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Noel Semple
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IN SICKNESS AND IN HEALTH? SPOUSAL SUPPORT AND UNMARRIED COHABITANTS

Noel Semple*

When an intimate relationship breaks down and one of the people involved seeks money from the other, should it make any difference to the law whether or not they were formally married? At the close of the 20th century, the Canadian answer to this question seemed to be in the negative. Scholars argued that formal marriage should be irrelevant to family law,[1] and many judges seemed inclined to concur.[2] However, as we progress into the 21st century, it seems that formal marriage is staging a comeback. In 2002, the Supreme Court of Canada found that formal marriage, or the lack thereof, is significant

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1 See e.g. Law Commission of Canada, *Beyond Conjugality* (Ottawa: Minister of Public Works and Government Services, 2001); Winifred Holland, "Marriage and Cohabitation – Has the Time Come to Bridge the Gap?" in *Family Law: Roles, Fairness and Equality Special Lectures of the Law Society of Upper Canada* (Toronto: Thomson Canada Limited, 1993) 369 [Holland, "Bridge the Gap"]; Winifred Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000) 17 Can. J. Fam. L. 114; Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants* (Toronto: The Commission, 1993).

2 *Miron v. Trudel*, [1995] 2 S.C.R. 418 [*Miron*]; *M. v. H.*, [1999] 2 S.C.R. 3; *Rossu v. Taylor*, [1999] 1 W.W.R. 85 [*Rossu*].

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enough to constitutionally justify excluding an unmarried ex-cohabitant from the property division remedy available to a married person.[3] Shortly thereafter, same-sex couples won the right to enter formal marriages. For these couples, and for the overwhelming majority in the Canadian legal establishment which supported them, marriage was an institution desirable and significant enough to merit a long and expensive struggle.

Today, the significance of marriage depends on the remedy in question. Formal marriage is irrelevant to the Canadian law of child support, but in most provinces it is relevant to the property division and matrimonial home remedies. However, little or no attention has been paid to the significance of formal marriage to the law of spousal support.

This article takes the position that formal marriage *should* matter to the law of spousal support. I will argue that people who were *either* married to each other or had a child together should be treated differently than people who did neither of these things. While those who did one of these things should continue to receive spousal support consistent with the relevant statutes and the *Spousal Support Advisory Guidelines* (SSAG),[4] spousal support awards to couples who did neither ought to be driven by a different set of principles. Courts should only grant spousal support to unmarried cohabitants without child support entitlements if they can demonstrate a "contractual" or "compensatory" rationale for it, as the Supreme Court of Canada defined those terms in in

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

4 Department of Justice, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson (Ottawa: Department of Justice, July 2008), online: Department of Justice <http://canada.justice.gc.ca/eng/pi/pad-rpad/res/spag/ssag_eng.pdf> [SSAG].

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Bracklow v. Bracklow.[5] If these couples can demonstrate entitlement, the quantum and duration of the support award must reflect only the compensatory and contractual rationales. The "non-compensatory" rationale enunciated in *Bracklow*, I will argue, is premised on the quasi-contractual significance of marriage vows, and should not be applied absent a formal marriage. The provincial statutes should be amended so as to provide for this narrower basis of support for unmarried applicants without child support entitlements.

The first part of this paper reviews the present Canadian law of spousal support, the SSAG, and the application of the SSAG to unmarried cohabitants. Part Two argues that the application of the SSAG to unmarried cohabitants is inconsistent with *Bracklow*. Relying on social science evidence, the third part elaborates on the proposed reform and argues that marriage *should* matter in Canadian spousal support law. Finally, Part Four seeks to demonstrate that this proposal is consistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*.[6]

STATUS QUO

In Canada, spousal support awards between divorced persons are governed by the federal *Divorce Act*.[7] Each Canadian province and territory also has statutory provisions allowing awards to be made absent a divorce. Married people who have separated without divorce most commonly use these provisions. However, with the exception of Québec, all of

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5 [1999] 1 S.C.R. 420 [*Bracklow*].

6 *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

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

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Canada's provinces and territories also allow the order of spousal support between individuals who have never been married.

Traditionally and at common law, spousal support was available exclusively to married people.[8] Statutory reform gave unmarried opposite-sex cohabitants access to the remedy in the 1970s. British Columbia was the first province to undertake such reform in 1972,[9] Ontario did likewise in 1978,[10] and the other common law jurisdictions eventually followed suit.[11] In Québec, spousal support remains available only to those who marry or enter a "domestic partnership" contract.

Why was spousal support extended to the unmarried in the 1970s? The major Canadian family law reform proposals of the 1960s and 1970s do not endorse this reform.[12] However, the speeches of Attorney-General Roy McMurtry, the Minister responsible for the legislation in Ontario, suggest that, at least in this province, there were two predominant motives for the reform.[13] Firstly, McMurtry believed that non-marital cohabitations often involved exploitation of one partner by the

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8 Spousal support was known to the common law as "alimony" or "maintenance."

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

10 *Family Law Reform Act*, R.S.O. 1978, c. 152, ss. 14-15.

11 The last was Alberta, with the *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, which came into force in 2003.

12 See e.g. Royal Commission on the Status of Women in Canada, *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970); Ontario Law Reform Commission, *Report on Family Law: Part VI, Support Obligations* (Toronto: Ministry of the Attorney General, 1975) at 7.

13 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 98 (26 October 1976) at 4102 (Hon. Roy McMurtry).

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other. Extending spousal support to cohabitants would remedy this injustice and make it impossible to shirk a moral obligation to support by avoiding formal marriage.[14] Secondly, it was argued that the reform would protect the public purse by deflecting the support of ex-cohabitants from the provincial treasury onto their ex-partners.[15] At the time, there was a general consensus in the Legislature regarding these arguments, and the reform generated little controversy either in Ontario or British Columbia.

Today, ss. 29 and 30 of Ontario's *Family Law Act* are fairly typical of the Canadian family law statutes outside Quebec. These sections provide that "every spouse ... has an obligation to provide support for himself or herself and for the other spouse ... in accordance with need, to the extent that he or she is capable of doing so."[16] For this section, "spouse" is defined to include both married people and those who have "cohabited" either (a) "continuously for a period of not less than three years" or (b) "in a relationship of some permanence, if they are the natural or adoptive parents of a child."[17] The verb "to cohabit" is defined by the *FLA* as "to live together in a conjugal relationship."[18] "Conjugal" is not defined. A list of criteria of conjugality was provided by the case of *Molodowich v. Pentinnen*,[19] and the Supreme Court of Canada has endorsed

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14 *Ibid.*, No. 98 (26 October 1976) at 4103 (Hon. Roy McMurtry). See also *ibid.* No. 119 (23 November 1976) at 4957 (Hon. Roy McMurtry).

15 *Ibid.*, No. 98 at 4103; see also "McMurtry Says: Man Runs Away, We All Pay" *Toronto Star* (13 November 1976).

16 R.S.O. 1990, c. F.3 [*FLA*].

17 *Ibid.*, s. 29.

18 *Ibid.*, s. 1(1).

19 (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) at 378ff [*Molodowich*].

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these as "the generally accepted characteristics of a conjugal relationship."[20] Whether or not a judge follows the *Molodowich* criteria, he or she will usually interpret "conjugal relationship" to mean a relationship which is sufficiently similar to that judge's idea of a "traditional marriage."[21]

If an applicant passes the threshold and a spousal support award is made, s. 33(8) of the *FLA* requires the award to fulfill four purposes:

> a) recognize the spouse's ... contribution to the relationship and the economic consequences of the relationship for the spouse ...;
>
> b) share the economic burden of child support equitably;
>
> c) make fair provision to assist the spouse ... to become able to contribute to his or her own support; and
>
> d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).[22]

These objectives apply to all spousal support awards, regardless of the marital or parental status of the applicant and respondent.

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20 *M. v. H.*, *supra* note 2 at para. 59.

21 A comprehensive summary of case law on this point can be found in Winifred Holland & Barbro Stalbecker-Pountney, eds., *Cohabitation: The Law in Canada*, looseleaf (Toronto: Carswell, 1992).

22 *Supra* note 16, s. 33(8).

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Bracklow v. Bracklow and its Aftermath

Bracklow[23] is the most recent comprehensive Supreme Court consideration of spousal support. While technically an interpretation of British Columbia's *Family Relations Act*,[24] it is routinely applied in support cases dealing with other provincial statutes as well as the federal *Divorce Act*. Canadian legal scholars excoriate the judgment's ambiguity,[25] and Bench and Bar have been able to cite it in support of a wide variety of mutually inconsistent pet theories of spousal support. I will suggest later in this paper, however, that *Bracklow's* reasoning has important corollaries for unmarried spousal support claimants, and that a careful reading of the case supports this paper's argument.

Mr. and Mrs. Bracklow were married in 1989, after four years of cohabitation. They separated in 1992 and divorced in 1995. As a consequence of psychiatric problems

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23 *Supra* note 5.

24 R.S.B.C. 1996, c. 128, ss. 89(1), 93(2)(a).

25 See Department of Justice, *Developing Spousal Support Guidelines in Canada: Beginning the Discussion* (Background Paper) by Carol Rogerson (Ottawa: Department of Justice Canada, 2002) at 24 [Rogerson, *Background Paper*]. Professor Rogerson concluded that "the basis of *Bracklow's* non-compensatory support is conceptually confused. The *Bracklow* judgment, which did not draw on any of the academic literature articulating alternative theories of spousal support, failed to articulate a coherent theoretical basis for non-compensatory support, giving rise to widely differing interpretations by judges and lawyers." See also Carol Rogerson, "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" (2001) 19 Can. Fam. L.Q. 185 [Rogerson, "Post-*Bracklow*"]; Rollie Thompson, "Everything is broken: No more spousal support principles?" (2001) [unpublished, archived at The Continuing Legal Education Society of British Columbia], online: The Continuing Legal Education Society of British Columbia <http://www.cle.bc.ca>.

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that predated and were unrelated to the marriage, Mrs. Bracklow became unable to work in 1991.[26] She had no income other than provincial benefits and the possibility of spousal support. Although the Bracklows had married and divorced, the application was decided at first instance under British Columbia's *Family Relations Act* in 1995. The Bracklows' dispute about the appropriate quantum and duration of spousal support was finally settled by the Supreme Court of Canada in 1999.

