BOTH SIDES NOW: COMMON LAW RELATIONSHIPS AS STATUS IN CANADA

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Introduction

The term status, at least when it is used to define marriage, is often explained in its opposition to contract. A contract, usually between two people, is entered into upon mutually agreed upon terms set by the individuals for a purpose specific to the goals and needs of those individuals. It can be terminated upon agreement by its parties who are subject to its privity. Contractual disputes can be resolved in accordance with the jurisdiction where the contract was made or by laws agreed upon by the parties. Once a contract is terminated, absent damages arising from the contract's breach, the parties owe each other nothing and have no ongoing legal relationship. The purpose of the

contract is private. It serves the individuals and their needs, but usually holds no greater communal or societal purpose.

Status is something that is ascribed by the state. It carries with it non-negotiable rights, duties and obligations that arise as a condition of the status. Its purpose is not individualized to any of its members but holds an importance fundamental to the functioning of society. There is no private ordering when it comes to pure status; it is public and communal in nature.

Much has been written on the idea of marriage as status. However, less time has been dedicated to the idea of common law relationships[1] as status. In the decision of *Quebec v A*,[2] the Supreme Court was asked whether the exclusion of unmarried couples from Quebec's division of property and spousal support legislation was unconstitutional. In answering no, the majority of the Court described common law relationships as free from state regulation, labeling them a "no regime" or at best "a regime of freedom of contract".

This article argues that this framing of common law relationships as unregulated and privately ordered was incorrect. It demonstrates that, on the contrary, common law relationships in Canada have been a form of status for decades, in some ways more so than marriage itself. Ascription into this status happens more organically and unwittingly than that of marriage. When common law couples separate, the termination of their common law status is regulated by governments in tandem to those laws that govern the dissolution of marriage. This regulation however is both inefficient and uncertain, in roughly half of the country. The result is unnecessary and costly litigation, the wasting of court resources, the creation of barriers to justice, and ultimately, financial and social strain on the state.

Exposing the frailty of the Court's logic in *Quebec v A* provides a strong argument for future constitutional challenges to provincial legislation that excludes common law couples from the obligations and protections assigned to separating, married persons in Canada. However, this article concludes that the more likely route, as we are seeing in real time since *Quebec v A*, is legislative reform.

This paper begins with a discussion on the status/contract framing of intimate relationships. It reviews in brief the work of Prof. Janet Halley and others in "family

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[1] This term is used (in conjunction with de facto spouses when discussing the province of Quebec) to describe two, unmarried persons living (usually cohabiting) in a conjugal relationship of some permanence. For an extensive discussion of this issue, see Leckey, "De Facto Relationships in Canada" in Jens M. Scherpe & Andy Hayward, eds, *The Legal Status of De Facto Relationships* (Cambridge: Intersentia, forthcoming) [Leckey De Facto Relationships] at 4–9. Electronic copy available at: https://ssrn.com/abstract=4052699.

[2] *Quebec (Attorney General) v A*, 2013 SCC 5 [*Quebec v A*].

law exceptionalism". It then looks at the decision of *Quebec v A* and the logic that appeared to decide that case's outcome. Doing so sets the stage for the final portion of this paper: a review of the history and contemporary regulation of common law status in Canada. The focus of this review is on two main incidents of separation: division of property and spousal support. As noted in this article, there are already many other ways that the state regulates unmarried couples, both with respect to the dissolution of their relationships as well as when they remain together, all of which show why common law relationships are more status than contract in Canada. However, given that the Court's decisions in *Quebec v A* were based on division of property and spousal support for unmarried couples, this article engages primarily with those two issues to demonstrate how neither of those incidents are unregulated by the state and subject only to private ordering.

After demonstrating that common law relationships are more status than contract, even in the province of Quebec, this paper concludes with some thoughts on a future s.15 challenge and the prospect of legislative reform in this area of the law.

1. Marriage as Status

The status/contract lens is a dichotomy used by Prof. Janet Halley and others to explain the inception and evolution of family law.[3] In her work, Halley provides a genealogy of family law, its focal point the exodus of the manor during the industrial revolution and the corresponding bifurcation of domestic relationships from those of the rapidly growing capitalist market. While the market was governed by freedom of contract, the family, according to the writings of German and English legal philosophers, was governed by natural law, by morality but not by contract.[4] Influenced by these writers, courts of law in Europe and North America also began to settle on the notion that family law, and in particular, marriage, was something "more than contract". Studying the writings and decisions of English jurists such as Joel Prentiss Bishop, Lord Robertson, and American Justice Joseph Story, Halley demonstrates how courts settled on the notion that this "more than contract" was status.

As Halley describes it, the term status was borrowed from civil law and gradually absorbed into the common law terminology;[5] its elements became defined in opposition to those of contract. Framing marriage as status helped legal scholars

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[3] Janet Halley, "What is Family Law? Genealogy Part I" (2011) 23:1 Yale JL & Human 1 [Halley Genealogy I]; "What is Family Law? Genealogy Part II" (2011) 23:2 Yale JL & Human 189 [Halley Genealogy II]; "Behind the Law of Marriage (I): From Status/Contract to the Marriage System" (2010), 6 Unbound: Harvard J Leg Left 1 [Halley Law of Marriage]. See also Duncan Kennedy, "Two Globalizations of Law and Legal Thought: 1850-1968" (2003) 36 Suffolk L Rev 631; Luke Taylor, "Marriage, Work, and the Invention of Family Law in English Legal Thought" (2020) 70 U Toronto LJ 137.

[4] Duncan Kennedy, "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought" (2010) 58 American J Comparative L 811.

[5] Halley Genealogy I, *supra* note 3 at 38.

cement the notion of contract by eliminating other areas of law from its domain that did not fit with the emerging notion of freedom of contract and the free market.[6] Marriage was not simply a contractual relationship between a husband and wife – easy to enter and exit on mutually agreed upon terms – but bigger than any individual couple. It was an institution, fundamental to society and the progress of civilization.[7] Where contract was private and variable in nature, status entailed something "public and communal".[8] Contracts contain terms as defined by the contracting parties. Status carries with it non-negotiable "rights, duties and obligations"[9] that arise as a condition of the status.[10] Halley's research pinpoints what may be the earliest English language court case describing marriage as status, in mid-19th century Scotland.[11]

Certainly, this was the view of marriage in the 1800s and early 1900s in the U.K. as well as in North America. The Supreme Court of the United States first defined marriage as status in the case of *Maynard v Hill*,[12] where, after refusing to recognize marriage as contract, the Court observed that marriage was "an institution, in the maintenance of which in its public character the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[13] In Canada, an early, formal recognition of marriage as "more than contract" occurred in *Re: Marriage Act*,[14] where the Supreme Court and later the Privy Council agreed with arguments that cited Joel Prentiss Bishop's famous refutation of marriage as contract:

> …you may call a marriage a contract as you may call a locomotive a horse, because there are more things in which marriage differs from a contract than

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[6] *Ibid* at 11. Halley also notes the longing in late nineteenth century American legal circles for what she calls "system" – the desire to combat the rising tide of an ever developing "mass of law" for a coherent and categorized legal system in America. *Ibid* at 54. The notion of system was inspired by legal philosophers like Gustav Hugo and Carl Von Savigny – both of whom were instrumental in relegating family law to something other than contract. As Halley explains, Hugo distinguished family law as a separate legal domain, whereas Savigny believed it to be separate and distinct from the rest of "the law". *Ibid* at 67–68 and 54–71.

[7] Halley Genealogy I, *supra* note 3 at 41.

[8] *Ibid* at 42, 45.

[9] *Ibid* at 42, citing Joseph Story, citing Lord Robertson.

[10] *Ibid* at 42–43. As well, the pragmatic effects of marriage as status allowed courts to take jurisdiction over marital disputes and apply their own law – regardless of where a couple was initially married. This was in contrast with emerging contract law that dictated contractual disputes were decided under the doctrine of *lex loci contractus.* Halley Law of Marriage, *supra* note 3 at 5.

[11] Halley Genealogy I, *supra* note 3 at 5. For a fulsome discussion on why the issue of marriage mattered so much to Scottish courts, see 27–33.

[12] *Maynard v Hill*, (1888) 125 US 190 at 210–11.

[13] *Maynard v Hill*, *supra* note 12 at 210–211 as cited in Halley Genealogy I, *supra* note 3 at 41.

[14] [1912] 46 SCR 132 [*Marriage Act*].

> in which it complies with the terms of a contract. But, there is no doubt there is a portion of marriage which is a contract, it involves the consensual contract of the parties to it, but this is only the beginning of the creation of a valid marriage.[15]

At the turn of the 20th century, marriage was, for most, a lifelong institution expected of couples, with requirements to enter and difficult to exit.[16] This was as close to pure status as marriage would get in Canada as even then it required the consent of couples to enter it.[17] As the century progressed, the institution of marriage attracted ever increasing incidents and expanded its membership. These included the introduction of dependents' relief acts, reforms to spousal support, the creation of family property legislation and the legal recognition of same sex marriage. Along with these expansions came several injections of contract.

No fault divorce,[18] the legalization of cohabitation agreements and marriage contracts,[19] and a cluster of Supreme Court decisions concerning the finality and unimpeachability of domestic contracts in the mid-1980s and 1990s[20] shifted the framing of marriage towards contract.[21] However, this highwater mark receded

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[15] *Ibid* at 256.

[16] Indeed, prior to the introduction of the *Divorce Act* in 1968, most couples seeking a court-ordered divorce first required an Act of Parliament to do so. See Julian Payne, "The Evolution of Family Law: Past, Present and Future: Reviewing the Past Fifty Years" (2018) *27th Annual Institute of Family Law Conference* 32, 2018 CanLIIDocs 10869.

[17] This can be contrasted with other forms of status in Canada such as minors. Children under the age of 18 or 19 in Canada are subject to special treatment by the state because of their age. This treatment includes different sentences if convicted of a crime, eligibility for child support, the inability to get a driver's license, to vote, or to marry until certain ages. This status is completely ascribed by the State and children have no ability to opt in or out of it.

[18] First with the introduction of the *Divorce Act, 1968,* SC 1967-8, c 24, s 4(e)(i), that provided the first no-fault divorce scheme in Canada requiring that the parties live "separate and apart" for at least three years. The subsequent reform of the *Divorce Act* in 1986 made no fault divorce more accessible, shortening the separation period to one year: *Divorce Act, 1986*, RSC 1985, c D-3.4, s 8(1)(a).

[19] See e.g. *Family Relations Act,* RSBC 1979, c 121, s 48; *Marital Property Act,* SNB 1980, c M-1.1, ss 33–41. For an example in case law, see *Crispen v Topham*, 1986 CarswellSask 60, 1 ACWS (3d) 56 (QB) at para 14.

[20] As Carol Rogerson notes, beginning in the late 1980's "the modern spousal relationship was reconfigured in contract rather than status. This new view of marriage by courts was of a contract between two autonomous and equal individuals freely choosing the structure of their relationship to meet their own needs and aspirations, without the paternalistic intervention of the state." Carol Rogerson, "Miglin v. Miglin 2003 SCC 24 – They are Agreements Nonetheless" (2003) 20:1 Can J Fam L 197 [Rogerson] at 198.

