

When the Law Doesn't Match the Reality of Relationships: Extending Matrimonial Property Rules to Common-Law Partners in Ontario

Luke's Place Support and Resource Centre for Women and Children

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TABLE OF CONTENTS

INTRODUCTION.....	5
Who we are	5
Land Acknowledgment	5
Overview	5
Setting the Context	6
The reality of IPV and the barriers faced by survivors in family court.....	6
Ontario's family laws for property division.....	9
Time for legal reform	12
PART I. Ontario Law on Property Division After a Relationship Ends.....	14
Property Division for Married Spouses	14
Matrimonial Home.....	15
Property Division for Common-Law Partners	16
Family Home	17
Challenges of Current Property Claims Available to Common-Law Partners.....	17
Complicated Legal Test with Unpredictable Outcomes	17
Unjust Enrichment Claims are Hard to Prove.....	17
No Straightforward Pathway to Claiming Exclusive Possession	19
Remedies that are not accessible to people who do not have a lawyer	20
Lack of Default Property Sharing Adds to the Financial Barriers Post-Separation	22
Lack of safe, affordable housing options.....	23
PART II. Other Canadian Provinces and Territories: Applying Matrimonial Property Scheme to Common-Law Partners	25
Overview	25
Why "Opt-Out"?.....	26
What Challenges Continue to Exist in "Opt-Out" Jurisdictions?	28
Procedural and Financial Challenges.....	28
Safety and Shelter – Availability of Exclusive Possession Orders	30
PART III. Past Reform Calls in Ontario	33
PART IV. Arguments For and Against Extending Matrimonial Property Rules to Common-Law Partners.....	37
i. Why Matrimonial Property Rules Should Not Be Extended to Common-Law Partners.....	37
Blurry boundary about what constitutes a family unit	37
Discourage people from marriage	38
Removing the freedom to choose.....	39
ii. Why Matrimonial Property Rules Should Be Extended to Common-Law Partners.....	40
Changing form of relationships in Ontario	40
Greater consistency and predictability in the law	41
Protection of vulnerable people, including survivors of IPV	42

<i>PART V. Reform Suggestions.....</i>	<i>44</i>
i. Extend the matrimonial property division scheme to common-law partners.	44
ii. Extend exclusive possession rights to common-law partners	45
iii. Increase public legal awareness	45
iv. Implement mandatory education on IPV for legal actors.....	46
<i>Conclusion.....</i>	<i>48</i>
<i>Appendices.....</i>	<i>49</i>
Appendix A, Table 1: Family Property Rules as Applied to Common-Law Partners in Canadian Common Law Jurisdictions	49
Appendix B, Table 2: Sources of Statutory Empowerment to Order Exclusive Possession to Common-Law Partners in Canadian Common Law Jurisdictions....	63
Appendix C, Table 3: Change in Marriage Rates Per 1,000 Before and After Reform in Canadian Common Law Jurisdictions	65
Appendix D, Table 4: Proportion of couples in common-law relationships in Canadian provinces and territories (1996, 2016, 2021).....	66
Appendix E, Table 5: Family Violence Legislation in Canadian Common Law Jurisdictions	67
Appendix F: Glossary of Legal Terms.....	73
Appendix G: Complicated Web of Legal Claims Available to Common-Law Partners in Ontario to get Exclusive Occupation of a Family Home After Separation	75

INTRODUCTION

Who we are

Luke's Place is an award-winning non-profit organization devoted to improving the safety and experience of women and their children as they deal with family law issues after leaving a relationship in which they were subjected to abuse. We provide direct services to hundreds of women and their children in the Durham Region and across the province every year. We share our expertise with service providers and lawyers across Ontario and Canada through training, resources, and mentoring, and work with academics to conduct research in our collaborative efforts to improve access to justice for all women and their children.

As part of Luke's Place's law reform and systemic advocacy work, we engage in both reactive and proactive law reform initiatives aimed at improving access to justice for women. This paper is part of this effort. We wish to thank the Rachlin Fellowship at the University of Toronto for making this project possible.

In this paper, we use gender-specific language to refer to those who are harmed by violence within the family and those who cause that harm. We believe it is important to acknowledge that, in Ontario and Canada, women in all their diversity and gender diverse people are overwhelmingly those who are subjected to abuse, and men are primarily those who engage in abusive behaviour.¹ We also acknowledge the diversity of women and families in this country and the continued adverse impacts of misogyny, homophobia, transphobia, and heteronormative culture.

Land Acknowledgment

Luke's Place Support and Resource Centre for Women and Children is located on the traditional territory of the Mississaugas of Scugog Island First Nation. As an organization, Luke's Place is committed to providing feminist, anti-oppressive and trauma-informed legal services.

Overview

This paper examines the significant gap between the legal rights of married spouses and common-law partners in Ontario, particularly in how property is divided and who is entitled to remain in the family home when their relationships come to an end. Under

¹ Family violence is highly gendered. In 2021, women and girls represented 69% of the police-reported family violence victims and 79% of the victims of police-reported intimate partner violence. We often use gendered language such as “women” to refer to family violence victims for this reason. However, we acknowledge that family violence also happens to men – according to Statistics Canada, the rate of family violence was 212 per 100,000 population for men and boys in 2021. See Statistics Canada, *Victims of police-reported family and intimate partner violence in Canada, 2021*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 19 October 2022). <https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019c-eng.htm>.

Ontario law, married spouses benefit from legal rules set out in legislation that ensure the equitable division of property accumulated during their relationship. No such legal rules exist in the legislation for people in common-law relationships, meaning they must rely on complex legal claims with uncertain outcomes to access similar remedies. Ontario law also only includes married spouses in the legal rules for exclusive possession of a home after separation, leaving people in common-law relationships without access to this important legal remedy.

The legal disparity between married spouses and common-law partners in Ontario disproportionately affects survivors of intimate partner violence (IPV). These women often face barriers such as economic abuse, lack of access to legal representation, and the emotional toll of navigating a complex legal system while facing ongoing violence and trauma. The current legal framework exacerbates inequality and vulnerability for survivors by failing to account for the realities of many common-law relationships.

This paper is an important part of the work to advocate for changes to Ontario's property laws that limit the rights of common-law partners after separation. It underscores the urgent need to align the legal framework with modern relationship dynamics and ensures equitable access to justice for all separating partners. Addressing this gap is particularly vital for protecting survivors of IPV, enhancing their financial security, and empowering them to leave relationships in which they are being harmed. The reforms discussed aim to reduce systemic barriers, simplify legal processes, and promote fairness in how property is dealt with after separation for common-law partners across Ontario.

This paper begins by describing the current legal regime in Ontario and highlighting the challenges experienced by common-law partners under this regime. We then explore legislation in other Canadian jurisdictions, some of which include common-law partners in the legislated rules for property division and possession of a family home. Following this, we discuss past calls for reform in Ontario, ending with recommendations for future law reform.

Setting the Context

The reality of IPV and the barriers faced by survivors in family court

IPV takes many forms and exists within all kinds of intimate relationships, from married spouses to common-law partners and people who are casually dating. As common-law relationships become increasingly prevalent in Ontario and across Canada, rates of IPV in common-law relationships are on the rise. In fact, past research has shown increased

rates of spousal homicide in common-law relationships as compared to married spouses.²

IPV can take many forms. It can include psychological, physical, financial or sexual abuse.³ It can change over time, and it often involves the children, who are severely impacted by being exposed to violence in the home. One of the most serious and dangerous forms of violence within an intimate relationship is coercive control, which is a cumulative and repeating pattern of violent behaviour over time designed to completely remove a survivor's autonomy, freedom and sense of self-worth.