The trial judge found that only a "compensatory" rationale could justify a support order. The compensatory rationale recognizes that, in the course of an intimate relationship, one or both parties often sacrifice future earning power. Most often, an individual will partially or completely forego paid employment in order to raise children or do other domestic work. Once the relationship breaks down, the party who has done so is often unable to resume her career where she left it.[27] Even if the individual was never employed before the relationship began, it may have damaged her earning capacity insofar as if it had not occurred she might have become employed and ascended a few rungs of the salary ladder during the period of the relationship. Conversely, the other party has been freed from domestic labour and has therefore climbed to a higher income. The compensatory rationale for spousal support is that, because the earning-power sacrifices of one party benefited the other, the post-breakup cost of those sacrifices should be shared by both parties. In 1992, *Moge v. Moge*[28] comprehensively enunciated this theory, establishing that a higher-earning ex-spouse has a duty to compensate the

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26 *Bracklow*, *supra* note 5 at para. 9.

27 I refer to this individual as a female, but this is not meant to imply that only women undertake this role.

28 [1992] 3 S.C.R. 813 [*Moge*].

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other spouse for financial disadvantages suffered as a result of the relationship. The compensatory rationale is reflected in the first two of the four purposes of spousal support enunciated by Ontario's *FLA*: (i) to recognize the spouse's contribution and the economic consequences of the relationship,[29] and (ii) to equitably share the economic burden of child support.[30]

Mrs. Bracklow's relationship with Mr. Bracklow, however, had caused her no financial disadvantage. Her curtailed employment during the relationship and her inability to work after it ended were not consequences of the relationship nor of sacrifices she made for it; rather, they were consequences of an unrelated medical condition. *Moge* and the compensatory rationale therefore offered no assistance to her spousal support claim. On this basis, the lower courts in *Bracklow* found that the wife had no entitlement to spousal support.[31]

Justice McLachlin, writing for a unanimous Supreme Court, overturned these decisions. She found that spousal support serves functions beyond mere compensation. She identified two models of marriage, each of which can support one or more rationales for spousal support. The "independent" model "sees each party to a marriage as an autonomous actor who retains his or her economic independence throughout marriage."[32] The independent model suggests that compensatory support is designed to achieve a "clean break" between the parties. This model of marriage is consistent with

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29 *Supra* note 16, s. 33(8)(a).

30 *Ibid.*, s. 33(8)(b).

31 *Bracklow v. Bracklow* (1995), 13 R.F.L. (4th) 184, [1995] B.C.J. No. 457 (QL) (however, because Mr. Bracklow had agreed to it, the Trial Court ordered a continuation of support for 18 months).

32 *Bracklow*, *supra* note 5 at para. 24.

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the "contractual" rationale for spousal support, in which a prenuptial or separation agreement between the spouses justifies a support order.[33]

The second model of marriage is that of "basic social obligation," which has the non-compensatory spousal support rationale as its corollary.[34] This rationale does not depend on earning-power sacrifices, formal contracts, or anything else which occurred during the marriage. Rather, it gives effect to the parties' moral duty to support each other. The non-compensatory rationale animates the latter two objectives listed in the *FLA* — (iii) to assist the spouse to become able to contribute to his or her own support,[35] and (iv) to relieve financial hardship, if this has not already been done by orders made pertaining to the matrimonial property and home.[36] It was the "non-compensatory" rationale that justified a spousal support award for Mrs. Bracklow in the circumstances. The case was returned to a lower court to determine the quantum and duration of the award in light of the principles enunciated by the Supreme Court.

Bracklow left *Moge's* compensatory rationale for spousal support undisturbed, but enunciated two other rationales. The "contractual" rationale simply means that spousal support may be justified by an agreement between the parties. The contractual rationale and the mechanism by which it is translated into a spousal support order are straightforward,

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33 Rogerson, "Post-*Bracklow*", *supra* note 25. The judgment provided very little elaboration of the "contractual" rationale, but according to Professor Rogerson "most have assumed that in its references to the contractual model the Court had in mind formal marriage and cohabitation contracts and separation agreements."

34 *Bracklow*, *supra* note 5 at para. 23.

35 *Supra* note 16, s. 33(8)(c).

36 *Ibid.*, s. 33(8)(d).

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although the circumstances in which such a domestic contract can be voided due to hardship on one of the parties thereto are controversial.[37]

The third spousal support rationale was labeled "non-compensatory" by *Bracklow*. This unhelpful moniker describes not what the rationale is but rather what it is not. One might expect that it is a contingency to be used when no other basis for an award can be found, but *Bracklow* has generally been read to mean that judges can turn to the non-compensatory rationale even if the other two alternatives are applicable. In fact, in a majority of the post-*Bracklow* cases, the analysis has been described as exclusively "non-compensatory." Specifically, it has proceeded through an examination of the means and needs of the two parties.[38] The applicant seeks to prove her needs by submitting a budget showing the inability of her income to meet her expenses. The respondent, in turn, submits a budget showing his lack of surplus. The Court evaluates the budgets for reasonableness and against one of a number of extant ideas of "need," then orders a spousal support award.

A "compensatory" analysis, by contrast, involves a judicial inquiry into what happened during the relationship and an attempt to distribute the applicant's compensable earning-power losses equally between the parties. Only a minority of post-*Bracklow* cases have relied exclusively on this type of analysis,[39] although a number of cases involving long, traditional marriages have used both non-compensatory and compensatory reasoning. This fading of the compensatory rationale after *Bracklow* is probably due less to judicial

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37 *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303.

38 Rogerson, *Background Paper*, *supra* note 25 at 9-11.

39 *Ibid.*

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disapproval of the reasoning (which is cogent and uncontroversial) than to the daunting challenge of quantifying compensable sacrifices. Doing so would require expensive and unreliable expert testimony about matters such as the job the applicant would have had if the relationship had never occurred and whether the respondent would have been promoted if he had needed to change more diapers.

The issue of entitlement to spousal support is a further source of ambiguity. Neither the *Divorce Act* nor any of the provincial statutes provide that an individual is entitled to a spousal support award simply because he or she was in a certain type of marital or non-marital relationship. In principle, an applicant for spousal support must therefore demonstrate something further to establish *entitlement* to an award. However, in the post-*Bracklow* period, the entitlement threshold was seldom a serious impediment to a spousal support claim. Entitlement generally followed from a demonstration of a) a marriage or a non-marital relationship passing the threshold test described above; and b) a post break-up income differential between the parties.[40]

Open-ended statutes, an ambiguous leading case, and evidentiary challenges were a recipe for theoretically unmoored and highly discretionary spousal support law in the post-*Bracklow* period. One consequence has been that practitioners and parties have had great difficulty predicting what spousal support order a court might make in a given factual scenario.[41] Many individuals potentially entitled to spousal support were deterred from claiming it by this ambiguity. However, a more salutary consequence was that judges retained autonomy to reflect the factors they deemed relevant in making spousal support awards. After following the detailed statutory

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40 *Ibid.* at 12.

41 *Ibid.* at 6.

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instructions for child support and property division, decision-makers were able to pursue overall economic justice between the parties in making a spousal support award.

The Spousal Support Advisory Guidelines

The Spousal Support Advisory Guidelines[42] (SSAG) were designed to bring predictability and consistency to the law, at the expense of judicial discretion. Prepared by Professors Carol Rogerson and Rollie Thompson and published by the Department of Justice in January 2005, the SSAG provide recommended ranges for the duration and quantum of spousal support awards. The ranges are calculated from formulas with three inputs and two outputs. The inputs are (i) whether there is a child support obligation between the parties;[43] (ii) the differential between the spouses' incomes;[44] and (iii) the length of the marriage. The outputs are (i) quantum (amount to be paid per month) and (ii) duration (period of time for which the support is to be paid.)

Because this paper's argument only involves parties who are not parents together, it will focus on the "Without Child Support" SSAG formula.[45] Once entitlement to spousal support is demonstrated, the without-child support formula predicts a range for duration and quantum of the order using the length of the relationship and the post-breakup income

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42 *Ibid.*

43 This obligation will usually exist if they are the joint parents of a child that is under 16 years of age, and will sometimes exist if they are the joint parents of an older child.

44 This is based on the gross (before tax) incomes of the parties, as it is defined in the *Federal Child Support Guidelines*, S.O.R./97-175; *supra* note 4 at 46.

45 *Supra* note 4, c. 7.

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differential between the parties. Essentially, an entitled applicant receives a portion of the difference between his or her post-breakup income and that of the respondent. The longer the relationship, the higher the portion, up to a maximum range of between 37.5 and 50% of the income differential for relationships that lasted 25 years or longer. The recommended duration of the order also increases with the length of the relationship, with indefinite duration for relationships in excess of 20 years.

The SSAG did not adopt *Bracklow's* three-part classification of spousal support rationales. Indeed, they could not possibly have done so. Distinguishing between cases in which the compensatory rationale is present and those in which it is absent would have undermined the purpose of the SSAG — to allow practitioners and judges to predict a reasonable range without the necessity of detailed factual inquiries. As for Bracklow's non-compensatory rationale, it is "hopelessly confused,"[46] and therefore incapable of being explicitly rendered into formulas with quantum and duration outputs.

The SSAG therefore rely on two theories not mentioned in *Bracklow* — "income sharing" and "merger over time."[47] "Income sharing" is defined by the SSAG as "a formulaic method used to determine the amount of support to be paid ... based upon the incomes of the ... spouses, rather than expense budgets, budget deficits, or some other method."[48] The phrase "income sharing" is sometimes used to denote a normative theory of why and how spousal support should be paid, but for the SSAG it is simply "a practical and efficient way of implementing many support objectives such as

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46 Rogerson, "Post-*Bracklow*", *supra* note 25.

47 *Supra* note 4 at 27, 53.

48 *Ibid.* at 160.

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compensation for the economic advantages and disadvantages of the marriage or the recognition of need and economic dependency."[49] The SSAG share income by specifying spousal support amounts in terms of percentage shares of the income differential between the parties after the relationship breakdown.