[21] The highwater mark of marriage as contract was a trilogy of decisions, referred to as the Pelech Trilogy: *Pelech v Pelech*, [1987] SCJ No 31, [1987] 1 SCR 801; *Richardson v Richardson*, [1987] SCJ No 30, [1987] 1 SCR 857; *Caron v Caron*, [1987] SCJ No 32, [1987] 1 SCR 892 (SCC). All of them concerned spousal support awards in the face of final agreements that purported to settle it. These decisions were oriented towards finality with an emphasis on autonomy and the goal of self-sufficiency of each party following a separation. While the 2003 decision of *Miglin v Miglin* overruled the ratio of these earlier decisions, it too imposed a severe test for those seeking a spousal support award in the face of a fairly negotiated, final

towards the end of the early aughts. The Supreme Court softened its views on the finality and unimpeachability of domestic contracts and marriage once more became something better classified as "more than contract".[22] Domestic contracts were no longer viewed as similar to commercial ones, but "an exceptional species of contract, and subject to a lower threshold for intervention on the ground of unconscionability than commercial contracts."[23]

The framing of marriage as something more than contract is also informed by its incidents, the most obvious that of spousal support. Between the 1980s and the late aughts, the Supreme Court's view on spousal support swung from a clean break, self-sufficiency oriented model to a compensatory one and then further, to a needs-based model with the potential for awards of indefinite length:

> …the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other…[24]

Finally, while no fault-divorce allows a couple to obtain a divorce after one year of living separate and apart, no one can legally divorce in Canada without a court order. Part of that order entails the court being satisfied "that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a

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agreement, and seemed to rely on the same autonomy, private ordering principals of the Pelech Trilogy: Rogerson, *supra* note 20 at 202–203; for a different interpretation of Miglin's impact on shifting separation agreements back towards status, see Luke Taylor, "Domestic Contracts and Family Law Exceptionalism: An Historical Perspective" (2020) 66:2 McGill L J 303 [Taylor] at 325–329. Further, In the 2004 case of *Hartshorne v Hartshorne*, 2004 SCC 22, the Supreme Court held that absent the usual contractual red flags of duress, capacity, undue influence – a marriage contract should be accorded much weight and not be varied or overturned by courts.

[22] Halley Genealogy I, *supra* note 3 at 35.

[23] Taylor, *supra* note 21 at 334. The scope of *Miglin* and *Hartshorne*, when it came to viewing domestic contracts like commercial contracts, was greatly reduced by the subsequent cases of *Rick v Brandsema*, 2009 SCC 10 [*Rick*], and later, *LMP v LS*, 2011 SCC 64 [*LMP*]. *Rick* recognized the unique vulnerabilities present in the context of domestic contracts and provided a list of factors a court must consider when the validity of the contract is challenged by a party after its execution. These included the presence or absence of independent legal advice, any power imbalances between the negotiating parties, and how far the terms of the contract stray from the objectives of the family law they seek to replace. The majority of the Supreme Court in *LMP* refused to adopt the *Miglin* standard for varying spousal support in the face of a fairly negotiated agreement, if that agreement was incorporated into a court order on consent. The consequence of this judgement was an isolation of the *Miglin* test to a specific and narrow set of circumstances: *LMP* at para 28. See also Rollie Thompson, "To Vary, to Review, Perchance to Change: Changing Spousal Support" (2012) 31:3 Can Fam L Q 355. Subsequent decisions of the Supreme Court have made it clear that the *Miglin* standard is inapplicable to other forms of domestic contracts as well: *Anderson v Anderson*, 2023 SCC 13, 2023 CarswellSask 224.

[24] *Quebec v A*, *supra* note 2 at para 387, citing *Bracklow v Bracklow*, 1999 CanLII 715, [1999] 1 SCR 420 at para 31.

nature that it would clearly not be appropriate to do so."[25] If couples reconcile for a certain period and then separate again, they must wait another year before obtaining a divorce order.[26] While "today no one really argues that legal marriage is entirely a status relationship imposed by the state,"[27] it remains "more than contract" and is best characterized as status-like.

In looking at the evolution of marriage as more status than contract, it is important to distinguish between two kinds of Supreme Court decisions. The first are those that, along with federal and provincial legislation, regulate the dissolution of conjugal relationships. The second involve the Court's framing of these relationships as status or contract in a particular decision in order to justify a secondary analysis. The former show us where a certain type of relationship might lie on the contract/status spectrum. The latter show us how the framing of such a relationship has been used to justify the constitutional reasoning of the Supreme Court of Canada when it comes to challenges such as those mounted in *Quebec v A*.

In the last 25 years of jurisprudence involving common law couples seeking access to laws that apply to married persons, whenever the Supreme Court has been forced to grapple with the issue, it has framed marriage as a status that people consent to be governed by when they decide to marry. Earlier, in 1995, the Court came close to framing it as an immutable status in *Miron v Trudel*,[28] based on factors other than personal or informed choice,[29] but it backtracked in *Walsh v Bona*,[30] finding that it was a status consented to upon the decision to marry.[31] This view of marriage was cleaved into pieces with the decision of *Quebec v A*, as discussed below. The s.15 judgement of Lebel J. maintained the *Walsh* framing from the outset while the s.1 judgements of Deschamps J. and McLachlin C.J. arrived at it eventually – defending at least the Quebec government's right to base their legislative scheme on this idea.

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[25] *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 10(1). Lawyers acting for either party in a divorce matter also have a duty under s 7.7(1) to:

> (a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses; and(b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to the legal adviser that might be able to assist the spouses to achieve a reconciliation.

[26] *Ibid*, s 8(3)(b)(ii); see also *KLS v DRS*, 2012 NBCA 16.

[27] Robert Leckey, "Relational Contract and Other Models of Marriage" (2002) 40:1 Osgoode Hall LJ 1 at 9.

[28] *Miron v Trudel*, 1995 CanLII 97, [1995] 2 SCR 418 [*Miron*].

[29] *Ibid*, per Justice L'Heureux Dubé at paras 56–63, and per Justice McLachlin at paras 97–104; see also Robert Leckey "Relational Contract and Other Models of Marriage" (2002) 40 Osgoode Hall LJ at 27.

[30] *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83, [2002] 4 SCR 325 [*Walsh*].

[31] *Ibid* at para 43.

The journey of marriage from status to contract and back to "something more than contract", while not the focus of this paper, is nevertheless important to understand because it provides the guideposts that indicate how common law relationships have also evolved into a status in Canada. Like marriage, the dissolution of common law relationships are subject to state regulation. While the private ordering of these relationships is possible – as it is with marriage – in the absence of such ordering, legislation and equity governs the dissolution of these relationships. Once this is understood, it becomes clear that the court's framing of these relationships as contract in *Quebec v A.* was and remains out of step with reality.

1.1 ***Quebec v A***

The facts of *Quebec v A* have been well documented and will not be reproduced here.[32] The plaintiff, referred to by Quebec media as "Lola",[33] challenged the exclusion of common law couples from the marital property and spousal support provisions of Quebec's *Civil Code*[34] on the basis that they unjustifiably violated her s.15 *Charter* right to equality.

The impugned laws consisted of Articles 401 to 430, 432, 433, 448 to 484 and 585 of the *Civil Code of Quebec*.[35] These articles pertain to the division of property and spousal support relief provided to separated married couples and separated couples in civil unions.[36] In 2013, common law couples in Quebec – known in that province as de facto spouses – could not avail themselves of these laws.

In Quebec, before marrying or entering a civil union, a couple may elect one of three different matrimonial regimes that will govern the economic relationship between them as well as between either spouse and a third party. These include the partnership of acquests; separation as to property; or community of property. If a couple fails to select a regime, the default is the partnership of acquests, where the private property of each spouse is not subject to division on dissolution of the

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[32] See Rollie Thompson, "Annotation to Droit de la famille – 091768" (2013) 21:7 RFL 325 [Thompson Annotation]; CBC News, "Unmarried Quebec couples have no right to alimony, court rules" (January 25, 2013), online (website): <https://www.cbc.ca/news/canada/montreal/unmarried-quebec-couples-have-no-right-to-alimony-court-rules-1.1322347>.

[33] CBC News, "Quebec Appeal Court hears 'Lola' alimony case" (May 20, 2010), online (website): <https://www.cbc.ca/news/canada/montreal/quebec-appeal-court-hears-lola-alimony-case-1.886135>.

[34] *Civil Code of Quebec,* CQLR c CCQ-1991 [*Civil Code of Quebec*].

[35] *Ibid,* arts 401–430, 432, 433, 448, 484, 585.

[36] Civil Unions were created in 2002 in Quebec. Persons who choose to form Civil Unions are included in the same matrimonial legislative regimes as married persons in Quebec.

marriage.[37] Regardless of the regime chosen, all married couples and civil unions are subject to the family patrimony. Introduced to Quebec in the late 1980s, the legislature carved out a subset of marital property that cannot be contracted out of nor displaced by any of the above regimes. Only after its partition following death, divorce or dissolution of a civil union can one spouse elect to waive his or her share. The family patrimony includes the matrimonial home, furniture and vehicles used by the family, and registered retirement savings plans or pension earnings accrued during the marriage.[38]

With regard to spousal support, section 585 of the *Civil Code* states that married or civil union spouses, and relatives in the direct line in the first degree, owe each other support. Upon separation[39] or dissolution of a civil union, each spouse can apply for a spousal support award against the other. Likewise, in certain instances, parents can sue their children for support just as children can sue their parents, and siblings may also be required to financially support one another. Support, when awarded by a court, is based upon needs and means of the parties, their circumstances, and, as the case may be, the financial resources of the payor.[40] Notably, spouses cannot prospectively contract out of spousal support in Quebec by way of marriage contract. Spousal support, like child support and the family patrimony, are considered to be provisions of law that are of "public order of protection."[41]

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[37] Private property includes that owned by each spouse before the marriage, as well as certain specific items acquired during the marriage. Examples include gifts, inheritances, traceable property to private property, and wedding rings. See *Civil Code of Quebec, supra* note 34, art 450. All other property is considered to be acquests, the value of which is divided equally between the spouses in the event of separation. Under the separation as to property regime, each spouse retains exclusive possession of his or her property, the right to administer that property alone and assumes responsibility for his or her debts. If the marriage dissolves, each spouse retains his or her own property, providing ownership can be proven. The community of property regime is the oldest matrimonial regime on record, with all marriages in Quebec prior to 1970 still governed by this regime unless the couple has entered into a marriage contract. Under this regime, the property of the spouses is divided into three categories: community property, private property and the wife's reserved property (her income, property acquired with that income, etc.). The husband administers the community property and his own private property, while the wife administers her own private property and her reserved property. On dissolution of the marriage, the community property and the wife's reserved property are divided equally between the two spouses and each spouse retains his or her private property.

[38] In addition, a spouse found to have "over contributed" to the patrimony may claim a "compensatory allowance". See *Civil Code of Quebec, supra* note 34 at art 427. These are claims that mirror an action in unjust enrichment. Typically, compensatory allowances are only awarded when the couple has chosen the "separate as to property" regime and rarely so under partnership of acquests. The claimant must prove an over-contribution; the enrichment of the other party, that the enrichment of the other-party has resulted from the over-contribution; and that the enrichment continues to exist at the time of divorce.

[39] Once a couple divorces, only the federal *Divorce Act* can found an obligation for spousal support: *Messier v Delage*, [1983] 2 SCR 401, [1983] SCJ No 80.

[40] *Civil Code of Quebec, supra* note 34, art 587.

[41] *Quebec v A*, *supra* note 2 at para 294, citing *Quebec (Procureure Generale) c T (B)*, 2005 QCCA 748, [2005] RDF 709.

