politics/rights_freedoms/clips/2671 (accessed May 2011).

14 Criminal Law Amendment Act 1968–69 (SC 1968–69, c 38). The Criminal Code, s 159 now provides:

'159. (1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to any act engaged in, in private, between

(a) husband and wife, or

(b) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.

(3) For the purposes of subsection (2),

(a) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and

(b) a person shall be deemed not to consent to an act

(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations respecting the nature and quality of the act, or

(ii) if the court is satisfied beyond a reasonable doubt that the person could not have consented to the act by reason of mental disability.'

15 By the phrase 'non-commercial sexual activities carried out between two consenting adults in private', I am intending to exclude sexual activities that are commercial, public, or non-consensual, or that involve animals or minors. And my use of the term 'sexual activity' is meant to refer to the activity itself not to the making of images or records of such.

16 *R v Labaye* 2005 SCC 80, [2005] 3 SCR 728 ('*Labaye*'); *R v Kouri* [2005] 3 SCR 789, 2005 SCC 81. The Criminal Code, s 197 defines a 'common bawdy-house' as 'a place that is (a) kept or

> 'A number of mattresses were scattered about the floor of the apartment. There people engaged in acts of cunnilingus, masturbation, fellatio and penetration. On several occasions observed by the police, a single woman engaged in sex with several men, while other men watched and masturbated.
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> Entry to the club and participation in the activities were voluntary. No one was forced to do anything or watch anything. No one was paid for sex. While men considerably outnumbered women on the occasions when the police visited, there is no suggestion that any of the women were there involuntarily or that they did not willingly engage in the acts of group sex.'

However unsavoury, the swingers' club activities did not amount to 'indecency' within the meaning of the Criminal Code. The Chief Justice concluded that: 'Consensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society.'[18]

Clearly then, Canada is tolerant of private non-commercial sexual activities among consenting adults. The major exception to this general rule of tolerance is incest. The Criminal Code provides:[19]

> 'Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.'

Incest is a crime even when the act takes place in private between consenting adults.[20]

At first blush, the Criminal Code provision on incest seems to mirror the law governing capacity to marry. If it did so, it would support extending to Canada the following description of American regulation of sexual activity:[21]

> 'Historically, criminal law and family law have worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as either legitimate marital behavior or illegitimate criminal behavior.'

But this statement, however applicable to the American states, has never been true of Canada, where the space for sexual activities that are 'neither marital nor criminal' has always been larger than in some US states.[22] For example, adultery is not a crime, but adulterers by definition are not married to one

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occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency', and under s 210 keeping a common bawdy-house is an indictable offence.

17 *Labaye*, paras 7 and 8.

18 *Labaye*, para 71.

19 Criminal Code, s 155(1). Section 155(4) provides: 'In this section, "brother" and "sister", respectively, include half-brother and half-sister.'

20 *R v RP* (1996), 149 NSR (2d) 91, 105 CCC (3d) 435 (CA).

21 Melissa Murray 'Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life' (2009) 94 Iowa L Rev 1253 at 1256.

22 Murray, ibid at 1257. Murray argues that, in light of cases such as *Lawrence v Texas*, the US is

another and are not free to marry because of the prior existing marriage. Even in regard to incest, there is space for sexual activities that are neither criminal nor marital.

In order to identify the 'law-free' zone of incestuous relationships, it is necessary to turn to the Marriage (Prohibited Degrees) Act, which provides an exhaustive list of the relatives one may not marry: 'No person shall marry another person if they are related lineally, or as brother or sister or half-brother or half-sister, including by adoption.'[23] This statute substantially reduced the restrictions on marrying relatives. Today, stepfathers and adult stepdaughters (or stepsons), aunts and adult nephews (or nieces), etc are not subject to any criminal sanctions for engaging in sexual activity, and their family relationship is not an impediment to marriage. But there remains a law-free zone of relationships that are neither sanctioned as marriages nor criminalised. The current restrictions on marriage include adoptive relationships, whereas the Criminal Code provision applies only to blood relationships. Therefore adoptive parents or grandparents and their (adult) children or grandchildren, or adoptive siblings are not subject to criminal sanctions for having sexual intercourse, but they are not able to marry.

In summary, Canada, for the most part, does not intrude into the bedrooms of the nation by imposing criminal sanctions for private, non-commercial sexual activity among consenting adults. Behaviours such as adultery, group sex, and sexual relations between adoptive fathers and their adult children may be considered immoral or repugnant to many or most Canadians, but these activities are not crimes. That sexual activity is not criminalised does *not* mean that the activity is necessarily legalised in the sense of governed by marriage law or otherwise deemed acceptable or in any way endorsed. In Canada, it is *not* the case that 'sexual acts and choices are categorized as either legitimate (marriage) or illegitimate (crime)'.[24] There is a law-free space within which parties may engage in sexual activity without criminal sanction but are not permitted to marry.

Canada's criminal provision on polygamy is included with but different from the other Criminal Code offences that are grouped under the heading 'Offences Against Conjugal Rights'. These five offences are bigamy (s 290), procuring a feigned marriage (s 292), polygamy (s 293), pretending to solemnise marriages without legal authority (s 294) and solemnising a marriage that contravenes the law (s 295).

Putting aside the provision on polygamy, these 'offences against conjugal rights' have long historical roots, stemming from a time in English history when the legal and social significance of marriage was far greater than it is today. The rules regarding creation of legal marriages were uncertain and in flux. Families,

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now developing a larger 'law-free' zone of sexual activity that is not criminal and not marital. This would move the US closer to the situation in Canada.

[23] SC 1990, c 46, s 2(2).