"Merger over time" is the reason why the SSAG produce larger awards for longer relationships. It is not itself a rationale for spousal support, but rather a theory *about* the "compensatory" and "non-compensatory" rationales and the way they should be translated into quantum and duration. "Merger over time" holds that, to give proper effect to these rationales, the quantum and duration of awards should vary according to the length of the relationship. (*Bracklow's* contractual rationale is not part of the SSAG; if a contract to pay support exists the parties or judge will generally rely upon it in lieu of looking to the SSAG, unless the legitimacy of the contract can be impugned or it is clearly inappropriate given the means and needs of the parties.)

The SSAG were not an attempt to rewrite the law of spousal support on the basis of these or any other theories, but rather to "build on current practice."[50] Rogerson and Thompson began with a number of hypothetical fact scenarios, and asked prominent family lawyers and judges what sort of spousal support awards the scenarios would produce. The formulas and the exceptions thereto emerged from this process,[51] and were subsequently tested on other fact patterns from case law. Income sharing and merger over time are the theories which fit the formulas and the facts.

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49 *Ibid.* at 28.

50 *Ibid.* at 17.

51 *Ibid.*

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The SSAG are purely advisory and there is no plan to legislate them. However, they have already found wide acceptance among practitioners and courts.[52] In the year after their release in draft format, the SSAG were downloaded over 50,000 times from the Department of Justice website.[53] They were cited in 400 judicial decisions by February of 2008.[54] The following passage from the judgment of Prowse J.A. of the British Columbia Court of Appeal in *McEachern v. McEachern*[55] aptly summarizes the impact of the SSAG on the law of spousal support:

> [T]he Advisory Guidelines are simply guidelines; they are not law. The formulas need not be slavishly adhered to by judges, who must always have regard to the particular facts before them.... But, it is fair to say that the Advisory Guidelines have been accepted by this Court, and by the trial courts, as a useful tool in determining the appropriate range of awards in most cases. In *Redpath v. Redpath*, [2006] B.C.J. No. 1550, 2006 BCCA 338, this Court went so far as to indicate that an order of spousal support which falls substantially above or below the suggested range could give rise to an error in law, unless a reasonable explanation was provided for the discrepancy. This is

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52 Carol Rogerson & Rollie Thompson, "Issues for Discussion: Revising the Spousal Support Advisory Guidelines" (Draft) (20 June 2006), online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/documents/rogerson/spousal_issuespaper.doc>.

53 SSAG, *supra* note 4 at 21.

54 *Ibid.*

55 2006 BCCA 508, [2007] 3 W.W.R. 471.

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> understandable since, as stated by this Court in *Yemchuk v. Yemchuk*, [2005] B.C.J. No. 1748, 2005 BCCA 406 (at para. 64): "... the Advisory Guidelines are intended to reflect the current law, rather than to change it." At this stage in their development, the Advisory Guidelines are not a substitute for relevant authorities, but a supplement to them.[56]

In *Fisher v. Fisher*,[57] the Ontario Court of Appeal suggested that if counsel comprehensively address the Guidelines in their arguments, and the judge makes an award outside the SSAG range, the written reasons should explain why.

The SSAG and Unmarried Ex-Cohabitants

The SSAG acknowledged that the guidelines were "specifically ... developed under the federal *Divorce Act* and ... intended for use under that legislation."[58] However, Rogerson and Thompson anticipated that the SSAG might be used under provincial legislation, given that courts have applied almost identical law to make spousal support determinations under federal and provincial statutes.[59] Applications by unmarried ex-cohabitants would "not cause any difficulties," they wrote, because the SSAG "rely upon the period of spousal cohabitation" rather than the period of the marriage as a formula input.[60]

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56 *Ibid.* at para. 64.

57 2008 ONCA 11, [2008] O.J. No. 38.

58 *Supra* note 4 at 29.

59 *Ibid.*

60 *Ibid.* at 27.

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As predicted by Professors Rogerson and Thompson, courts across the country have used the SSAG to guide spousal support determinations under provincial statutes as well as under the *Divorce Act*. A Nova Scotia family court judge recently stated, "[t]here is no reason to conclude that these Guidelines, drafted no doubt primarily or exclusively having regard to the federal *Divorce Act*, would be any less helpful in dealing with our provincial legislation."[61] In most provincial legislation SSAG cases, the couples have separated but have not commenced divorce proceedings.

However, there were also, as of May 2008, more than 10 reported Canadian cases in which the SSAG were used to determine a support award for an unmarried cohabitant without a child support entitlement.[62] None of these cases identify the lack of a formal marriage as an argument against using the SSAG, or as a relevant factor in the exercise of judicial discretion within the SSAG ranges. One of the cases, *Conquergood v. Dalfort*, specifically asserts that, so long as the threshold conjugality test is met, the quality of the relationship between unmarried parties is irrelevant to the determination of spousal support:

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61 *H. (H.E.) v. H. (S.L.)*, 2005 NSFC 19, 21 R.F.L. (6th) 310 at para. 7.

62 The most recent of these include *Bramhill v. Dick*, 2007 BCSC 262, 155 A.C.W.S. (3d) 1183; *Kerr v. Baranow*, 2007 BCSC 1863, 47 R.F.L. (6th) 103; *Conquergood v. Dalfort*, 2007 BCSC 1556, 165 A.C.W.S. (3d) 134 [*Conquergood*]; *Briere v. Saint-Pierre*, 159 A.C.W.S. (3d) 107, [2007] O.J. No. 2926 (QL); *Kauwell v. Melnyk*, 2007 BCSC 485, 156 A.C.W.S. (3d) 151; *Elezam v. Ireland*, 2006 ABPC 230, [2006] A.J. No. 1374 (QL); *Wilson v. McDougald*, 2006 BCSC 1155, 152 A.C.W.S. (3d) 283; *E.K.G.D. v. L.W.P.*, 2006 BCSC 1721, 153 A.C.W.S. (3d) 640; and *G.L. v. D.W.*, 2006 BCPC 243, [2006] B.C.J. No. 1293 (QL).

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> [A] relationship is either marriage-like or it is not marriage-like. There is no half measure, with some marriage-like relationships resulting in full spousal support obligations, and others resulting in reduced obligations.[63]

APPLYING SSAG "WITHOUT CHILD SUPPORT" FORMULA TO THE UNMARRIED IS CONTRARY TO *BRACKLOW*

Because *Bracklow*'s tripartite classification of spousal support theories cannot provide a theoretical basis for support guidelines, the SSAG adopt theories (income sharing and merger over time) which *can* be translated into guidelines. When applied to married people, the SSAG do not contradict *Bracklow,* and cannot be faulted for de-emphasizing it. The formulas reflect the income sharing and merger-over time theories to give divorced persons awards which reflect both compensatory and non-compensatory entitlements, while their advisory nature allows the decision-maker to give effect to *Bracklow*'s contractual rationale if there is occasion to do so.

However, the application of the SSAG's without-child-support formula to unmarried people is problematic. As I will argue, the non-compensatory rationale for spousal support enunciated in *Bracklow* is premised on the quasi-contractual consequence of formal marriage. If this is so, it is inapplicable to unmarried people. Because the SSAG without-child support formula elides the compensatory and non-compensatory entitlements, it produces an inappropriate award for an applicant who was not married to and never had a child with the respondent.

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63 *Conquergood, ibid.* at para. 79.

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"A contract," according to the definition in a leading text, "is a promise the law will enforce ... when there are sufficient reasons for justice to require enforcement."[64] Before it will require enforcement, the law usually requires that a party give consideration for the promise. Consideration is the transfer of something of value from the person seeking enforcement to the person against whom enforcement is sought.[65] However, the consideration may itself be a promise flowing in the other direction, so long as this promise has value.[66] Marriage is not a formal, enforceable contract of support, because the vows lack the necessary specificity to create a reasonable expectation of a certain dollar amount per month after relationship breakdown.

I will argue, however, that marriage *is* a "quasi-contract" for spousal support, because people who marry can be reasonably understood to be promising to support each other. Each party makes this promise to the other, and this mutual exchange constitutes consideration. One of the reasons why the law should order spousal support is the same reason the law enforces contracts — because it is a reasonable expectation engendered by a promise for which consideration was paid. This marriage-dependent, quasi-contractual reason, I will argue, *is* the "non-compensatory" rationale for spousal support.

While *Bracklow* does not explicitly hold marriage as a quasi-contract, it does strongly imply that wedding vows are significant. The judgment is written using the language of

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64 S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto: Canada Law Book, 1998) at 11.

65 *Ibid.* at 85.

66 *Ibid.* at n. 297.

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marriage, not the language of relationship.[67] "[W]hen two spouses are married," wrote McLachlin J., "they owe each other a mutual duty of support."[68] "Marriage," she adds, "is a joint endeavour.... The default presumption of this socio-economic partnership is mutuality and interdependence."[69] One oft-cited passage from the judgment emphasizes the open-endedness of the commitment — "Marriage, while it may not prove to be 'til death do us part', is a serious commitment not to be undertaken lightly. It involves the *potential* for lifelong obligation."[70]

Matrimonial language is also prominent in McLachlin's description of the "basic social obligation" theory, which she says underlies non-compensatory support orders. This theory "postulates each of the parties to the marriage agreeing, as independent individuals, to marriage and all that it entails — including the potential obligation of mutual support."[71] According to the SSAG Proposal, this theory "grounds the obligation to meet that need in the status of marriage itself."

MacLachlin, however, also states that "[i]t is not the bare fact of marriage, so much as the *relationship* that is established and the expectations that may reasonably flow from it that give rise to the obligation of support under the statutes."[72] Later, she reiterates that "it is not the act of saying 'I do', but the marital relationship between the parties that may

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67 Rogerson, "Post-*Bracklow*", *supra* note 25 at n. 37.

68 *Bracklow*, *supra* note 5 at para. 20.

69 *Ibid.*

70 *Ibid.* at para. 57 [emphasis in original].

71 *Ibid.* at para. 30.

72 *Ibid.* at para. 44 [emphasis in original].

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generate the obligation of non-compensatory support pursuant to the Act."[73] It is somewhat difficult to reconcile these statements with the emphasis placed on marriage elsewhere in the judgment.[74] The most coherent understanding of this contradiction is that formal marriage is a *necessary but not sufficient* condition for entitlement to non-compensatory support.