The trial judge in *Quebec v A* followed the previous Supreme Court decision of *Walsh v Bona*,[42] discussed below, and consequently found no violation of Lola's s.15 rights. Lola was partially successful on appeal; the Quebec Court of Appeal held that *Walsh* was distinguishable from the case at bar concerning spousal support and that the exclusion of de facto couples from that legislative regime constituted an infringement of s.15 that could not be saved under s.1.[43]

The Supreme Court heard Lola and her ex-partner, "Eric's", respective appeals and rendered its decision in January of 2013. The judgement spans approximately 200 pages and involved four different sets of reasons. The accumulative result of three sets of reasons was a total loss for Lola, but it is necessary to look at them individually to understand how the Court, with the exception of Justice Abella, viewed common law relationships. It is also important to review Justice Abella's judgement in order to understand how a future, similar constitutional challenge to legislation like Quebec's could succeed.

1.2 Justice Abella's Judgement

Abella J., though ultimately in dissent, wrote the s.15 reasons that four other judges in *Quebec v A* signed on to. A good portion of her decision was a revisitation and condemnation of the Court's early decision in *Walsh v Bona.*[44]

Walsh involved a similar s.15 *Charter* challenge of Nova Scotia's *Matrimonial Property Act* (*MPA*) and its exclusion of common law couples from the division of property regime triggered upon marital breakdown in Nova Scotia.[45] In an 8-1 majority, the Court found no violation of s.15 and therefore engaged in no s.1 analysis. The crux of the majority's decision in *Walsh* framed marriage as a choice of two people to enter an economic partnership, the terms of which were dictated by the state. Due to the significant ramifications of this decision on the parties' finances, a court could not presume to impose this status on parties absent a clear indication that they consented to its terms. As Justice Bastarache, writing for the majority, noted, it was "indeed clear from the evidence that some cohabitants have specifically chosen not to marry and not to take on the obligations ascribed to persons who choose that status."[46] The majority reasons held that many unmarried couples chose to "avoid the institution of marriage and the legal consequences that flow[ed] from it."[47] Bastarache

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[42] *Walsh*, *supra* note 30.

[43] *Quebec v A*, *supra* note 2 at para 127.

[44] *Walsh, supra* note 30.

[45] *Ibid* at paras 3–4.

[46] *Ibid* at para 40.

[47] *Ibid* at para 43.

J. reasoned that to impose a marriage-like status on those couples who choose not to marry would be to disrespect their freedom of choice.[48]

A scathing dissent in *Walsh*, written by L'Heureux-Dubé J., found that the impugned provisions of the *MPA* violated s.15 of the *Charter* and could not be saved under s.1. L'Heureux-Dubé J.'s judgement is cited often by family law scholars for its myriad observations about the legal and practical realities of common law relationships in modern day Canada. Her strongest arguments challenged the idea of marriage being a choice, let alone one based on the legal consequences of the institution's dissolution. She noted that if only one member of a couple, often the more economically vulnerable, wishes to marry, marriage, and the rights and obligations that flow from it, will not materialize.[49] Second, if marriage is a choice, she maintained that it is not one made for the purpose of contracting into the laws and obligations of provincial marital property statutes. Most Canadians are ignorant of the specific legal consequences of marriage and a typical marriage cannot be characterised as an informed, contractual exercise based on the laws of separation and divorce.[50] Her view, supported by empirical studies and statistics about the changing demographics and norms of Canadian families, was that family legislation should operate on a functional definition of family, not a formal one.[51] In her opinion, if the purpose of the law was to assure a fair redistribution of wealth upon the dissolution of relationships, then it should protect all families.

In *Quebec v A*, Justice Abella declined to follow *Walsh* for reasons that included an evolved interpretation and application of s.15, and the decision's overemphasis on the notion of marriage as a choice. This, she argued, clashed with previous decisions of the Court, namely *Miron v Trudel* where a law that excluded common law couples from claiming through each other's auto insurance was found to discriminate on the ground of marital status and could not be saved under s.1.[52] Justice Abella's decision in *Quebec v A* echoed and added to Justice L'Heureux-Dube's dissent in *Walsh*. In it she provided updated statistics and law reform commission studies in support of her reasons.[53]

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[48] *Ibid.*

[49] *Ibid* at para 153.

[50] *Ibid* at paras 143–146. In a forthcoming article by Justice Robert Leckey, an empirical study of de facto spouses' knowledge of the law with respect to their rights reveals a prevailing ignorance of the law, despite the media coverage of Lola et Eric in Quebec that one lawyer characterized as "an information campaign that no government could pay for." Robert Leckey, "Family Lawyers on Cohabitation and Judge-Made Law" 74:4 U Toronto LJ (forthcoming in 2024) [Leckey Family Lawyers] at 22.

[51] *Walsh*, *supra* note 30 at paras 130–138.

[52] *Quebec v A*, *supra* note 2 at paras 334–347.

[53] *Ibid* at para 351.

Justice Abella reviewed the history of family legislation in Canada and in particular, the history of property division legislation, concluding that "[t]he law dealing with division of family property ha[d] also come to be conceptualized in recent years on a protective basis rather than a contractual one."[54] Likewise, when reviewing the evolution of family law in Quebec, Abella J. reiterated that each reform was motived by "the goal of better protecting economically vulnerable spouses" and that this goal subordinated the "freedom of choice" of married couples.[55] The remedy of unjust enrichment claims was insufficient and a poor substitute for access to spousal support and property division.[56]

Abella J. found that the impugned laws drew a distinction between de facto spouses and married/civil union spouses, based on the analogous ground of marital status, recognized as such in *Miron*.[57] Marriage, in Justice Abella's opinion, could not be classified as a choice to opt into the legal consequences of divorce.[58] She found the exclusion of de facto couples from the legislative scheme denied a benefit so important to the economically vulnerable members of the comparator group that married persons and members of civil unions were not allowed to contract out of it.[59] This distinction was discriminatory in nature as it perpetuated the historic disadvantage of rights and recognition to unmarried couples and their relationships. Justice Abella found that none of the impugned laws could be saved under s.1, holding that each failed the minimal impairment stage of the analysis.

Four judges agreed with Justice Abella's s.15 reasons, but had different ideas when it came to the s.1 portion of her analysis. Justice Deschamps (joined by Justices Cromwell and Karakatsanis) found that the s.15 violation with respect to division of property could be saved under s.1. The Chief Justice found that both violations could be saved under s.1. Justice Lebel (joined by Fish, Rothstein, and Moldaver JJ.) found no violation of s.15. The cumulative message that ran through these reasons was that in choosing not to marry, common law couples choose to opt out of state regulation and into a privately ordered relationship.

1.3 Justices Deschamps' Judgement

Justices Deschamps found that the exclusion of de facto spouses from spousal support could not be saved under s.1 but that the division of property legislation could. In her

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[54] *Ibid* at para 301.

[55] *Ibid* at para 305.

[56] *Ibid* at paras 366–369.

[57] *Ibid* at para 334.

[58] *Ibid* at paras 334–343.

[59] *Ibid* at para 349.

brief reasons, Deschamps J. differentiated between the two kinds of relief, writing that spousal support did not require the consent of the "debtor of support" nor was it compensatory in nature in Quebec.[60] Division of property, however, was based on a variety of different purposes, one of which was "to recognize the economic union formed by married and civil union spouses"[61] and "to ensure autonomy and fairness for couples who have been able to, or wanted to, accumulate property."[62] The crux of her distinction between the two kinds of relief was that spousal support in Quebec was based on means and need – something completely outside the realm of contract or choice. Division of property laws were based on a number of factors, all of which required a "concrete" decision on the part of the parties.[63]

In her s.1 reasoning on the marital property provisions, Justice Deschamps described the law that governed married and registered common law unions as a "legal regime". She referred to the one that governed de facto spouses as the "'no regime' option".[64] In her words, "like married and civil union spouses who opt for the legal regime, de facto spouses, while living together, remain completely autonomous and retain full ownership of the property they acquire."[65] Justice Deschamps added that some de facto couples might opt to sue each other in unjust enrichment, but made no reference to the most recent decision of the Supreme Court concerning this issue, discussed below.[66]

1.4 Chief Justice McLachlin's Judgement

Chief Justice McLachlin avoided any acrobatics of separating spousal support from division of property legislation in her s.1 decision. Throughout her opinion, McLachlin C.J. stressed deference to the Quebec Government in its attempt to create a regime that

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[60] Justice Deschamps held that it is the Patrimonial Allowance that addresses support for compensatory reasons: See *Civil Code of Quebec, supra* note 34, arts. 427–430. Her reference appears to be to article 587 of the Code that states that support is based on the need of the recipient and to a lesser extent, the ability of the payor to pay it. See also Jodi Lazare, "Spousal Support in Quebec: Resisting the Spousal Support Advisory Guidelines" (2018) 59:4 C de D 929 [Lazare].

[61] *Quebec v A*, *supra* note 2 at para 383.

[62] *Ibid* at para 392. Whether this reasoning makes sense, given that there are echoes of this reasoning to justify the creation of the joint family venture in *Kerr* as discussed below. See also Robert Leckey, "Strange Bedfellows" (2014) 64:5 U Toronto LJ 641 [Leckey Bedfellows] at 659–662.

[63] *Quebec v A*, *supra* note 2 at para 403. For a thoughtful and detailed explanation of why the marital property regimes of Quebec cannot be legitimately framed as contractual in nature see Lazare, *supra* note 60.

[64] *Quebec v A*, *supra* note 2 at para 402.

[65] *Ibid.*

[66] *Ibid.*

allowed couples to opt out of state regulation. She included this quote from the legislative debates at the time of the *Civil Code*'s last major overhaul:

> [providing married and de facto spouses the same legal treatment] would not be without consequences, for what then would be the meaning of marriage or the value in the civil context of religious marriage, and what would be the form of union developed by those who do not want to be regulated?[67]

The underline is McLachlin C.J.'s own. In her view, the decision to exclude de facto spouses from both parts of the *Civil Code* was to provide Quebecers with a "clear choice between a regime of division of property and support on the one hand, and a regime of full autonomy on the other hand…"[68] This purpose and goal was sufficient for McLachlin C.J. to find that the means taken by the government were rationally connected to the legislation's purpose and that there was no other way the Quebec government could have legislated with a similar purpose that was more minimally impairing of de facto spouses' rights. She found the overall benefits of the legislation – the promotion of autonomy and freedom of choice – outweighed its negative effects.[69]

1.5 Justice LeBel's Judgement

LeBel J.'s reasons, which found no s.15 violation, held that the Quebec government specifically created three different legal regimes that couples in Quebec could opt into in order to govern the economic aspects of their intimate relationships. The married and civil union regimes were governed by provisions of the Quebec *Civil Code* that regulated spousal support and the division of property upon termination of the relations. The de facto spouse regime consisted of the right to enter into cohabitation agreements with one another, the right to sue one another in unjust enrichment, and rights similar to those of married persons and civil union members vis-à-vis third parties as well as some aspects of the civil law.[70] LeBel J. described this last regime, the one that governed Quebec's de facto spouses, as "a regime of freedom of contract".[71]

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[67] *Quebec v A*, *supra* note 2 at para 436, McLachlin C.J. citing National Assembly, *Journal des débats*, vol. 30, No 125, 33rd Leg., 2nd Sess, June 8, 1989 at 6487.

[68] *Ibid* at para 438.

[69] *Quebec v A*, *supra* note 2 at para 449, McLachlin CJ.

[70] *Quebec v A*, *supra* note 2 at paras 115–126.

[71] *Ibid* at para 110. Rollie Thompson, paraphrasing, described this as a "blissful state-free zone": Thompson Annotation, *supra* note 32.