[24] Murray (above n 21) at 1302.

the state and the church were accorded far greater control over marriages. Divorce was largely unavailable. In this context, clandestine marriages and irregular marriages (bigamous, incestuous or involving minors) were a problem.[25] Drawing on criminal provisions first enacted in Britain from the early seventeenth century, Canada first enacted its own criminal law on bigamy in 1869,[26] shortly after confederation, on procuring or assisting in procuring a feigned marriage in 1886,[27] on solemnising a marriage without legal authority in 1886,[28] and on solemnising a marriage that contravenes the law in 1886.[29]

Canada's bigamy law now provides:

> '290. (1) Every one commits bigamy who
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> (a) in Canada,
> (i) being married, goes through a form of marriage with another person,
> (ii) knowing that another person is married, goes through a form of marriage with that person, or
> (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or
> (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.
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> (2) No person commits bigamy by going through a form of marriage if
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> (a) that person in good faith and on reasonable grounds believes that his spouse is dead;
> (b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years;
> (c) that person has been divorced from the bond of the first marriage; or
> (d) the former marriage has been declared void by a court of competent jurisdiction.

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[25] Lawrence Stone *Uncertain Unions and Broken Lives* (Oxford University Press, 1995); Law Reform Commission of Canada *Bigamy* Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at 7–8; David Lemmings 'Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753' (1996) 39(2) The Historical J 339; RB Outhwaite *Clandestine Marriage in England, 1500–1850* (London: The Hambledon Press, 1995).

[26] Offences against the Person, SC 1869 (32–33 Vict), c 20, s 58 (this provision was based on existing provisions enacted in provinces).

[27] An Act to punish seduction, and like offences, and to make further provision for the Protection of Women and Girls, SC 1886 (49 Vict), s 52, s 3 (this provision was based on existing provisions enacted in provinces).

[28] An Act respecting Offences relating to the Law of Marriage, RSC 1886 (49 Vict), c 161, s 1 (this provision was based on existing provisions enacted in provinces).

[29] Ibid, s 3 (again, this provision was based on existing provisions enacted in provinces).

> (3) Where a person is alleged to have committed bigamy, it is not a defence that the parties would, if unmarried, have been incompetent to contract marriage under the law of the place where the offence is alleged to have been committed.
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> (4) Every marriage or form of marriage shall, for the purpose of this section, be deemed to be valid unless the accused establishes that it was invalid.
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> (5) No act or omission on the part of an accused who is charged with bigamy invalidates a marriage or form of marriage that is otherwise valid.'

Bigamy had first been made a criminal offence in England in 1603.[30] Prior to this it was an ecclesiastical offence. England's criminal provision on bigamy law was aimed at deceptive conduct. It punished those who bigamously married an innocent victim and also couples who sought social acceptance or some other advantage by entering into a bigamous marriage. The existence of a prior marriage was kept secret from the innocent spouse or society at large or both.[31] The bigamy law did not address open polygamy, although polygamy was practised and discussed in Europe at the time.[32] England did not then and has not since criminalised polygamy, in the sense of open, ongoing cohabitation of multiple parties, only bigamy.

Canada's criminal provision on polygamy was not imported from England (or France, Canada's other 'mother country'). It was first enacted in 1890 in response to the criminalisation of polygamy in the US, the renunciation of polygamy by American Mormons and the potential move to Canada of fundamentalist Mormons who wished to continue to practise polygamy.[33] Parliamentary debates and the wording of the provision itself indicate that the law was aimed at the Mormons. Indeed one early unreported case apparently ruled that it applied only to Mormons.[34] However, since 1890 there has only

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30 1 Jac 1, c 11.

31 The deceptive nature of bigamy, which is misuse of a ceremony that would otherwise be valid to create a state-sanctioned union, was emphasised in *R v Friar* (Ont Co Ct, 1983), unreported, Borins J, as cited in *R v Sauve* [1997] AJ No 525 (Prov Ct) at para 3, put it: 'The essential gravity of the offence remains the deception which the bigamist exhibits, in some cases, where he has said nothing about the original marriage to the new partner; but, perhaps, more importantly which he exhibits in all cases by the falsification of state records in the application for the marriage licence.'

32 Samuel Chapman *Polygamy, Bigamy and Human Rights Law* (Xlibris, 2001) pp 26–27.

33 An Act further to amend the Criminal Law, SC 1890, c 37, s 11 (1890). The provision read: 'Every one who practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into (a) any form of polygamy; or (b) any kind of conjugal union with more than one person at the same time; or (c) what among the persons commonly called Mormons is known as spiritual or plural marriage; or (d) who lives, cohabits, or agrees or consent to live or cohabit, in any kind of conjugal union with a person who is married to another or others in any kind of conjugal union . . . is guilty of a misdemeanor, and liable to imprisonment for five years and to a fine of five hundred dollars ….'

34 *R v Liston* (1893) (Toronto assizes, unreported).

ever been one conviction under the polygamy provision, and that was of a native Canadian who had two wives in accordance with tribal customary law.[35]

The references to religion have been expunged, and the current Canadian polygamy provision states:

> '293. (1) Every one who
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> (a) practises or enters into or in any manner agrees or consents to practise or enter into
> (i) any form of polygamy, or
> (ii) any kind of conjugal union with more than one person at the same time,
> whether or not it is by law recognized as a binding form of marriage, or
> (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii), is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
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> (2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.'

This broad provision does not contain the limitation included in the US Uniform Model Penal Code provision on polygamy, which provides:[36]

> 'A person is guilty of polygamy, a felony of the third degree, if he marries or cohabits with more than one spouse at a time in purported exercise of the right of plural marriage. The offense is a continuing one until all cohabitation and claim of marriage with more than one spouse terminates. *This section does not apply to parties to a polygamous marriage, lawful in the country of which they are residents or nationals, while they are in transit through or temporarily visiting this State.*'

On its face, the Canadian provision applies to visitors to Canada who have a valid foreign polygamous marriage. Canada is a monogamous country, but its public policy against polygamy may not require exposing such visitors to the risk of criminal prosecution. There is no obvious state interest in prosecuting transient parties to a polygamous marriage.[37]

The provision applies to all parties to the relationship. It is not limited to blameworthy patriarchs who use their position of authority to acquire multiple

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35 *The Queen v Bear's Shin Bone* (1899) 4 Terr LR 173, 3 CCC 329.