IPV is not a rare occurrence. In fact, police-reported rates of IPV in Canada have been increasing each year for the last seven years,⁴ although the true prevalence of this violence is likely much higher due to underreporting. It is estimated that approximately 80% of people who are subjected to IPV do not report to the police.⁵ In 2018, self-reported data suggested that IPV affects a significant proportion of women in Canada, with 44% of the women who had been in an intimate partner relationship reporting that they had been subjected to some form of intimate partner violence throughout their lifetime.⁶ Women and girls are overwhelmingly more likely to be victimized by this violence than are men.⁷

² Maire Sinha, *Family Violence in Canada: A Statistical Profile, 2011* (Ottawa: Statistics Canada, 25 June 2013), online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11805-eng.pdf>.

³ According to the federal *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2(1), which is substantially similar to Ontario's *Children's Law Reform Act*, family violence is any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes

- (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
- (b) sexual abuse;
- (c) threats to kill or cause bodily harm to any person;
- (d) harassment, including stalking;
- (e) the failure to provide the necessities of life;
- (f) psychological abuse;
- (g) financial abuse;
- (h) threats to kill or harm an animal or damage property; and
- (i) the killing or harming of an animal or the damaging of property

⁴ Statistics Canada, *Victims of police-reported family and intimate partner violence in Canada, 2021*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 19 October 2022), <https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019c-eng.htm>

⁵ Government of Canada, *Fact sheet: Intimate partner violence*, (2021) online: <https://www.canada.ca/en/women-gender-equality/gender-based-violence/intimate-partner-violence.html> [Fact sheet: IPV]

⁷ See for example Statistics Canada, *Victims of Police-Reported Family and Intimate Partner Violence in Canada, 2021* (Ottawa: Statistics Canada, 19 October 2022), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/221019/dq221019c-eng.htm>.

A lack of financial resources is one of many barriers survivors face when leaving an abusive partner.⁸ Many women also live in poverty post-separation, with research indicating that their household income decreases by almost 30% post-separation as compared to only 5% for men.⁹ Many women are also subjected to economic abuse during the relationship and after separation, further exacerbating their financial hardship.¹⁰ As many as 95% of IPV survivors have been subjected to economic abuse in their lifetime.¹¹ The abuse may involve assets being held solely in the abuser's name, the woman having limited or no access to resources, or the abuser providing her misinformation about her rights and entitlements if the relationship ends.

Many women in common-law relationships do not realize they do not have the same legal protections as married spouses when it comes to division of property or exclusion occupation of a family home after separation. In a 2023 Ontario study examining legal knowledge amongst married and unmarried respondents, researchers found 84% of common-law spouses were unaware of the legal differences between marriage and common-law status, while 78% were unaware that they were not automatically entitled to share in the value of the family home upon separation.¹²

Many women who have been subjected to IPV turn to family law and family court when they are leaving an abusive partner to sort out how the family will function financially and otherwise after a relationship ends. Many women are concerned about how the children will be cared for, how they will stay safe and how they will be able to financially support themselves.

The women who turn to the family law system quickly learn that it is challenging to navigate and may not provide them with the outcomes they need to keep themselves and their children safe and financially secure. They face barriers throughout the process and a legal system that does not understand their experiences or hear their concerns. While engaging in the complex family law system, many women continue to be subjected to violence post-separation, have ongoing safety concerns for themselves and/or their children, and have to grapple with the extensive impacts of trauma and abuse.

⁸ Canadian Center for Women's Empowerment, *Written Brief on the Financialization of Housing: Impacts of Financialization of Housing on Women Fleeing Domestic Abuse* (Ottawa: CCFWE, 2023), online: <<https://ccfwe.org/wp-content/uploads/2023/05/CCFWE-HUMA-Submission-Financialization-May-2023-house-commons.pdf>>. [CCFWE Housing Brief]

⁹ As reposted in Department of Justice Canada, *Economic Consequences of Divorce and Separation*, online: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/ecds-cfds.html#:~:text=After%20divorce%20or%20separation%2C%20women's,income%20decreased%20by%20only%206%25.>

¹⁰ CCFWE Housing Brief, *supra* note 9; Economic abuse is where someone uses money and financial resources to exploit and control someone else. See Adrienne E Adams et al, "Development of the Scale of Economic Abuse. Violence Against Women" (2008) 14:5 Violence Against Women 563 [Adams].

¹¹ CCFWE Housing Brief at 3, *supra* note 8.

¹² Institut national de la recherche scientifique, *Economic Practices and Social and Legal Representations of Life Together* (April 2023), online: https://espace.inrs.ca/id/eprint/13538/1/RapportBelleau_2023.pdf at 13.

The family law system itself is often re-traumatizing, as women may not be believed when they raise the issue of abuse. Myths and stereotypes about the victim and the violence itself continue to work against women in family court and impact how credibly they are viewed by the court.¹³ Many women navigate these barriers without the benefit of a lawyer, which makes it even more challenging for them to engage meaningfully in the family court process and advocate for their rights.

Abusers often use the court process itself as a way to continue exerting power and control over their former partner, something referred to as “litigation abuse” or “legal bullying”.¹⁴ Common tactics of legal bullying include not complying with court orders for support or financial disclosure, which can make it exceptionally challenging for women to both financially support themselves and their children after separation, and advance financial claims in court.

Ontario’s family laws for property division

In Ontario, married spouses are statutorily entitled to equal division of property accumulated during the marriage, regardless of which of them legally owns it, as set out in the *Family Law Act (FLA)*.¹⁵ This means that both spouses will share in the growth of each other’s net worth during the marriage, regardless of ownership. There are various deductions and exclusions, but the process of dividing property is clearly laid out in the legislation. People who wish to set their own terms for dividing up property when their marriage ends can do so by writing a domestic contract¹⁶; for example, a marriage contract at the beginning of their marriage and/or through a separation agreement when they separate.

On the other hand, someone leaving a common-law relationship has no statutory right to share in the value of assets accumulated during the relationship. To ensure a right to such a share, people in a common-law relationship could enter into a domestic contract at the beginning of their relationship – a cohabitation agreement – setting out their intention to share their property in the event of relationship breakdown or could resolve their property issues through a separation agreement after their relationship ends. Otherwise, someone seeking a share of the property would have to bring an equitable

¹³ Hrymak and Hawkins, “Why Can’t Everyone Just Get Along? How BC’s Family Law System Puts Survivors in Danger” (January 2021) online: < <https://womenslegalcentre.ca/wp-content/uploads/2021/01/Why-CantEveryone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf>>; Koshan, “Challenging Myths and Stereotypes in Domestic Violence Cases”, 35 Can J Fam L 33.