1.6 A Regime of Freedom of Contract

In the decade that has passed since its release, much has been written about *Quebec v A*, none of it overly positive. Rollie Thompson's annotation of the decision marks its release as the time of death of family law functionalism.[72] Robert Leckey lamented the decision of the plaintiffs to attack both division of property and spousal support as an overly broad, strategic error.[73] Others dismayed at the steadfast framing of marriage as an informed choice to contract into the status of marriage.[74]

Less has been written about the court's view in *Quebec v A* concerning the nature of common law relationships and, in particular, how it fails to correspond with the legal reality of their dissolution in Canada. Deschamps J.'s term "no regime" appears to have anchored half of the opinions that decided the matter, with Justice LeBel's "freedom of contract" regime, anchoring the other. These reasons independently state that in choosing not to marry or register, common law spouses choose a relationship unregulated by the state, one where they are free to negotiate their own terms with respect to what they owe each other upon breakdown of the relationship. In other words, common law relationships are not status like but instead better understood as contractual in nature with unmarried couples free to privately order how their relationships end.

The problem with this idea is that it is at best based on semantics,[75] and at worst, inaccurate. Putting aside the debate about whether marriage itself is truly "a choice" as well as the idea that it is an informed choice with respect to the laws that govern the breakdown of marriages, nowhere in Canada is the dissolution of common law relationships unregulated by the state. Whether it be by statute or the state's courts via the common law and equity, when common law relationships end there is a system of family law that governs their dissolution. This includes Quebec. As discussed below, in 2013, Quebec was likely the most eligible for such a framing. However, even in that province, common law couples did not reside in "a regime of full autonomy" where only the laws of contract applied.

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[72] Thompson Annotation, *supra* note 32.

[73] Lecky Bedfellows, *supra* note 62.

[74] Natasha Mukhtar, "A Feminist Critique of Quebec v. A.: Evaluating the Supreme Court's Divided Opinions on Section 15 and Common Law Support Obligations" (2017) 30:1 Can J Fam L 129; Suzanne Zaccour, "All Families Are Equal, but Do Some Matter More than Others: How Gender, Poverty, and Domestic Violence Put Quebec's Family Law Reform to the Test" (2019) 32:2 Can J Fam L 425.

[75] This relates to the distinction between state regulation being viewed as purely legislative in nature – and excludes notions of the common law and equity. Notably unjust enrichment is codified in Quebec and interpreted in accordance with common law and equity decisions of the Supreme Court, as discussed further below: *Civil Code of Quebec*, *supra* note 34, art 427.

2. Common Law Relationships and the Road to Status

Let's now look at the two incidents of separation at issue in *Quebec v A*. A review of the Canadian jurisprudence and legislative reform that cemented these relationships as status shows us why the majority's framing of common law relationships was and remains wrong.

2.1 Common Law Relationships and Division of Property

Prior to the 1980s, the "no regime" view of common law couples in Canada when it came to property division[76] – and family law in general – was a much more plausible theory. As noted by LeBel J. in *Quebec v A*, common law couples and their children were not only afforded little protection or rights but were also openly discriminated against by the Canadian state.[77] By the time the decision *Pettkus v Becker*[78] was heard some of the openly discriminatory laws had been repealed.[79] However, the social stigma surrounding common law relationships persisted. There was little political appetite to protect vulnerable persons exiting these relationships who had failed to secure a marriage before cohabitation. [80] *Pettkus* was the first of a series of Supreme Court decisions that carved out a specific family law regime for division of property between separated, common law couples. These decisions span over three decades but when viewed together clearly show the shift of common law relationships from contract towards status.

[76] The term "division of property" is used for ease of reference throughout this article to describe in broad terms the law devoted to claims made by a party on another's property for purposes of redistribution of wealth following the dissolution of a relationship. It is by no means accurate as even many marital property statutes do not provide for an actual division of property regardless of title, but instead an equal division of the marital property's value. Further, as discussed below, the joint family venture's monetary award also does not provide a division of property or an *in rem* remedy at all.

[77] *Quebec v A*, *supra* note 2 at paras 101–104.

[78] *Pettkus v Becker*, [1980] 2 SCR 834, 1980 CanLII 22 [*Pettkus* SCC].

[79] At least in Ontario, the status of illegitimate children had been abolished. See Susan B. Boyd and Jennifer Flood, "Illegitimacy in British Columbia, Saskatchewan, Ontario, and Nova Scotia: A Legislative History" (2015) The Peter A. Allard School of Law Allard Research Commons at 49.

[80] Something that was evident by the trial judge's reasons in *Pettkus* where he dismissed the labour and money Ms. Becker invested in Mr. Pettkus and his business as "the nature of risk capital invested in the hope of seducing a younger defendant into marriage": *Pettkus v Becker,* 20 OR (2d) 105, 1978 CanLII 50 (CA) [*Pettkus* ONCA] at para 13.

2.1.1 Pettkus v Becker

After the dissolution of a long and abusive relationship,[81] Rosa Becker sought a declaration that she was entitled to a one-half interest in the real property and assets acquired by her former common law partner, Lothar Pettkus, as a result of their joint efforts during their period of cohabitation.

Pettkus has long been regarded as a seminal decision in Canadian law for two main reasons. First, Justice Dickson was able to clarify the formula for these kinds of claims – that they were based in unjust enrichment with the possible remedy of constructive trust.[82] The law concerning unjust enrichment claims between separated couples would later be refined in the subsequent decision of *Sorochan v Sorochan.*[83] In that decision, Dickson J. explained that the constructive trust was one of two remedies that flowed from a successful claim in unjust enrichment. The second was monetary in nature and would become known as the "value received" remedy or quantum meruit.[84]

The second and most significant part of *Pettkus* was Justice Dickson's confirmation that this action was available to unmarried couples. The previous decisions concerning trust claims in family law scenarios had always involved married persons.[85] Notably, Justice Dickson's finding was met by resistance by several members of the Court in *Pettkus.* Their reasons, though not opposed to some relief for claimants like Rosa Becker, show a reluctance to allow unmarried couples the scope of Dickson J's action and remedy.[86] Mr. Pettkus' arguments, as summarized by Justice Dickson, were even more pointed:

> the Family Law Reform Act of Ontario, enacted after the present litigation was initiated, does not extend the presumption of equal sharing, which now applies between married persons, to common law spouses. The argument is

[81] Lori Chambers, "Women's Labour, Relationship Breakdown and Ownership of the Family Farm" (2010) 25:1 Can JL & Soc 75 at 86.

[82] *Pettkus* SCC, *supra* note 78 at paras 37–43. There was some confusion as to whether Ms. Becker's claims were best supported by way of resulting or constructive trust. Both equitable doctrines had recently been imported into Canadian family law from the U.K., and had yet to be fully understood or clarified by the Supreme Court. See *Murdoch v Murdoch* (1973)*,* [1975] 1 SCR 423, [1974] 1 WWR 361; *Rathwell v Rathwell*, [1978] 2 SCR 436, [1978] SCJ No 14 [*Rathwell*]. Justice Wilson, for the Ontario Court of Appeal, awarded Ms. Becker a one-half interest in the lands owned by Mr. Pettkus and a half interest in the bee-keeping business established by the couple but owned by Mr. Pettkus by way of resulting trust. *Pettkus* ONCA, *supra* note 80 at para 12.

[83] *Sorochan v Sorochan*, [1986] 2 SCR 38, 1986 CanLII 23.

[84] Eran Kaplinsky, Malcolm Lavoie, & Jane Thomson, eds, *Ziff's Principles of Property Law,* 8th ed (Toronto: Thomson Reuters, 2023) [Kaplinski et al] at 281.

[85] *Rathwell, supra* note 82.

[86] *Pettkus* SCC, *supra* note 78 at paras 70–75.

> made that the courts should not develop equitable remedies that are "contrary to current legislative intent".[87]

Justice Dickson denied that he was creating a separate scheme for common law couples in the face of a statute that expressly excluded them from a division of property remedy on relationship breakdown. He noted that the action of unjust enrichment and the remedy of constructive trust predated the *Family Law Reform Act* of Ontario[88] and that it was not an invention of the Court. He also noted that unlike Ontario's legislation, the remedy to claim of unjust enrichment contained no presumption of equal division of the property at issue.

History would belie Justice Dickson's downplaying of his decision's significance. As Justice Cromwell would observe, thirty years later, unjust enrichment and its remedies became "the pre-eminent vehicle for addressing the financial consequences of the breakdown of domestic relationships" for common law couples in Canada.[89]

2.1.2 Peter v Beblow

In 1993 the law that governed property division between common law spouses moved a step closer to that of provincial and territorial family law statutes. In *Peter v Beblow*,[90] Justice McLachlin (as she then was) held that a claim of unjust enrichment could be based not only on extraordinary contributions such as those of Rosa Becker, but also on conventional domestic labour, such as cooking, cleaning, raising children and maintaining the family home, observing that:

> . . . It has been recognized for some time that such services are entitled to recognition and compensation under the *Divorce Act* and the provincial Acts governing the distribution of matrimonial property … I do not think that similar recognition in the equitable doctrine of unjust enrichment will have any different effect.[91]

Like Justice Dickson in *Pettkus,* Justice McLachlin was forced to confront accusations of the Court creating a legal scheme in the face of a statute that expressly excluded common law couples from division of property. Like Justice Dickson, she denied that she was doing so. Instead, she cited those very statutes as support for her

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[87] *Ibid* at para 47.

[88] *Ibid*. See also *Family Law Reform Act,* SO 1978, c 2.

[89] *Kerr v Baranow,* 2011 SCC 10 [*Kerr*] at para 3.

[90] *Peter v Beblow*, 1993 CarswellBC 44, [1993] 1 SCR 980 [*Peter*].

[91] *Ibid* at para 21.

decision, finding "[i]t is precisely where an injustice arises without a legal remedy that equity finds a role."[92]

Like *Pettkus*, *Peter* was still a highwater mark case with respect to its facts. Catherine Peter was not only a traditional housewife, raising her four children along with Mr. Beblow's but also engaged in heavy labour and intensive care for the home.[93] Mr. Beblow was also far from a sympathetic character. He drank heavily and towards the end of the marriage both verbally and physically abused Ms. Peter.

The question that lingered after *Peter* was what to do about common law relationships that did not contain such stark divisions of labour but where both parties contributed to the household in terms of domestic and external labour. Often competing claims of unjust enrichment would be set off against each other, but not always in a consistent, logical, or fair manner.[94] Other issues persisted as well that caused confusion for litigants and jurists alike. One was the need for a "substantial and direct connection" between the contributions of the claimant and the property over which she sought a constructive trust, limiting the kind of property subject to such a claim. Another was the requirement for a monetary remedy to be "inadequate" or "insufficient", for a constructive trust to be awarded.[95] The companion decisions of *Kerr v Baranow* and *Vanasse v Seguin*[96] sought to address these issues and in so doing, further refined and cemented the regime of common law property division by grounding it on principles very much akin to those of marital property legislation.

2.1.3 Kerr v Baranow and Vanasse v Seguin[97]

In *Vanasse*, the parties cohabited for 12 years and had two children. In the first part of their relationship, both parties worked outside the home. When they had children, Ms. Vanasse stayed home with the children and also left her job to relocate to a different city so that Mr. Seguin could build his business. After Mr. Seguin sold his business for several million dollars, both parties stayed home with the children. It was clear that Mr. Seguin had been unjustly enriched by Ms. Vanasse, but their relationship was a modern one, with domestic chores and child raising done by both parties at different times. Further, the bulk of the wealth generated during the relationship was Mr. Seguin's business and lacked a sufficient connection to Ms. Vanasse's domestic efforts

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[92] *Ibid* at para 22.