36 American Law Institute, Model Penal Code, art 230.1(2). Author's emphasis.

37 On this issue it may be useful to consider the fact that most countries do not permit same-sex marriage and many impose criminal penalties on same-sex relations. Canada may be more successful in persuading the latter to be tolerant, at least to the point of not criminalising same-sex married couples visiting from Canada, if we refrain from criminalising their visiting polygamous families.

'wives'. It applies to the women as well. Although law enforcement officers may adopt a policy of not charging the women, casting them as outlaws may in itself be problematic. There is reason to believe that some polygamous families may be isolated and suspicious of government intervention. Casting all members, including the 'victims', as criminals may exacerbate the isolation and suspicion and thereby impede efforts to provide assistance to vulnerable members.

The provision applies to cases involving adults who freely choose to carry on conjugal relationships with multiple parties. It is not limited to cases involving minors or where any of the parties lacked the capacity to consent for any reason. It appears to criminalise consensual egalitarian 'polyamorous' relationships.[38] In light of the fact that state has largely withdrawn from the bedrooms of the nation, it is difficult to see the rationale for intervening in cases of polygamy involving only consenting adults. Such intervention is particularly hard to justify because the crime described in s 293 is difficult to distinguish from adultery, which is not a crime. Because Canadians can carry on adulterous relationships or join swingers clubs without criminal penalty, it cannot credibly be claimed that carrying on conjugal relationships with multiple parties is so violative of our social norms that, like incest, it must be criminalised even when it involves only consenting adults.[39]

Supporters of the polygamy provision argue that it is needed to deal with the harms in closed communities such as Bountiful. Such communities, isolated from mainstream society, particularly those led by patriarchs who control the resources and sexuality of the members and sustained by religious or cult beliefs, have a sorry history.[40] Whether or not polygamy is a feature of such

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[38] In the reference case now before the British Columbia Supreme Court, the Attorney-General of British Columbia is arguing that s 293, properly interpreted, is constitutional, and has submitted that: 'on its face and when interpreted in light of its purpose, legislative history, social context, and Canadian and international human rights norms, the prohibition in s. 293 should be interpreted as follows: "Section 293 prohibits marriages or marriage-like relationships involving more than two persons that purport to be (a) sanctioned by an authority having power or influence over the participants and (b) binding on any of the participants."' The Attorney-General has further submitted that: 'The Criminal Code prohibition was and is addressed to the overwhelmingly dominant form of polygamy, and the one most closely associated with demonstrable and apprehended social harms: that is, a patriarchal polygyny that is intergenerationally normalized and enforced through more or less coercive rules and norms of non-state social institutions. Section 293 leaves the balance of multi-partner human sexual behaviour, that which is unrelated to the harms the prohibition seeks to address, unaffected': *Reference re: Criminal Code*, s 293, 2010 BCSC 1308 at para 8. Whatever may be the submissions of the Attorney-General on the proper interpretation of s 293, the provision on its face does not carry the limitations that are suggested. The Attorney-General appears to be inviting the court to effectively rewrite the provision in order that it pass constitutional muster.

[39] Justices Bastarache and LeBel in *Labaye* at para 109 said that: 'According to contemporary Canadian social morality, acts such as child pornography, incest, polygamy and bestiality are unacceptable regardless of whether or not they cause social harm. The community considers these acts to be harmful in themselves.' Insofar as this statement suggests that polygamy as defined in the Criminal Code is so violative of social norms that criminalisation is justified, I respectfully disagree.

[40] See, eg, Kate Barlow *Abode of Love: Growing Up in a Messianic Cult* (Goose Lane Editions,

closed communities, there may be concerns about abuse of vulnerable people, particularly children, trapped in such communities and fragile souls who may be drawn to such groups. Governments wanting to address apparent abuses in such communities are greatly challenged. Efforts to rescue vulnerable people from closed communities may have the effect of drawing the group closer together. Some ham-fisted government interventions have been self-defeating or of questionable effect.[41] Even those within the group who perceive problems and would like outside assistance may be distressed by what they perceive as overly zealous or unfair targeting of the community.

The reactions of closed communities that practise polygamy to aggressive criminal enforcement efforts are referred to in the handbook for law enforcement officials published jointly by the Utah and Arizona Attorney-Generals:[42]

> 'The fundamentalists adapted to a secret, underground lifestyle to avoid prosecution and what they perceived as persecution from the "world". Mass arrests were made in some polygamous communities in 1935 and 1944, culminating in the largest raid of that era occurring in 1953, when more than 100 officers descended upon Short Creek (now Hildale, Utah and Colorado City, Arizona) in an aggressive crusade to stamp out polygamy. The husbands were arrested, while the panicked women and children were bussed to southern Arizona. Images of crying children being torn from the arms of polygamous mothers triggered a public relations backlash.
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> Recently, a community-wide raid took place in the FLDS community near Eldorado, Texas, in April of 2008. Although this raid did not occur in Utah or Arizona, many of the families involved had recently relocated to Texas expressly to distance themselves from perceived persecution. These events have resulted in deep scars among Fundamentalist Mormons and helped to foster a fear of government agencies and a distrust of "outsiders".'

The current strategy outlined in the Utah/Arizona handbook is to increase efforts to enforce laws when child abuse, domestic violence or fraud is alleged, rather than prosecuting for bigamy, or polygamy, per se.[43] Instead of focusing on the polygamous 'lifestyle', the states are working to reduce the fear and distrust of government so that they can provide needed services and education to those remaining in or making the transition out of the polygamous community. The advantage of this strategy is that it may help to decrease the secrecy and isolation that can shield abusers and prevent victims from seeking help.

