Common-Law Marriage in Canada's Common-Law Provinces

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COMMON-LAW MARRIAGE IN CANADA'S COMMON-LAW PROVINCES

Introduction

Under Canada's Constitution, *solemnization of marriage* is a subject that falls under provincial jurisdiction.[1] In exercising this power, all of Canada's provinces have enacted marriage acts.[2] None of these statutes expressly provides that common-law marriages are or are not possible within the jurisdictions they cover. In some cases, the wording of the statute would appear to preclude that possibility, but others would seem to have left the relevant common law undisturbed.

An example of a statute that would seem to preclude the possibility of common-law marriage being entered into within the jurisdiction is Nova Scotia's Solemnization of Marriage Act. This statute states that:

> ...no marriage in the Province is valid unless (a) it is solemnized by a person authorized by this Act to solemnize marriage; and (b) a license has been obtained for the solemnization of the marriage.[3]

Since this provision is virtually identical to an English statute that has been widely interpreted to have made it impossible for parties to enter into a common-law marriage within that jurisdiction,[4] it would seem to have the same effect as § 25 of the Marriage Act, 1949.[5] Nevertheless, even in the Nova Scotia case it is possible to argue that the section just quoted should be interpreted to be directory rather than mandatory and that a failure to comply with it does not render any other form of a marriage to be automatically void. This issue does not appear to have been judicially decided in Nova Scotia.

There are no reported cases from any of the common-law provinces in which it was held that two persons who decided to live together without attempting to comply with the local marriage laws intentionally or unintentionally entered into a valid marriage at common law. On the other hand, there are a few reported opinions in which the local marriage laws were interpreted to make this impossible. For example, a county court judge in the Province of Ontario ruled in 1977 that:

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[1] Constitution Act, 1867, R.S.C. No. 5, § 92 (App. 1985).

[2] For example, Ontario has enacted the Marriage Act, R.S.O. ch. M.3 (1990).

[3] N.S.R.S. ch. 436, § 15 (1989).

[4] W. Rayde, *Law and Practice in Divorce and Family Matters* 158 (1991).

[5] 12, 13, 14 Geo. 6, ch. 76.

> ...there is no legal marriage at common law in...Ontario at this time and the only valid form of marriage that this province recognizes is that provided for in the Ontario Marriage Act.[6]

Higher courts, including the Supreme Court of Canada, have not ruled on the matter.

Common-law marriage

The major reason as to why the issue of whether common-law marriages are still possible in Canada's common-law provinces has not been judicially decided by the Supreme Court or the highest provincial courts of appeal is that the requirements for contracting a valid marriage at common law are such that it is all but impossible for persons who have cohabited in a province during this century to prove that they were ever legally married.[7]

The term *common-law marriage* is often used to describe the relationship of a man and woman who have decided to live together indefinitely without any attempt to comply with the local marriage laws. However, in England and the other Commonwealth countries that continue to almost invariably follow and apply the pronouncements of the House of Lords and other English courts, this usage of the term is legally incorrect.[8] Instead, a true common-law marriage in England and Canada is a marriage ceremony that results in the solemnization of a valid, recognizable marriage. In other words, it is an event rather than a status acquired over time.

In 1844, the House of Lords held in the celebrated case of *R. v. Millis* that an English marriage had to be celebrated by an episcopally-ordained minister to be valid at common law.[9] One Law Lord went on to qualify this rule by stating that it was only applicable if the attendance of such a minister was at all possible. If the presence of an episcopally-ordained minister was not possible, another religious figure or, perhaps, even a non-ordained person could be chosen to solemnize the marriage.

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[6] *Dutch v. Dutch*, 1 R.F.L. (2d) 177, at 189 (Ont. Co Ct. 1977).

