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The History & Future of Marriage in Canada

Nicholas Bala*

Marriage as a social institution predates not only Canada, but also law and probably even religion, so the discussion of its history offered here can merely outline themes rather than provide a detailed discussion. Despite the limited nature of the treatment offered in this paper, a central theme emerges from a study of the history of marriage: it has not been a static social or legal institution. Rather, marriage has changed over the course of history in response to changing beliefs, values, behaviours, social structures, technology and demographics, and similarly there are great differences today in marital laws and attitudes towards such laws in different countries.

While the laws governing marriage and spousal relations in Canada have changed dramatically over the past century and a half, so too have attitudes and behaviours about spousal and familial relationships. Each major change in marriage laws over the past 150 years was controversial, with opponents of reform raising the spectre of dire social consequences if "traditional marriage" were to be altered. These dire societal developments did not materialize as a result of changes in the nature of marriage. Although the legal changes have both reflected and reinforced changes in attitudes and behaviours, marriage remains one of Canada's most important institutions. As society changes, the question which must be faced is whether the legal rules that were developed in the past to govern the definition of marriage and spousal relationships continue to best meet the current social, economic, cultural and spiritual needs of society.

A Brief History of Marriage

While some today are arguing that religion should have no place in the current debate about the legal definition of marriage,[1] religion, and specifically the Christian faith, historically established the legal basis of marriage in Canada. Interestingly, while the Old Testament of the Bible accepts polygamy without critical comment, it is often claimed that

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[1] See e.g. Elizabeth Thompson and Anne Dawson, "Church told to butt Out: same-sex debate no place for religion" *National Post* (28 January 2005) A1.

homosexual acts are condemned in the Old Testament.[2] The New Testament of the Bible recognizes the special nature of marriage and the importance of marital love. Although polygamy is not condemned in the New Testament, major Christian faiths came to accept that marriage is to be monogamous, and until very recently all major faiths and the laws of all countries were premised on the view that marriage is only to be between a man and a woman.[3]

The English law of marriage, which was historically the basis of the law of Canada, had an explicitly Christian basis, and until the middle of the nineteenth century, legal jurisdiction over much of what today is called "family law" rested in the Ecclesiastical courts, rather than the King's Courts. In the traditional legal view of marriage, the husband and wife had very different roles, rights and obligations. The leading 18th Century English legal scholar, William Blackstone, recognized that the common law gave a husband the right of "moderate correction" as regards his wife (i.e. "moderate" abuse of a wife by her husband was not a crime). Blackstone wrote:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage ... and consolidated into that of the husband.[4]

Historically, from social, economic and religious perspectives, the procreation of children was viewed as a central purpose of marriage, as was reflected in the common law concept of consummation. The inability or refusal to consummate a marriage (engage in opposite-sex intercourse)

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[2] "You shall not lie with a male as with a woman; it is an abomination." *Leviticus* 18:22 (Revised Standard Edition). Like many passages in the Bible, there are differing translations and interpretations of this passage, but it has traditionally been regarded as a condemnation of homosexual acts.

[3] The polygamists in the Old Testament include Abraham, Jacob, David and Solomon. By 420 A.D. Saint Augustine condemned polygamy in *The Good of Marriage* (chapter 15, paragraph 17). (see Augustine of Hippo, *Nicene and Post Nicene Fathers*, ed. by Philip Schaff, trans by Rev. C.L. Cornish (Peabody, Massachusettes: Hendrickson Publishers, 1995) vol. 3 at 406.) It is clear, however, that polygamy continued to be practiced in medieval Christian Europe; in 1563, the Roman Catholic Council of Trent felt it necessary to proclaim: "If anyone says that it is lawful for Christians to have several wives at the same time and that this is not forbidden by any divine law, let him be anathema." Canons on the Sacrament of Matrimony, Canon 2, 24th Session of the Council of Trent, November 11, 1563.

[4] William Blackstone, *Commentaries on the Laws of England* (1765) (Book 1, Chapter 15) at 430, online: The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/blackstone/bk1ch15.htm.

rendered a marriage voidable. While the jurisprudence discussed the importance of procreation to marriage, the common law defined the consummation of marriage in terms of the "apparent ability to conceive," as opposed to actual procreation.[5] This focus on the *apparent* ability to conceive was at least in part because until recently, the state of medical knowledge was such that it was generally not known why a couple which was engaging in sexual relations was unable to have a child, and whether the couple might still have a child despite a long period without conception. The "apparent ability to conceive" could be established (or rebutted) soon after the wedding by the testimony of one of the parties about the occurrence (or non-occurrence) of intercourse. Further, it would have been very unfair, especially to women, if the actual inability to conceive would have been grounds for annulment or termination of a marriage.

In the 1866 English case of *Hyde v. Hyde*, Lord Penzance articulated a definition of marriage that is frequently quoted[6] in Canada in the debate over same-sex marriage:[7]

> marriage, as understood in Christendom, may ...be defined as the voluntary union for life of one man and one woman to the exclusion of all others.

It is interesting that this definition was actually made in the context of a decision about non-recognition of polygamous marriages, though it is cited today as establishing the centrality of opposite-sex partners for marriage. Further, by the time that it was articulated in 1866, this definition was already out-dated. In 1857, after intense debate, the English Parliament enacted the *Matrimonial Causes Act*,[8] transferring jurisdiction for family law issues from the Ecclesiastical to the secular courts and allowing for judicial divorce. As is the case today, the debate in 1857 engaged religious leaders as well as politicians. The dates for the introduction of divorce into Canada varied, with New Brunswick allowing for divorce as early as 1758,

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[5] See e.g. *Corbett v. Corbett*, [1970] 2 All E.R. 33.

[6] See, e.g., "Religion and marriage," Editorial, *The Globe and Mail* (3 February 2005) A20. See also trial decision of Pitfield J. in *EGALE Canada Inc. v. Canada (Attorney General)* (2001), 19 R.F.L. (5th) 59 (B.C.S.C.)

[7] *Hyde v. Hyde and Woodmansee* (1866), [1861-73] All E.R. Rep. 175 at 177.

[8] *Divorce and Matrimonial Causes Act*, 1857, 20 & 21 Vict. c. 85. For a discussion of the controversy over the 1857 English reforms, see e.g., Lawrence Stone, *Road to Divorce: England 1530-1987* (Oxford: Oxford University Press, 1990) and Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society* (Cambridge, UK: Cambridge University Press, 1988).

but divorce being permitted in Ontario in 1930, and in Quebec and Newfoundland only in 1968.[9]

In the 100 years following 1857 there was a gradual erosion of the patriarchal nature and explicitly gendered nature of the laws governing marriage, as well as changes in family life. Starting in 1884, married women in Ontario could own property, though even after the law changed, in practice it was much more common for property to be held in the name of the husband. Until 1925, in those provinces allowing for divorce, there was an explicit "double standard," with a husband entitled to a divorce based solely on his wife's adultery, while a wife had to prove that her husband had committed adultery in addition to some other act repudiating the marriage, such as desertion.