2006) about the nineteenth-century English group Agapemone formed by a defrocked clergyman who claimed to be guided by the Holy Ghost.

41 In the extreme case of the 1993 FBI assault on David Koresh's Branch Davidians in Waco Texas, well-meaning but clumsy government efforts ended in tragedy. See Dick Reavis *The Ashes of Waco: An Investigation* (New York: Simon and Schuster, 1995).

42 Utah Attorney-General's Office and Arizona Attorney-General's Office *The Primer: A Handbook for Law Enforcement and Human Services Agencies Who Offer Assistance to Fundamentalist Mormon Families* (updated August 2009) at 8.

43 Ibid at 9.

The question in Canada is whether the polygamy provision is a useful tool to deal with potential problems in closed polygamous communities. Because living in a conjugal relationship with more than one person seems no worse than adultery, which is not a crime, those who consider polygamy consistent with their religious beliefs are likely to perceive the provision as evidence of public hostility to their religion. The history of the criminal offence and its terms support the narrative of religious persecution among polygamous groups. Prosecuting for polygamy, rather than dealing directly with child abuse, domestic violence, fraud or other crimes, is likely to appear as persecution and may increase secrecy and isolation.

Supporters of the polygamy provision also argue that it is needed to protect children who might be harmed by polygamy as a result of growing up in a polygamous household and being exposed to polygamy or by becoming a 'child bride' in a polygamous union or by becoming a superfluous 'lost boy' who is ejected from a polygamous community.[44] Preventing such harms would be a justification for criminalisation. Canada's polygamy provision, however, does not target any of these potential harms directly. There is no reference to children in the provision. There is no requirement that there be any children involved for there to be a conviction. The current provision applies whether children are present or not and whether children are harmed or not. The provision is overly broad because it applies to cases involving no children and only consenting adults.

There are provisions in the Criminal Code that directly target harms to children and that might apply to children in polygamous communities. Section 172 of the Criminal Code criminalises adultery, sexual immorality, habitual drunkenness and other forms of vice carried on in the home of a child if the effect is to endanger the morals of the child. These behaviours generally carry no criminal penalty but do so when it can be shown that they endanger children. As for cases of minors becoming 'wives' in polygamous unions, the Criminal Code imposes sanctions for sexual activity with children and, in particular, for sexual touching of minors by those in a position of trust or authority towards the child, or who is someone with whom the young person is in a relationship of dependency, or who is in a relationship with a young person that is exploitive of that young person.[45]

In addition to the Criminal Code provisions, there is also child protection legislation, which allows authorities to apprehend children who are in need of protection.[46] It should also be noted that the laws of each province restrict the marriage of minors. In British Columbia, for example, parties under the age of 19 (the age of majority in that province[47]) may not marry without the consent

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[44] The terms are borrowed from Daphne Bramham *The Secret Lives of Saints: Child Brides and Lost Boys in a Polygamous Mormon Sect* (Random House Canada, 2008).

[45] Criminal Code, s 153.

[46] See, eg, Child, Family and Community Service Act, RSBC 1996, c 46.

[47] Age of Majority Act, RSBC 1996, c 7, s 1.

of their parents (or parent substitutes) or a court order, and parties under the age of 16 cannot be married without a court order.[48]

Canada's polygamy provision at best offers an indirect way of preventing possible harms to children. The criminal provisions that directly deal with harms to children and current child protection legislation and marriage laws (and other laws, including education laws and child labour laws) appear to address potential harms to children in polygamous families.

Supporters of the polygamy provision also argue that it is needed to address the harms to women involved in polygamous relationships. Polygamy is associated with gender inequality, and Canada is committed to eliminating discrimination against women. Canada has obligations under the Canadian Charter of Rights and Freedoms and the Convention on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women to ensure gender equality and eliminate discrimination against women. The Committee on the Elimination of Discrimination Against Women issued a General Recommendation 1994, stating:[49]

> '14. States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention'.

Rebecca Cook and Lisa Kelly noted that:[50]

> 'Beyond international human rights treaty law, it is clear that customary international law requires the prohibition or at the least restriction of polygyny. Surveying state practice, it is evident that the majority of states prohibit the practice.'

Supporters of the polygamy provision argue that it is needed to comply with international human rights treaties and the Canadian Charter of Rights and Freedoms. However, a distinction must be drawn between giving state sanction to polygamous marriages on one hand, and criminalising the practice of living in a conjugal relationship with more than one person on the other. Canada, like most Western countries, does not permit polygamous marriages under its marriage laws. Furthermore Canada, like many Western countries, criminalises bigamy. It is not at all clear that, in addition, a criminal prohibition against living in a conjugal relationship with more than one person is necessary, and many monogamous countries have not enacted such a law. If polygamous

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48 Marriage Act, RSBC 1996, c 282, ss 28 and 29.

49 General Recommendation No 21 (13th session, 1994).

50 Rebecca Cook and Lisa Kelly 'Polygyny and Canada's Obligations under International Human Rights Law' (September 2006), research report for Department of Justice Canada, in part VA.

marriages are not permitted under a country's civil marriage laws and if bigamy is a crime, the country has established that it is a monogamous country that 'prohibits' polygamy and in compliance with human rights norms. There are no reports of international human rights bodies suggesting that monogamous countries that do not permit polygamous marriages and criminalise bigamy must also criminalise the practice of carrying on a conjugal relationship with more than one person in order to comply with their human rights obligations. Nor is it at all clear that carrying on a conjugal relationship with more than one person, in and of itself, violates the guarantee of gender equality.