[93] *Ibid* at para 45.

[94] See *Wilson v Fotsch*, 2010 BCCA 226 at paras 65–92.

[95] *Kerr*, *supra* note 89 at para 50.

[96] *Kerr*, *supra* note 89.

[97] The Court's decision in the cases is referenced as *Kerr* throughout this paper, however the creation of the Joint Family Venture was based primarily on the facts of Vanasse.

and sacrifices for the purpose of imposing a constructive trust. The case only palely resembled those of *Pettkus*, *Sorochan* and *Peter*.

Kerr did a lot of things to clarify and streamline the area of unjust enrichment as well as other trust-related claims between separated, common law couples.[98] Arguably its biggest contribution to the law was a modified remedy for unjust enrichment, expressly carved out for common law couples, called the joint family venture (JFV). Justice Cromwell explained that a JFV could be established through four main criteria: (i) mutual effort, (ii) economic integration, (iii) the primacy of the family to the parties' actions, and (iv) their subjective intentions.[99]

In *Kerr*, Justice Cromwell held that if a claimant established unjust enrichment, and further could prove that the parties had engaged in a JFV, that claimant would be entitled to a monetary award based on a percentage of all wealth accumulated by the parties during the relationship. While the claimant had to establish a link between the joint efforts of the parties and the accumulation of wealth during the relationship, this link was far less direct than the one required for a constructive trust claim.[100] As with past decisions in this area of law, the percentage of accumulated wealth awarded would not automatically or even presumptively amount to 50% but instead, be assessed "by determining the proportionate contribution of the claimant to the accumulation of the wealth."[101]

What is so remarkable about Cromwell J's judgement is how far, in theory at least, it moved the law of unmarried cohabitants with respect to division of property towards the provincially legislated regimes that govern separation of married couples – all the while denying that it was doing so or acknowledging that it was doing anything new at all.

A prime example of this is how Justice Cromwell's reasons deal with the issue of set off – or as he wrote – "dueling quantum meruits".[102] In *Vanasse*, Mr. Seguin argued that his contributions to raising the children in the latter half of the relationship should be offset against Ms. Vanasse's claim, potentially cancelling it out altogether. However, applying Justice Cromwell's new JFV framework, rather than help Mr. Seguin's set-off case, his contributions to childcare only solidified Ms. Vanasse's JFV claim. Mr. Seguin's efforts helped prove that they were indeed in a JFV, working

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[98] For example, in *Kerr v Baranow*, the notorious "common intention resulting trust" was finally put to rest: Kaplinsky et al, *supra* note 84 at 284.

[99] For more on these criteria and how they have been assessed, see David Frenkel, "Joint Family Venture: A Synthesis of the Post-Kerr Case Law" (2014) 34:1 CFLQ 35.

[100] Kaplinksy et al, *supra* note 84 at 285.

[101] *Kerr*, *supra* note 89 at para 81.

[102] *Kerr*, *supra* note 89 at para 48, citing J.D. McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?" in J.W. Neyers, M. McInnes and S.G.A. Pitel, eds, *Understanding Unjust Enrichment* (Oxford: Hart, 2004) 359 at 376.

together to mutually raise and care for their children.[103] The new remedy also purported to reduce the tit for tat nature of previous unjust enrichment cases between more modern common law couples.[104]

From a functional approach, *Kerr* cemented the idea that if an unmarried couple operates as a family, upon its dissolution, if unjust enrichment is proven, the wealth accumulated during the relationship will be shared in some proportion between the parties regardless of title. This was a far cry from the constructive trust route where, if claimants were lucky enough to pass the "inappropriate or insufficient" test, they were awarded a percentage of a specific piece of property, provided they could establish a sufficient and direct contribution to its betterment or maintenance. It was also the antithesis of the quantum meruit route that reduced former partners to housecleaners, babysitters, and handymen – often paid minimum wage. One immediate observation made about the decision was that given its impact, as with married persons and marital property laws, common law couples would be wise to contract out of the regime by way of cohabitation agreements.[105]

However, in Justice Cromwell's view, the Court was not imposing a new division of property scheme for common law couples. He was careful to state that "there is and should be no separate line of authority for 'family' cases developed within the law of unjust enrichment."[106] His reasons rejected the notion that the joint family venture was a novel invention of the Court, citing the use of the term, or ones like it, in previous decisions of the Supreme Court.[107]

But he also said this:

> There is nothing new about the notion of a joint family venture in which both parties contribute to their overall accumulation of wealth. It was recognition of this reality that contributed to comprehensive matrimonial property legislative reform in the late 1970s and early 1980s. As the Court put it in Clarke v. Clarke, [1990] 2 S.C.R. 795 (S.C.C.), at p. 807 (in relation to Nova Scotia's Matrimonial Property Act), "... the Act supports the equality of both parties to a marriage and recognized the joint contribution of the spouses, be it financial or otherwise, to that enterprise. ... The Act is accordingly remedial in nature. It was designed to alleviate the inequities of the past when the contribution made by women to the economic survival and growth of the family was not recognized" (emphasis added).

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[103] *Kerr*, *supra* note 89 at para 153.

[104] *Kerr*, *supra* note 89 at para 69.

[105] Berend Hovius, "Property Disputes Between Common-Law Partners: The Supreme Court of Canada's Decisions in Vanasse v. Seguin and Kerr v. Baranow" (2011) 30:2 CFLQ 129 at 164.

[106] *Kerr*, *supra* note 89 at para 33.

[107] *Ibid* at paras 61–67.

> Unlike much matrimonial property legislation, the law of unjust enrichment does not mandate a presumption of equal sharing. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.[108]

These passages, despite Justice Cromwell's insistence that the Court was not creating a common law spousal property regime, compare the purpose and goals of the joint family venture with those of marital property legislation. They equate their basic principles and distinguish them mainly on the presumption of equal sharing – a threshold dividing the two systems that the Court has been consistently unwilling to cross.

None of the reasons produced in *Quebec v A* mention *Kerr*, even though *Kerr* was decided two years earlier. While there is some reference to the availability of unjust enrichment to "some" de facto couples,[109] the s. 1 decisions of Justice Deschamps and Chief Justice McLachlin in particular are silent on the issue.

The action of unjust enrichment is codified in Quebec's civil law.[110] While the development of the doctrine's use in relation to common law couples and property has been developed through the common law and equity, the Supreme Court decisions of *Pettkus* and *Peter* have been applied by Quebec courts in resolving these claims. The constructive trust, a common law concept, is inapplicable as a remedy to these claims in Quebec.[111] However in September of 2013, nine months after the release of *Quebec v A*, the Quebec Court of Appeal made it clear that *Kerr* applied in that province:

> …l'arrêt *Kerr v. Baranow* … vient préciser que, pour les cas clairs d'enrichissement injustifié, c'est-à-dire lorsqu'une partie conserve une part disproportionnée des biens provenant d'une coentreprise familiale, et qu'une réparation pécuniaire doit être accordée, il faut calculer cette réparation en fonction de la part de ces biens qui est proportionnelle aux contributions du conjoint demandeur. Ceci est en tout point conforme aux prescriptions de l'article 1493 C.c.Q., dont celle de l'exigence d'une simple corrélation entre l'appauvrissement et l'enrichissement.[112]

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[108] *Ibid* at paras 61–62.

[109] *Quebec v A*, *supra* note 2 at paras 117–120, 401–402.

[110] *Civil Code of Quebec*, *supra* note 34, arts 1493–1496. Notably, in addition to the usual test for unjust enrichment, the Civil Code has been interpreted to also require "the absence of any other recourse for the impoverished person." See *Droit de la famille – 123039*, 2013 QCCA 1586 [*Droit de la famille – 123039*] at para 39.

[111] *L (L) v B (M)*, [2003] RDF 539 (QCCA) at para 31; *Falardeau v Barrette*, 2010 CarswellQue 4951 at para 43; *Droit de la famille - 123039*, *supra* note 110 at para 60.

[112] *Droit de la famille – 123039, supra* note 110 at para 60. Author's translation: "… the *Kerr v. Baranow* decision… clarifies that, for clear cases of unjust enrichment, i.e. where one party retains a disproportionate share of the assets from a family joint venture, and monetary relief must be granted, it is necessary to

Of course, in tandem with the expanded scheme for common law couples in equity, roughly half of Canadian provinces and territories have included common law couples in their division of property schemes. With the exception of the Yukon, every jurisdiction west and north of Ontario now includes common law couples in its marital property legislation, provided they cohabit for a certain period of time and/or share a child or children and a relationship of some permanence.[113]

2.1.4 A Sub-Par Status East of Manitoba

While the decisions of the Supreme Court have clearly established a division of property regime for common law couples, and one that has inched ever closer to the scheme in place for married persons, it is important to be realistic about this common law status. Initially, *Kerr* looked promising for those seeking a fairer and more streamlined approach to division of property disputes by way of unjust enrichment. In practice, the common law scheme for division of property remains flawed, impractical, and uncertain.

First, a joint family venture can only be found if there is also a finding of unjust enrichment.[114] No such finding is required for a division of property under the provincial marital property statutes. It is presumed that married persons, absent a contract stating otherwise, are to share the property acquired during (and sometimes brought into) their marriage upon its dissolution. As Justice Abella commented in her reasons in *Quebec v A*, "…the burden [is] placed on the claimant… unjust enrichment requires the claimant to establish his or her contribution before the court will order any corresponding compensation."[115] As Leckey notes, the Court's steadfast refusal to mandate a presumption of equal sharing upon the establishment of a joint family venture eroded the weight behind Justice Cromwell's message about "dueling quantum meruits" or for courts to refrain from minute calculations about who did what in relation to accumulated wealth.[116] A recent empirical study by Leckey analyzed interviews with nine family law practitioners in Quebec. They were asked about the

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calculate this compensation based on the share of these assets which is proportional to the contributions of the requesting spouse. This is in full compliance with the requirements of article 1493 CCQ, including the requirement of a simple correlation between impoverishment and enrichment." For how Kerr has been accepted and applied by lower courts in Quebec, see Robert Leckey, "L'Enrichissement Injustifié, L'union de Fait et L'emprunt à la Common Law en Droit Mixte du Québec" (2018) 59:3 C de D 585 at 604.

[113] *Family Law Act*, SBC 2011, c 25, s 3(1)(b); *Family Property Act,* RSA 2000, c F–4.7 ss 1(a), 3.1; *The Family Property Act,* SS 1997, c F-6.3, s 2(1); *The Family Property Act,* CCSM c F25, ss 1(1), 2.1; *Family Law Act,* CSNu, c F-30, ss 1(1), 34; *Family Law Act,* SNWT 1997, c 18, ss 1(1), 34.

[114] *Martin v Sansome*, 2014 ONCA 14, 2014 CarswellOnt 759.

[115] *Quebec v A*, *supra* note 2 at para 368.

[116] Leckey Family Lawyers, *supra* note 50 at 47. See also Robert Leckey, "Cohabitation, Female Sacrifice, and Judge-Made Law" (2018) 41:1 J Social Welfare & Family L 72.

impact of *Kerr* on their practice and the legal reality of de facto couples in Quebec. Their responses were largely in line with the critiques of others with respect to this area of the law.[117] The experience of Leckey's interview subjects describe the excessive time and detail required in providing individual claims.[118] The outcome of such pleadings is always uncertain as it is based entirely on the discretion of the presiding judge. As a result, this regime both encourages litigation rather than settlement. It also discourages parties with inadequate funds from availing themselves of it at all.