Until late in the twentieth century, the law reinforced the importance of marriage (and penalized women and their children born out of wedlock) by limiting the rights of those who engaged in sexual activities outside of marriage. The courts regarded women who lived with men outside of marriage as being in a position akin to engaging in prostitution, and these women had no legal claims against their partners at the end of a relationship. Children born out of wedlock were at common law literally outside the law – "illegitimate children." Although gradually legislation gave their mothers the possibility of seeking child support from their fathers, it was difficult for the mother of a child born out of wedlock to seek child support, as she required corroboration of her testimony to establish paternity. Even if paternity were established, a child born out of wedlock suffered various disabilities, such as being excluded from making a claim against a father's estate in a situation of intestacy. The social stigma, economic challenges, and lack of legal protection meant that it was rare for a single woman to rear a child, and these children were typically adopted, apprenticed out or placed in some type of institution, if not abandoned to die.

Until the latter part of the twentieth century, the law clearly and explicitly reinforced moral expectations and sexual roles within marriage. Until 1968, a divorce in Canada could only be obtained based on a petitioner proving that a respondent had been guilty of a "matrimonial offence," such as adultery. Until late in the twentieth century, family law legislation was written in explicitly gendered terms. The husband was expected to be employed, and the wife was regarded as a dependent, caring

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[9] See D.C. McKie, B. Prentice, and P. Reed, *Divorce: Law and the Family in Canada* (Ottawa: Statistics Canada, 1983) at 24-38 [McKie].

for the home and children. Only a wife was eligible to seek spousal support at the end of a marriage, but she would forfeit this right if she committed adultery, even if it was after separation and her husband had already committed adultery. There was a strong presumption throughout much of the twentieth century in Canada that children were to be placed in the care of their mothers after separation, unless the mother had violated the "fundamental" expectations for marriage by committing adultery or deserting her husband.

CHANGES IN FAMILY LIFE AND FAMILY LAW: 1968 - 2002

In the latter part of the twentieth century there were dramatic changes in attitudes and behaviours in regard to the family, followed by changes in the laws governing family relations, which in turn contributed to further social changes.[10] Marriage has come to be viewed as a partnership of equals, and gender has virtually disappeared as a concept in laws governing family relationships. The law no longer explicitly refers to "husbands" and "wives," with prescribed and distinctive social, economic and legal roles, but rather to generic "spouses" with presumptively "equal" roles that individual couples define for themselves.

Reliable and relatively effective means of birth control have led to a dramatic fall in the birth rate and a steep decline in family size, and contributed to a society in which pre-marital sexual relations are the norm, and extra-marital relations are not uncommon. Technological changes (such as frozen food, microwave ovens, vacuum cleaners, washing machines etc.) have meant that a household can be managed with much less time and effort than a century ago, while a decline in the importance of physical labour has increased demand for women in the paid labour force.

Prior to the middle of the twentieth century, divorce was rare, and could only be obtained by an "innocent" spouse who could prove that the other spouse was guilty of a "matrimonial offence," like adultery. In 1968, and again in 1986, Canada's divorce laws were changed. Today, almost all divorces in Canada are granted on the no-fault ground of one year's separation. While before 1968 adultery and fault were central to the laws governing divorce, spousal support and custody, today's divorce legislation specifically directs courts not to consider marital misconduct for the purposes of determining spousal support or making arrangements for the

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[10] For detailed statistical information about familial behaviour in Canada, including divorce statistics, see *Profiling Canada's Families III*, 3rd Ed., (Ottawa: Vanier Institute of the Family, 2004).

care of children.[11]

A century ago, for a host of social, economic, religious and legal reasons, it was very unlikely that a man, let alone a woman, would contemplate leaving an unhappy relationship, even one in which there was abuse. In 2005, more than one in three marriages in Canada will end in divorce. Although divorce is not cheap, and has social and emotional costs, especially for children, the increasing ability of women to support themselves means that the social and economic costs of divorce have dramatically declined for both husbands and wives.

The law now regards marriage as a "partnership of equals," with a presumption that marital property will be divided equally, regardless of whose efforts contributed to the acquisition of specific assets. Spousal support is usually not given except for women who stayed at home for relatively long periods or are married to relatively wealthy men - an important group of cases for family law lawyers in Canada, but a minority among those who are divorcing.

At the same time, unlike earlier family laws which had rigid expectations and refused to allow for marriage contracts, today spouses have significant autonomy to define their rights and obligations upon the termination of their relationship. While marriage contracts are not common in Canada, as long as the parties understand their rights and obligations (usually assured by independent legal advice), the courts will generally respect their choices about the nature of their relationship,[12] except that parents cannot make binding contracts related to their children, as the courts are always ready to intervene to protect the best interests of children.[13]

Until 1983 a husband in Canada could not be charged with the rape of his wife, even if the couple was separated. This reflected a patriarchal view of marriage, with a man having property-like rights in regard to his wife; he did not need her consent to have sex with her. It was only in the 1980's that police and the justice system began to regard domestic violence as a criminal offence that is to be prosecuted; a husband's abuse of his wife began to be treated as a crime, rather than as acceptable conduct.

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[11] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), ss.15.2(5) and 16(9).

[12] See, e.g., *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550.

[13] See D.A. Rollie Thompson, *When is a Family Law Contract Not Invalid, Unenforceable, Overridden or Varied?* (2001) 19 Can. Fam. L.Q. 399.

There have been dramatic changes in attitudes, behaviours and laws governing committed spouse-like relationships outside of marriage, with more emphasis placed on the functional nature of the relationship than on its moral or religious status. Until the last part of the twentieth century, there was social, moral and religious opprobrium attached to "living in sin," and no legal recognition was afforded to these relationships. Inevitably it was women who suffered from this lack of legal recognition when the relationships ended. The change in legal approaches to common-law marriage was in part motivated by a desire to protect vulnerable women. Changes in the law both reflected and reinforced changes in social attitudes and behaviour, and among opposite-sex conjugal partners in Canada today, about one in seven is a non-marital relationship.

In the last quarter century, the concept of illegitimacy has been legally abolished. It is now rare for an unmarried woman who becomes pregnant to place her child for adoption, as the social opprobrium attached to having a child out of wedlock has virtually disappeared. Although unwed mothers face economic and social challenges, it is now possible, and indeed the norm, for women who have children outside of a spousal relationship to rear them alone. Changes in the law and DNA testing have made it much easier for single mothers to seek child support from fathers, and social assistance is available to provide at least basic economic support if the father does not pay support and the mother is unemployed.