[7] One Anglo-Canadian common principle that causes much confusion in this area states that evidence of cohabitation as man and wife may raise a presumption that the couple are legally married. (Re Taylor, [1961] 1 All E.R. 55 (C.A.), *Porteous v. Dorn* 45 D.L.R. (3d) 596 (S.C.C.). This principle does not imply that persons who live together without attempting to comply with local marriage laws are legally married and it is inapplicable to cases in which the onus is on one of the parties to prove the existence of a valid marriage. *See Rignall v. Andrews,* [1990] STC 410 (Ch. 1990). In this case, a taxpayer argued that it order to qualify for the higher personal allowance married persons can claim, he did not have to prove that he was legally married, but merely that he had cohabited with a woman in such circumstances as to raise the presumption that he was legally married. This argument was accepted by a commissioner, but on appeal, the judge of the Chancery Division found that while he may have lived with his *wife* in such circumstances, he was not allowed to claim the allowance unless he could prove that he was legally married.

[8] In his treatise on *Informal Marriage, Cohabitation, and the Law 1750-1989*, Stephen Parker, Professor at the Australian National University, has written: "As one legal historian tells us, rather archly, 'it is one of the most absurd solecisms of the twentieth century to regard concubinage as a common law marriage'" [At 5, 1990].

[9] 8 Eng. Rep. 844 (H.L. 1844).

Since 1844, there have been several cases in which ceremonies conducted outside England by non-ordained persons have been recognized as being valid at common law by English courts.[10] These marriages were not celebrated in England, but rather on remote islands, in prisoner of war camps, and in isolated regions where the attendance of an ordained minister was not possible.[11] The marriages in question were contracted by parties who found themselves in very difficult and unusual circumstances and the courts sympathized with their situations. By contrast, there are no reported cases in which English or Canadian courts have held that a common-law marriage was contracted by parties who deliberately decided not to comply with the local laws or that a common-law marriage could be entered into through cohabitation.

Rights of cohabitants

In order to alleviate cases of hardship, the Federal Government of Canada and the governments of the individual provinces have expanded a number of statutes to confer rights to many benefits and entitlements upon cohabitants. For example, Alberta's Employment Pension Plans Act defines the term *spouses* to include unmarried persons who have been cohabiting with one another for at least three years if they continuously held themselves out as consorts in their community.[12] Newfoundland's extended versions of the term *spouse* found in the Family Law Act[13] and Matrimonial Property Act[14] apply to persons who have entered into void marriages in good faith, but not to persons who have lived together. More broadly, the Federal Government has provided that for the purposes of the Canada Pension Plan, the term *spouses* includes unmarried persons who have cohabited for at least one year.[15]

Despite the fact that they confer rights upon cohabitants and former cohabitants, statutes such as the Canada Pension Plan Act, Employment Pension Plans Act of Alberta, and the Family Law Act of Newfoundland cannot be said to be laws of general application. These laws do not purport to bestow matrimonial status upon persons who have failed to comply with provincial marriage laws. Instead, their definitions of the term *spouse* were expanded to assist parties who are not recognized as being married by the local law. Entitlement to a pension under the Canada Pension Plan as a qualified consort does not, for example, qualify a person to be sponsored for the issuance of an immigrant visa or for matrimonial support.

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10 Rayden, supra note 4.

11 In what appears to be an exception to the rule that English courts seldom recognize a distinction between English and Commonwealth common law, it seems to be settled that the *R. v. Millis* rule specifying that the minister must have been episcopally-ordained does not apply outside England [*id*].

12 1986 S.A., ch. E-10.05, § 1(hh).

13 1988 Newf. S., ch. 60, s. 2.

14 1979 Newf. S. ch. 32.

15 R.S.C. ch. 30, § 1(3) 2d Supp. 1985).

However, in 1995, the Supreme Court of Canada issued a ruling that has called into question the constitutionality of any law that does not treat at least certain qualified cohabitants as spouses. The plaintiff in the case of *Miron v. Trudel*[16] had argued that a provision of a standard automobile insurance policy prescribed by provincial legislation was unconstitutional because it illegally discriminated against unmarried couples. Before being amended, this law had only mandated the entitlement of spouses lawfully married to persons injured in accidents to receive benefits. Insurance companies were not required to provide coverage to any persons living with another until that law was changed. Since this change had occurred after the accident giving rise to the case under review, it was not of assistance to the plaintiff.