The key point, however, is that a legal regime that regulates the division of property for common law couples exists. Choosing not to marry is not akin to being free from state regulation. Common law couples are subject to state regulation when it comes to division of property – it is only the legal mechanism that differs.

To be clear, Quebec is possibly the strongest case for the status/contract framing of marriage and de facto unions respectively when it comes to division of property law. The fact that married couples cannot contract out of the family patrimony by way of marriage contract, arguably renders that institution more status like in nature. The absence of similar rights for de facto unions nudges them further towards contract. However, the recent decision of Justice Mongeon, affirmed by the Quebec Court of Appeal,[119] makes it clear that Courts in Quebec can and should apply the joint family venture to claims of unjust enrichment, absent legislative reform in this area, to effect just outcomes of the dissolution of de facto unions in that province:

> la création jurisprudentielle des présomptions d'enrichissement et d'appauvrissement corrélatifs, la nécessité d'une preuve forte et déterminante pouvant renverser le jeu de telles présomptions et l'institution d'une approche large souple et généreuse face à une telle demande d'indemnisation permettent aujourd'hui aux tribunaux québécois de suppléer jusqu'à un certain point à la lenteur du législateur à adopter des règles claires et précises applicables aux unions entre conjoints de fait.[120]

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[117] As one lawyer interviewed noted, "I challenge anyone, including in the legal milieu, to define the famous joint family venture." Leckey Family Lawyers, *supra* note 50 at 28; see also Alberta Law Reform Institute, "Property Division: Common Law Couples and Adult Interdependent Partners Final Report" (2018), online (PDF): <https://www.alri.ualberta.ca/2018/06/property-division-common-law-couples-and-adult-interdependent-partners-final-report-112/> [Alberta Law Reform Report] at 18; Law Reform Commission of Nova Scotia, "Division of Family Property Final Report" (2017), online (PDF): <https://lawreform.ns.ca/wp-content/uploads/2020/04/divisionoffamilyproperty-finalreport.pdf> [Nova Scotia Division of Family Property Report] at 88.

[118] Leckey Family Lawyers, *supra* note 50 at 27–29.

[119] *Droit de la famille – 201878*, 2020 QCCA 1587.

[120] *Droit de la famille – 182048*, 2018 QCCS 4195 [*Droit de la famille – 182048*] at para 4. Author's translation: "The jurisprudential creation of presumptions of correlative enrichment and depravation, the need for strong and decisive evidence to rebut such presumptions, and the institution of a broad, flexible and generous approach to such claims have enabled Quebec courts to compensate to some extent for the legislator's slowness in adopting clear and precise rules applicable to unions between de facto spouses."

Framing de facto unions as a regime of contract or a "no regime" is not the legal reality of de facto unions in Quebec with respect to division of property.

2.2 Common Law Relationships and Spousal Support

2.2.1 Spousal Support in Quebec

At the time *Quebec v A* was heard, no right to spousal support existed for de facto unions. That is still the law ten-plus years out and counting. This fact, along with the reality that spousal support cannot be contracted out of by way of marriage contract, lends credence to the spousal support decisions of Justices McLachlin and Lebel, at least with respect to the "no regime" line of thinking. If one accepts the argument that Quebec's common law couples choose not to marry in order to opt out of spousal support obligations, then that was indeed the outcome with respect to spousal support. However, the framing of common law relationships as contract was not restricted to the findings of Justice Lebel or the Chief Justice with respect to spousal support. It played no role in Deschamps, Cromwell, and Karakatsanis JJ.'s section 1 reasons on spousal support, if anything its categorization by Deschamps as a needs-based right, independent of choice, frames it closer to an incident of status from which de facto couples were unjustifiably excluded.

What is clear is that the idea of common law relationships as contract is untenable when, in addition to the property division regime, we consider the law of spousal support as it applies to common law couples in any other jurisdiction in Canada. With the exception of Quebec, common law couples have been eligible to sue their former partners for spousal support in every Canadian jurisdiction, beginning in British Columbia in the 1970s. Entitlement to spousal support has been interpreted in a consistent manner to that of married persons with courts applying the principles of *Moge* and *Bracklow* despite those decisions involving divorce.[121] Indeed, a recent decision of the Ontario Court of Appeal shows us just how powerful the ascription of common law status in Canada can be.

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[121] Note that certain jurisdictions, apart from the usual cohabitation periods and/or children of the relationship component, include additional provisions such as New Brunswick's *Family Law Act*, SNB 2020, c 23:

14(2) The obligation to provide support in subsection (1) applies to common-law partners if

> (a) they have cohabited continuously for a period of not fewer than three years during which time one person has been substantially dependent on the other for support, or
>
> (b) they have cohabited in a situation of some permanence, if there is born a child of whom they are the parents.

2.2.2 Climans v Latner

Climans v Latner[122] involved an application for spousal support. Mr. Latner and Ms. Climans had a 14-year relationship. Mr. Latner was extremely wealthy and Ms. Climans quit her job so that she could travel and entertain with him. She also assisted him with errands. Beginning early in their relationship, Mr. Latner supported Ms. Climans financially. During their relationship, he provided her and her children with a lavish lifestyle. The parties' personal and social lives were closely interwoven and they presented as a couple in public. However, she never moved in with him, nor he with her. Ms. Climans and Mr. Latner spent July and August at Mr. Latner's Muskoka cottage as well as weekends in Florida in the winter months. Sometimes they vacationed in Florida during the week of March break. Throughout all of this they maintained separate homes.

At trial Mr. Latner argued that Ms. Climans did not qualify for spousal support under the Ontario's *Family Law Act* (*FLA*) as the parties never married and never lived together. S. 29 of the *FLA* defines "spouse" as follows:

> "spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or
>
> (b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children's Law Reform Act*. ("conjoint") R.S.O. 1990, c. F.3, s. 29; 1999, c. 6, s. 25 (2); 2005, c. 5, s. 27 (4-6); 2009, c. 11, s. 30; 2016, c. 23, s. 47 (1).[123]

The trial judge's analysis focused on whether the parties had "cohabited", defined in s. 1(1) of the *FLA* to mean "to live together in a conjugal relationship". In so doing, she relied on the early case of *Molodowich v Penttinen*[124] that set out a non-exhaustive list of criteria to be considered in determining whether a conjugal relationship exists. These include shared shelter, sexual and personal behaviour, services, social activities, economic support, children as well as the social perception of the couple. The element that "gave [the trial judge] pause" was whether the parties had a "shared shelter".[125] Taking into consideration the parties' living patterns, she held that had those "been the only factors" she would not have found them to be common law spouses. However, when combined with "all the other dynamics" in the parties' relationship, the trial judge held that they lived together in a conjugal

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[122] 2020 ONCA 554 [*Climans*].

[123] *Family Law Act*, RSO 1990, c F 3, s 29.

[124] *Molodowich v Penttinen* (1980), 1980 CanLII 1537, 17 RFL (2d) 376 (Ont Dist Ct).

[125] *Climans*, *supra* note 122 at para 32.

relationship for the purposes of the *Act*.[126] Ms. Climans was awarded spousal support at an amount of $50,000 a month on an indefinite basis.

The Ontario Court of Appeal affirmed the finding that spousal support was owed to Ms. Climans,[127] agreeing that lack of a shared residence was not determinative of the issue of cohabitation but that "there needs to be some element of living together under the same roof."[128]

Why *Climans* is particularly helpful in understanding common law as status was the attempt and failure of Mr. Latner to protect himself from its ascription. Mr. Latner's evidence at trial was that he had "asked Ms. Climans to sign a domestic contract" and his testimony that he had made it clear "that he would never marry or move in with Ms. Climans without a domestic contract."[129] Less than a year into their relationship, Mr. Latner presented Ms. Climans with a domestic contract. Ms. Climans took the contract to a lawyer, but no further drafts were exchanged, and the agreement was never signed.[130] Eleven years later, when problems began to develop in the relationship, Mr. Latner again presented a domestic contract to Ms. Climans. This time, there were some discussions between the parties (and their lawyers) and a second draft was prepared but ultimately never signed.[131] As a result, at least according to Mr. Latner, the parties maintained separate residences and finances. However, this was not enough to escape ascription of common law status. The fact that they had entered "a committed relationship"[132] coupled with intermittent cohabitation, was enough to qualify them as spouses for the purposes of Ontario's *FLA*.

Climans was not the first decision to find a couple, that did not cohabit full time, to be spouses for the purposes of spousal support.[133] As well, this reasoning has been applied to common law couples in joint family ventures, and posthumously in cases concerning unjust enrichment claims against estates or claims related to intestacy.[134]

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[126] *Climans*, *supra* note 122 at para 35, quoting *Climans v Latner*, 2019 ONSC 1311 [*Climans* trial decision] at para 139.

[127] The Court of Appeal varied the judgement on other matters such as duration of spousal support and the cost award. *Climans*, *supra* note 122 at paras 109–111.

[128] *Climans*, *supra* note 122 at para 34.

[129] *Climans* trial decision, *supra* note 126 at para 14.

[130] *Ibid* at para 80.

[131] *Ibid* at paras 81–84.

[132] *Ibid* at para 33.

[133] *Nowell v Town Estate* (1997), 30 RFL (4th) 107, 35 OR (3d) 415 (ONCA).

[134] *Anderson v Dudek*, 2011 ONSC 4937 at paras 130–133; *Hillier Estate v McLean*, 2011 NLTD(G) 86; *Connor Estate*, 2017 BCSC 978, where the parties were found to be in a spouse like relationship even though

2.3 Other Incidents of Common Law Status

As noted in the introduction to this article, its focus has rested primarily on the incidents of division of property and spousal support to demonstrate why common law relationships are better understood as status rather than contract. However, a myriad of laws, unrelated to dissolution of relationships, confer benefits, obligations, and rights to common law couples.[135] Provincial and federal levels of government recognize the right of common law partners to sue for the loss of their partners whose death was caused by a wrongful act,[136] to bring dependants' relief claims against the estate of their partner,[137] and to share and balance credits with respect to their income taxes.[138] These laws, along with many others, regulate common law relationships in the same manner as married ones, remarkably even in jurisdictions that do not include common law couples in their division of property legislation.

3. Common Law Relationships as Status in Canada

In her writings on family law exceptionalism and marriage as status, Halley ponders the creation of a common law status. As Halley writes, if a court were to ascribe the benefits and obligations of marriage to an unmarried cohabiting couple this could be seen as even more status like than marriage itself. Unless one "live[s] alone" it would

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they not only lived separate and apart, but one of them was married to another person for most of that relationship.

[135] The Nova Scotia Law Reform Commission, in a family law discussion paper, provides an exhaustive illustration of this reality. In Nova Scotia, common law partners are defined in legislation as two "persons" or "individuals" cohabiting in a conjugal relationship for at least one or two years or more. In that province, common law couples have equivalent rights to those of married spouses under: the *Maintenance and Custody Act*, RSNS 1989, c 160; the *Pension Benefits Act*, RSNS 1989, c 160; the *Fatal Injuries Act*, RSNS 1989, c 163; the *Fatality Investigations Act*, SNS 2005, c 42; the *Health Act*, RSNS 1989, c 195; the *Hospitals Act*, RSNS 1989, c 208; the *Involuntary Psychiatric Treatment Act*, SNS 2005, c 42; the *Insurance Act*, RSNS 1989, c 231; the *Members' Retiring Allowances Act*, RSNS 1989, c 231; the *Labour Standards Code*, RSNS 1989, c 246; *the Provincial Court Act*, RSNS 1989, c 238; the *Income Tax Act*, RSNS 1989, c 217; the *Domestic Violence Intervention Act*, SNS 2001, c 29; and the *Workers Compensation Act*, SNS 1994-95, c 10. Federally, common law partners have equivalent or similar rights and obligations under the *Income Tax Act*, RSC 1985, c 1 (5th supp); the *Pension Benefits Division Act*, SC 1992, c 46, sch II; the *Old Age Security Act*, RSC 1985, c O-9; and the *Canada Pension Plan Act*, RSC 1985, c C-8: Law Reform Commission of Nova Scotia, "Discussion Paper: Division of Family Property" (May 2016), online (PDF): <https://lawreform.ns.ca/wp-content/uploads/2020/04/division-of-family-property-discussion-paper-2016.pdf> at 73–74.