Beginning in 1972 in British Columbia, legislatures in Canada began to recognize non-marital opposite-sex cohabitation for such purposes as "spousal" support at the end of the relationship. In a series of decisions starting with its 1980 decision in *Pettkus v. Becker*,[14] the Supreme Court of Canada held that property claims between unmarried partners should be determined based on their contributions to the relationship, including domestic contributions.[15] In its 1995 decision in *Miron v. Trudel*,[16] the Court held that for some legal purposes, legislatures were obliged under s. 15 of the *Charter* to give long term opposite-sex common law partners the same rights and obligations as married partners. However, in 2002 in *Nova Scotia (Attorney General) v. Walsh*,[17] the Supreme Court also held that since

[14] [1980] 2 S.C.R. 834.

[15] See, e.g., *Peter v. Beblow*, [1993] 1 S.C.R. 980.

[16] [1995] 2 S.C.R. 418. This decision actually dealt with the status of "spouse" for the purposes of making a claim under an insurance policy.

[17] 2002 SCC 83, [2002] 4 S.C.R. 325.

common law partners have "chosen" not to marry, it is not discriminatory to deny them rights under provincial marital property laws. There is some variation between provinces in the rights and obligations of common-law opposite-sex couples, as well as variation within provinces in the operative legal definitions, but in general, common-law opposite-sex relationships today can be characterized as "marriage-lite." Except in Quebec, for many but not all legal purposes those who live together without marrying will, after a period of cohabitation, acquire the rights and obligations of those who chose to marry. The period of cohabitation varies for jurisdiction and purpose, from any period of time at all to as long as five years. In Quebec, given its civilian traditions, rights will generally only arise if the parties have registered their relationship, though even in that province for such federal purposes as income tax, "common law spousal status" arises after one year's cohabitation even without registration, and the courts will recognize contributions to the acquisition of assets.

There have also been major changes in attitudes, behaviours and laws regarding parenting. Increasingly, society and the law view parents as having "equal" roles in the lives of their children. For example, in 2003, the Supreme Court held that laws could not give mothers of children born out of wedlock priority over fathers in the naming of their children.[18] While in the typical family mothers still do more child care than fathers, the involvement of fathers in the lives of their children has been steadily increasing over the past decades. Courts have now rejected the "tender-years doctrine," and on separation there is no longer a presumption that children should be placed with their mothers; close to one half of Canadian divorces now result in some form of joint custody or shared parenting.

While most children in Canada are still born in wedlock, there has been an increase in the number of children being reared by single parents and outside of marriage. At the same time, a relatively small but growing number of married couples are "childless by choice." Further, with couples delaying attempts to become pregnant, and perhaps due to environmental changes, there has been an increase in infertility. With improvements in artificial reproductive technology (ART), there are growing numbers of married opposite-sex couples who are having children by means of ART to whom only one parent is a biologically related. Canadian law has also evolved to give a very significant set of rights and obligations to those who "stand in the place of a parent," such as step-parents, recognizing the

[18] *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835.

importance of psychological ties for both adults and children.

At least in legal terms, marriage has been transformed from a patriarchal relationship of husband and wife, with gender roles clearly defined in law, into a relationship of equals without gender distinction in law. While there are, *on average*, social, psychological, economic and of course biological differences between husbands and wives, there is also an acceptance that individual couples should be able to determine their roles within marriage. And there is increasing variation and androgyny in spousal roles within marriages in Canada. Further, while parenting is in some significant social ways still linked to marriage, there is a much greater social acceptance of parenting outside of marriage, and the legal links between parenting and marriage have virtually disappeared. Family law in Canada is increasingly premised on imposing rights and obligations based on the functional nature of the relationship (whether parental or spousal), rather than based on legal ties through marriage or biology.

With all of these changes, it was inevitable that the question of the legal recognition of same-sex relationships would arise. Spouses are viewed as equal, gender is no longer legally important for marriage, and the link between marriage and parenthood has become attenuated. The argument that marriage is inextricably intertwined with procreation no longer seems valid. And it is much more difficult to make arguments that marriage requires two spouses of opposite gender, since there are no longer specified gender roles. Conversely, those who oppose same-sex marriage and favour upholding the traditional legal definition of marriage are generally social conservatives, who also tend to support relatively traditional social roles for husbands and wives within marriage.[19]

SAME-SEX RELATIONSHIPS

Homosexual acts, such as anal intercourse between consenting adults, were criminal offences (under the sodomy laws) in Canada until 1969. Starting in Quebec in 1977,[20] provincial legislatures began to add provisions to their human rights codes prohibiting discrimination on the basis of sexual orientation in such areas as employment. After the

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[19] See Monte Neil Stewart, "Judicial Redefinition of Marriage" (2004) 21 Can. J. Fam. L. 11 [Stewart]; and Susan Frelich Appleton, "Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate" (2005) 16 Stan. L. & Pol'y Rev. 97.

[20] *An Act to amend the Charter of Human Rights and Freedoms*, S.Q. 1977, c. 6. Alberta still has not added sexual orientation as a prohibited ground, though the Supreme Court of Canada has "read in" this term to that province's human rights code: *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

introduction of the *Charter* in 1982, most politicians and members of the Canadian public were prepared to accept that it was wrong to discriminate openly against individuals on the basis of their sexual orientation in regard to such matters as employment. By the late 1980s, there was a growing social acceptance of homosexuality, which resulted in more gay and lesbian partners openly cohabiting, especially in urban areas. The demand for legal recognition of same-sex relationships increased, and Canadian courts started to give limited recognition to these relationships for family law purposes. In 1986, for example, a British Columbia court held that a same-sex partner could make use of the constructive trust doctrine just as an opposite-sex common-law partner could, to make a claim to property acquired during a domestic relationship.[21]

Despite a growing consensus that overt discrimination against gays and lesbians would not be tolerated in Canadian society, homosexuals continued to face prejudice as well as acts of violence perpetrated against them because of their sexual orientation. In the early 1990s, politicians and judges were still unwilling to accord spousal status to same-sex partners. In 1993, in *Layland v. Ontario (Minister of Consumer and Commercial Relations)*,[22] an Ontario court dismissed a *Charter* challenge by same-sex partners who argued that their constitutional rights had been violated when they were refused a marriage license. The court ruled that, since the legal definition of "marriage" was a union of "one man and one woman," it was not discriminatory to preclude same-sex partners from marrying. One of the "principal purposes of the institution of marriage," the court observed, is the procreation and care of children, which cannot be "achieved in a homosexual union," and it is "this reality that is recognized in the limitation of marriage to persons of opposite sex."[23]

As early as the mid 1970s, the courts began to accept that mothers could be awarded custody after separation from their husbands, even if they were living in a lesbian relationship. In 1976, one judge remarked that "the manner in which one fulfills one's sexual needs does not relate to the abilities of being a good parent."[24] By the mid 1990s, it was accepted that the lesbian partner of a child's biological mother could have

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[21] *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).

[22] (1993), 14 O.R. (3d) 658 (Div. Ct.).

[23] *Ibid.* at 666.

[24] *K. v. K.*, [1976] 2 W.W.R. 462 at 465 (Alta. Prov. Ct.); see also *Bubis v. Jones* (2000), 6 R.F.L. (5th) 83 at 90 (Ont. Sup. Ct.), where Quinn J. stated, "[h]eterosexual parenting is not better than lesbian parenting – just different."