The SSAG document, on the other hand, does not mention the marriage vow in explaining the non-compensatory rationale. Rather, it argues that the merger-over-time theory which underlies the formulas reflects both the compensatory and non-compensatory rationales from *Bracklow*.[75] There are two non-compensatory ideas underlying merger-over-time as Rogerson and Thompson explain it. I will argue that both of these require a marriage vow in order to make sense.

The first non-compensatory idea which the SSAG identify is that, absent a spousal support award, the lower-income spouse will be left further below the marital standard of living than the higher-income spouse. A spousal support award should be made to protect the lower-income spouse from this "differential loss."[76]

However, if X and Y have a consensual arrangement which subsequently breaks down, the fact that Y loses more from the breakdown than X does not in of itself provide a reason why X should pay money to Y. Before the law will order X to pay Y in such circumstances, Y must demonstrate either that X was unjustly enriched or that Y has a reasonable

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73 *Ibid.* at para. 53.

74 Rogerson, "Post-*Bracklow*", *supra* note 25.

75 SSAG, *supra* note 4 at 51.

76 *Ibid.* at 53-54.

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expectation engendered by a promise made by X. When there is no compensatory rationale and no formal support contract present, the only promise made by X capable of serving this function is the marriage vow.

The SSAG's second non-compensatory justification for merger over time is that it reflects "elements of reliance and expectation that develop in spousal relationships and increase with the length of the relationship."[77] In an earlier paper, Professor Rogerson suggested that the non-compensatory rationale is "grounded in ... reliance."[78] Reliance and expectation are types of damage for breach of contract in the common law.[79] Canadian law only fulfills expectations or vindicates reliance when the party who expected or relied was given a promise by the party from whom he or she is seeking satisfaction. The marriage vow is the promise that justifies the payment of reliance and/or expectation damages to the applicant for spousal support.

It is possible to apply a logical process of elimination to the ambiguity of the non-compensatory rationale. Other than an enforcement of the quasi-contractual marriage vow to support, what else could it possibly be? It cannot be a form of unjust enrichment, because that is the domain of the compensatory rationale. Nor can it be tortious or criminal in nature, because there is no finding of fault on the part of the respondent.

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77 *Ibid.* at 55.

78 Rogerson, "Post-*Bracklow*", *supra* note 25.

79 Waddams, *supra* note 64 at 515. See also Lon Fuller & William R. Perdue, Jr., "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52.

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One might argue that protection of the public purse is the non-compensatory rationale. Creating spousal support obligations reduces the likelihood that those exiting intimate relationships will receive public social assistance benefits. As noted above, this was among Ontario Attorney-General Roy McMurtry's two stated rationales for extending spousal support to the unmarried in 1978. *M. v. H.*, a Supreme Court spousal support case discussed in detail below, recognized relief of the public purse as among the legislative objectives of spousal support.[80] *Bracklow* also seemed to endorse this reasoning. In explaining the "mutual obligation view of marriage," Justice McLachlin wrote that it "places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls."[81]

Bracklow did not, however, elevate relief of the public purse into an independent rationale for spousal support orders on par with the compensatory and contractual rationales. Indeed, doing so would be unconscionable. In general, the moral duty to lend support where it is needed rests on Canadian taxpayers collectively. A law that makes spousal support orders with no justification other than protecting the public purse would allow the state to offload this duty onto a single individual who has no good reason to bear it. This would be no fairer than requiring employers to support all of their ex-employees who ever become indigent after leaving employment. The public purse argument only acts as an *additional reason* to impose the support of a needy individual on a private party with whom that individual had a conjugal relationship when there is already some good reason to do so:

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80 *Supra* note 2. See also *Rossu*, *supra* note 2 at para. 138.

81 *Bracklow*, *supra* note 5 at para. 31.

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> Without more, the general desire to tackle a given social problem does not provide any ethical justification for why responsibility for addressing it should fall on particular individuals, rather than other people, the state, the general population as a whole or no one at all.[82]

If the non-compensatory rationale is not a form of unjust enrichment, not tortious or criminal, and not an arbitrary offloading of society's support obligation onto an individual, then it must be the result of a promise. Promises qualifying as formal support contracts have their own rationale in *Bracklow*. It must therefore be the only other conceivable promise which arises in conjugal relationships — the marriage vow. Because marriage is a voluntary agreement between two adults, it provides a quasi-contractual reason why those two adults have support duties *other* than compensating each other for earning power sacrifices and giving effect to their subsequent formal contacts. Marriage is the reason why the losses associated with breakdown should be shared equally between the parties, and it is the reason why the reliance and expectation of the applicant should be fulfilled by the law. Those who are not married (and lack common children, the presence of whom may provide alternate potential rationales for spousal support) are not entitled to non-compensatory support. The SSAG, which elide compensatory and non-compensatory support, should not therefore be applied to them.

Legislative amendments to provincial statutes are necessary to give effect to this analysis. For example, as noted above, s. 33(8) of Ontario's *FLA* requires spousal support awards to accomplish four objectives, two of which are

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82 Sally Sheldon, "Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?" (2003) 66(2) Mod. L. Rev. 175 at 188ff.

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compensatory and two of which are non-compensatory. (None of the four seems to be contractual in nature, but family court judges do not need statutory authority to give effect to contracts between the parties.) The Ontario *FLA* should be amended so as to distinguish unmarried people without child support obligations from all other "spouses." Spousal support awards made to those in the former category should only reflect the first two elements of s. 33(8) — recognizing the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse[83] and sharing the economic burden of child support equitably.[84]

WHY MARRIAGE SHOULD MATTER

From the point of view of spousal support applicants, is it just to attach significance to the presence or absence of a formal marriage? Suppose Sarah and Sanjay are a married childless couple, and Jim and Jane are an *unmarried* childless couple. Suppose further that the two couples intermingle their lives and their finances in the same way — the two relationships are functionally identical. Suppose both married Sarah and Sanjay and unmarried Jim and Jane stay together for 15 years, and in each couple the man makes $50,000 more than the woman after the split. For Sarah, the SSAG would suggest a spousal support award from Sanjay of between $11,250 and $15,000 per year, to last for between 7.5 and 15 years.[85] This article's

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83 *Supra* note 16, s. 33(8)(a).

84 *Ibid.*, s. 33(8)(b).

85 SSAG, *supra* note 4 at 52. The without-child-support formula: "Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the gross income difference) for each year of marriage (or more precisely, year of cohabitation), up to a maximum of 50 percent. The range remains fixed for marriages 25 years or longer, at 37.5 to 50 percent of income difference. (The upper end of this maximum range is capped at the amount that would result in

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proposal is that Jane, unlike Sarah, would have to demonstrate compensatory or contractual justification in order to receive a spousal support award, rather than relying on the SSAG. If Jane never quit or curtailed paid employment during the relationship, and Jane and Jim never contracted for post-relationship support, then it is likely that no spousal support award would be payable.[86]

Is it fair to create such a stark difference between Sarah and Jane based on whether or not they married 15 years earlier? I will argue below that it *is* fair to do so, because marriage represents a meaningful promise to support and mere cohabitation does not. However, two preliminary observations should first be made.

Firstly, it is *fairer* to do so than it would be if spousal support were a public benefit. When a public benefit is at issue, denying it when it ought to be paid can create a drastic

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equalization of the spouses' net incomes—the net income cap). Duration ranges from .5 to 1 year for each year of marriage. However support will be indefinite (duration not specified) if the marriage is 20 years or longer in duration or, if the marriage has lasted five years or longer, when years of marriage and age of the support recipient (at separation) added together total 65 or more (the rule of 65)."

[86] It should be noted that in such circumstances, it is unlikely that Jane would have even sought child support. See Rogerson, "Post-*Bracklow*", *supra* note 25 ("pure non-compensatory cases are rare and constitute the periphery rather than the core of the law of spousal support").

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impact on a single individual. On the other hand, granting it where it ought *not* to be paid creates a cost that is spread among tens of millions of Canadian taxpayers, according to their ability to pay. Because the consequences of mistakenly denying the benefit are more severe than the consequences of mistakenly granting it, there should arguably be a bias towards liberality in setting and administering rules for granting public benefits.

Spousal support, by contrast, is a private obligation. The cost of excessive generosity in spousal support law is not diffused among taxpayers, but rather falls on a single individual. This individual has a higher income than the recipient, but this is a relatively poor indication of ability to pay. In the SSAG, support award ranges are provided for payor incomes as low as $20,000.[87] Moreover, neither the statutes nor the SSAG automatically take account of the respondent's other possible obligations, such as second families.[88]

Secondly, it bears repeating that this paper argues that marriage should only matter in spousal support when there is no child support obligation between the parties. The argument is qualified in this way for two reasons, despite the fact that nothing about the non-compensatory rationale seems to depend on the presence or absence of children. Firstly, when a spousal support applicant is the custodial parent of the respondent's children, there may be a fourth rationale in addition to the three mentioned in *Bracklow*. In such circumstances, spousal support awards may be made to protect the best interests of the child and to minimize the impact upon the child of the parents' relationship breakdown. In principle, the remedy of child support is meant to give effect to this rationale, but it may not

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87 *Supra* note 4 at 34.

88 *Ibid.* at 150.

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always be sufficient to do so.[89] Legally discriminating in spousal support law between married parents and unmarried parents would run the risk of disadvantaging children of cohabitants relative to children of married people.[90] It is better to require more from respondents in such circumstances than to risk such an unconscionable outcome.

The second reason for excluding joint parents from this article's proposal is that parenthood usually substantially increases the compensation that the respondent should be providing to the applicant.[91] The lion's share of applicants' compensable sacrifices occurs in child rearing and the accompanying reduction to participation in the labour force. When a spousal support order is made, if the children are still minors and the applicant is the custodial parent, these compensable losses are not only retrospective but also prospective. In essence, the applicant should be compensated for future earning power sacrifices which will be necessitated by ongoing childrearing responsibilities. Child support, arguably, does not do so.[92] The SSAG describe this as a

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89 Nicholas Bala, "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29 Queen's L.J. 41.

90 John Eekelaar, *Family Law and Social Policy* (London: Weidenfield and Nicholson, 1984).

91 *M. v. H.*, *supra* note 1 at para. 353, Bastarache J., concurring ("Given the findings in *Symes v. Canada*, [1993] 4 S.C.R. 695, and *Moge*, *supra* note 29, there can be no doubt that the presence of these children enhances the likelihood of the economic vulnerability of women upon the breakdown of a conjugal and permanent relationship.").