¹⁴ We use the term “legal bullying” to refer to the abuse tactic where the abusive partner uses family law and the family court process as a strategy to maintain power and control over their ex-partner. The abusive partner uses the family court process to intimidate, harass and induce fear in their ex-partner. Some tactics include bringing repeated motions on an issue that has already been decided or does not have merit, repeatedly changing lawyers or deciding to represent himself even when he can afford a lawyer, and failing to obey court orders. To read more about legal bullying, please visit Luke’s Place website, Family Court and Beyond: <https://familycourtandbeyond.ca/family-law-court/family-law-issues/legal-bullying/#:~:text=Legal%20bullying%20can%20take%20many,required%20in%20the%20court%20proceeding.>

¹⁵ *Family Law Act*, RSO 1990, c. F. 3.

¹⁶ Please see the Glossary of Legal terms attached as an Appendix for a definition of “domestic contract”.

legal claim, which, as discussed below, can be complicated and unpredictable in terms of outcomes as compared to outcomes based on rules set out in legislation.

Another important distinction between married spouses and common-law partners in Ontario is the right to exclusively occupy a family home after a relationship ends. In Ontario, the law explicitly allows married spouses to claim exclusive possession of a matrimonial home after separation. This law only applies to married spouses, which means that common-law partners do not have access to this kind of order. Instead, they have to rely on a series of complicated ancillary claims to try to secure a court order that has the practical effect of excluding a former partner from a shared home.

While the division of property issues affects only people who own property and, therefore, are typically more privileged economically, accessibility of exclusive possession orders has an impact on individuals of all income levels, including low-income individuals. This is especially true as exclusive possession orders can extend to leased property and be granted regardless of ownership.

Further complicating the situation is the fact that laws related to property rights are not consistent across jurisdictions. Several provinces and territories now include common-law partners in their definition of spouse for the purposes of property division and exclusive possession of a family home, but Ontario is not one of them. Anyone relocating from one of these other jurisdictions may not understand the differences that exist in Ontario and the limits this may place on their automatic entitlements under the laws in this province. In addition, governments recognize common-law relationships for many legal and financial purposes. Common-law partners are generally treated as spouses for income tax purposes after only one year of cohabitation, and many federal, provincial, and territorial benefit programs extend eligibility to common-law partners who meet a minimum cohabitation requirement. As a result of the mixed messages, individuals may reasonably assume that common-law partners are entitled to the same property rights as married spouses upon separation.¹⁷ The current lack of legislated rights poses challenges for survivors in common-law relationships.

Many of the survivors we have supported at our organization who were in a common-law relationship learned for the first time after separation that they may not be entitled to an equal share of property or to stay in a family home after separation. For some of these survivors, the misinformation about their rights and entitlements was part of the financial abuse and control they were subjected to during the relationship. The economic reality faced by these survivors post-separation is often far more challenging and complicated than the financial reality faced by married survivors, particularly if they want to make any claim related to property. As noted by Joanna Radbord when discussing the lack of statutory rights for unmarried partners in Ontario, “[e]quitable claims require lengthy, expensive trials that few survivors of FV can afford; indeed,

¹⁷ Laurence Breton & Margo Hilbrecht, *The Rights of Common-Law Partners in Canada* (Ottawa: The Vanier Institute of the Family, 24 November 2023) at 3-4.

pursuit of such a claim is likely to consume, for most, the entirety of the amount at issue.”¹⁸

These two scenarios may help express the significant challenges created by the current distinction between married spouses and common-law partners in Ontario.

Mary Beth and Simon have been in a relationship for 15 years. They have two children. Mary Beth has been a stay-at-home mother for the past 10 years and is entirely dependent on Simon financially. Because Simon earns a lot of money, the family lives very comfortably. The house they live in is owned by Simon, who bought it before their relationship began. Both cars are registered in Simon’s name. Mary Beth has access to the joint chequing account, but all other bank accounts and investments are in Simon’s name alone. She cannot use their joint credit card.

Simon is abusive to Mary Beth. He is very controlling financially, and Mary Beth knows little about the family’s financial situation. He also engages in coercive control and, occasionally, gets physical with Mary Beth.

She has decided to leave the relationship.

Scenario one: Mary Beth and Simon are married. This means that Mary Beth will be able to apply to receive spousal support and be entitled an equalization of the family property, including the matrimonial home, even though Simon bought it before they were married and the deed is in his name only. The equalization will also include any increase in the value of any investments and pensions that Simon may have. If she wishes to remain in the matrimonial home with the children, she will be able to make an application for exclusive possession of the home. The legal test for exclusion possession includes a consideration of what’s best for the children and the violence to which Mary Beth has been subjected to throughout the marriage.

Scenario two: Mary Beth and Simon live in a common-law relationship and do not have a cohabitation agreement. Mary Beth will be able to apply to receive spousal support, but she will not automatically be able to receive an equalization of the family property, including the home. Because her name is not on the deed, she will not be able to apply to the court for exclusive possession of the home.

¹⁸ Radbord, chapter 9 at page 238.

Clearly, Mary Beth is in a much more vulnerable position in the second scenario; something she may not even be aware of.

Time for legal reform

In Ontario, more and more people are living in common-law relationships instead of getting married. In 2021, 16% of couples in Ontario were in a common-law relationship¹⁹ compared to only 8.1% in 2016.²⁰ We see the prevalence of common-law relationships firsthand with the women we support, as many of them have left an abusive common-law partner and are looking to access safety and financial security through family court.

Ontario is not alone in the growing number of common-law relationships. The same is true across other provinces and territories in Canada, with all seeing an increase in the last 10 years (see Appendix). To date, six provinces and territories have included common-law partners in their property-sharing regime in their family law legislation, and, just recently, Quebec amended its Civil Code to provide more legal protections to common-law partners related to property and the family home.²¹

The Law Commission for Ontario studied this issue back in 1993 and recommended that Ontario extend its property rights to common-law partners.²² Since then, other Ontario practitioners and legal scholars have similarly explored the exclusion of common-law partners from property-sharing legislation²³ and exclusive possession claims²⁴ and also recommended that Ontario change its laws to provide better protection to common-law partners.

Despite these past calls for change, the Ontario government has yet to address this issue. As a result, common-law partners in Ontario continue to lack the same legislated rights that married spouses have at separation. The impact of this exclusion is borne most heavily by the most vulnerable people in the province, including survivors of intimate partner violence.

¹⁹ Statistics Canada, *State of the Union: Canada Leads the G7 with Nearly One-Quarter of Couples Living Common Law, Driven by Quebec* (13 July 2022), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220713/dq220713b-eng.htm>

²⁰ Statistics Canada, *Focus on Geography Series, 2016 Census* (18 April 2019), online: <https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-PR-Eng.cfm?TOPIC=4&LANG=Eng&GK=PR&GC=35>

²¹ *An Act Respecting Family Law Reform and Establishing the Parental Union Regime*, SQ 2024, c 22 [Bill 56].

²² Law Commission of Ontario, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993), online: <https://archive.org/details/reportonrightsre00onta>

²³ Thomas, “For Better or for Worse? The Need for Property Reform for Unmarried Partners in Ontario”, 43 CFLQ 363.

²⁴ Sadvari and Valdez, “Can a Common Law Spouse Obtain Exclusive Possession by Injunction or Other Means?” presented at Ontario Bar Association’s, *Constructive Trusts and Resulting Trusts: Bringing Order to Chaos*, 2007.

The time is now for the laws to change so they provide better protection to those who most need it.