The Supreme Court ruled that the provincial law in question had infringed the equality rights section of the Canadian Charter of Rights and Freedoms before being amended by the provincial legislature. A majority of the judges characterized cohabitants as a *historically disadvantaged* group. Following this reasoning, they ruled that the amendment that changed the applicable law should be given retroactive effect. This law provided that persons who had lived with another for three years or, if they had a child, in a permanent relationship should be regarded as spouses.

The Supreme Court of Canada did not expressly state in *Miron v. Trudel* that all provincial laws that fail to treat at least some cohabitants the same as lawfully married spouses are unconstitutional. Nevertheless, it would appear that the same arguments presented in that case could be used to challenge the constitutionality of other laws. Constitutional experts in the Department of Justice and the Library of Parliament in Ottawa agree that one reason it is very difficult to predict whether such a challenge would be successful is that the Supreme Court of Canada was deeply divided in *Miron v. Trudel*. The five justices in the majority were opposed by a minority of four justices that included the Chief Justice. The decision in *Miron v. Trudel* was also handed down on the same day that two other appeals involving equality rights were disposed of through lengthy opinions.

A leading treatise on cohabitation has interpreted *Miron v. Trudel* as follows:[17]

> The decision can be seen as a victory for unmarried couples; the Supreme Court by a majority has held that the situation of heterosexual unmarried couples does fit within § 15(1) of the Charter. The decision is likely to have the greatest impact in provinces where there is still a substantial gap between marriage and cohabitation; but, even in provinces where there is already extensive recognition of unmarried couples, the decision may hasten the end of all remaining distinctions. In Ontario, for example, there are a few differences between marriage and cohabitation relationships. Here the decision will support challenges to the remaining distinctions regarding exclusion from Parts I and II of the Family Law Act and the intestacy provisions of the Succession Law Reform Act.

The legal position of cohabitants has changed significantly over the past two decades. However, there are some remaining differences between married and cohabiting couples; for example,

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[16] [1995] S.C.J. No. 44.

[17] W. H. Holland & B. Stalbecker-Pountney, *Cohabitation: The Law in Canada*, 1-45 & 1-46 (1995).

cohabitants cannot make claims under provincial matrimonial property legislation and are not covered by intestacy provisions.

> While the courts have been very willing to adapt remedies, such as the constructive trust in dealing with property disputes between cohabitants, many thorny issues still remain unresolved. In the meantime cohabitants have resorted to the Charter to challenge what are perceived to be discriminatory provisions. In the wake of *Miron v. Trudel* further challenges are anticipated. Charter litigation is lengthy, time consuming and costly, and it would be preferable to have the appropriate place for consideration of all the ramifications of change. The Ontario Law Reform Commission Report has recommended that heterosexual cohabitants should have the same rights and responsibilities as married spouses throughout the Family Law Act of Ontario. The proposals are to be welcomed and should be implemented, thus obviating the need for further Charter litigation in this area.

This presents a rather optimistic picture. What it does not consider is how much more difficult it is to determine whether parties ever lived together in a stable relationship than it is to determine whether they ever complied with local marriage laws. If *Miron v. Trudel* has the attributed effect, to it could lead to a substantial increase in litigation and appeals of governmental decisions. For that reason, judges may find it desirable to interpret *Miron v. Trudel* more restrictively.

Conclusion

In conclusion, there are no reported cases in which it has been held that persons who lived together in a common-law province entered into a marriage that was valid at common law. Although arguments can be made to suggest that they are still possible, the requirements for establishing the existence of a valid common-law marriage would seem to be extremely difficult to satisfy in anything other than a very unusual case involving physically isolated parties. Nevertheless, cohabitants do have significant legal rights under Canadian law. Federal and provincial laws extend many benefits to parties who have lived in a stable relationship. Statutes that do not provide that at least certain cohabitants qualify as spouses may offend the Canadian Charter of Rights and Freedoms. However, the courts have not yet established just how far they are prepared to go in this direction.

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