92 Federal/Provincial/Territorial Family Law Committee, *Report and Recommendations on Child Support* (Ottawa: Department of Justice, 1995).

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"parental partnership"[93] analysis, and it is one of the key reasons why the guidelines have a separate and more elaborate set of formulas for spousal support awards made in the context of a child support obligation. Although this article's proposal would leave the compensatory rationale for awards between unmarried ex-cohabitants intact, the full SSAG "*with child support*" entitlement is a complete code calculated to ensure that compensation is paid for both past and future sacrifices.

Marriage: A Promise to Support

Above, I argued that the non-compensatory rationale for spousal support depends on formal marriage, which should be given quasi-contractual effect in spousal support. Are people who marry each other actually promising to support each other? Or do they usually marry for other reasons, reasons to which the law should not attach support consequences? Justice L'Heuereux-Dubé observed that it is "highly problematic to conceive of marriage as a type of arrangement people enter into with the legal consequences of its demise taken into account."[94] However, it may be easier to support a more modest claim — that people who marry generally feel a stronger commitment to mutual support than people who do not, and that formal marriage is therefore a legitimate proxy for intention to commit to long-term support.

In this section, I survey first reasons for marrying, then *non*-reasons for marrying; and finally reasons for *not* marrying. I reach three conclusions. Firstly, while people choose to marry for a wide variety of reasons, a substantial number of those undertaking wedding vows understand themselves to be making a mutual, open-ended commitment to support each other. Secondly, that marriage today is a voluntary,

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93 *Supra* note 4 at 73.

94 *Walsh, supra* note 3 at para. 143, L'Heureux-Dubé J., dissenting.

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unconstrained exercise of free will made by adults in the context of a viable alternative — cohabitation. Thirdly, the average unmarried cohabitant lacks the intention and commitment to support his or her counterpart which the average married person has, while the law permits unmarried cohabitants who *do* have this intention and commitment to express it through contract. Marriage is therefore a fairly good proxy for an intention and commitment to support on the part of the parties thereto. This explains why the non-compensatory rationale is, for married people, a sensible enforcement of a commitment to support. It also explains why unmarried cohabitants, who have made no such commitment, should not be treated as if they have.

1. Reasons for Marrying

Why do Canadians get married? A unique formula of motivations propels each Canadian who arrives at an altar. The formula of the person who proposes marriage need not necessarily be identical to that of the person who accepts. However, there is strong evidence that many people marry because they want to make a mutual commitment to support each other. Many religious traditions have marriage rites which emphasize commitment. For example, marriages in the Anglican Church of Canada involve a promise "to have and to hold from this day forward; for better, for worse, for richer, for poorer, in sickness and in health."[95] There is reason to believe that marital vows to support are not just empty words — they reflect a genuine commitment to support each other on the part of the people undertaking them.

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95 "The Solemnization of Matrimony" in Anglican Church of Canada, *The Book of Common Prayer* (Toronto: General Synod of the Anglican Church of Canada, 1962).

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Scholars seeking to explain the decision to marry have done so, naturally enough, by asking newlyweds about their motivations. Canadian data is difficult to come by, but several British studies are insightful on this point. Eekelaar and MacLean[96] asked 32 English people why they got married; the respondents gave 39 reasons. Three of the reasons were categorized by the authors as "practical" — marriage was entered to secure immediate legal benefits such as more convenient immigration or the avoidance of inheritance tax.[97] Eighteen of the reasons given were categorized as "conventional," meaning "some social source, external to the respondent, whether it be in the form of the practice of others, or the opinions of other" motivated the marriage.[98] Responses in this category often referred to religious doctrine or the expectations of parents. Another 18 responses involved "internal" reasons to marry. Eekelaar and MacLean found that "the value which marriage was seen to hold by these respondents all related to the idea of commitment." For these people, marriage either (i) confirmed to the outside world a commitment which they had already made;[99] (ii) was expected to act as a source or impetus for further commitment between them;[100] or (iii) was expected to "se[t] up a framework within which the partners work towards ... deeper commitment."[101]

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96 John Eekelaar & Mavis Maclean, "Marriage and the Moral Bases of Personal Relationships" (2004) 31(4) J.L. & Soc'y 510.

97 *Ibid.* at 518.

98 *Ibid.*

99 *Ibid.* at 520.

100 *Ibid.* at 521.

101 *Ibid.* at 522.

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The authors of a 2001 study asked 172 engaged people at an English "wedding fair"[102] why they were getting married. The top two primary reasons given were "love" (30%) and "commitment" (13%). Very few referred to external pressure or practical reasons. None admitted to financial reasons, and only one person cited "legal reasons."[103] Seventy-three percent of the respondents were cohabiting before marriage, and only 18% indicated disapproval of it.[104] Cohabitation was a viable option for many of these people, which suggests that they had meaningful reasons for marrying.

Jane Lewis conducted a comprehensive interview of 34 British cohabiting and married couples to assess the nature and level of their "commitment." Her study was not designed to answer the questions being explored by this paper, and all of her interviewees had children. However, when asked about their "obligations" to each other, twice as many unmarried as married people stated that they had "no obligations to one another, or had not thought about them."[105]

2. Non-Reasons for Marrying

Non-reasons for marrying are considerations which *are no longer likely* to cause people to marry rather than cohabit, even if they might have done so in the past. Cohabitation is today a viable alternative to marriage, by which Canadians can obtain domestic economy, intimacy, and companionship without paying any significant price in the form of social or legal

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[102] Mary Hibbs, Christopher Barton & J. Beswick, "Why marry? Perceptions of the affianced" (2001) 31 Family Law 197.

[103] *Ibid.* at 200-201.

[104] *Ibid.* at 199.

[105] Jane Lewis, *The End of Marriage? Individualism and Intimate Relations* (Cheltenham: Edward Elgar Publishing, 2001) at 145.

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discrimination. This is a relatively recent development. In the early 20th century, marriage was the "normative expectation of women in all social classes,"[106] and unmarried women were often subject to social opprobrium. However, Canadian attitudes about cohabitation and pre-marital sex have exhibited a dramatic shift during the post-war decades. In his comprehensive survey of cohabitation as a demographic phenomenon in Canada, Zheng Wu concluded:

> [A]ttitudes towards premarital sexual behaviour, cohabitation, and marriage ... have shifted towards being less conventional and more permissive. The vast majority of Canadians, particularly young people, now accept premarital sex. Non-traditional attitudes towards cohabitation and marriage are widespread.[107]

By "non-traditional attitudes," Wu means lack of moral disapprobation. As early as 1984, for example, only about 25% of Canadians disapproved of female premarital sex.[108]

Nor does non-marital cohabitation expose the parties thereto to legal disadvantages during their relationship. In *Miron*,[109] the Supreme Court of Canada forbade governments to discriminate on the basis of marital status in awarding public benefits. In the wake of this decision, provincial and federal governments comprehensively amended laws granting benefits

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106 *Ibid.* at 29.

107 Zheng Wu, *Cohabitation: An Alternative Form of Family Living* (Toronto: Oxford University Press, 2000) at 146.

108 *Ibid.* at 56-57.

109 *Supra* note 2. Further discussion of this case will be found at 360, below.

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from third parties to a member of a couple.[110] These laws no longer discriminate between members of married couples and members of most cohabitational relationships.[111] From the couple's point of view, there is therefore no net financial penalty to cohabiting instead of marrying.

In response to the dissipation of social opprobrium and legal discrimination, many couples who would once have married are now cohabiting instead. After the 1960s, the prevalence of marriage fell dramatically, although it may have stabilized in the mid-1990s.[112] In the 1960s, 90% of Canadian women were statistically expected to marry at some point in their lives. In 2000, only slightly above 50% were expected to do so. There were 10.6 marriages per 1000 Canadians in 1941, and only 5.0 in 2000.[113] Celine Le Bourdais reports that "among the youngest cohorts who entered their first union during the 1990s, cohabitation has become the favoured way to start conjugal life. By age 29, 53% of women had formed a consensual union, as compared with only 31% who had

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

[111] Of course, threshold tests are still applied to determine which cohabitants are treated like married people. However, these are almost invariably less onerous than the three years of conjugal cohabitation required by Ontario's *FLA*, *supra* note 16.

[112] Céline Le Bourdais & Evelyne Lapierre-Adamcyk, "Changes in Conjugal Life in Canada: Is Cohabitation Progressively Replacing Marriage?" (2004) 66 Journal of Marriage and Family 929 at 930.

[113] Anne-Marie Ambert, *Cohabitation and Marriage: How are they related?* (Ottawa: Vanier Institute of the Family, 2005) at 6.

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married directly."[114] 15.5% of Canadian families included a cohabiting couple in 2006, up from only 7.2% in 1986.[115]

Canadians who marry today are free to *not* marry; the increasing popularity of cohabitation proves this. Marriage is therefore a less *constrained* choice than it once was. An average pair of 1957 newlyweds seeking intimacy, companionship, and domestic economy might well have been *pushed* toward marriage by fear of the negative social and legal consequences of non-marital cohabitation. Newlyweds in 2007 are much more likely to have been *pulled* toward marriage by a conscious desire to assume that state. This makes it more legitimate to attach legal consequences to their marriage that are not attached to non-marital cohabitations.

The 2007 newlyweds are also less likely than their 1957 counterparts to be making an impulsive or poorly thought-out decision. Two demographic developments support this proposition. Firstly, Canadians now marry at an older age. Between 1960 and 2001, the average age of first marriage increased from 23.95 to 29.2 years.[116] Because the number of second and subsequent marriages has also increased since 1960 and because these marriages happen later in life, the average age of *all* newlyweds must have increased even more dramatically. It is more reasonable to attach legal consequences to the decisions of a 30-year old than to the

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[114] Le Bourdais, *supra* note 112 at 932.

[115] Statistics Canada, "2006 Census: Families, marital status, households and dwelling characteristics" *The Daily* (12 September 2007), online: Statistics Canada <http://www.statcan.ca/Daily/English/070912/d070912a.htm>.

[116] Le Bourdais, *supra* note 112 at 930-931. The age at first marriage was "25.4 years among men and 22.5 years among women in Canada in 1960 .... In 2001, [it] was 30.2 and 28.2 years, respectively, for men and women in Canada."