In the remainder of this paper, we explore in more detail the current laws in Ontario, the differences in the laws across other Canadian jurisdictions, past calls for reform in Ontario and the arguments for and against legislative change. We end the paper with a set of recommendations for addressing the legal disparity between married spouses and common-law partners.

PART I. Ontario Law on Property Division After a Relationship Ends

As discussed above, in Ontario, property division for common-law partners differs from that for married couples because the property provisions in the FLA apply only to married couples.

The FLA contains two different definitions of spouse. Section 1(1) of the FLA defines “spouse” as either of two persons who “are married to each other”.²⁵ This definition applies to the entire FLA except the sections dealing with child and spousal support. In the part of the FLA that deals with support, spouse is defined more broadly, to include either of two persons who are not married to each other and have cohabited “(a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children’s Law Reform Act*”.²⁶

In other words, while non-married people may be considered spouses for the purposes of child or spousal support, they are not considered spouses when it comes to dealing with property after separation.

Property Division for Married Spouses

Part II (Family Property) of the FLA governs matrimonial property division for married people when they separate. The basic premise is that, subject to certain exceptions, spouses should share equally in the wealth accumulated during the marriage. The process is called “**equalization**”. In general, the equalization process generally focuses on the increase in each spouse's net worth during the marriage. To determine each spouse's entitlement, their “net family property” is calculated by determining the value of their debts, liabilities and assets on the date of separation and deducting certain amounts, including the value of property they brought into marriage.²⁷ Once each spouse's net family property has been determined, section 5(1) of the FLA provides that “the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.”²⁸

Some properties are excluded from this calculation, including property (other than a matrimonial home) acquired by gift or inheritance from a third party and damages for

²⁵ *Family Law Act*, RSO 1990 c F3, s 1(1). This section says “spouse” can also mean either of two persons who “have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right. (“conjoint”) [FLA]

²⁶ *Family Law Act*, RSO 1990, c F3, s 29.

²⁷ *Family Law Act*, RSO 1990, c F3, s 4(1).

²⁸ *Family Law Act*, RSO 1990, c F3, s 4(5).

personal injuries.²⁹ The spouse who owns these excluded properties does not need to share them with the other spouse.

According to section 5(7) of the *FLA*, the purpose of equalizing net family properties between married spouses is to “recognize that child care, household management, and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties”.³⁰

Matrimonial Home

Special rules apply to the matrimonial home.³¹ These rules are set out in the *FLA* and only apply to married spouses.

Married spouses have an equal right to possession regardless of ownership (i.e. no matter which of their names is on the deed)³² and the right to an equal share in the full value of the home at the time of separation, regardless of ownership, even if the home was inherited or gifted to one particular spouse during the marriage or was brought into the marriage by one spouse alone.³³

The right to apply for exclusive possession of the home is also an important legal right available to married spouses.³⁴ It is usually granted on a temporary basis pending resolution of the case and does not affect ownership or the right to an equal share of the home’s value on separation. An exclusive possession order can be extremely important in situations of IPV. For example, a survivor might not have the resources to seek alternative accommodations, and it may be unsafe for her to continue staying under the same roof with her ex-partner.³⁵ The test for getting an exclusive possession order under the *FLA* requires a court to consider “any violence committed by a spouse against the other spouse or the children”. IPV is also considered by courts when considering the best interests of the child, which also forms part of the legal test for exclusive possession.³⁶

²⁹ *Family Law Act*, RSO 1990, c F3, s 4(2).

³⁰ *Family Law Act*, RSO 1990, c F3, s 5(7).

³¹ See Glossary of Legal Terms attached as an Appendix for definition of “matrimonial home”.

³² *Family Law Act*, RSO 1990, c F3, s 19(1).

³³ According to section 4(1) of the *FLA*, the matrimonial home is explicitly excluded from pre-marital assets which is to be deducted when calculating a partner’s net family property. In section 4(2) of the *FLA*, the matrimonial home is again explicitly excluded from the list of “Excluded Property”. This means that even if the matrimonial home was a pre-marital asset or acquired by gift or inheritance, its full value is to be included in the calculation of net family property, thereby subjected to equal division between the spouses. *Family Law Act*, RSO 1990, c F3, ss 4(1)–(2).

³⁴ *Family Law Act*, RSO 1990, c F3, s 24(1).

³⁵ There is gender asymmetry in family violence. Most survivors of family violence and casualties from family violence are women. Most women killed by their spouses are killed after leaving the relationship or while attempting to leave the relationship.

³⁶ See *Flesias v Flesias*, 2020 ONSC 2368 at para 39.

Property Division for Common-Law Partners

There are no statutory provisions in Ontario that govern property division for people in common-law relationships when they separate. Each common-law partner gets to keep the following:

- What they own (i.e., what they brought into the relationship or bought during it)
- Half of anything they jointly own with their partner

The starting point is “keep what you own”, unlike the starting point for married spouses, which is the equal division of accumulated property. The law in Ontario does not recognize that people in common-law relationships make equal contributions to joint family responsibilities in the same way it does for people who are married. However, there has been some recognition in the case law that common law relationships may involve similar financial integration and partnership as compared to married spouses.

A common-law partner can make claims in equity for a share of the value of the property. This type of claim is based on the doctrine of unjust enrichment and focuses on the property-owning partner giving up a gain they have unjustly received at the expense of the other partner.³⁷ It is an equitable claim addressing benefits unfairly retained by one person at another's expense, often involving money or services. Unlike the statutory equalization regime available to married spouses, unjust enrichment claims require common-law partners to establish each element of the legal test for unjust enrichment, including:

- Enrichment of or benefit of the owning partner;
- Corresponding deprivation on the part of the claiming partner; and
- Absence of a juristic reason for the enrichment (i.e. is there a reason for the benefit based on law, contract or the intentions of the party?).³⁸

In *Kerr v. Baranow*, nearly 15 years ago, the Supreme Court of Canada first recognized the concept of a “joint family venture”.³⁹ A joint family venture claim provides a mechanism for the court to consider the contributions of the non-owning partner for the purposes of establishing unjust enrichment by considering the extent to which the parties were financially integrated and worked together to accumulate assets during the relationship. The court will consider factors such as mutual effort between the partners to accumulate wealth during the relationship, economic integration of their finances and the actual intent of the people to deliberately choose to integrate their finances.

If a common-law partner can meet the legal test for unjust enrichment, the legal remedy could be an order for the other partner to pay money as a way to compensate for the benefit they received or a constructive trust order. A constructive trust is a legal

³⁷ Kit Barker, “Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right” (1998) 57 CLJ 301.

³⁸ *Kerr v. Baranow*, 2011 SCC 10, at paras 36-41.

³⁹ *Kerr v. Baranow*, 2011 SCC 10, at parast 60-69.

remedy that gives the claiming partner an interest in property held by the other partner. In many cases, courts will find that simply compensating the claiming partner through an order for the payment of money is sufficient. If money isn't a sufficient remedy and the claiming partner can show a direct link between their contributions and the maintenance or improvement of a particular asset, they may be awarded an ownership interest through a constructive trust.