"parental" support rights and obligations as a person who "demonstrated a settled intention" to treat the child as part of her family.[25]

In 1999, in *M. v. H* [26] the Supreme Court held that the failure to permit partners in long-term same-sex relationships to seek support in the same way as opposite-sex common law couples at the end of the relationship constitutes discrimination on the basis of sexual orientation. Justice Cory, for the majority of the Court, emphasized the social importance of recognizing same-sex relationships:

> The exclusion of same-sex partners from the benefits of [spousal support law]...promotes the view that...individuals in same-sex relationships...are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.... *[T]he human dignity of individuals in same-sex relationships is violated by the impugned legislation.*[27]

In *M. v. H.*, the Supreme Court was careful to observe that it was ruling that it was discriminatory to deny same-sex conjugal partners the rights enjoyed by unmarried opposite-sex conjugal partners, and the Court was not directly comparing same-sex partners to married opposite-sex couples. However, the Court's analysis and rhetoric clearly suggested that the Court would be sympathetic in the future to the argument that the failure to allow same-sex partners to marry is an affront to their "human dignity." The Court recognized in *M. v. H.* that "there is evidence to suggest that same-sex relationships are not typically characterized by the same economic and other inequalities which affect opposite-sex relationships."[28] Nevertheless, the Court stated:

> same-sex couples will often form long, lasting, loving and intimate relationships.... While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the

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[25] *Buist v. Greaves*, [1997] O.J. No. 2646 (Gen. Div.)

[26] [1999] 2 S.C.R. 3.

[27] *Ibid.* at paras. 73-74 [emphasis added].

[28] *Ibid.* at para. 110, per Iacobucci J.

relationship is "conjugal."[29]

In response to *M. v H.* the federal and provincial governments enacted legislation to give same-sex partners the same recognition as opposite-sex common law partners.[30] Nova Scotia, Manitoba and Quebec went further by also enacting a registered domestic-partnership law,[31] allowing unmarried conjugal partners, whether of the same or opposite sex, to gain many of the rights and obligations of married spouses, to the extent permitted by provincial law (i.e. for such purposes as marital property and support).

As a result of *Charter*-based challenges brought by gays and lesbians seeking the right to marry, the courts in eight provinces and two territories recognized that it is a violation of the *Charter* to deny same-sex partners the right to marry. One of the earliest and most frequently cited decisions on the *Charter*-based right of same-sex partners to marry is the Ontario Court of Appeal judgment in *Halpern v. Canada (Attorney General).*[32] On the importance of giving same-sex partners the right to marry, the Court of Appeal wrote:

> Marriage is...one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other.... This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.[33]

The Court of Appeal relied in part on the Supreme Court decision in

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[29] *Ibid.* at paras. 58-59, per Cory J.

[30] See e.g. *Modernization of Benefits and Obligations Act*, S.C. 2000, C. 12.

[31] See *An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province*, S.N.S. 2000, c. 29, (in force 4 June 2001). See also *The Common-Law Partners' Property and Related Amendments Act*, S.M. 2002, c. 48, s. 23, creating a registration scheme under the *Vital Statistics Act*; *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, c. 6. For a fuller discussion of registered domestic partnerships, see Nicole LaViolette, "Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada" (2002) 19 Can. J. Fam. Law 115.

[32] [2003] O.J. No. 2268 (C.A.) [*Halpern*].

[33] *Ibid.* at para. 5. The decision was a unanimous ruling by McMurtry C.J.O., MacPherson and Gillese JJ.A.

Nova Scotia (Attorney General) v. Walsh,[34] which emphasized the importance of the "choice" that opposite-sex partners have when deciding to get married or live common law, observing:

> [M]arried couples have instant access to all benefits and obligations.... [I]n *Walsh* the Supreme Court of Canada [recognized that] opposite-sex couples are able to gain access to...[matrimonial property] legislation as they can choose to marry. Same-sex couples are denied access because they are prohibited from marrying...[and] same-sex couples are excluded from a fundamental societal institution - marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked.... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.[35]

In the course of these decisions, the courts had to consider what has been the strongest secular concern about same-sex marriage - that it may endanger the family and society. One commentator, for example, argued that there is "danger in taking the country down the path marked out by the court...[which] would undermine an institution so essential to the well-being of Canadians."[36] In rejecting this type of argument, the Ontario Court of Appeal in *Halpern* observed:

> We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples.[37]

While the widespread legal recognition given to heterosexual common-law unions in Canada may well have dissuaded some opposite-sex couples

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[34] *Supra* note 17.

[35] *Supra* note 32. at para. 104-107.

[36] Douglas Allen et al., "Don't kiss off marriage" *The Globe and Mail* (18 June 2003) A19. This statement was signed by a number of Canadian religious leaders, academics and lawyers. For a fuller critique of Canada's recognition of same-sex marriage, see Daniel Cere & Douglas Farrow, eds. *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* (Montreal: McGill-Queen's Press, 2004) and Stewart, *supra* note 19.

[37] *Supra* note 32 at para. 123

from marrying, it is hard to believe that recognizing same-sex unions would deter any heterosexual person from marrying or having children. Further, it is becoming more common for same-sex couples in Canada to have the care of children, whether the children are conceived by one partner through artificial insemination, adopted by the couple, or born to one partner prior to entering the same-sex relationship. There is now a substantial body of social science literature concerning the impact on children of growing up with same-sex partners (usually lesbians) as custodial parents. The overwhelming preponderance of psychological research findings serves to alleviate the fear that children who are reared in these relationships are worse off than children raised reared by opposite-sex parents. No significant differences have emerged in emotional or cognitive developmental outcomes, or in terms of mental health, between children reared by same-sex couples and opposite-sex couples. [38]

In its December 2004 decision in *Reference Re Same-Sex Marriage* [39] the Supreme Court clearly signaled its support for same-sex marriage, for example noting the importance of the "protection" of the rights already acquired by same-sex partners who had married. There was, however, considerable value in the Court refusing to rule that the *Charter* requires recognition of same-sex marriage, and leaving it to Parliament to enact same-sex marriage. Not only was it preferable for the Court not to directly impose a resolution in regard to such a controversial issue, but the added time for debate allowed more opportunity for the public to become engaged and educated about the issues. The type of momentous social and legal change that is represented by same-sex marriage benefited from the Parliamentary debate and Committee hearings.

The enactment by Parliament of the *Civil Marriage Act*[40] in the

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[38] See J. Stacey and T. Biblarz, "(How) Does the Sexual Orientation of Parents Matter?" (2001) 66 Am. Soc. Rev. 159. While there have been some differences in terms of sexual orientation of children reared in gay and lesbian households, there are very likely genetic explanations for at least some of this difference; further a majority of children reared by homosexual parents grow up to be heterosexuals.

[39] 2004 SCC 79, [2004] 3 S.C.R. 698.