[136] *Fatal Injuries Act*, RSNS 1989, c 163, s 3.

[137] *Provision for Dependants Act*, RSNB 2012, c 111.

[138] Canada Revenue Agency, "Line 30300 – Spouse or common-law partner amount" (2024), online (website): <https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/line-30300-spouse-common-law-partner-amount.html>.

be impossible to avoid a status with deep implications ascribed to you by the state.[139] Halley's thought experiment is the lived reality of common law couples in Canada. Indeed, as cases like *Climans* demonstrate, sometimes even the decision to "live alone" is not enough to escape ascription. Justice Bastarache wrote in *Walsh* that to impose a marriage-like status on those couples who choose not to marry would be to disrespect their freedom of choice. With the successive march of our common law regime of property division towards that of marital property law, and the robust application of spousal support to unmarried couples, this appears to be what has happened despite the Court's decision in *Walsh*.

To Halley's point, a review of the governing law concerning the dissolution of common law relationships shows us that indeed, in some ways, they are even more status-like than marriage. The tenuous equation of consent to marriage with consent to the laws of its status becomes completely unworkable when it comes to common law relationships. First, common law relationships lack the legal step of marriage that has been found as "concrete" consent to state regulation of the relationship's dissolution.[140] Second, as observed by Justices L'Heureux Dubé and Abella, most Canadians are completely ignorant of the laws that govern the dissolution of marriage. This ignorance is even more prevalent when it comes to the law that governs the dissolution of common law relationships.[141] People enter committed relationships for a variety of reasons beyond those of moons and Junes and ferris wheels, but it is an exercise in fiction to equate this action with consent to the legal consequences of such a union.[142] Of course, the option of contracting out of spousal support or equitable obligations to one another means that common law relationships, like marriage, are not pure status. Both hold the option of some degree of private ordering but the force of this counter-argument fades with the fact that such private ordering requires knowledge of the law and money to access it. Most Canadians are unaware, not only of laws that govern the

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[139] Halley Law of Marriage, *supra* note 3 at 21; Alberta Law Reform Report, *supra* note 117 at 31.

[140] *Quebec v A*, *supra* note 2 at para 403.

[141] Hélène Belleau, Carmen Lavallée et Annabelle Seery, « *Unions et Désunions Conjugales au Québec: Rapport de Recherge, Première Partie: Le Couple, L'argent, et le Droit* » (Montreal: Institut National de la Recherche Scientifique, Centre – Urbanisation Culture Société, 2017) [Belleau et al] at 4; Aleena Amjad Hafeez, *Albertan's Perceptions and Attitudes Regarding Common-Law Property Division Laws: Exploring Evidence From the Alberta Survey 2016* (Edmonton: University of Alberta Department of Sociology, Population Research Laboratory: 2017);

"Why BC's rules on common law marriage need reform" (2023), online (website): <https://allard.ubc.ca/about-us/news-and-announcements/2023/why-bcs-rules-common-law-marriage-need-reform>; Melanie Patten, "Common-law couples can be 'woefully ignorant of their rights': lawyer" (February 11, 2016), online (website): <https://globalnews.ca/news/2511460/common-law-couples-can-be-woefully-ignorant-of-their-rights-lawyer/>.

[142] While cohabitation is not even a requirement for ascription into this status, common law couples may choose to cohabit for reasons based less on love and more on economies of scale: "Why BC's rules on common law marriage need reform" (2023), online (website): <https://allard.ubc.ca/about-us/news-and-announcements/2023/why-bcs-rules-common-law-marriage-need-reform>; see also Erez Aloni and Régine Tremblay, eds, *House Rules: Changing Families, Evolving Norms, and the Role of the Law* (Vancouver: UBC Press, 2022).

dissolution of relationships, but also of the availability of cohabitation agreements and marriage contracts.[143]

The solidification of common law relationships as status over the past 40 years can likely be explained for two main reasons. The first lies with the fundamental reason for the laws that make marriage more status like than contract; the state has an interest in promoting family units for reasons that are both economical and based on social well-being. As Justice Gonthier explained in *Walsh*:

> Marriage and the family existed long before any legislature decided to regulate them. For centuries they have been central to society, contributing to its social cohesion and fundamental structure.[144]

Like the laws that govern it, the composition and stability of marriage has not remained steadfast over the centuries. As Winifred Holland has put it:

> Graff describes [marriage] as "a kind of Jerusalem," an archaeological site on which the present is constantly building over the past, letting history's many layers twist and tilt into day's walls and floors. While Jerusalem, like marriage, may retain its ancient name, very little else in this city has remained the same - not its boundaries, boulevards or daily habits - except the fact that it is inhabited by human beings.[145]

With the evolving views of marriage and its regulation came an equally evolving view of marriage-like relationships. Common law relationships no longer hold the stigma they did when *Pettkus* was decided nearly forty-five years ago. Society's acceptance of common law couples is recognized not only by the extension of benefits, rights and obligations to common law couples via legislation but also a fact recognized by the Supreme Court cases like *Egan*,[146] *Miron*,[147] *Walsh*,[148] and *Quebec v A*.[149] As L'Heureux Dubé noted in Walsh:

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[143] In Robert Leckey's empirical study, family lawyers largely agreed that neither *Kerr* nor *Quebec v A* had caused any significant uptick in cohabitation agreements in their respective practices: Leckey Family Lawyers, *supra* note 50 at 31. See also Leckey De Facto Relationships, *supra* note 1 at 28, citing E. Aloni, "Compulsory Conjugality" (2021) 53 *Connecticut Law Review* 55.

[144] *Walsh*, *supra* note 30 at para 192.

[145] Winifred Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 Can J Fam L 114 at 125, citing E.J. Graff, *What is Marriage For?* (Boston: Beacon Press, 1999).

[146] *Egan v Canada*, 1995 CanLII 98, [1995] 2 SCR 513.

[147] *Miron*, *supra* note 28.

[148] *Walsh*, *supra* note 30 at paras 130–132.

[149] *Quebec v A*, *supra* note 2.

> It is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.[150]

Perhaps the overarching purpose of all family law legislation, as one commentator has observed, is that of "social engineering".[151] It is true that the private economy of the family is a key driver of those laws that require ex-spouses, rather than the state, to support each other and their children long after a relationship ends. However, as I have argued elsewhere, at its core, family law draws its legitimacy from what we as a society think members of a family, in all of its forms, owe one another.[152]

3.1 De Facto Relationships as Status in Quebec?

Jurists and scholars familiar with the family law system in Quebec might still argue that the framing of de facto unions as an unregulated regime subject only to private contract, rather than a kind of status, is plausible in that province. It is true that Quebec's legal system provides the most fertile ground for this notion.

As discussed above, marriage in Quebec contains incidents that couples cannot pre-emptively contract out of, namely the family patrimony and obligations of spousal support. These are indications of marriage being something more than contract – particularly if we accept the well-trodden path of thinking that persons who decide to marry do so for other reasons than their agreement to be bound by the laws of divorce. While a pushback to this point is the option for couples to choose their particular marital property regime in Quebec, the fact that a default regime exists provides for the reality that most people who marry in Quebec, as in the rest of Canada, are ignorant of this legal reality.[153]

In contrast, de facto spouses are not entitled to sue each other for spousal support. They are free to share accumulated wealth by way of cohabitation agreements.

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[150] *Walsh*, *supra* note 30 at para 131.

[151] Paul L Coxworthy, "Case comment: Lawen Estate v Nova Scotia (Attorney General)" (2019) 39:1 ETPJ 44 at 52.

[152] Jane Thomson, "Disinheritance, Discrimination, and the Case for including Adult Independent Children in Dependents' Relief Schemes: Lawen Estate v Nova Scotia" (2021) 44:2 Dalhousie LJ 641 at 660.

[153] Notably, officiants are required to read aloud to prospective spouses certain Civil Code provisions, but not those pertaining to selecting a matrimonial regime or to marriage contracts: Quebec, Directeur de l'état civil, "Officiant's Guide" (April 2024), online (PDF): <https://www.etatcivil.gouv.qc.ca/publications/Officiants_guide.pdf>. Aside from the evidence to support the argument that Canadians are largely ignorant of the law with respect to separation and divorce provided in the decisions of L'Heureux Dubé and Abella J.J. in *Walsh* and *Quebec v A*. Anecdotally, I recently congratulated a friend, who is a lawyer and attended law school in Quebec where she took a course on family law, on her marriage. I asked her which marital regime she and her wife chose. She had no idea what I was talking about.

Notably, cohabitation agreements in Quebec between de facto spouses are not subject to the rigorous standards of marriage contracts with respect to formality.[154] Further, de facto spouses have the option of making claims of unjust enrichment against each other. This picture – painted in part by Justice Lebel's reasons in *Quebec v A* – does indeed strengthen the framing of these relationships as "a regime of freedom of contract". However, research and reality prove this to be a false dichotomy. Both relationships are more status than contract. Each have contractual elements in them that belie a framing of pure status, and neither can be classified as unregulated and only privately ordered, even in Quebec.

While married Quebeckers cannot pre-emptively contract out of spousal support obligations or the family patrimony, they may do so by way of a separation agreement. Further, Leckey's empirical study provides at least some evidence that very few de facto spouses enter into cohabitation agreements at all. Widespread ignorance as to what laws apply to what kind of relationship in Quebec continues, despite the media coverage associated with *Quebec v A* in that province.[155] When de facto couples do create cohabitation agreements it is not to create their own preferred method of compensation after a relationship breakdown, but rather to confirm that there will be no compensation paid to either spouse upon the dissolution of the relationship.[156] Finally, there have been several landmark decisions since *Quebec v A* that have affirmed the applicability of *Kerr* in that province and the use of the joint family venture for de facto spouses.[157]

Furthermore, while de facto spouses fail to engage in the private ordering available to them with respect to their relationship's dissolution, they are by no means free to privately order their affairs while they remain together. The plethora of federal and provincial laws that recognize the status of common law spouse for purposes other than spousal support or division of property, discussed above, also applies to Quebec. Notably this recognition of de facto spouses status is not just with respect to federal legislation but also provincial acts like the province's Pension Plan.[158] Indeed, Leckey notes the bitter irony of Quebec's recognition of de facto spouses rights, not only with respect to auto insurance rights or workplace benefits, but also their obligations for the purposes of reduction of benefits such as student loans or social assistance, all the while denying these members adequate protection under its family law legislation.[159]

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[154] Leckey Family Lawyers, *supra* note 50 at 7–8.

[155] Belleau et al, *supra* note 141 at 67.

[156] Leckey Family Lawyers, *supra* note 50 at 32.

[157] *Droit de la famille – 123039*, *supra* note 110; *Droit de la famille – 182048*, *supra* note 120.