Family Home

In Ontario, common-law partners do not have the same statutory protections with respect to the home that are available to married spouses. A partner whose name is not on the deed or lease has no equal possessory right to the home and no right to share in the value of the home at separation. As a result, common-law partners who are non-owners have only limited ways to obtain *de facto* exclusive possession of the family home, many of which are connected to support and have their own complicated legal tests. Please see the Appendices for a more detailed breakdown of the possible claims a common law partner can make that may allow them to stay in a family home to the exclusion of their former partner.

Challenges of Current Property Claims Available to Common-Law Partners

Complicated Legal Test with Unpredictable Outcomes

Unjust Enrichment Claims are Hard to Prove

The legal concepts outlined above that are available to common-law partners are complicated and very dependent on the facts of a particular case. Because of the fact-specific nature of these claims and the lack of default rules that universally apply, outcomes for equitable claims are often unpredictable. There is no guarantee that the person making the claim will be successful and, even if they are, that the remedy will come close to an equal sharing of the value of property accumulated during the relationship as it is for married spouses. The laws and legal tests that apply to common law partners simply do not assume equal contributions to the family unit as it does for marriages. Contributions have to be proven.

The uncertainty associated with unjust enrichment claims can make it difficult for common-law partners to assess the strength of their case or predict what remedy a court may grant. Some scholars have noted that this uncertainty may actually foster litigation by encouraging parties to "try their luck" in court rather than settle disputes earlier in the process.⁴⁰

⁴⁰ Brynne Thomas, "For Better or for Worse? The Need for Property Reform for Unmarried Partners in Ontario" (2025) 43:3 *Canadian Family Law Quarterly* 363.

A successful unjust enrichment claim requires extensive evidence, which isn't always available. For instance, banks in Canada keep records related to paid and prescribed balances for only seven years, which can make it difficult to prove financial contributions dating back several years.⁴¹ Many people do not keep track of all the financial contributions they make to properties or joint accounts because they are not planning for the relationship to end. Access to evidence and financial records is even more challenging for survivors of IPV, many of whom may have limited access to financial documentation and information about ownership of assets. While advancements in the law such as the recognition of a joint family venture may be helpful in some cases in terms of establishing unjust enrichment, it still requires people to prove what is otherwise assumed for married spouses, namely that the partners were financially integrated and intended to be integrated, and were engaged in mutual efforts to grow their assets and value of property during the relationship.

Another challenge in making a claim for unjust enrichment based on a joint family venture is that courts often seem to have a "traditional family" in mind when assessing these claims based on the view of a "traditional family" as having an earner-homemaker arrangement, the presence of children, and joint finances (e.g. joint bank accounts, shared expenses etc.). Courts look at characteristics associated with traditional families to determine whether there was a joint family venture. For instance, in *Belair v Bourgon*, although the partners had cohabited for five years, the court concluded that there was no joint family venture based on the fact that they had no children together and had limited joint finances.⁴² Common-law partners in relationships that do not fit what a "traditional family" looks like may face added difficulties in making out the claim.⁴³ In comparison, regardless of whether or not a married relationship has the features of a "traditional family", each spouse would still be entitled to an equal share of the property accumulated during the relationship.

Even if a joint family venture is found, there is no presumption of equal division of family property.⁴⁴ In other words, the finding of a joint family venture does not automatically entitle the claimant to a 50% share of the value of property accumulated during the relationship, which is the default of what the claimant would get if they were in a marriage.⁴⁵ A common law partner seeking equal division of property accumulated

⁴¹ Bank of Canada, *Info Source* (October 2025), online: Bank of Canada <https://www.bankofcanada.ca/about/contact-information/atip/information-programs-information-holdings/> (indicating that records relating to paid and prescribed balances are retained for seven years)

⁴² *Belair v Bourgon*, 2019 ONSC 933.

⁴³ See Jennifer Flood, "Share the Wealth – Kerr v Baranow and the Joint Family Venture" (2011) 27:2 Can J Fam L 361 [Flood].

⁴⁴ In *Hutsul v Kostikov*, 2021 ONSC 2028, M McKelvey J. said, "Under *Kerr* there is no presumption that wealth will be shared equally; unlike the *Family Law Act*, *Kerr* does not presume an equal contribution to the property acquired in the course of the family venture" (para 65).

⁴⁵ Following *Kerr*, critics have warned against such a lack of presumption of equal division resulting in certain contributions being de-valued or ignored (see Flood, *supra* note 43). One critic predicted the natural tendency of a 50-50 split since "what brave judge [...] is going to find that having the primary responsibility for childcare and the household is not equal to financial provision?" (Berend Hovius, "Property Disputes Between Common-Law

during the relationship will need to provide specific evidence to prove that the two partners made equal contributions to the value of that property.

A review of the case law suggests that certain kinds of family contributions might be viewed as less valuable in calculating the division of property in these cases. For instance, in *Porteous v Conway*, the applicant and the respondent were in a common-law relationship for 13 years.⁴⁶ The applicant became injured at one point in the relationship and subsequently stayed home to undertake more household responsibilities, including supervising the renovation of a property jointly owned by the parties.⁴⁷ The court found a joint family venture but concluded that a 60-40 retention of accumulated property was just in this case, with the respondent retaining the larger share.⁴⁸ Given that the people contributed fairly equally to their joint family venture prior to the applicant's injury and that, even after her injury, she contributed her benefits and a significant amount of domestic labour to the family, it seems that the unequal split of property could only be explained by their difference in responsibilities following the injury. One cannot help but wonder whether the respondent's larger financial contributions during the last five years of the relationship were deemed more valuable than the applicant's larger non-financial contributions during that time.

Given the challenges and unpredictability in both providing unjust enrichment and securing an appropriate remedy, many common law partners may be discouraged from bringing this kind of claim.

No Straightforward Pathway to Claiming Exclusive Possession

There is also unpredictability when it comes to securing an order allowing a common law partner to stay in a family home following separation. Because there is no direct legal route to making this claim as there is for married spouses, common law partners have to explore other legal remedies that may have the practical effect of excluding their former partner from a home (see Appendix). They have to understand what options may be available and the legal tests that each of these options would entail, all of which are very different and require different kinds of evidence.

Partners: The Supreme Court of Canada's Decisions in *Vanesse v. Seguin* and *Kerr v. Baranow*" (2011) 30:129 *Canadian Family Law Quarterly*). His prediction became generally true in subsequent case law: see *Farkas v Bedic*, 2016 ONCA 82 and *Piment v Jaggernaut*, 2021 ONSC 6810.

⁴⁶ *Porteous v Conway*, 2015 ONSC 5871 [*Porteous*].

⁴⁷ *Porteous v Conway*, 2015 ONSC 5871 at para 83.

⁴⁸ Here are the facts of *Porteous v Conway*, 2015 ONSC 5871: Respondent was employed throughout the 13-year relationship and financially contributed to household expenses. Prior to Applicant's injury, the parties contributed fairly equally to household expenses. Applicant was mostly unemployed throughout the last 5 years of the relationship due to her injury and contributed her injury benefits to household expenses during that time. Applicant stayed home during the last 5 years of the relationship and assumed more domestic duties than Respondent. Applicant also spent significantly more time supervising and working on the renovations. The parties shared the cost of renovating their property fairly equally (paras 11 and 83).