[40] Bill C-38, 38th Parliament, 1st Session, 1st Reading Feb. 1, 2005. Enacted as S.C. 2005, c. 33. Royal assent July 20, 2005. Federal legislation could, and perhaps ideally would, deal with such arcane issues as what constitutes consummation and adultery for a same-sex union, but the government was politically leery of such an explicit discussion of homosexual sexual acts, and left this type of problem for the courts to resolve. The issue of what constitutes consummation and adultery in a same-sex marriage was raised by Pitfield J. in his overturned decision in *EGALE v. Canada* (2001), 19 R.F.L. (5th) 59 (B.C.S.C.). Historically, both consummation and adultery required "natural heterosexual intercourse"

summer of 2005 reflected the recognition by a majority of Canada's federal politicians that same-sex marriage is an important aspect of the recognition of human rights in this country. In this writer's view, if Parliament had not recognized this, there would have been further litigation, with the virtually certain outcome being a Supreme Court declaration that the *Charter* requires same-sex marriage.

By 2005, with marriage for opposite-sex partners increasingly considered a relationship of equals without distinctive gender roles in law, marriage and child-rearing becoming less closely intertwined, and an increasing commitment to ending discrimination based on sexual orientation, the legal recognition of the right of same-sex partners to marry in Canada seemed inevitable. There was, however, some uncertainty with respect to whether it would be politicians or the judiciary who would take the final step to make same-sex marriage legal everywhere in Canada.

POLYGAMY: MARRIAGE FOR MORE THAN TWO?

One of the arguments raised by the opponents of same-sex marriage was that this change to the definition of marriage will lead to Canada recognizing polygamy. Given the history of marriage and the acceptance of polygamy in many countries in the world today, it is understandable that the issue of polygamy would be raised in the course of the same-sex marriage debate. Taking an increasingly pluralistic and functional legal approach to the definition of the family in Canada does raise the question of whether polygamy is so abhorrent to Canadian values and social policy as to merit criminal prohibition. However, the argument that recognition of same-sex marriage will lead to legal recognition of polygamy is specious, as polygamy is very different from monogamous marriage in social, cultural and economic terms. The legal recognition of polygamy raises very different issues from same-sex marriage,[41] and it seems most unlikely that in the foreseeable future any Canadian legislature or court will be

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and "lesser acts of intimacy" and homosexual acts would not suffice; this was consistent with the procreative nature of marriage. If same-sex marriage is legally required by the *Charter*, it undoubtedly follows that the *Charter* requires that homosexual acts constitute adultery and consummation. While "lesser" sexual acts between same-sex lovers such as kissing would not suffice, it is submitted that the touching of a partner's genitals for a sexual purpose should suffice for consummation and adultery. See *P.(S.E.) v. P.(D.D.)* , [2005] B.C.J. No. 1971 (S.C.), where Garson J. accepted that the *Charter* and the *Civil Marriage Act* require that homosexual acts constituted adultery, without resolving exactly what "type of intimate sexual activity constitutes adultery."

[41] See Maura I. Strassberg, "Distinctions of Form or Substance: Monogamy, Polygamy and Same-sex Marriage" (1997) 75 N.C.L. Rev. 1501.

favourably disposed towards polygamy.

A small number of people are presently living in polygamous relationships in Canada,[42] most of them Fundamentalist Mormons living in the interior of British Columbia and a few Muslims scattered across the country.[43] There are reports that government authorities in British Columbia are reluctant to prosecute any of these cases,[44] at least in part due to a concern that the s. 293 *Criminal Code* prohibitions on polygamy are vulnerable to constitutional challenge.[45] In this writer's view, the *Criminal Code* provisions which make it an offence to live in a polygamous union or enter into a polygamous marriage are constitutionally valid, though it must be acknowledged that the issue of their validity is contentious in academic circles, and the question can ultimately only be resolved by the courts.[46]

One possible basis for constitutional challenge to s. 293 of the *Criminal* Code is that it is discriminatory and in violation of s. 15 of the *Charter*. A major difficulty with such argument is trying to characterize the ban on polygamy as "discrimination." The acceptance of sexual orientation as a prohibited category of "discrimination" under s. 15 of the *Charter* has been central to the argument in favour of same-sex marriage. Sexual orientation has been recognized as a prohibited ground of discrimination, because it is an inherent aspect of a person's identity. The practice of polygamy is a particular type of chosen behaviour that is prohibited by law because of its harmful effects and its inconsistency with the acceptance in Canada of the fundamental equality of men and women. Prohibiting polygamy does not discriminate against individuals

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[42] See, e.g., "Polygamy in Bountiful," Fifth Estate, broadcast Jan 15, 2003, online: <www.cbc.ca/fifth/polygamy.polygamy.html> (date accessed Feb. 26, 2005).

[43] C. Cobb & B. Harvey, "Canadian Muslim leader defends polygamy" *The National Post* (21 January 2005) A6.

[44]. *Criminal Code of Canada*, R.S.C. 1985, c. C-34, s. 293. This provision makes it an offence to practice or "*enter into*...(i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time." [emphasis added] It is common in polygamous relationships in North America for a man to legally marry his first wife, and take other "wives" without legally marrying them. Such relationships do not technically violate the *Criminal Code*.

[45] See, e.g., interview with B.C. Attorney General in *supra* note 44.

[46] See e.g. N. Bala, K. Duvall-Antonacopoulos, L. MacRae & J. Paetsch, *An International Review of Polygamy: Legal and Policy Implications for Canada* (Ottawa: Status of Women Canada, forthcoming 2005) [Bala]. Other papers are being published by Status of Women Canada that take a different view of the constitutionality of s. 293 of the *Criminal Code*.

based on certain inherent characteristics, but rather proscribes certain behaviour.

Probably the strongest argument for a constitutional challenge to the polygamy laws is that they violate freedom of religion, as guaranteed by s. 2(a) of the *Charter*. It is important to note that while some faiths, like Islam, *permit* polygamy, most do not *require* their adherents to practice polygamy. The vast majority of adherents of Islam do not practice polygamy, and a few predominantly Muslim countries like Tunisia and Turkey have banned polygamy, on the basis of a concern that it treats women as inherently unequal to men. Courts in Mauritius[47] and India[48] have rejected arguments that a ban on polygamy is a violation of freedom of religion or discriminatory.

While the main Mormon Church rejected polygamy in 1890, Fundamentalist Mormons continue to practice polygamy, and some of them believe that this is a religiously required practice, at least if they are directed to have a polygamous relationship by a church leader or "prophet." The American courts, however, have rejected religious freedom-based constitutional claims by Fundamentalist Mormons to challenge the laws criminalizing polygamy. The most recent decision was made after the United States Supreme Court ruled unconstitutional laws criminalizing sodomy in *Lawrence v. Texas*, suggesting that polygamy is a very different issue from same-sex marriage, not only in social terms but also in constitutional terms.[49]

In Canada, the issue of validity of the prohibition on polygamy involves a consideration of a number of policy issues, which in a legal context may arise in the consideration under s. 1 of the *Charter*. Are the restrictions on the recognition of polygamy justified in Canada as reasonable limits in a "free and democratic" society? The issue of the

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[47] *Bhewa v. Gov't of Mauritius*, 1991 LRC (Const) 298 (1990).