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decisions of a 24-year old. Secondly, Canadians are now more likely to marry having already experienced cohabitation. Today's choice to marry rather than cohabit therefore seems more likely to be informed by experience of the alternative.

Although social pressure on cohabitants to marry is not entirely a thing of the past, today Canadians who choose to marry rather than cohabit are probably *not* doing so for fear of the social disapprobrium or financial disadvantages which would accompany cohabitation. Cohabitation is now a viable choice by which Canadian couples can increasingly achieve much which was once the exclusive preserve of married people — companionship, sex, domestic economies of scale, home ownership, and parenthood. Cohabitants receive all the public financial benefits to which the married are entitled, and usually suffer very little social opprobrium. By comparison to 1957 newlyweds, 2007 newlyweds are also more likely to be making a mature decision which is informed by first-hand experience of the alternative.

3. Reasons for Not Marrying

Can any generalizations be made about why conjugally cohabiting couples have *not* married? Lack of marriage may represent lack of desire to marry on the part of either one or both members of the couple. Reasons for cohabiting without marriage are heterogenous, perhaps even more so than reasons for marrying.[117] It is also undoubtedly true, as Professor Bala writes, that "many cohabitants give little thought to their rights

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[117] Ambert, *supra* note 113. The members of a cohabiting couple are less likely than the members of a marriage to have the same reasons as each other for being in that type of relationship. This is because people have relatively vague ideas of what cohabitation inherently is and what it means, whereas people have a stronger set of mental norms and role demands which they associate with marriage.

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and obligations, or are ill-informed or understandably confused about exactly what rights common-law partners have."[118] Bala argues that, because most unmarried cohabitants are not consciously seeking to avoid the consequences of marriage (to which they may incorrectly believe themselves entitled by virtue of their cohabitation), they should be treated as if they are married.

However, the legitimacy of marriage-based distinctions does not require a demonstration that unmarried cohabitants *have consciously chosen to avoid* marriage's consequences. Rather, it is sufficient to show that those un-married cohabitants who have not signed a support contract generally lack the desire which married people have to make a mutual, long-term commitment to support. If this is so, then marriage is a good proxy for commitment to support and the pseudo-contractual, marriage-dependent version of the non-compensatory rationale which I developed above is vindicated.

There is some evidence that the average member of a cohabiting couple has a weaker intention to commit to long-term mutual support of his or her counterpart than the average member of a marriage. Zheng Wu reports:

> [C]ohabitation is particularly selective of individuals who hold less conventional attitudes towards marriage and the family.... Our analysis provides similar evidence of self-selection into cohabitation. People who reject the institution of marriage and, by implication, the roles and responsibilities married couples assume may select cohabitation.[119]

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[118] Bala, *supra* note 89 at 15.

[119] Wu, *supra* note 107 at 150.

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Anne-Marie Ambert's recent study of cohabitation and marriage adds further evidence that, on average, cohabitations may be less characterized by intentions of mutual commitment than are marriages, at least among younger adults. She cites several studies showing that cohabitants are less sexually faithful than married people,[120] and while commitment to sexual fidelity is not the same thing as commitment to financial support it seems likely that they are correlated. After surveying the evidence, Ambert makes the following general observation — "cohabiting men are often less committed to their relationship and partner than are married men."[121]

Advocates for the legal assimilation of cohabitation and marriage disagree.[122] They suggest other reasons why cohabitants do not marry, reasons which *do not* indicate a lack of commitment to support. For example, Caroline Thomas suggests that "[w]hether for financial, practical, or symbolic reasons, partners may choose to cohabit rather than to marry for reasons unrelated to commitment."[123] The apparent choice to marry or cohabit, she adds, is actually "an illusion" for many Canadians.[124] This position is echoed in judgments penned by Justices McLachlin[125] and L'Heureux-Dubé.[126] There are

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120 Ambert, *supra* note 113 at 14.

121 *Ibid.*

122 Caroline A. Thomas, "The Roles of Registered Partnerships and Conjugality in Canadian Family Law" (2006) 22(2) Can. J. Fam. L. 223; Carol Smart, "Stories of Family Life: Cohabitation, Marriage, and Social Change" (2000) 17(1) Can. J. Fam. L. 20; Bala, *supra* note 89; Onofrio Ferlisi, "Recognizing a Fundamental Change: A Comment on *Walsh*, *the Charter*, and the Definition of Spouse" (2001) 18(1) Can. J. Fam. L. 159 at 177.

123 *Ibid.* at 224.

124 *Ibid.*

125 *Miron*, *supra* note 2.

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certainly some cohabiting couples without domestic support contracts who nonetheless have a stronger intention to support each other than some married Canadians.

However, here I will suggest that this is a small and shrinking group. The number of unmarried couples whose commitment to support is high relative to married couples is insufficient to undermine the legitimacy of marriage as a proxy indicator of this commitment. Until recently, the most convincing reason why couples with a strong commitment to support would not marry was the illegality of same-sex marriage. The word "marriage" was historically defined in Canadian common law as the "the voluntary union for life of one man and one woman, to the exclusion of all others."[127] This definition made it impossible for same sex couples to marry. A series of 2002 and 2003 rulings by Canadian courts held that the traditional definition violated s. 15(1) of the *Charter*.[128] The 2004 *Reference re Same Sex Marriage* established the exclusive jurisdiction of the federal government to redefine marriage.[129] In July of 2005 Parliament relied on this finding to pass the *Civil Marriage Act*.[130] This bill defined

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126 *Ibid.*; *Walsh*, *supra* note 3.

127 *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130 at 133.

128 *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251, 225 D.L.R. (4th) 472; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.); *Hendricks v. Québec (Procureur général)*, [2002] R.J.Q. 2506 (Sup. Ct.).

129 *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

130 S.C. 2005, c. 33.

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marriage as "the lawful union of two persons to the exclusion of all others."

The legality of same sex marriage means that legal distinctions on the basis of marriage will no longer incidentally discriminate against same-sex couples. These couples can now make the same decision about marital status that opposite-sex couples can. The determined campaign for these reforms conducted by same-sex advocates demonstrates the significance which marriage holds for this group of Canadians.

Justice McLachlin has identified "religious or social constraints" which might prevent people from marrying.[131] Catholicism and Judaism, for example, do not recognize an adherent's divorce and remarriage until he or she has done something above and beyond what's required by the *Divorce Act*. These people are free, of course, to remarry in a non-religious civil ceremony, but some of them might not wish to. Caroline Thomas identifies a similar group of potentially highly committed cohabitants — couples who "cannot ... afford the financial burdens of a wedding, yet do not wish to be married in a simple ceremony."[132]

Those who feel themselves constrained from remarrying for such reasons can enter a domestic support contract. Such contracts allow unmarried cohabitants to create support obligations which will bind them when and if their relationship breaks down.[133] *Bracklow's* "contractual" rationale for spousal support orders gives effect to such contracts.

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[131] *Miron*, *supra* note 2 at para. 153.

[132] Thomas, *supra* note 122.

[133] *FLA*, *supra* note 16, s. 53(1).

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The SSAG facilitate the assumption of support duties through contract. Pre-SSAG, two cohabitants seeking to contract for support would be obliged to either specify the dollar amount to be paid after break-up, devise a complex formula, or delegate determination of their support obligations to a third party to be determined as if they had been married. Given the substantial ambiguity in Canadian support law, the latter option would provide very little certainty to the parties. However, a couple in this situation could now contract into the SSAG entitlement using a brief, simple document.

SECTION 15(1) OF THE *CHARTER OF RIGHTS AND FREEDOMS*

Would this proposal survive *Charter* scrutiny? This paper's thesis is that a legal distinction should be made on the basis of marital status. An unmarried ex-cohabitant who is not a joint parent with the respondent seeking spousal support should be denied a benefit available to a similarly situated married person. The benefit denied is not spousal support itself, which I propose should be awarded in these circumstances if a compensatory or contractual rationale supports it. Rather, the benefit to be denied in these circumstances is non-compensatory spousal support, which forms part of the quantum and duration recommendations of the *SSAG*.

Section 15(1) of the *Charter* states that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."[134] The right to equal protection enshrined in s. 15(1) can be "subject[ed] only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[135] This article has proposed firstly that

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134 *Supra* note 6.

135 *Ibid.*, s. 1.

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judges should not apply the SSAG "without child support" formula to unmarried cohabitants. Secondly, Ontario's *FLA* and analogous legislation in other jurisdictions should be amended to provide that if an unmarried ex-cohabitant without a child support entitlement from the respondent seeks spousal support, any order made should reflect only compensatory and contractual rationales.

Although the proposed distinction denies a benefit on the basis of a ground of distinction analogous to those enumerated in s. 15(1) of the *Charter*, I argue here that it does not do so in a manner which demeans the human dignity of an unmarried applicant seeking spousal support from a respondent who lacks a child support obligation to the applicant. It would not therefore violate s. 15(1), and would not require a s. 1 justification. In this section, I argue this position after summarizing four recent s. 15(1) cases. Three decisions from the late 1990s serve as precedents for a constitutional attack on the proposed distinction; I will summarize the majority holdings of these cases in order to identify the possible constitutional case against my argument. I then turn to the Supreme Court of Canada's 2002 decision in *Walsh*.[136] I argue that *Walsh* is a binding precedent establishing the constitutionality of this article's proposed distinction.

Miron v. Trudel

Miron[137] arose after John Miron was severely injured in an automobile accident. Miron was a passenger, and would have been entitled to disability benefits from the insurer of the driver or, failing that, the owner of the vehicle. However, neither of these individuals had automobile insurance. Miron therefore

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136 *Supra* note 3.

137 *Supra* note 2.

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turned to the automobile insurance policy held by his common law partner, Jocelyne Valliere.

Miron and Valliere had been living together for over four years, had children together, and shared their finances. Valliere's insurance policy was governed by Ontario's *Insurance Act*,[138] which provided that accident benefits had to be extended to any "spouse" of the insured in Miron's position. The insurer denied the claim on the grounds that the word "spouse," as used in the *Insurance Act,* did not encompass unmarried cohabitants. Miron argued that, if this was indeed the meaning of the *Act*, it constituted a breach of s. 15(1) of the *Charter*.