There have been cases in which judges have commented on their inability to order exclusive possession despite the situation warranting this kind of order, simply because of the current state of the law. For instance, Master Nolan in *Barkley v. Demars* commented, "...had the parties been married and, thus, had the property rights accorded by Part 1 of the FLA, I would have had no hesitation in granting the applicant an order for exclusive possession on the grounds that it is in the best interest of the child that the child remains in that home at least for the time being".⁴⁹ Mackinnon J. in *Souleiman. v Yuusuf* commented that "had section 24 of the FLA applied, I would have granted exclusive possession to the applicant" with the awareness that continued occupation of the home by both spouses would likely expose their children to "parental conflict and tension until their parents' case is finalized".⁵⁰

Given the significance exclusive possession orders can have for survivors after separation in terms of providing a safe place to live, the unavailability of these orders for common-law partners is a significant gap in our current laws.

Remedies that are not accessible to people who do not have a lawyer

Retaining a lawyer is expensive. In 2018, the average hourly rate of family lawyers in Canada with 2 to 5 years of experience was \$239.93. Because Ontario lawyers earn the most among Canadian provinces, the rate in Ontario was likely higher than \$239.93 hourly.⁵¹ In 2018, a trial of up to 2 days could cost as much as \$12,000 and a trial of up to 5 days as much as \$23,000.⁵² These rates have undoubtedly gone up in the last eight years, given inflation.

Although Legal Aid Ontario pays for lawyers through their certificate program, this program is only available to individuals with extremely low incomes. People who do not qualify for legal aid but can't afford to retain a lawyer may end up as unrepresented litigants or give up on pursuing complicated and time-consuming claims altogether.⁵³ Legal Aid also limits the legal issues they will provide a certificate for, which may exclude coverage for any property-related claims. Additionally, when property issues are involved, women may often be disqualified for Legal Aid because of the financial threshold, even if they do not currently have access to funds from the property at issue.

⁴⁹ *Barkley v Demars*, 1997 CarswellOnt 5814 [*Barkley*] at para 4.

⁵⁰ *Souleiman v Yuusuf*, 2021 ONSC 6994 [*Souleiman*] at paras 6 and 24.

⁵¹ Marg Bruineman, "The right price", *Canadian Lawyer* (April 2018) at 21, online: https://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_Apr_18_LegalFeesSurvey.pdf [Bruineman].

⁵² Marg Bruineman, "The right price", *Canadian Lawyer* (April 2018) at 22, online: https://www.canadianlawyermag.com/staticcontent/AttachedDocs/CL_Apr_18_LegalFeesSurvey.pdf

⁵³ Lawyer fees are not the only type of fee that litigants have to pay. The procedure itself costs money. Ontario Regulation 417/95 lists the costs associated with specific proceedings in family court. For example, filing an application costs \$214 and placing an application on the list for hearing costs \$445. Fee waivers are only available to individuals with extremely low income.

Data from 2012 shows that between 40% and 57% of parties did not have a lawyer when they appeared in court for family law issues in Canada.⁵⁴ The prevalence of self-representation in family law appears to have increased over time. The National Self-Represented Litigants Project (NSRLP) estimated in 2016 that 64% of individuals involved in applications under the *FLA*, the *CLRA*, or the *Divorce Act* in Ontario do not have a lawyer. This was likely an underestimation because many litigants start their case with a lawyer but then become unrepresented:

Being unrepresented can pose many problems for people trying to pursue legal remedies in family court. First, learning the law without having gone to law school can be extremely challenging. Unrepresented litigants must understand and navigate the complexities of court process and procedure, as well as the substantive legal tests they have to meet.⁵⁵ As discussed above, unjust enrichment claims can be complicated even for legal professionals with years of education. Unrepresented litigants must manage all of this while also balancing their “private, professional, marital and parental obligations”.⁵⁶ Second, the court experience can be overwhelming for unrepresented litigants who might not understand the language that is being used in court. Research shows that litigants without a lawyer are “less able to argue objectively and rationally”.⁵⁷ This leads to poorer court outcomes, with approximately 75% of people without a lawyer losing at trial and 85% being unsuccessful in motions court.⁵⁸ This is especially true for unrepresented litigants whose first language is not English, for whom understanding the law, the legal tests and the courtroom procedure can be exponentially more challenging.

The difficulties that unrepresented litigants face are especially felt by survivors of IPV.⁵⁹ In past research about women’s experiences of family court when unrepresented, both lawyers and judges noted particular concerns about a lack of legal representation in cases involving violence. Lawyers observed that when it is the survivor who does not have a lawyer, she may be coerced into accepting a settlement that does not adequately protect her or her children. And for many, the lack of legal representation is not a choice. For example, in one study that sampled abused women in Ontario found that 84% of them started their cases with legal representation but ended up as unrepresented litigants; 49% of them said that they were unrepresented for strictly

⁵⁴ Government of Canada, “Self-Represented Litigants in Family Law” (June 2016), online: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>.

⁵⁵ David Lundgren, “Inaccessible justice: a qualitative and quantitative analysis into the demographics, socioeconomics, and experiences of self-represented litigants” (2023), online: <https://representingyourselfcanada.com/wp-content/uploads/2023/05/Inaccessible-Justice-David-Lundgren.pdf> [Lundgren].

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Jennifer Lynch & Margot Mary Davis, “What can be done about upward trend of self-represented litigants” (18 May 2021), online: <https://www.law360.ca/articles/26793> [Lynch & Davis].

⁵⁹ Lundgren, *supra* note 55.

financial reasons.⁶⁰ Survivors who cannot afford legal representation have no options but to navigate the legal system and complicated property claims by themselves.⁶¹

Without a lawyer, an already challenging legal system can become all but impossible to navigate. A lack of knowledge about the law, limited understanding about the procedure, challenges with completing the correct paperwork, and having to deal directly with the abusive ex-partner and/or his lawyer are key challenges for unrepresented survivors in court. The psychological effects of the abuse are amplified by an intimidating courtroom setting. They also have to face their abuser directly without the buffer of a lawyer, which can be extremely triggering and traumatizing.

It is within this context that women need to figure out what kind of property claims they can make, what evidence they need to prove these claims and how these claims can be properly put before the court. This is extremely challenging. For some survivors, the result is simply that they walk away from financial rights and entitlements as opposed to bringing complicated legal claims that have uncertain outcomes.

Lack of Default Property Sharing Adds to the Financial Barriers Post-Separation

Research shows that women are more likely to experience greater financial hardship following separation. For example, research shows that women's household income decreases more than men's after divorce and that women with dependent children are less likely than men to reach their pre-divorce income within six years following the divorce.⁶² One scholar notes that, regardless of marital status, relationship breakdown can create economic disadvantages for a partner who has assumed primary responsibility for childcare and domestic labour,⁶³ roles that continue to be disproportionately undertaken by women.

For married women, having a legislated property division scheme eliminates some of the financial uncertainties at the time of separation when it comes to their rights and entitlements. They know that, barring a domestic contract setting out a different way to share property, the rules for property division set out in the *FLA* will apply and they will

⁶⁰ Luke's Place Support and Resource Centre, *Through the Looking Glass: The Experiences of Unrepresented Abused Women in Family Court* (2008), online: <http://lukesplace.ca/pdf/Pam-Appendix-2.pdf>.