[48] *Sarla Mudgal v. Union of India, All India Reports* 1995 S.C. 1531.

[49] In the 2005 case of *Bronson v. Swenson* (2005 U.S. Dist. LEXIS 2374), Utah's *Criminal Code* and constitutional provisions prohibiting polygamy were challenged by polygamists on the grounds that these laws violate the plaintiffs' right to free exercise of their religious beliefs under the First Amendment and right to privacy under the Fourteenth Amendment of the American Constitution. The plaintiffs argued that their religion, Fundamentalist Mormonism, requires the practice of polygamy, and they brought the action after one of them was denied a marriage license on the grounds that he was already married. Justice Stewart referred to the *Lawrence v. Texas* decision, and concluded that, as the United States Supreme Court had carefully delineated the limitations of its ruling, *Lawrence* cannot be used to require Utah to recognize polygamous marriages as legally valid.

constitutionality of the laws prohibiting polygamy is thus likely to be resolved by a consideration of functional and value-based questions: Do polygamous families offer social advantages similar to those of monogamous families? What are the social and economic costs and benefits of this type of relationship? Does polygamy result in the exploitation of vulnerable persons? What is the impact on children of being reared in a polygamous family?

There is no credible social science research which indicates that same-sex relationships involve a greater social cost, more abuse, or greater risks for vulnerable individuals or children than opposite-sex relationships. Indeed, there are social and economic advantages to recognition to same-sex relationships, for example in terms of having dependent individuals look to their partners rather than the state for financial support and health care.

In contrast to same-sex relationships, there are many media reports and research studies that raise serious concerns about exploitation and abuse of women in polygamous relationships, with many of the women entering into polygamous marriages while still minors.[50] There is a growing body of research from Muslim societies which finds that there is a greater prevalence of low self-esteem, loneliness and poverty among women living in polygamous relationships than among women in monogamous marriages.[51] Women in these relationships are in an inherently vulnerable and unequal position in social and economic terms, and are more likely to be victims of domestic violence. There are also studies which have found that in comparison to children from monogamous families, children from polygamous families have lower self-esteem, higher levels of self-reported family dysfunction, and lower levels of socio-economic status and academic achievement.[52]

There are also serious social concerns if some (inevitably wealthy or powerful) men have multiple wives, forcing men who would otherwise marry to remain single.[53] The societies that continue to recognize

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[50]. "Speaking Out against polygamy" *The Globe and Mail* (21 May 2001) A9. See also Paula Simons "Polygamy: let's just call it a class act" *National Post* (21 May 2001) A14.

[51] A. Al-Krenawi, "Women from "Polygamous and Monogamous Marriages in an Out-Patient Psychiatric Clinic" (2001) 38 Transcultural Psychiatry 187.

[52] A. Al-Krenawi, J.R. Graham & V. Slonim-Nevo, "Mental Health Aspects of Arab-Israeli Adolescents from Polygamous Versus Monogamous Families" (2002) 142 J. S. Psychology 446.

[53] The Canadian political theorist Tom Flanagan worries about the inequities which polygamy creates *between men*, observing that if polygamy is widely practiced there will be a

polygamy are not only deeply patriarchal, but they also tend to have a much more rigid social structure than Canada. There is a growing worldwide trend towards prohibiting polygamy, even in societies where it has long, religiously-based traditions, reflecting the greater recognition of equality, especially gender equality.

There are strong arguments in favour of continuing the legal prohibitions against polygamy in Canada, which are embodied in the present laws which both criminalize polygamy and prevent immigration into Canada of parties to a polygamous marriage.[54]

It is true that both same-sex and common-law unions differ from traditional opposite-sex marital relationships in some respects. For example, there is a greater likelihood that married opposite-sex spouses will have children than either common law opposite-sex partners or same-sex partners. However, both same-sex marriage and common law relationships (opposite and same-sex) serve many of the same social, economic and psychological functions as traditional opposite-sex marriages, and there is no evidence that the legal recognition of these relationships is harmful. In contrast, polygamy gives rise to both economic and social concerns, and gender inequality is inherent in this type of relationship. In this writer's view, an argument that it is a violation of the *Charter* for Canadian law to fail to accept polygamy is unlikely to succeed.[55]

For those who worry about an "undemocratic activist" judge forcing

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significant group of men without families, who are likely to be socially disruptive. Flanagan argues that polygamy produces brutal societies "dominated by a warrior cult of violent masculinity." T. Flanagan, "Democracy, polygamy and the sexual constitution" *The National Post* (23 May 2001) A16.

There are also legitimate economic concerns about costs to employers and others if a person can claim to have two or more spouses, each of whom would be entitled to spousal benefits.

[54] It is not clear that persons who enter into a polygamous marriage in a country where it is legal and then enter Canada could be prosecuted under s. 239 of the *Criminal Code*. For example, could we prosecute spouses in a polygamous marriage who come to Canada as visitors? However, Canadian immigration policy excludes those living in a polygamous relationship; see *Ali v. Canada (Minister of Citizenship and Immigration)* (1998), 154 F.T.R. 285; and "An ideal candidate for immigration is denied after it is learned he has two wives" *The National Post* (1 February 2005) A7.

[55] The Supreme Court of Canada in *Law v. Canada*, [1999] 1 S.C.R. 497 held that a consideration of the effect on "human dignity" is a key criteria for determining whether there is a violation of s. 15 of the *Charter of Rights*. For a fuller discussion, see Bala, *supra* note 48.

polygamy on Canadian society, it is worth emphasizing that the courts did not force same-sex marriage on society against the will of a majority of the Canadian public. Rather, the courts pushed politicians to take action that has the lukewarm support of a majority of Canadians in the face of opposition from a vocal, committed minority who oppose same-sex marriage.[56] Legal recognition of polygamy is supported only by a small minority of Canadians,[57] and it seems very unlikely that the courts would try to force the Canadian public to accept this type of a social change. While, in this writer's view, Canada's polygamy laws are valid, there should be prosecutorial restraint in the use of the criminal law to combat the practice of polygamy in Canada. Women and children who live in these relationships are vulnerable; criminal prosecution should only be used against men who have coerced women into entering into polygamous relationships. There should, however, be culturally sensitive services to support women and children who want to leave these relationships.

DOES CONJUGALITY MATTER?

As the debate over the legal recognition of same-sex marriage and common-law relationships in Canada has progressed, questions have arisen about the extent to which laws and benefit schemes should make conjugality a central organizing criterion. To what extent should the law confer rights and impose obligations based on conjugal status, and to what extent should the law recognize relationships in which adults live together with varying degrees of economic interdependence and close emotional ties, whether or not the relationship could be characterized as "conjugal"?