In polygamous countries, polygamy is legal and endorsed by the state, which extends the status of marriage and incidents of marriage to those who enter into this unequal form of marriage. Legalised polygamy is part of a package of laws, policies and practices that maintain gender inequality in polygamous countries. The package often includes one-sided divorce laws, and unequal access to education and economic opportunities for women. The obligation under the United Nations human rights conventions is to get rid of or at the very least restrict state-sanctioned legal polygamy. This obligation does not require that carrying on a conjugal relationship with more than one person be criminalised.

Supporters of the provision also argue that it is needed to protect Canada from immigration by polygamous families. Canada's immigration laws protect Canada's monogamous character by excluding multiple spouses from the family reunification programme and from the list of family members who can immigrate with a successful applicant.[51] In addition, applicants who qualify independently may be deemed 'inadmissible' for 'criminality' – applications will be turned down if there are reasonable grounds for an immigration officer to believe that an applicant will commit an offence under the polygamy provision.[52] The polygamy provision, then, provides a basis for determining

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[51] The Immigration and Refugee Protection Regulations (SOR/2002–227), s 117(9)(c), provides: '(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if . . . (b) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended; (c) the foreign national is the sponsor's spouse and (i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or (ii) the sponsor has lived separate and apart from the foreign national for at least one year and (a) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or (b) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor ….'

[52] Immigration and Refugee Protection Act, SC 2001, c 27, I-2.5, s 36(2)(d), which provides: 'A foreign national is inadmissible on grounds of criminality for committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.' This must be read in light of s 33, which provides: 'The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.' See, eg, *Ali v Canada (Minister of Citizenship and Immigration)* [1998] FCJ No 1640 (TD); *Awwad v Canada (Minister of Citizenship and Immigration)* [1999] FCJ No 103; [1999] ACF no 103; 162 FTR 209; 85 ACWS (3d) 892.

that an applicant is inadmissible for criminality. Canada could more directly carry out its policy of not permitting immigration of polygamists by including in the list of those who are inadmissible to Canada anyone who is coming to Canada to practise polygamy. This direct approach is used in other countries, for example, the United States.[53]

If it were not a crime to carry on a conjugal relationship with more than one person at a time, it would not follow that there would be a constitutional right to marry more than one person at a time or that more than one person could be sponsored for immigration as a 'conjugal partner'. A person with standing could bring a constitutional challenge to Canada's marriage law, which permits only monogamous marriages, or to the exclusion of polygamous parties from the category of eligible family members under the immigration law. It is highly unlikely that any such challenge would be successful, but this issue is distinct from the issue of retaining criminal prohibition of polygamy. Protecting Canada's monogamous marriage law and immigration policy from constitutional challenges does not depend on making the practice of living in a conjugal relationship with more than one person a criminal offence.

As the constitutional reference proceeds through the courts, it is to be hoped that the confusion relating to the issues will be cleared away. This confusion is in part based on confusion between 'decriminalisation' and 'legalisation'. 'Decriminalisation' refers to repealing the criminal offence of polygamy. Some people use the term 'legalisation' as a synonym for 'decriminalisation,' in other words, to mean repeal of the polygamy provision. Others use 'legalisation' to mean changing the marriage laws to allow polygamous marriages to take place. It is important to clarify that decriminalisation does *not* mean changing the marriage laws to allow polygamous marriages to take place. Eliminating the criminal prohibition against polygamy would not change the civil laws, which do not permit polygamous marriages to take place in Canada.

There is also confusion in the use of the terms 'prohibit,' 'ban' and 'criminalise'. Sometimes the terms 'prohibit' or 'ban' are used as synonyms for 'criminalise', but other times these terms are used to describe the effect of civil marriage laws that do not permit polygamy. This can lead to misunderstandings. For example, a Canadian government report says that 'In the United Kingdom, polygamy is also prohibited'.[54] This may lead readers to think that polygamy is a crime. But Britain does not have a criminal offence of polygamy, only bigamy. This is also an instance of the confusion in the use of the terms 'polygamy' and 'bigamy'.

The Law Reform Commission of Canada noted that:[55]

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[53] See, eg, Immigration and Nationality Act, 8 USC 1182, s 212(15)(A): 'Any immigrant who is coming to the United States to practice polygamy is inadmissible.'

[54] Rebecca Cook and Lisa Kelly 'Polygyny and Canada's Obligations under International Human Rights Law' (September 2006), research report for Department of Justice Canada, in part V4.

[55] Law Reform Commission of Canada *Bigamy* Working Paper 42 (Ottawa: Law Reform Commission of Canada, 1985) at 13.

> ' . . . polygamy consists in the maintaining of conjugal relations by more than two persons. When the result of such relations is to form a single matrimonial or family entity with the spouses, this is regarded as polygamous marriage . . . The maintaining of more than one monogamous union by the same person corresponds with the popular notion of bigamy . . . In legal terms, however, [polygamy and bigamy] have a more specific meaning. In particular bigamy, which is defined in relation to the legal institution of marriage, is distinguished from polygamy by the requirement of formal marital ties.'

As the terms are used in Canada's Criminal Code, 'bigamy' is going through a form of marriage while married to someone else. 'Polygamy' is the practice of living in a conjugal relationship with more than one person at the same time. Some use the term 'polygamy' to mean 'bigamy'. For example, a reporter wrote that 'polygamy' is illegal in Britain and punishable by imprisonment for up to 7 years,[56] but, as already noted, polygamy is not a criminal offence in Britain, and it is bigamy that is punishable by imprisonment for up to 7 years.

It is particularly important to be specific as to what is meant by 'ban,' 'prohibit' and 'criminalise' and by 'polygamy' and 'bigamy' in the comparative law context. Policy makers may well look to what other jurisdictions have done in relation to polygamy. The material cited above may well give the impression that Britain has a criminal offence of polygamy, when in fact it does not. Many countries maintain their monogamous character without creating a criminal offence of polygamy, and it is helpful to know that.