⁶¹ Note that many studies on family violence focus on women's experience due to the gender asymmetry of family violence. However, these issues can apply to male family violence survivors as well. See *Fact sheet: IPV*, *supra* note 6: women are significantly more likely than men to have experienced any form of IPV. See also Rachel Birnbaum & Nicholas Bala, *The Impact of the Lack of Legal Aid in Family Law Cases*, (Ottawa: Department of Justice Canada, 2019), online: https://www.justice.gc.ca/eng/rp-pr/jr/laf-ljdf/docs/RSD_RR2019_The_Impact_of_the_Lack_of_Legal_Aid_in_Family_Law_Cases_EN.pdf: Women are more likely than men to be the victims and survivors of abuse and are more likely to be in need of legal aid services for economic and parenting issues, as well as court protection.

⁶² Statistics Canada, *Economic Consequences of Divorce and Separation* (June 2016) online: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/ecds-cfds.html>.

⁶³ Bruno Jeandidier, "[Commentaries]: Should There be a System of Alimony for Unmarried Couples who Separate?" (2016) 71:3 *Population* (English Edition, 2002-) 494.

share in the value of assets accumulated during the marriage. Having this kind of predictability in equal sharing of property upon separation increases the possibility of settling or resolving issues outside court, which is often less expensive than lengthy and expensive litigation.

The same is not true for women experiencing the breakdown of a common-law relationship. These women face the uncertainty of litigation based on equitable remedies that are complicated and fact-specific. They have no certainty of sharing equally in the value of property accumulated during the relationship. They then have to face the high costs of litigation because, with less clarity around rights and entitlements, there may be less opportunity for settlement outside of court. Going to court is expensive. High litigation costs, including legal fees, pose significant financial barriers for common-law partners at a time when they may already be struggling financially.⁶⁴

These financial barriers can be exacerbated in situations of IPV. A lack of financial resources can trap women in situations of violence and make it difficult for them to leave the relationship and start a court case in the first place, let alone a court case involving complex legal claims. Many women are grappling with the impacts of past and ongoing economic abuse, further placing them in a precarious financial position both during the relationship and after it has ended.

Lack of safe, affordable housing options

A common-law partner who does not own the family home can be kicked out by the owning partner before any court proceedings are underway. Or, if she has nowhere to go, but has no legal right to exclusive possession of the home, she may have to remain with her abusive partner. Even if she is a co-owner of the property, she will have a hard time excluding him from the home because of the lack of an accessible legal remedy.

Finding alternative accommodations can be exceptionally challenging. If the woman does not have friends and family to rely on, she may need to find space at a local shelter. Yet even this decision can become a point of contention in family court, with abusers often attempting to claim that the woman is staying at a shelter only for strategic reasons to gain a tactical advantage in family court, rather than a response to safety concerns. In addition to facing repercussions in family court, the reality is that there isn't always shelter space available. In 2019, approximately 620 women and children across Canada were turned away each day from shelters because of a lack of space.⁶⁵ It is also not financially tenable for many survivors to afford a place of their

⁶⁴ Guyonne Kalb & Barbara Broadway, "Women's probability of being in poverty more than doubles after separation" (8 June 2022), online: <https://theconversation.com/womens-probability-of-being-in-poverty-more-than-doubles-after-separation-181345>

⁶⁵ Tara Carman, "Women, Children Turned Away from Shelters in Canada Almost 19,000 Times a Month", CBC News (5 March 2020), online: CBC News <https://www.cbc.ca/news/canada/womens-shelters-turned-away-domestic-violence-1.5483186>.

own to rent or buy given the rising cost of living and the housing crisis. IPV is a leading cause of homelessness among women in Canada.⁶⁶

Extending property rights to survivors in common-law relationships would reduce some of the barriers to safe housing when the partners separate. They would have access to more certainty around financial rights and entitlements, better equipping them with the financial resources they need to live separate and apart from their abuser. It would also allow them to access the safety and consistency of living in the family home to the exclusion of their abusive ex-partner while they look for other, affordable housing options.

⁶⁶ Statistics Canada, *Canadian residential facilities for victims of abuse, 2020/2021*, by Dyna Ibrahim, Catalogue No 85-002-X (Ottawa: Statistics Canada, 12 April 2022) online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00006-eng.htm>.

PART II. Other Canadian Provinces and Territories: Applying Matrimonial Property Scheme to Common-Law Partners

Overview

There are 12 common law jurisdictions in Canada.⁶⁷ These jurisdictions can be divided into three broad categories when it comes to common-law partners and family property division.

Category I – “opt-out” jurisdictions: 6 provinces and territories apply their matrimonial property schemes to common-law partners:

- Alberta,
- British Columbia,
- Manitoba,
- Northwest Territories,
- Nunavut and
- Saskatchewan.

In these provinces and territories, unmarried partners who meet the requirements of the relevant cohabitation period are given the same property rights as married people. They can opt out of the scheme by signing a domestic contract.

Category II – “registration” jurisdictions: 2 provinces have a system of registered domestic partnership. Unmarried partners who register under the respective provincial *Vital Statistics Act* will be covered by their jurisdiction’s matrimonial property division laws:

- Nova Scotia and
- Manitoba.

Note that Manitoba falls under both **Categories I** and **II**. In Manitoba, the *Family Property Act* applies to common-law partners once they have cohabited for three years.⁶⁸ Common-law partners who want the *Family Property Act* to apply to them prior to the three-year mark also have the option to register their relationships under the provincial *Vital Statistics Act*.⁶⁹

Category III – “opt-in” jurisdictions: 5 provinces and territories only apply their family property division legislation to married spouses. In these jurisdictions, common-

⁶⁷ Quebec is a civil law jurisdiction and, as a result, was not included in this research. To note, in Quebec, Bill 56 came into force on June 30, 2025 and treats common law partners who share a child closer to married spouses in the Civil Code when it comes to property rights and other rights related to a family home. Quebec has the highest number of common law relationships compared to any other jurisdiction in Canada.

⁶⁸ *Family Property Act*, CCSM c F25, s 1(1) [*Manitoba Family Property Act*].

⁶⁹ *The Vital Statistics Act*, CCSM c V60.

law couples have the option to opt into the matrimonial property sharing scheme in the legislation by signing a domestic contract:

- Newfoundland and Labrador,
- New Brunswick,
- Ontario,
- Prince Edward Island, and
- Yukon Territory.

See Appendix - Table 1 for a comparison of the family property division schemes as applied to common-law partners in all 12 common-law jurisdictions.

Beginning in 1998, when Northwest Territories and Nunavut first extended property rights to common-law partners, there has been a general trend in Canada toward extending statutory property rules to unmarried partners.⁷⁰ The momentum slowed in 2002 when the Supreme Court of Canada in *Nova Scotia (Attorney General) v Walsh* held that excluding common-law partners from the provincial *Matrimonial Property Act* in Nova Scotia did not violate constitutional equality rights.⁷¹ More recently, however, Alberta became the latest to join the “opt-out” jurisdictions when they extended their property sharing laws to common-law partners in 2020.

Below, we analyze some of the case law in “opt-out” jurisdictions, examining whether some of the challenges that common-law partners currently face in Ontario exist to a similar extent in jurisdictions that have extended their matrimonial property schemes to common-law partners.