The 2001 report of the Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Relationships Between Adults* made the argument for deemphasizing the role of marriage and conjugality in law. This report challenged the traditional approach of

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[56] A survey in July 2004 by the Centre for Research and Information on Canada and Environics Research found that 57% of Canadians supported allowing same-sex marriage, while only 38% were opposed. Online: Centre for Research and Information on Canada <http://www.cric.ca/pdf_re/new_canada_redux/new_canada_redux_summary.pdf>. When the civil union "option" was added to a recent public opinion poll, 35% favoured legalization of same-sex marriage, 36% favoured civil unions, and only 29% were opposed to any legal recognition of same-sex relationships. However, the option of "civil union" as a legislative compromise alternative to marriage is not available to the federal Parliament in Canada. The option of a civil union would not only violate s. 15 of the *Charter*, but ss.. 91 and 92 of the *Constitution Act, 1867* would make it impossible for the federal government to enact a comprehensive civil- union scheme.

[57] See Tom Blackwell, "Most want referendum" *The National Post* (2 February 2005) A1 reporting that only 14% of Canadians support legal recognition of polygamy.

basing many entitlements and obligations on the fact that two individuals are "spouses" (whether common-law or married, same-sex or opposite-sex).[58] It argued that "conjugality is a poor means of isolating relationships that are likely to give rise to household economies."[59] The Commission advocated an ambitious review of all schemes based on marital or common-law status, in order to determine whether the same rights and obligations should attach to other "close personal adult relationships" that "share the functional characteristics of emotional and financial interdependence," such as relationships in which adult siblings reside together.[60]

The position of the Law Commission raises the fundamental question of why conjugality is important, and whether there should be a rethinking of the central role played by the concept of "spouse" in various legal and social policy schemes. There are significant legal and policy purposes for which it is appropriate to reconsider the basis for eligibility, abandon the concept of "spousal status" or "conjugality," and replace them with more inclusive concepts, such as the "close personal adult relationship". For example, family leave policies should recognize that individuals may be taking time off work not only to care for sick children and spouses, but also aged parents and invalid friends. However, for many of the important aspects of private law – those which define the rights and obligations of adults under family and succession law – jettisoning the concept of conjugality would not be appropriate. Further, there are significant areas of public law, such as entitlement to public benefit schemes, for which conjugality and marriage should remain central.[61]

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[58] Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (Ottawa: Minister of Public Works and Government Services, 2001) at 29 [*Beyond Conjugality*]; See also Brenda Cossman & Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18 Can J. Fam. L. 269 and Nancy D. Polikoff, "Making Marriage Matter Less: The ALI Domestic Partner Principles are One Step in the Right Direction" (2004) U. Chi. Legal F. 353.

[59] Beyond Conjugality, *ibid.* at 81.

[60] *Ibid.* at xi.

[61] With many government programs and legislative schemes there are potential problems of "adverse selection" with any definition of "close personal adult relationship". Those who may claim *benefits* from the state or an employer will be very likely to identify themselves. If there are *obligations* being imposed, those who are in these relationships are much less likely to identify themselves, even if they are within such a relationship. The adverse selection issue is already a problem with informal (i.e. non-marital) conjugal relationships, for example in determining social assistance (in)eligibility, though there will generally be more

Conjugality – living together in a spousal relationship – is not defined in exclusively sexual terms, though a sexual relationship is almost always an important element of conjugality. Conjugality is established by a combination of the sharing of economic, social and emotional lives. The Supreme Court of Canada has held that the characteristics of a "conjugal" relationship include "shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple."[62] A couple does not necessarily have to satisfy all of these elements to be living in a conjugal relationship.

What distinguishes a conjugal cohabiting relationship from two roommates living together, or from an adult child and parent residing together? Conjugal relationships involve economic and emotional interdependencies but *also* a set of commitments, expectations and understandings about the relationship. While individual attitudes and behaviours vary, Canadians generally share a set of cultural, psychological and spiritual feelings about conjugal relationships. Those who live in conjugal relationships invariably share at least some significant aspects of their economic lives, and recognize that both parties are gaining from the relationship. There is usually an expectation that a conjugal relationship will be "permanent," or at least indefinite, even though all conjugal relationships will come to an end, whether by death or separation. Those who choose to marry, legally establish a conjugal relationship as soon as the ceremony is performed, with their public declaration of commitment immediately giving them a set of rights and obligations. Those who live together in a conjugal relationship outside of marriage have to live together for a stipulated period, after which they are deemed, for many purposes, to have sufficient interdependence to have "spousal status."[63]

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indicia and records available to help make this determination than for non-conjugal relationships.

[62] *M. v. H.*, *supra* note 26 at para. 59, citing *Molodowich v. Penttinen*, (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

[63] In *Brebric v. Niksic*, [2002] 215 D.L.R. (4th) 643(Ont. C.A.) the Ontario Court of Appeal rejected an constitutionally based argument by a woman who cohabited with a man for less than three years that she should be treated as a "spouse" for purposes of tort claim. The Court rejected this argument, ruling that it was not a discriminatory violation of s. 15 of the *Charter* for the legislature to rely on an "informed generalization" about the differences between shorter and longer cohabiting relationships. At paragraphs 23 and 31, Chief Justice McMurtry recognized that it was appropriate to have the same period of eligibility for tort law and spousal support purposes:

> Spousal support obligations that arise on the termination of a relationship have a compensatory purpose of recognizing contributions to the relationship and the economic consequences of the relationship....This three year "qualifying period" is

While there are relatively rare cases where it may be difficult to determine whether a particular couple is "cohabiting" in a "conjugal" relationship, the occasional difficulty in line-drawing does not mean that conjugality is not a relatively clear and important legal and social concept.[64]

Although it is often inappropriate to award spousal support or impose other obligations at the end of a conjugal relationship, in many cases it is fair to do so. The law of spousal support does not always require that support is to be paid at the end of a conjugal relationship, but rather the determination of whether there is a support obligation requires consideration of such factors as the length of the relationship, the contributions and responsibilities of each party, the relative incomes of the parties and whether there were children. The key question is not whether the parties were legally married, but rather a decision about whether to order support requires an assessment of their particular conjugal relationship, their particular interdependencies, contributions, resources and needs. For non-conjugal close personal adult relationships, like the common situations of an adult child who is living with an older parent,[65] or two siblings or platonic friends sharing a residence, it would invariably be unfair, unexpected and socially undesirable to impose support obligations if the parties cease to reside together.

It might in theory be argued that the existing legal obligations imposed on "informal" spouses may cause some who have a sexual relationship and would otherwise enter such a conjugal relationship to

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> an attempt to target only those relationships of sufficient duration and demonstrated permanence as to justify the imposition of ongoing private support obligations after the termination of a relationship....
>
> Although the three year minimum period of cohabitation may not correspond precisely with the characteristics of all common law relationships, any deleterious effects of the definition of spouse are outweighed by the advantages of having an objective standard by which individuals and the courts can determine when state-imposed support obligations and rights of action arise.