Confusion has also arisen in regard to use of the term 'recognition'. Canada does not 'recognise' polygamous unions by extending status to such unions under its domestic laws, but it does 'recognise' valid foreign polygamous marriages, as do most Western countries. The recognition of valid foreign polygamous marriages does not vitiate Canada's character as a monogamous country or suggest endorsement of polygamy. Incidents of marriage – the rights and obligations, benefits and burdens that flow from marital status – are extended to valid foreign polygamous marriages only to the extent that doing so does not violate Canada's public policy. Canada's commitment to monogamy does not require a blanket refusal to extend the incidents of marriage to those validly married in polygamous countries. Any such blanket refusal would disproportionately affect the women, because it would effectively strip them of the marital rights that they reasonably expected to enjoy as the result of entering into a legally valid marriage in their home country.

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[56] Susan Martiuk 'Polygamous marriages drain taxpayer dollars' *Calgary Herald*, 15 February 2008. See also Christina Hall 'Bay City Wife Charged With Polygamy' *Detroit Free Press*, 5 September 2009. See also 4 Am & Eng Enc L (2d ed) 39: 'Bigamy, or polygamy, therefore consists in the making of the unlawful contract and the abuse of the formality which the law has enjoined as requisite to the creation of the marital relation. And it is the abuse of this formal and solemn contract, by entering into it a second time when a former husband or wife is still living, which the law forbids because of its outrage upon public decency, its violation of the public economy, as well as its tendency to cheat one into a surrender of the person under the appearance of right.'

III PROPERTY RIGHTS OF UNMARRIED COHABITANTS

Some Canadian provinces and territories have extended statutory family property rights and obligations to unmarried couples who have cohabited for a defined period.[57] Most jurisdictions in Canada, however, do not include unmarried couples in their family property regimes. An argument that this exclusion violates the Canadian Charter of Rights and Freedoms by discriminating on the basis of marital status was rejected by the Supreme Court of Canada in 2002.[58] Therefore, most unmarried parties must look outside of family law to claim a share of the property accumulated during cohabitation.

Courts in common law Canada have a long history of using trust doctrines to remedy inequitable divisions of family property. These doctrines were initially used for married couples. After the doctrine of coverture was modified by the introduction of Married Women's Property Acts, women no longer ceded ownership of their property to their husbands on marriage. Under the new system of separate property each spouse owned his or her own property, and on dissolution of a marriage, each spouse was entitled to his or her own property.[59] Because of the sexual division of labour within families, however, most often men acquired more assets during marriage than did women. Property claims were based on title, not on rights and obligations arising from the marital relationship. Women without their own means could be left propertyless under the separate property regime. Unless they held title to property acquired during the marriage, they had no claim to share in it. So applying a system of separate property on dissolution of marriage meant that men often left marriage with all or most of the assets that the family had accumulated. Courts used trust doctrine to remedy this situation.

The primary doctrine used to give women a share of marital property was the resulting trust. If a wife contributed to the purchase price of property taken in the name of the husband, the court would apply the presumption that a beneficial interest in the property resulted back to the wife.[60] The resulting trust device was expanded to apply to cases where the contribution of the wife to the acquisition of property was indirect. This indirect contribution could take the form of such actions as providing labour during construction of the matrimonial home or paying household costs while the husband acquired title

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57 Family Property Act, CCSM, c F25, s 1, 2.1 (Manitoba, 2 years cohabitation); Family Law Act, SNWT 1997, s 18, ss 1, 36 (Northwest Territories, 2 years cohabitation or less if child); Family Law Act, SNWT (Nu), ss 1, 36 (Nunavut, 2 years cohabitation or less if child); Family Property Act, SS 1997, c F-6.3, ss 2, 21 (Saskatchewan, 2 years cohabitation).

58 *Attorney-General of Nova Scotia v Walsh* [2002] 4 SCR 325.

59 Lori Chambers *Married Women and Property Law in Victorian Ontario* (Toronto: University of Toronto Press, 1997); Berend Hovius and Timothy G Youdan *The Law of Family Property* (Scarborough: Carswell, 1991).

60 *Re Whitely* (1974) 4 OR (2d) 293 (CA).

to the matrimonial home.[61] The doctrine of resulting trust was also applied where the contribution of the non-titled spouse was to the improvement, rather than the acquisition, of property.[62]

Under the traditional doctrine of resulting trust, the presumed intention of the contributor is that a beneficial interest in the property proportionate to the contribution should result back to the contributor. But the expansion of the doctrine to apply to indirect financial contributions or non-financial contributions created challenges in determining whether a presumption arose and the extent of the interest of the contributor. Courts focused increasingly on the 'common intention' of the parties to resolve these challenges. In the infamous case of *Murdoch v Murdoch*, the evidence was that during her 25-year marriage the wife had made substantial contributions of physical labour not only doing household work but as a rancher.[63] She was responsible for 'haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done'.[64] Her claim for an equal share of the family property that was acquired during the marriage but held in the name of the husband was dismissed. The majority found that there was no common intention that ownership of the property was to be shared, and therefore her trust-based claim was dismissed.[65]

The doctrine of resulting trust did not provide an adequate tool to deal with family property division, and Canadian courts after the *Murdoch* case turned the unjust enrichment and the 'remedial constructive trust' to divide family property.[66] At the same time, provincial and territorial marital property legislation created a statutory right to a division of marital property. While married parties now rely on the family property statutes, most unmarried cohabitants continue to assert claims based on unjust enrichment or resulting trust in order to claim a share of property.