A five-four majority agreed, and struck down the impugned provisions. The reasons of McLachlin J. were supported by three of her colleagues, and L'Heureux-Dubé J. concurred in separate reasons. Justice McLachlin found that marital status is a ground of discrimination analogous to those enumerated in s. 15, for three reasons. Firstly, it "touches the essential dignity and worth of the individual" just as the enumerated grounds do.[139] Secondly, unmarried cohabitants "constitute an historically disadvantaged group."[140] Thirdly, although most couples can freely choose it, marital status is to some extent "personal" and "immutable," and the *Charter* is particularly intolerant of discrimination on the basis of such characteristics.[141] The fact that marriage is a "good and

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138 R.S.O. 1990, c. I.8, ss. 231, 233, Schedule C, and R.R.O. 1980, Reg. 535.

139 *Miron, supra* note 2 at para. 151, McLachlin J.

140 *Ibid.* at para. 152.

141 *Ibid.* at para. 153.

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valuable" institution does not excuse discriminating against those who are not part of it.[142]

Turning to the s. 1 *Oakes* test, McLachlin J. identified the purpose of the impugned provision as "to sustain families when one of their members is injured in an automobile accident,"[143] and found this goal to be pressing and substantial. However, the challenged distinction — excluding unmarried cohabitants from this benefit — was not rationally connected to the goal. Marriage or lack thereof was not "a reasonably relevant marker of individuals who should receive benefits in the event of injury of a family member in an automobile accident, given the goal of the legislation."[144]

Justice L'Heureux-Dubé, though she adopted a somewhat different doctrinal methodology, made many of the same observations about unmarried cohabitants as McLachlin J. and reached the same conclusion about the constitutionality of the impugned provision. She also called attention to "couples in which one person wishes to be in a relationship of publicly acknowledged permanence and interdependence and the other does not," and quoted Professor Winifred Holland's claim that "[t]he flip side of one person's autonomy is often another's exploitation."[145] Justice L'Heureux-Dubé also observed that unmarried cohabitants who do not wish to have spousal status ascribed to them can avoid it through domestic contract.[146]

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142 *Ibid.* at para. 152.

143 *Ibid.* at para. 153.

144 *Ibid.* at para. 168.

145 Holland, "Bridge the Gap", *supra* note 1 at 380, cited in *Miron*, *supra* note 2 at para. 96, L'Heureux-Dubé J., concurring.

146 *Miron*, *supra* note 2 at para. 101, L'Heureux-Dubé J., concurring.

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By the time *Miron* was heard in the Supreme Court of Canada, Ontario had amended the *Insurance Act's* definition of "spouse" to include cohabitants like Miron. Justices McLachlin and L'Heureux-Dubé agreed that the appropriate remedy for the constitutional breach would be to retroactively apply the new definition to the appellant Miron. In the wake of the judgment, Canadian governments amended statutes which mandated payments from third parties to "spouses," redefining that word so as to include some unmarried cohabitants.[147] The key *ratio* of Miron is that marital status is a ground of distinction analogous to those enumerated in s. 15(1) of the *Charter*, and that legal distinctions drawn on this basis will, at least sometimes, be unconstitutional.

Rossu v. Taylor

Judgment in *Rossu* was delivered by the Alberta Court of Appeal in 1998.[148] The case was a constitutional challenge to the spousal support provisions of Alberta's *Domestic Relations Act*.[149] The *DRA* at that time authorized support orders for "spouses" but did not define this word so as to include unmarried ex-cohabitants. The Court found that, in the context of the statute, the word did not include the unmarried,[150] and it was the total exclusion of unmarried ex-cohabitants from eligibility for spousal support which was challenged as contrary to s. 15.

The Court noted that spousal support was then (before the advent of the SSAG), a highly discretionary remedy. Giving unmarried cohabitants the right to *apply* for it (which

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147 *Modernization of Benefits and Obligations Act*, *supra* note 110.

148 *Supra* note 2.

149 R.S.A. 1980, c. D-37 [*DRA*].

150 *Rossu*, *supra* note 2 at paras. 90-93.

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the *DRA* denied them) would not require judges to make any particular finding regarding entitlement, quantity and duration of the order in a given circumstance.[151] The constitutional right being claimed was to *apply* for support, not to *receive* it.[152]

The appellant, from whom the spousal support was being sought, argued that *Miron*'s finding that marital status was a prohibited ground of discrimination analogous to those enumerated in s. 15 of the *Charter* was inapplicable to the facts at bar. In *Miron*, he noted, marital status was being used to disadvantage the claimant with regard to a benefit from a third party (the insurer). The facts of *Rossu,* by contrast, involved a claim within the couple.[153] The Court, however, found that it was bound by *Miron*, that the discrimination was contrary to s. 15, and that an *Oakes* s. 1 analysis was necessary.

In this stage of the proceedings, the respondent submitted that the purpose of the impugned provisions was to promote the institution of marriage. The Court found it difficult to accept that the Legislature had such a purpose in mind, and that even if it did, it might not be pressing and substantial given the increasing prevalence of non-marital cohabitations. In any case, the provisions were not rationally connected to the goal of promoting marriage, as required by the *Oakes* s. 1 analysis.

In conclusion, the Court rebutted the argument that imposing spousal support obligations on the unmarried would amount to coercively imposing an undesired status on adults. The first response was that the "counter-arguments about the exploitation of the economically weaker partner for the benefit

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[151] *Ibid.* at paras. 121-123.

[152] *Ibid.* at para. 124.

[153] *Ibid.* at paras. 126-129.

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of the stronger"[154] outweighed the autonomy argument. Secondly, the Court noted that the heavy support obligation which might be appropriate for a lengthy "traditional" marriage[155] would not be imposed on those who conduct a "'modern' relationship in which both parties intend to be 'free spirits', and conduct their affairs accordingly so that neither is disadvantaged by the relationship," regardless of whether the two were married. The high degree of discretion in spousal support law circa 1998 would ensure that the actual nature of the relationship would be reflected in the award. It was therefore unnecessary and illogical to bar all claims from the unmarried, whatever the demographic distinctions between the married and unmarried might have been.

The court in *Rossu* chose as a remedy to declare the entire support section of the *DRA* invalid, with a 12-month suspension on the declaration to allow for legislative revision. Alberta did so shortly thereafter with the *Adult Interdependent Relationships Act*, which introduced a scheme similar to Ontario's as described above.[156]

M. v. H.

M. v. H.[157], a 1999 Supreme Court of Canada case involving s. 15 of the *Charter*, focused on sexual orientation rather than marital status as a ground of legal distinction. However the judgment, like *Rossu*, found a spousal support statute to be under-inclusive. It would certainly be cited in a constitutional challenge to the distinction proposed by this paper.

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[154] *Ibid.* at para. 145.

[155] *Ibid.* at para. 146.

[156] S.A. 2002, c. A-4.5.

[157] *Supra* note 2.

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At the time of the case, Ontario's *FLA* only provided spousal support to opposite-sex couples. M and H, both women, had been cohabiting in an intimate relationship for at least five years. After the dissolution of the relationship, M sought spousal support from H. Had M and H been of opposite gender, M would have passed the *FLA*'s threshold for non-marital spousal support. M claimed that the opposite-sex requirement in that Act was discrimination on the basis of sexual orientation contrary to s. 15 of the *Charter*. The 1995 case of *Egan v. Canada*[158] had clearly established that sexual orientation was a ground of distinction analogous to those enumerated in s. 15(1).

The Court accepted M's argument, with only Gonthier J. dissenting. Cory J., supported by five colleagues, wrote the majority judgment. After reviewing the *FLA*'s support regime and its application to the unmarried, Cory J. noted that "this appeal has nothing to do with marriage per se."[159] Rather, the s. 15 issue was the distinction the *FLA* drew "by specifically according rights to individual members of unmarried cohabiting opposite-sex couples, which by omission it fails to accord to individual members of same-sex couples who are living together."[160]

Although most spousal support applicants are women, Cory J. observed that "the legislature drafted s. 29 to allow either a man *or* a woman to apply for support, thereby recognizing that financial dependence can arise in an intimate relationship in a context entirely unrelated either to child rearing or to any gender-based discrimination existing in our

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158 [1995] 2 S.C.R. 513.

159 *M. v. H.*, *supra* note 2 at para. 52.

160 *Ibid.* at para. 53.

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society."[161] Same sex relationships are just as capable as opposite-sex relationships of meeting the "conjugality" threshold in the *FLA*, which involves factors such as "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple."[162] Same-sex relationships were also just as capable as opposite-sex relationships of satisfying the duration-of-relationship portion of the *FLA*'s threshold test for the unmarried. Cory J. therefore concluded that s. 29 of the *FLA* drew a distinction based solely on the basis of sexual orientation, and used this distinction to deny a benefit (access to the spousal support remedy) to M.

Cory J. then turned to the four "contextual" factors which, according to *Law v. Canada (Minister of Employment and Immigration)*,[163] could be used to determine whether a distinction denying a benefit was sufficiently demeaning to someone's dignity to make that distinction unconstitutional. Three such factors supported the claimant —"significant pre-existing disadvantage and vulnerability" of members of same-sex relationships;[164] a failure of the provision to take into account the reality of the claimant's situation;[165] and "the nature of the interest affected by the impugned legislation."[166] The majority found that:

> The exclusion of same-sex partners from the benefits of s. 29 of the *FLA* promotes the view

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161 *Ibid.* at para. 54 [emphasis in original].

162 *Ibid.* at para. 59.

163 [1999] 1 S.C.R. 497 at para. 68 [*Law*].

164 *M. v. H.*, *supra* note 2 at para. 69.

165 *Ibid.* at para. 70.

166 *Ibid.* at para. 72.

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> that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.[167]

Justice Gonthier, the only member of the Court who would not have struck down the law, did not even find a contravention of s. 15(1), and therefore did not consider the s. 1 *Oakes* test. Justices Iacobucci (who wrote on behalf of five colleagues), Major, and Bastarache, although differing in their approach to s. 1, did not find that it saved the impugned provision.

