

## **Second Study Commission – Civil Law and Procedure**

### **CANADA - ONTARIO**

#### **Legal Rules Regarding Patrimonial Interests, Succession and Duties of Couples Living Together but Not Being Married**

##### **[A] Contractual arrangements**

1. Does your system of law allow (i) heterosexual couples and (ii) same sex couples who are living together to enter into a contract governing their cohabitation, particularly as respects:

- obligations of support or maintenance
- ownership of property during cohabitation
- financial claims on the cessation of the cohabitation?

**Answer:** At common law, contracts that promoted sexual immorality were considered illegal. Historically, unmarried cohabitation was considered immoral and contracts formed in relation to these relationships were unenforceable. In Canada, each common law province has enacted legislation to recognize these contracts, although in the absence of legislation it is likely that a cohabitation agreement would no longer be void for public policy.

In Ontario, legislation expressly allows both heterosexual couples and same-sex couples to enter into a cohabitation agreement. The agreement may address one or more aspects of the respective rights and obligations during cohabitation and upon cessation of cohabitation. The law expressly includes the possibility of agreements governing obligations of support and the ownership in or division of property both during the cohabitation and upon cessation of the cohabitation.

The law varies in other Canadian common law jurisdictions: New Brunswick, Newfoundland and Labrador, Prince Edward Island, Northwest Territories, and Nunavut closely resemble the Ontario model, while the other provinces and Yukon Territory have provisions that are unique to their own jurisdiction.

2. If such contractual arrangements are permitted, is it common for cohabiting couples to conclude a cohabitation contract?

**Answer:** There are no official statistics regarding the prevalence of these agreements. Unofficial sources suggest that these contracts are uncommon among the general public, but more likely to be entered into when one of the parties has already experienced a relationship breakdown and wishes to formalize the terms of a subsequent relationship.

3. Are there any formal requirements (eg signature before witnesses, involvement of a notary) which require to be satisfied before a cohabitation contract is valid?

**Answer:** Yes. A cohabitation agreement must be made in writing, must be signed by the parties, and must be witnessed in order to be enforceable. There is no statutory requirement for the involvement of a notary.

## **[B] Heterosexual couples: non contractual rules**

This section of the questionnaire is concerned with the rules governing or affecting the relationship between a man and woman who are living together, unmarried, without having concluded any cohabitation contract as in [A].

1. Where a couple are co-habiting does your legal system recognise any mutual duty of aliment or maintenance during the period of co-habitation?

**Answer:** Yes. Every spouse (a legally defined term that includes unmarried cohabitating couples) is legally required to support himself/herself and his/her spouse, in accordance with need, to the extent that he/she is capable of doing so.

2. Are there any particular rules regarding ownership of moveable property such as, for example, household furniture acquired during the time in which the couple are co habiting?

**Answer:** In Ontario, unmarried couples are excluded from statutory provisions for property division upon relationship breakdown. However, the equitable doctrines of constructive trust and resulting trust are not obviated by statute; these doctrines provide a limited form of protection for non-title holding individuals who contribute to the acquisition of property (both moveable and immoveable).

3. If the relationship breaks down and the parties separate, does your legal system enable one of the co-habitants to claim from the other (a) payment of maintenance or (b) payment of a capital sum? If so, are such claims determined on the same principles as would apply were the couple married or do different rules apply?

**Answer:** In Ontario, the court has wide discretionary powers regarding orders for support. These include the ability to require periodic support payments or the payment of a capital sum.

The same principles apply to both married and unmarried couples who separate, as both fall under provincial jurisdiction. If (or when) a separated married couple initiates formal divorce proceedings, they then fall under federal jurisdiction and are governed by a different statute, with different statutory principles governing support orders. However, in practice, courts have applied the same principles to all couples regardless of the legal form of the relationship.

4. Where the house in which the parties live together is either owned or tenanted by one of the parties, does your legal system give the other party any right to continue to occupy the house when the relationship breaks down?

**Answer:** No. These rights are only granted to legally married couples.

5. Where the cohabitation comes to an end by reason of the death of one of the co habitants, what rights, if any, in the estate of the deceased cohabitant does your legal system give to the surviving co-habitant?

**Answer:** If the deceased co-habitant dies intestate, the surviving co-habitant has no spousal entitlement to his/her partner's estate. (In Ontario, legally married spouses are granted robust rights to the deceased's property if the deceased dies intestate.)