Remedial constructive trusts provide a proprietary remedy in situations of unjust enrichment. In a series of cases decided by the Supreme Court of Canada in the 1970s and 1980s, women who had contributed substantially in money and labour to the acquisition and improvement of property owned by their husband or unmarried intimate partner were awarded a beneficial interest in the property by way of a constructive trust.[67] Claimants to ownership by way of constructive trust must prove four things:

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61 *Madisso v Madisso* (1975) 21 RFL 51 (Ont CA); *Trueman v Trueman* 5 RFL 54 (Alta CA).
62 *Rathwell v Rathwell* [1978] 2 SCR 436.
63 [1975] 1 SCR 423.
64 Ibid at para 47.
65 *Murdoch v Murdoch* [1975] 1 SCR 423.
66 *Pettkus v Becker* [1980] 2 SCR 834.
67 *Rathwell v Rathwell* [1978] SCR 436; *Pettkus v Becker*, ibid; *Sorochan v Sorochan* [1986] 2 SCR 38.

(1) that by their contributions of money or labour they have enriched the legal title holder of the property in question;

(2) that the enrichment of the other has resulted in a corresponding deprivation of the contributor;

(3) that there is no juristic reason for the enrichment, such as a contract or legal obligation to make the contribution; and

(4) that there is a nexus (or 'causal connection') between the deprivation of the plaintiff and the property in question.

The first three elements are the elements of unjust enrichment. If unjust enrichment can be proven, but there is no nexus between the plaintiff's deprivation and the property in question, the court can award monetary compensation.

Courts have sometimes been willing to find a causal connection and to award a property interest even without direct contribution to the property itself. For example, where the claimant, by taking almost complete responsibility for childcare and household management, has freed the title holder to acquire property, the Supreme Court has granted the claimant a proprietary remedy by way of constructive trust. This was the case in *Peter v Beblow*, a major decision of the Supreme Court of Canada on unjust enrichment and remedial constructive trusts in the context of unmarried cohabitation.[68] In *Peter v Beblow*, the court ruled that if the claimant is entitled to the proprietary remedy of a constructive trust, the value of the trust is to be determined on the basis of the 'value survived' approach, in other words, according to the portion of the actual value of the property in question that is attributable to the claimant's services. The court suggested in obiter dicta that if the claimant is entitled only to monetary compensation, the amount should be assessed on a quantum meruit basis, balancing the benefits and detriments to the claimant from the relationship.

With the development of the doctrine of unjust enrichment and the remedial constructive trust, there has been uncertainty about the continuing role of the resulting trust, and, in particular, the doctrinally questionable development of the resulting trust based on the common intention of the parties that was developed in an effort to provide relief on breakdown of relationships. In regard to claims based on unjust enrichment, there has been a division among Canadian courts in cases where money damages, rather than a remedial constructive trust, is the appropriate remedy. Some courts have ruled that the 'value survived' approach may be used when quantifying a monetary award,[69] while others have ruled that the 'value received' approach must be used for

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[68] [1993] 1 SCR 980.

[69] See, eg, *Panara v Di Ascenzo* (2005) 16 RFL (6th) 177 (Alta CA).

monetary awards.[70] This issue is of great practical significance, because the 'value survived' approach inevitably results in a higher amount than does the 'value received' approach, which is simply a quantum meruit calculation. The former would result in a percentage share of the property acquired by the couple during the relationship, whereas the latter would result in payment for the services of the claimant, taking into account the benefits received by the claimant.

These continuing problems in relation to resulting trusts and unjust enrichment were addressed by the Supreme Court of Canada in two cases that were heard together, *Kerr v Baranow* and *Vanasse v Seguin*.[71] The Court ruled that the resulting trust arising solely from the common intention of the parties is no longer good law in Canada. The Court rejected the doctrinally questionable modifications of the traditional doctrine and clarified that the proper role for the doctrine of resulting trusts in domestic cases is to address gratuitous transfers of property from one party to the other, or cases where both parties contributed to the acquisition of property but title was taken in the name of only one.

As for claims of unjust enrichment, the Court addressed three issues that have given rise to difficulties: (1) assessment of monetary awards; (2) balancing benefits and detriments when calculating a monetary award; and (3) the parties' reasonable or legitimate expectations.

On the issue of assessing monetary awards, the courts rejected the notion that there is a 'remedial dichotomy', that is, the 'view that there are only two choices of remedy for an unjust enrichment: a monetary award, assessed on a fee-for-services basis; or a proprietary one (generally taking the form of a remedial constructive trust), where the claimant can show that the benefit conferred contributed to the acquisition, preservation, maintenance, or improvement of specific property'.[72] The Court ruled that there should be flexibility in the approach taken to monetary awards, and that limiting the power of courts to a 'fee-for-services' calculation is inappropriate. The Court reasoned that inevitably using a quantum meruit approach: (1) 'fails to reflect the reality of the lives of many domestic partners'; (2) 'is inconsistent with the inherent flexibility of unjust enrichment'; and (3) 'ignores the historical basis of *quantum meruit* claims'.[73]

In some cases a quantum meruit award is appropriate for unjust enrichment. But '[w]here the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of . . . a "joint family venture" to which both partners have contributed, the monetary remedy should reflect that fact'.[74] In such cases, the monetary award for unjust

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70 See, eg, *Bell v Bailey* (2001) 203 DLR (4th) 589, (Ont CA).
71 2011 SCC 10.
72 Ibid at para 57.
73 Ibid at para 58.
74 Ibid at para 80.

enrichment should be assessed, not on a quantum meruit basis, but 'by determining the proportionate contribution of the claimant to the accumulation of the wealth'.[75]

The Court noted that unmarried couples form a diverse group, and that not all such couples could be described as engaging in a 'joint family venture' sufficient to attract the deviation from a quantum meruit assessment. The Court outlined factors that should be considered in determining whether parties were engaged in a joint family venture. The first of these factors was 'whether the parties worked collaboratively towards common goals'. The Court noted that '[i]ndicators such as the pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent, if any, to which the parties have formed a true partnership and jointly worked towards important mutual goals'.[76] The second factor was the existence of economic interdependence and integration. The Court commented that '[t]he more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be considered as having been engaged in a joint family venture'.[77] Evidence that the parties prioritised the welfare of the family unit over their individual interests will be relevant in regard to this factor. The third factor was the intention of the parties, either express or inferred. The final factor is the extent to which the parties gave priority to the family in their decision making.