[158] *An Act Respecting the Quebec Pension Plan*, CQLR c R-9, ss 91(b), 170.

[159] For example, as Leckey explains, "the Individual and Family Assistance Act defines 'spouses' broadly and functionally to include cohabitants who are the parents of a child or who have lived together in a de facto union for at least one year. With heavy consequences, the definition of 'family' draws on that notion of 'spouse.' For example, the threshold for qualifying to receive assistance depends on the total resources

In *Walsh*, Justice Bastarache distinguished the regulation and rights of common law couples vis-à-vis third parties from the private ordering of the "rights and obligations of the spouses vis-à-vis each other".[160] Leckey's point renders this reasoning hollow given that when it comes to determining whether or not someone qualifies for social assistance, the income of their de facto partner is taken into account. Why? The government presumes that de facto spouses, while together, act as an economic unit and through these laws, imposes an obligation of support and sharing between them. As Leckey notes, "[i]n short, despite its discourse of choice, Quebec fails the standard by which the state should 'avoid direct or indirect forms of coercive interference with adults' freedom to choose whether or not to form, or remain in, close personal relationships."[161]

The reality of de facto spouses in Quebec cannot be framed as a "no regime" or one of "freedom of contract". It is more properly understood as status, albeit a flawed one that fails the most vulnerable members of its population.[162] If this is not true then it is unclear why the majority of the Court in *Quebec v A* concurred with Justice Abella's s.15 reasons.

4. What's Next?

This paper has sought to demonstrate that the framing of common law relationships as unregulated and subject only to private ordering – as the deciding decisions of the Supreme Court in *Quebec v A* did – is out of step with the actual law, much of it created by the Supreme Court itself. What does that entail for the future of the law that governs the dissolution of common law and de facto relationships in Canada?

First, it is likely that a third, similar s.15 challenge brought anywhere east of Manitoba would have the legal arsenal behind it to succeed. Interestingly, unlike the deciding judgements in *Quebec v A*, in *Walsh,* the majority and the minority acknowledged the presence of the two legal regimes – one for married persons and one for common law couples. In his majority reasons, Justice Bastarache identified a sub-set of common law couples who "live out their lives together in a manner akin to marriage."[163] In his opinion, those couples had recourse to a different legal regime when it came to division of property on separation – unjust enrichment and

of the 'family.' Moreover, if the government overpays benefits, de facto spouses are jointly and severally liable for repayment." Leckey Bedfellows, *supra* note 62 at 657.

[160] *Walsh*, *supra* note 30 at para 53.

[161] Leckey Bedfellows, *supra* note 62 at 662. See also Leckey, "Cohabitation Law in Quebec: Confusing, Incoherent, and Unjust" (2022) 44:2 Houston J Intl L 331.

[162] Thompson Annotation, *supra* note 32.

[163] *Walsh*, *supra* note 30 at para 59.

constructive trust – a regime "tailored to the parties' specific situation and grievances."[164] Justice Bastarache believed it was the presence of this alternative regime that provided legal recourse to separated unmarried couples, while respecting their decision not to marry, that assured there was no violation of human dignity and therefore no s.15 violation.[165]

In her dissent, Justice L'Heureux-Dubé observed that the distinction drawn by the *MPA* created two "regimes": one for married couples, and one for unmarried ones.[166] The former regime, she noted, allocated not only the benefits associated with division of property upon separation to married couples but additional benefits such as exclusive possession rights of the matrimonial home. As for the tailored, equitable remedies noted by Justice Bastarache, L'Heureux-Dubé J. cited their failure to replace the efficiency and settlement inducing legislation like the *MPA*.[167] In her opinion, it was the existence of these two separate regimes – one superior to the other for no valid s.1 reason – that grounded her constitutional findings.

The majority in *Quebec v A* agreed with Justice L'Heureux Dubé's view when it came to finding a violation of Lola's s.15 rights. The s.1 reasoning that gutted it – while partially viable in Quebec at least with respect to spousal support – certainly holds no water anywhere else in Canada. It is true that "neither incoherence nor inconsistency is a free-standing constitutional defect,"[168] but one would hope that there is no place for a nonsensical s.1 finding in a Supreme Court of Canada judgement. Therefore, yet another reversal on the Court's s.15 stance or a novel s.1 argument would have to materialize in order for such a challenge not to succeed.[169]

However, whether or not success is likely, or even if there is an appetite for such a challenge,[170] the fact that the dissolution of common law relationships is already regulated by the state – albeit poorly and uncertainly in half of the country – lends more credence to the prediction that the law will ultimately be reformed by governments. This is what happened almost immediately after *Quebec v A* was decided and continues to happen.

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[164] *Ibid* at para 61.

[165] *Ibid* at para 62.

[166] *Ibid* at para 85.

[167] *Ibid* at para 167.

[168] Leckey Bedfellows, *supra* note 62 at 657.

[169] Natasha Bakht, "A v B and Attorney General of Quebec (Eric v Lola) – The Implications for Cohabiting Couples Outside Quebec" (2012) 28:2 Can J Fam L 261.

[170] In a forthcoming book chapter, Leckey hints at two such challenges in Ontario and Quebec but fails to specify them at the request of the counsel involved: Leckey De Facto Relationships, *supra* note 1 at 28. Subsequent communications with Prof. Leckey confirm that both cases have settled.

In March 2013, British Columbia included common law couples for purposes of family property division under the new *Family Law Act*. Common law couples living in a "marriage-like relationship…continuously for two years" may claim rights to property division under the *Act*.[171] Also in 2013, the Federal Government passed the *Family Homes on Reserves and Matrimonial Interests or Rights Act*. Common law partners are included in the family property regime created by that Act, if one or both partners is "a First Nation member or an Indian".[172]

In 2020, Alberta replaced its *Matrimonial Property Act*[173] with the *Family Property Act*.[174] The new legislation includes common law couples[175] in the division of property scheme formerly reserved for married persons.

In March of 2024, the Government of Quebec tabled Bill 56, an act to create a "parental union regime". This new amendment to the *Civil Code* was assented to by the Assemblée Nationale in June of 2024 and will take effect in June of 2025.[176] It will apply some of the rules of family patrimony to unmarried Quebec couples who cohabit, publicly present themselves as a couple and have or adopt children together.[177]

New Brunswick is currently reviewing its intestacy provisions as a larger overhaul of its wills and estates legislation. Part of the suggested reforms include recognizing common law partners as next of kin entitled to a portion of an intestate's property.[178]

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[171] *Family Law Act*, SBC 2011, c 25, ss 3(1)(b), 81.

[172] SC 2013, c 20, s 6.

[173] *Matrimonial Property Act*, RSA 1980, c M-9.

[174] RSA 2000, c F-4.7.

[175] The couple must qualify as adult interdependent partners as per section 3 of the *Adult Interdependent Relationships Act*, SA 2002, c A–4.5, i.e., they will qualify if they have lived in a relationship of interdependence for a continuous period of not less than 3 years, or of some permanence if there is a child of the relationship by birth or adoption, or if they have entered into an adult interdependent partner agreement with the other person.

[176] Bill 56, *An Act respecting family law reform and establishing the parental union regime*, 1st Sess, 43rd Parl, 2024, c. 22.

[177] Notably, the bill is described as "family patrimony light" by Quebec family lawyer Anne Frances Goldwater. CBC News, "Quebec tables bill on rights of unmarried partners, creating new 'parental union regime'" (March 27, 2024), online (website): <https://www.cbc.ca/news/canada/montreal/quebec-bill-56-tabled-unmarried-partners-parents-1.7157432>. The bill provides for division of only some of the property classified as the family patrimony. Further, unlike married couples, common law couples can opt out of the scheme entirely and those who bring children into the union from previous relationships will not be ascribed into the parental union regime. Bill 56, *An Act respecting family law reform and establishing the parental union regime*, 1st sess, 43rd leg, Quebec, 2024.

[178] New Brunswick Legislative Services Branch, Office of the Attorney General, "Law Reform Notes #47" (April 2023), online (PDF): <https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/LawReform/notes-47.pdf>.

Why legislative reform seems the more realistic route for change has to do with the pragmatic reasons behind it. These reasons render the legislative regulation of common law separation palatable to governments of varying political views. For example, the legislative debates surrounding the passage of Alberta's legislation cite a number of reasons for including common law couples in its marital property scheme. These included not only the goal of protecting vulnerable persons, but also the need to reduce the amount of family litigation by implementing clear rules, the rising number of common law relationships[179] and the necessity of reducing the burden on the court system.[180] An uncertain legal regime that encourages litigation instead of settlement makes little sense when a system of laws already exists that could be easily adapted and applied in its stead.[181] Cynically, one could argue that the uncertainty of this regime discourages litigation; not knowing how a court will rule with respect to an unjust enrichment claim acts as a barrier to justice due to the cost and financial risk involved. However, that too results ultimately at the government's expense. As noted above, requiring former family members to care for one another, rather than become dependent on the state, has long been a cornerstone of family law. With the acceptance and recognition of common law relationships as something that is here to stay, the appeal of dual systems, one of which operates inefficiently and chaotically, wanes with the passage of time and the change in societal values reflected by Canada's demographics.[182]

Conclusion

Halley's descriptor of marriage as "more than contract" is applicable to common law relationships in Canada but they are a different kind of status than marriage. Common law couples do not need a court order to legally end their relationship. However, like

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[179] Alberta, Legislative Assembly, *Hansard*, 29th leg 4th sess, no 54 (27 November 2018) at 2135.

[180] *Ibid* at 2136.

[181] For a detailed discussion on how to include common law couples into existing marital property regimes, see The Law Reform Commission of Nova Scotia, "Discussion Paper: Division of Family Property" (May 2016), online (PDF): <https://lawreform.ns.ca/wp-content/uploads/2020/04/division-of-family-property-discussion-paper-2016.pdf> at 94–103.

[182] Statistics Canada, "State of the union: Canada leads the G7 with nearly one-quarter of couples living common law, driven by Quebec" (July 13, 2022), online (website): <https://www150.statcan.gc.ca/n1/daily-quotidien/220713/dq220713b-eng.htm>. As Robert Leckey has noted, "[d]e facto union is now [Quebec]'s most common form of couple family for raising young children. In Quebec, three-fifths of couple families raising children five years or younger are headed by de facto spouses (60.5%)." Leckey De Facto Relationships, *supra* note 1 at 5, citing Statistics Canada, "Census Family Structure (7B) and Presence and Ages of Children (15) for Census Families in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 and 2011 Censuses - 100% Data" (June 17, 2019), online (website): <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=113434&PRID=10&PTYPE=109445&S=0&SHOWALL=0&SUB=0&Temporal=2016&THEME=117&VID=0&VNAMEE=&VNAMEF=>.

marriage, the incidents and obligations that flow from it can live on beyond the relationship, legally tying the former couple together much like their divorced counterparts. Much has been written about the legitimacy of linking the decision to marry as a choice to be governed by the status of marriage. This article leaves this debate to others and instead offers a different view on the matter. If there is a decision that triggers ascription to status in Canada it is that of choosing to enter a serious committed relationship in the first place.

It is clear that common law relationships and their dissolution are both recognised and governed by the Canadian state. They are "more than contract". Indeed, in some ways they appear more status-like than marriage itself. The uneven and uncertain nature of this status east of Manitoba lends fuel to a future successful s.15 challenge to the legal regimes that regulate this status. It may well be that a successful legal challenge will push legislative reform of common law status east. However, it seems clear that legislative reform is not only the most logical path forward, but also, for governments of all stripes, the most pragmatic.