If the deceased co-habitant dies with a valid will in place, the surviving co-habitant is limited to whatever provision is made for him or her in the will. (Legally married spouses may elect to undergo a statutory property division scheme if they are unhappy with the testamentary bequest.)

However, in both an intestacy and a testamentary situation, if the deceased co-habitant was providing support to the surviving co-habitant immediately before his or her death, then the surviving co-habitant may apply to the court for an order for support to continue out of the assets of the deceased's estate. The entitlement to support and amount of support is discretionary, and would likely not equal the spousal entitlement in an intestacy or the optional statutory property division available in a testamentary situation.

The only right that a surviving co-habitant has that is equivalent to that of a legally married spouse is the right to priority consideration as the deceased's estate's administrator (executor).

6. Does a co-habitant have any title to sue for damages in the event that his or her partner is killed through the fault or negligence of a third party?

**Answer:** Yes – this right is expressly provided by statute.

7. In so far as your legal system does give rights to a co-habitant, does it also define what is necessary for the relationship to be treated as a "co-habitation"? Are different definitions of "cohabitation" used, depending on the right which is claimed? What factors are taken into account in the definition(s)?

**Answer:** There is a three-tier answer to this question. The first tier requires the definition of the term "spouse." In Ontario, when "spouse" includes unmarried co-habitants, the law usually requires the parties to have cohabited continuously for a period of not less than three years or to have cohabited in a relationship of some permanence (i.e. may be less than three years) if they are the natural or adoptive parents of a child.

The second tier defines the term "cohabit." Ontario law defines "cohabit" as "to live together in a conjugal relationship, whether within or outside of marriage." This definition is consistent regardless of the right that is claimed – the availability of rights depends on legal married status, not on a variable definition of cohabitation.

The third tier defines the term "conjugal." This word is not defined by statute, but by reference to case law. Factors taken into account to determine whether a relationship is conjugal or not include the parties':

- living arrangements,
- sexual and personal behaviour,
- division of domestic chores,

- social activities,
- economic arrangements,
- and attitudes towards children.

While the seven factors are derived from a case decided in 1980, an evaluation of how those factors ought to apply to a contemporary couple would rely on 21<sup>st</sup>-century values. These factors are as salient today as they were 25 years ago.

In summary, in order to meet the legal definition of *spouse*, a couple must *cohabit* in a *conjugal* relationship for the requisite period of time.

### **[C] Homosexual couples: non contractual rules**

This section of the questionnaire is concerned with the rules governing or affecting the relationship between two people of the same sex who are co-habiting without having concluded a cohabitation contract as in [A].

1. In your country are couples of the same sex able to enter into a relationship which, following registration or some other public ceremony, will be legally recognised by the State?

**Answer:** Canada is one of the few countries around the world that recognizes same-sex marriage. Following the passage of the federal *Civil Marriage Act* in 2005, same-sex couples throughout Canada are able to enter into legal marriages. Before the passage of the *Act*, Ontario same-sex couples were able to enter into legal marriages after the Court of Appeal for Ontario ruled in 2003 that the restriction of the definition of marriage to opposite-sex relationships was unconstitutional. Similar rulings followed in the provinces of British Columbia, Quebec, Manitoba, Nova Scotia, Saskatchewan, Newfoundland and Labrador, and New Brunswick, and in the Yukon Territory.

2. If so, what are the principal ways in which the rules governing the patrimonial aspects of that relationship differ from those applying in (heterosexual) marriage?

**Answer:** This question is more applicable to a civil law jurisdiction such as the province of Quebec.

3. In the event that a same sex couple either cannot enter into a legally recognised relationship or have chosen not to do so, does their cohabitation give rise to the same rights and obligations which would result from cohabitation of a man and a woman? If not, what are the principal differences?

**Answer:** In Ontario, unmarried same-sex cohabitants have the same rights and obligations as unmarried opposite-sex cohabitants. There is no difference between the two.

## **[D] Miscellaneous**

1. Are there any proposals for reform of the law relating to cohabiting couples (homosexual and heterosexual)?

**Answer:** The current federal government has indicated an intention to ask Parliament to reconsider the institution of same-sex marriage, but no formal resolution or bill has been presented yet. At present, all Canadians (homosexual and heterosexual) have equal access to the institution of marriage, and in Ontario everyone has equal access to the current system of rights accorded to unmarried cohabitating couples. There are no proposals to widen the rights of unmarried cohabitating couples to bring them closer to the rights of married couples.

2. What points would you wish to discuss in greater detail?

**Answer:**

3. What subject do you suggest for the next meeting?

**Answer:**