[64] For the contrary argument that "conjugality" is too uncertain to constitute a clear legal category in Canada, see Cossman & Ryder, *supra* note 60. The authors of that article review much of the case law on the definition of "conjugality." See Bruce Ryder, (2005 John and Mary A. Yaremko Conference on "Equality and the Family," Faculty of Law, University of Toronto, February 4-5, 2005) [unpublished].

[65] Interestingly, the law recognizes that an adult may be legally obliged to support a parent even if they are not living together, though this obligation is very rarely enforced: see Christa Bracci, "Ties that Bind: Ontario's Filial Responsibility Law" (2000) 17 Can. J. Fam. L. 455. However, if, for example, an elderly widow shares her residence with, and provides support for, her unemployed adult son, she may require him to leave at any time, and generally will have no obligation towards him.

choose not to cohabit, though there is no clear evidence that the imposition of obligations on common-law partners in Canada has actually had an effect on the willingness of individuals to cohabit. For many people, the very significant social, psychological, and economic benefits to forming a conjugal relationship and cohabiting outweigh the potential costs, even if obligations may be imposed at the end of the relationship. However, for dependent adults such as the elderly, there is likely to be a very limited number of other adults who are willing to share their residence and provide support for them. If there are legal burdens added to those who, for example, take into their homes an infirm, unemployed, or dependent adult, this is likely to have a very significant adverse impact on how many dependent adults receive care or support from relatives or friends. The imposition of obligations would be a great disincentive to the formation of non-conjugal households, with significant negative effects for dependent adults, and increased costs for the state, which would be forced to assume the full burden of care for these adults.

Further, while society can no longer equate conjugality with procreation, there is still a strong relationship between conjugality and children. Conjugality is relevant to both psychological and biological parenthood, and there are relatively few people who would consider (as a first choice) sharing a residence and rearing a child with a partner who was not in a conjugal relationship with them. The commitment inherent in a conjugal relationship is also desirable in establishing a stable, loving environment in which to rear children. Legal and social support for conjugality provides indirect support for children, though in establishing any social program or legal regime, care must be taken not to discriminate against children who live with only one parent, or who live in other circumstances.

Given the profound importance of conjugal relationships to Canadians, and the symbolic and religious significance that the vast majority of Canadians attach to "marriage," the legal concepts of "marriage," "spouse" and "conjugality" should not be abandoned in favour of the more "rational" concept of the "close personal adult relationship". While laws and policies that are based on marriage and conjugality should be examined to consider whether these are appropriate criteria for the granting of rights and benefits, politicians in Canada are unlikely to want to abandon concepts that have deep psychological and spiritual significance for so many.

CANADA & THE U.S.A: VALUES, POLITICS AND FAMILY LAW

It is interesting to observe that Canada and the United States have

significant differences in terms of their family law in general, as well as in regard to same-sex marriage. In general, the laws of the United States take a narrower approach to the definition of "the family," offering much less legal recognition for unmarried opposite-sex cohabitation and psychological parenthood than in Canada. With marriage playing a much greater role in family law in the United States, advocates of same-sex marriage in that country face a greater barrier in persuading American courts to rule that the denial of the right to marry violates their Constitution. And legal realists would note that while the words of American constitutional documents are very similar to those in Canada, the political reality is that a narrow majority of Canadians favour same-sex marriage, while a clear majority of Americans are opposed to same-sex marriage. For all of the complex constitutional analysis, in some important respects, American courts are simply reflecting the policies favoured by a more conservative, religious country, while Canadian courts are reflecting sentiments and values in this country. It is far from coincidental that the American states where the courts have been most receptive to recognizing same-sex relationships, notably Vermont and Massachusetts, are also among the most politically liberal.[66] It would appear that the United States is moving towards greater recognition of same-sex relationships, with even President Bush accepting that there could be a role for civil unions for gays and lesbians. However, the movement towards recognition of same-sex marriage is clearly progressing much more slowly and unevenly than in Canada and it seems unlikely that in the foreseeable future American judges or politicians will give much recognition to same-sex marriage.

CONCLUSION: THE FUTURE OF MARRIAGE AND THE FAMILY IN CANADA

Marriage is one of the oldest and most universal social institutions. It has, however, dramatically changed in social and legal terms over the course of recorded history, and even today there is great variation around the world in the laws and mores of marriage in different countries.

The major changes of the last century and a half in the laws governing marriage were all controversial when they were introduced. There were divisive and highly publicized debates occurring between church leaders and politicians during the 1857 and 1968 Parliamentary divorce law

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[66] Outside of Vermont and Massachusetts, recent appellate decisions from the USA have consistently rejected constitutionally based arguments for legal recognition of same-sex relationships. See A. Liptak and T. Egan, "A Sharply Divided Washington Supreme Court Upholds State's Ban on Same-Sex Marriage" *The New York Times* (27 July 2006) A18.

reforms.[67] Like today's debate over same-sex marriage, past controversies were important to their societies, not only in purely functional terms for those couples directly affected, but also in symbolic and emotional terms for all of society. It is true, as opponents of reforms argued then, that family life was altered by these legal changes, but marriage and the family were not destroyed by these changes. Within a few years of these reforms, the controversy was over, and there was no movement for a return to a legal regime that no longer met the needs of those societies.

After contentious debate about the nature of marriage, Canada has permitted same-sex marriage. The recognition of same-sex marriage serves to promote equality and fairer treatment for gays and lesbians; it also reflects the recognition that marriage today is a relationship of equals, without clear gender roles, at least in legal terms. The recognition of same-sex marriage changes in some ways the social understandings of marriage, but it will not undermine the institution of marriage. Marriage will remain a fundamental social institution in Canada. There is social evidence that, in general, the best environment for rearing children is one in which there are two adults who are in a marital relationship, as opposed to one in which the parents are living common law or children are living in a single parent family.[68] The support that two adults in a loving, committed relationship give each other clearly has benefits for their parenting capacity. There must, however, be social and legal supports for all of those who care for dependents, whether or not they are married.

Marriage serves important social and economic functions for those who are childless, and even more so for families with children. Society as a whole benefits from the institution of marriage, and it will remain a fundamental institution in Canada. Given the benefits of marriage to children and adults, much of the present social and legal privileging of marriage should continue, though the time has clearly come to give same-sex couples the same rights as opposite-sex couples to enjoy marriage, with all of its attendant rights and obligations.

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[67] For a discussion of the controversy over 1968 divorce law reforms in Canada, see McKie, *supra* note 9 at 52-53.

[68] See, e.g., David Popenoe and Barbara Dafoe Whitehead, "Should We Live Together? What Young Adults Need to Know about Cohabitation before Marriage: A Comprehensive Review of Recent Research," (New Brunswick, NJ: The National Marriage Project Rutgers, January 1999) online: <http://www.smartmarriages.com/cohabit.html>; and J.Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* (New York: Harper Collins, 2002).