The Court went on to address the difficult question of balancing benefits and detriments when calculating monetary awards for unjust enrichment. The Court first addressed cases where such balancing will not be required. Those are the joint family venture cases where the remedy will be a share of the wealth proportionate to the claimant's contributions. The Court commented that:[78]

> 'Once the claimant has established his or her contribution to a joint family venture, and a link between that contribution and the accumulation of wealth, the respective contributions of the parties are taken into account in determining the claimant's proportionate share. While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.'

Where a quantum meruit award is the appropriate remedy for unjust enrichment, it will be appropriate to carry out a balancing of benefits and detriments. For those cases, the Court ruled that 'mutual benefit conferral' can be taken into account at two stages. It can be considered when determining whether unjust enrichment has been proven, specifically in regard to whether or not there was any juristic reason for the enrichment of the defendant. At that point mutual benefit conferral can be considered if it provides relevant evidence

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75 Ibid at para 81.
76 Ibid at para 90.
77 Ibid at para 92.
78 Ibid at para 102.

of the existence of a juristic reason for the enrichment. Mutual benefit conferral should also be considered at the remedy stage in accordance with established principles of quantum meruit claims, where any benefits that flowed from the defendant to the claimant are taken into account by reducing the claimant's recovery.

Finally, the Court expressly reduced the role of the reasonable expectations of the parties in claims of unjust enrichment. The Court noted that these expectations have been significant in regard to whether there was a juristic reason for the enrichment, and acknowledged that they may continue to play a minor role in that determination.

The decision of the Court in *Kerr v Baranow* and *Vanasse v Seguin* has provided much needed clarity to the doctrines of resulting trust and unjust enrichment in the context of unmarried cohabitation. Most important was the Court's ruling that monetary awards for unjust enrichment are not necessarily limited to quantum meruit assessments and do not always require a balancing of benefit and detriments. The availability of monetary awards that are calculated as a proportionate share of the wealth acquired during cohabitation for couples who engaged in a joint family venture is a significant increase in the rights of claimants.

IV SUPPORT FOR UNMARRIED COHABITANTS

On 24 March 2011, the Supreme Court of Canada granted leave to appeal in an important case from Quebec relating to the support rights of unmarried cohabitants.[79] Quebec is the only province in Canada that does not extend support rights and obligations to parties who are not either married or a party to a civil union. This regime affects a large percentage of the population – according to the 2006 census, in 28.8% of all families in Quebec the couples were unmarried.[80] Quebec accommodates couples who do not wish to marry by maintaining a civil union scheme that is available to parties of the same or opposite sex and that carries with it the rights and obligations available to married couples under Quebec law. But parties who are not married or in a civil union are not included in Quebec's family laws. This exclusion is for a principled reason. Quebec has taken the view that thrusting the private law rights and obligations of marriage on those who have not chosen to marry violates autonomy rights.[81]

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79 *Attorney-General of Quebec, et al v A et al* (SCC) docket number 33990, 24 March 2011.

80 Statistics Canada 'Census families by number of children at home, by province and territory (2006 Census)(Quebec)' available at www40.statcan.gc.ca/l01/cst01/famil50f-eng.htm (accessed May 2011).

81 Back in 1998, then Minister of Justice Serge Ménard stated: 'Lorsque le législateur a révisé le droit de la famille, tant en 1980 qu'en 1991, il s'est interrogé sur l'opportunité de prévoir des conséquences civiles aux unions de fait. S'il s'est abstenu de le faire, c'est par respect pour la volonté des conjoints: quand ils ne se marient pas, c'est qu'ils ne veulent pas se soumettre au régime légal du mariage.': Quebec, Debates of the National Assembly, 18 June 1998.

Because the Quebec court does not permit the parties to be identified by name, the media has dubbed it the 'Lola' and 'Eric' case. Eric is well-know billionaire, who met Lola in her native Brazil in 1992, when he was 32 and she was just 17. Their 10-year relationship produced three children, who receive substantial child support. Lola challenged the exclusion of unmarried parties from Quebec's support scheme. She was unsuccessful at trial, but her appeal was granted. The Quebec Court of Appeal ruled that the law was discriminatory. Now the Supreme Court of Canada will make a final ruling on the issue.

In 2002, the Supreme Court of Canada ruled that family property statutes that extend only to married persons the presumptive right to an equal share of a couple's property in the event of separation or death were constitutional.[82] In that ruling, the Court emphasised the importance of respecting the personal autonomy and dignity of individuals by not imposing on them rights and benefits that they did not choose. Exclusion of unmarried couples was not considered by the Court to be based on stereotype or presumed characteristics that perpetuate the notion that such couples are less worthy of respect or less valued members of society.

Whether the same emphasis on personal autonomy will prevail in the Lola and Eric case is doubtful. In the 2002 case, the distinction between support on one hand and marital property on the other was explicitly addressed. Justice Gonthier, in a concurring opinion, stated that family property division is aimed at dividing assets according to the regime chosen by parties, either explicitly or implicitly by getting married. In contrast, stated Gonthier J, the purpose of support laws, which generally apply to both marriage and cohabitation, is to meet the needs of spouses and children. Family property schemes are contractual in nature, while support laws are not contractual but rather responsive to situations of dependency. Most commentators expect that this distinction will be reiterated in the Lola and Eric case, and that the decision of the Quebec Court of Appeal that the Quebec law is unconstitutional will be upheld.

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[82] *Attorney-General of Nova Scotia v Walsh* [2002] 4 SCR 325.