Nova Scotia (Attorney General) v. Walsh

In 2002, in the wake of *Miron, Rossu,* and *M. v. H.,* the days seemed to be numbered for formal marriage as a basis of distinction in Canadian family law. It was clear that marital status was a personal characteristic analogous to those enumerated in s. 15(1) of the *Charter*, and that the total exclusion of unmarried cohabitants from spousal support was unconstitutional. While *M. v. H.* did not involve a marital status distinction, it did demonstrate the intolerance of the Supreme Court of Canada for a legal distinction in spousal support which was found to demean dignity and to lack any justifying public purpose. In this context, the December 2002 decision of the Supreme Court in *Walsh*[168] was a surprise to many.[169]

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[167] *Ibid.* at para. 73.

[168] *Supra* note 3.

[169] Martha Bailey, "Regulation of Cohabitation and Marriage in Canada." (2004) 26(1) Law & Pol'y 153; James T. McClary, "A

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The plaintiff in *Walsh* alleged that Nova Scotia's *Matrimonial Property Act*[170] violated s. 15(1) of the *Charter*. The impugned sections provided for a division of property between people exiting a relationship, but only if they were married. Ex-cohabitants were not under any circumstances entitled to access this remedy. The original applicant, Susan Walsh, had lived with the respondent, Wayne Bona, for 10 years. She sought a share in his property equal to what she would have received had she been married to him. Her constitutional argument was rejected at trial,[171] but accepted by the Nova Scotia Court of Appeal.[172]

The Supreme Court of Canada, however, in an eight-to-one decision, rejected Walsh's argument and quashed the Court of Appeal ruling. Writing on behalf of six Justices, Bastarache J. accepted that (i) the statute drew a formal distinction; and (ii) the distinction was analogous to those enumerated in s. 15(1) of the *Charter*.[173] These are the first two branches of the *Law* test used to evaluate claims of constitutional discrimination.

Different View of *Nova Scotia (Attorney-General) v. Walsh*" (2005) 22(1) Can. J. Fam. L. 43.

170 R.S.N.S. 1989, c. 275, s. 2(g) [*MPA*].

171 [1999] N.S.J. No. 290 (S.C.), 91 A.C.W.S. (3d) 387 (QL).

172 *Walsh v. Bona*, 2000 NSCA 53, [2000] N.S.J. No. 117 (QL); with supplementary reasons: *Walsh v. Bona*, 2000 NSCA 73, [2000] N.S.J. No. 173 (QL).

173 *Walsh*, *supra* note 3 at para. 32.

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The third branch of the test required a consideration of "whether a reasonable heterosexual unmarried cohabiting person, taking into account all of the relevant contextual factors, would find the *MPA*'s failure to include him or her in its ambit has the effect of demeaning his or her dignity."[174] Justice Bastarache found that answering this inquiry required a characterization of the relationship between Walsh and Bona. The outcome of the case hinged on how he approached this question:

> [T]he most important aspect ... is not whether the situation in which Walsh and Bona found themselves at the time of trial was similar to that of married persons, but whether persons entering into a conjugal relationship without marrying are in fact entering into a relationship on the same terms as persons who marry.[175]

He found that they did not. The provision reflected the fact that at least "some cohabitants have specifically chosen not to marry and not to take on the obligations ascribed to persons who choose that status,"[176] and did not perpetuate prejudice against unmarried cohabitants. The impugned provisions had a very substantial impact on property rights. This remedy was "tailored to persons who have taken a mutual positive step to invoke it."[177] Walsh and Bona, not being married and not having entered a domestic contract, had not done so. "[P]eople who marry," wrote Justice Bastarache, "can be said to freely accept mutual rights and obligations. A decision not to marry should be respected because it also stems from a conscious

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[174] *Ibid.* at para. 38.

[175] *Ibid.* at para. 35.

[176] *Ibid.* at para. 40.

[177] *Ibid.* at para. 50.

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choice of the parties."[178] Due to the fundamental differences between cohabitation and marriage, the distinction drawn by the act did not demean Ms. Walsh's dignity, and it was therefore not in violation of the *Charter*.

Justice Gonthier concurred with the majority. His reasons emphasize that "[m]arriage is an institution in which couples agree to participate by the expression of a formal and public choice. The contractual nature of marriage distinguishes married couples from common law couples who have not expressed their wish to be bound by the obligations of marriage."[179] Conversely, he wrote, "extending the presumption of equal division of matrimonial assets to common law couples — would be to intrude into the most personal and intimate of life choices by imposing a system of obligations on people who never consented to such a system."[180]

The Constitutionality of this Article's Proposal

The reform proposed in this paper should not be found to infringe s. 15 of the *Charter*. The majority judgment in *Walsh* is the cornerstone precedent for the reform's constitutionality. The *Law* test, which currently structures s. 15(1) inquiries, can be applied much as it was in *Walsh*. One of the "contextual factors" prescribed by that test is "correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others."[181] This factor might help support this article's proposal, which seeks to take account of the actual

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178 *Ibid.* at para. 55.

179 *Ibid.* at para. 200.

180 *Ibid.* at para. 201.

181 *Law*, *supra* note 163 at para. 88.

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circumstances of cohabiting spousal support applicants and respondents, and how these circumstances differ from those of married people.

The opposing argument would seek to distinguish *Walsh* on the basis that it was about property division, not spousal support. Although these are both statutory remedies which create financial obligations between people leaving intimate relationships, there are differences between them. Gonthier J.'s concurring judgment in *Walsh* contrasted property division and spousal support in the following terms:

> While spousal support is based on need and dependency, the division of matrimonial assets distributes assets acquired during marriage without regard to need.... The division of matrimonial assets and spousal support have different objectives. One aims to divide assets according to a property regime chosen by the parties, either directly by contract or indirectly by the fact of marriage, while the other seeks to fulfil a social objective: meeting the needs of spouses and their children. This Court also recognized in *M. v. H.*, *supra*, at para. 93, that one of the objectives of spousal support is to alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those spouses who have the capacity to support them. The support obligation responds to social concerns with respect to situations of dependency that may occur in common law relationships. However, that obligation, unlike the division of matrimonial property, is not of a contractual

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> nature. Entirely different principles underlie the two regimes.[182]

It should firstly be noted that this passage was an *obiter dicta* opinion of a Justice who was writing for himself alone and who retired in 2003. The reasons of Bastarache J., with which six judges concurred, do not refer to spousal support or distinguish it from property division. More importantly, Gonthier J.'s statements about the rationale of spousal support are questionable. They make no reference to the unanimous opinion of the Court in *Bracklow* two years earlier, nor do they seem consistent with it. For example, while Gonthier J. flatly claims that spousal support is "not of a contractual nature," *Bracklow* clearly provides that there *is* a contractual rationale for spousal support, at least if a formal support agreement is present. For the reasons mentioned above, I believe that a close reading of *Bracklow* and its non-compensatory rationale make it evident that marriage vows are a legitimate basis of distinction.

One possible point of differentiation between property division and spousal support not mentioned by Gonthier J. is that the former is a much more rigid remedy than the latter. Spousal support was still, at the time of *Walsh*, an area of almost unconstrained judicial discretion. However, the SSAG are eroding this discretion, and as it erodes so does this point of distinction.

Although settled by a lower court, *Rossu*[183] involves facts closer to those which would arise in a *Charter* challenge to my proposal. Whereas *Walsh* was about property division, *Rossu* considered spousal support, and found that the exclusion of unmarried cohabitants was unconstitutional. A challenge to

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182 *Walsh*, *supra* note 3 at paras. 203-204.

183 *Supra* note 2.

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my proposal would certainly seek to rely on *Rossu.* However, the following passage from that judgment suggests a basis for distinction:

> If the legislature wishes to respect individuals' ability to choose intimate relationships other than traditional marriage while protecting the economically vulnerable in such relationships, support criteria could be revised to emphasize that support will be awarded only where the nature of the relationship was such that the parties could reasonably be said to have undertaken obligations to each other, or where one partner has been economically disadvantaged by the relationship.[184]

One feature of my proposal which makes it more *Charter*-compatible than the impugned provisions in *Rossu, M. v. H.,* or even *Walsh* is that it does not completely exclude a group from a benefit. *Rossu* struck down a law which made spousal support entirely unavailable to cohabitants; *M. v. H.* struck down a law which made spousal support entirely unavailable to same-sex partners; *Walsh* upheld a law which made statutory property division entirely unavailable to cohabitants. My proposal, by contrast, envisions the continued availability of spousal support to unmarried childless cohabitants so long as a compensatory or contractual rationale is present. One cannot say of the proposed regime, as was said of the *FLA* provisions impugned in *M. v. H.,* that it renders cohabitant couples "invisible to the law."[185] Rather, the regime enquires into the actual nature of the relationship and the couple's moral obligations to each other, and makes an order commensurate with these.

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[184] *Ibid.* at para. 148.

[185] *Supra* note 2 at para. 306, Bastarache J.

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Finally, the legalization of same sex marriage might have helped to *Charter*-proof this paper's proposal. In a recent article, James T. McClary suggested that "a partial explanation of the surprising result in *Walsh* lies in the debate over same-sex marriage and the Supreme Court's vision of how same-sex relationships should fit within the institution of marriage."[186] Given its emphasis on marriage as a consequence of personal choice, McClary argues that the ruling may have been a hint that the Supreme Court of Canada would soon ensure that this personal choice would be open to *all* Canadian couples. As this is now the case, distinctions based on marital status are even less likely to undermine the dignity of the unmarried than they were when *Walsh* was decided in 2002.

In the early years of the 21st century, marriage is making a comeback in Canadian family law. This development should be welcomed. Marriage usually means a great deal to those who choose to undertake it. Today, more than ever, it is an optional life state, by which two adults can commit to support each other till death do them part. When the law can recognize this commitment to support without doing injustice to the unmarried, it should do so. This article has taken the position that marriage can and should be significant to the law of spousal support. This remedy should be applied to unmarried cohabitants to account for compensable sacrifices and give effect to contractual promises. However, spousal support awards which go beyond the compensatory and contractual rationales — and, by extension, the *SSAG* — should be reserved for couples who are married and couples who are parents together. In the wake of *Walsh* and the legalization of same-sex marriage, there are hopeful signs that the Supreme Court of Canada would perceive in this reform not a degradation of the dignity of the unmarried, but rather a natural

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[186] *Supra* note 169.

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and fitting recognition of marriage and its meaning to Canadians today.

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