In considering the property sharing models that exist across jurisdictions, it is important to keep in mind that whatever the legislated rules are, people always have the choice of entering into a domestic contract. Domestic contracts are legal agreements entered into by people who wish to set their own terms in their relationships with one another that may be different from what the law sets out. Domestic contracts include cohabitation agreements, marriage contracts and separation agreements.⁷²

Why “Opt-Out”?

BC became an “opt-out” jurisdiction in 2013. In the second reading of Bill 16⁷³, which proposed the reform, MLA Leonard Krog brought up five rationales to support it:

1) Increase predictability of judicial outcome and reduce judicial discretion:

⁷⁰ Gary Joseph & Ann Wilton, *Family Property Law and Practice in Canada* (Toronto: Thomson Reuters Canada, 1988, loose-leaf), pt VI at s VI-2. Online: Westlaw Canada (date accessed 8 July 2017).

⁷¹ *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 [Walsh].

⁷² See Appendix for Glossary of Legal Terms

⁷³ Bill 16, *Family Law Act*, 4th Sess, 39th Parl, British Columbia, 2011.

"Judicial discretion around dividing family property will be reduced so that the law will be more certain and separated spouses will be better able to predict court outcomes".⁷⁴

2) Reduce litigation and emotional damage:

"... reality is that many of our family law disputes, particularly over property division, have ended up in the court system... the cost and the damage that is done – the economic loss; the pain and suffering on an emotional level; and most importantly, I would suggest, the damage to children in relationships - are certainly not insignificant."⁷⁵

3) Gender equality and fairness at large:

"A number of cases that went to the Supreme Court... involved women who worked long and hard on the family farm in Alberta and Saskatchewan, years and years, and literally left their marriages, sanctioned by the Supreme Court saying, at the end of the day: "Tough luck. You don't get anything. It was your husband's farm when it started out, and it's going to be your husband's farm[...]"...fairness should apply across the board, whether you're married or not married."⁷⁶

4) Align with common expectations and prevent exploitation:

"One of the unfortunate realities [...] is that for those, mainly women, who were in common-law relationships and had made the assumption that being in that common-law relationship for two years entitled them to a certain amount of property division, a very unhappy surprise met them when that relationship would break down. I have, unfortunately, heard of many cases of men, I have to say, who have proudly told me that they are remaining in a common-law relationship in order to avoid the obligations that they might have in terms of property division if they were to be married."⁷⁷

5) Reflect changing family structures:

Common-law families in BC were growing at a rate three times faster than the number of married couples and that it was necessary to protect parties against "financial advantage being taken through avoiding marriage".⁷⁸

The rationale supporting the extension of matrimonial property rules to common-law partners across different "opt-out" jurisdictions was similar. Alberta's parliamentary debate on Bill 28 in 2018 mentioned many of the same reasons for changing the law, including clearing up current confusion of the law, reflecting the increasing proportion

⁷⁴ "Bill 16, Family Law Act", 2nd reading, *Debates of the Legislative Assembly of BC*, 28, No 2 (17 November 2011) at 8845, online: <https://www.leg.bc.ca/hansard-content/Debates/39th4th/20111117am-Hansard-v28n2.htm> \ [Bill 16 Debate].

⁷⁵ Bill 16 Debate at 8846, *supra* note 742.

⁷⁶ Bill 16 Debate at 8847, *supra* note 742.

⁷⁷ Bill 16 Debate at 8854, *supra* note 742.

⁷⁸ Bill 16 Debate at 8855, *supra* note 742.

of unmarried couples, and reducing costs and time burdens as well as children's exposure to conflict.⁷⁹

In 1993, the Ontario Law Reform Commission listed similar rationales in a call to extend property rules to common-law partners, which we discuss in Part III of this paper. More recently, in 2016, the Law Commission of Saskatchewan similarly recommended that the province extend its property sharing legislation to common-law partners who had been in a relationship for at least two years.⁸⁰ They took this position because of the prevalence of common-law relationships in Saskatchewan and the reality that often these relationships are not dissimilar to marriage when it comes to economic integration and joint accumulation of property.

What Challenges Continue to Exist in “Opt-Out” Jurisdictions?

Procedural and Financial Challenges

The question for a common-law partner in Ontario seeking property division might be “is there a way I can get some of the value of our property,”. In “opt-out” jurisdictions the question becomes, “does my relationship meet the definition of common law in my province?”. If proving the second question is easier for a claimant than proving the first, extending statutory property rules to common-law partners in Ontario will likely alleviate some of the challenges they currently face.

In “opt-out” jurisdictions, to qualify under the family property statute, people in common-law relationships generally need to either meet a minimum length of cohabitation or be parents of a child. Additionally, Manitoba, the Northwest Territories and Nunavut require that the partners be in a “conjugal” relationship.⁸¹ BC's *Family Law Act* requires common-law partners to have lived with each other “in a marriage-like relationship”.⁸² Saskatchewan's *Family Property Act* requires cohabitation as “spouses”.

⁷⁹ See “Bill 28, Family Statutes Amendment Act, 2018”, 3rd reading, *Alberta Hansard*, afternoon session (28 November 2018) at 2209, online:

https://docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_29/session_4/20181128_1330_01_han.pdf [Bill 28 Debate].

⁸⁰ <https://lawreform.ns.ca/wp-content/uploads/2020/04/divisionoffamilyproperty-finalreport.pdf>

⁸¹ See *Manitoba Family Property Act*, CCSM c F25, s 1(1): “common-law partner” of a person means (b)... another person who, not being married to the person, cohabited with him or her in a conjugal relationship.... See also *Family Law Act*, SNWT 1997 c 18, s 1(1) [*NWT Family Law Act*]: “spouse” means a person who (c) has lived together in a conjugal relationship outside marriage with another person.... See also *Family Law Act*, CSNu c F30, s 1(1) [*Nunavut Family Law Act*]: “spouse” means a person who (b) has lived together in a conjugal relationship outside marriage with another person....

⁸² *Family Law Act*, SBC 2011 c 25, s 1(1) [*BC Family Law Act*].

According to the case law, when determining whether a relationship qualifies as “conjugal”, “marriage-like”, or “spousal” in these five jurisdictions, courts refer to a list of guiding factors called the “*Molodowich* factors” which include:

- (1) shared shelter
- (2) sexual and personal behaviour
- (3) services
- (4) social activities
- (5) economic support and children, and
- (6) societal perception of the couple

when determining whether a common-law couple fits under the respective statutory definitions.⁸³

Alberta’s *Family Property Act* and *Adult Interdependent Partner Act* require adult interdependent partners, which include common-law partners, to “share one another’s lives”, be “emotionally committed to one another”, and “function as an economic and domestic unit”.⁸⁴ To determine whether a couple functions as “an economic and domestic unit”, section 1(2) of the *Adult Interdependent Partner Act* provides a list of factors to consider:⁸⁵

- conjugality
- degree of exclusivity
- conduct and habits in respect of household activities and living arrangements
- degree to which the persons hold themselves out to others as an economic and domestic unit
- degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another
- extent to which direct and indirect contributions have been made by either person to the other to their mutual well-being
- degree of financial dependence or interdependence and any arrangements for financial support between the persons
- care and support of children, and
- ownership, use and acquisition of property

Each factor on its own is neither determinative nor essential. The Alberta Court of King’s Bench has made it clear that a rigid bright-line test is not possible.⁸⁶ In other words, not every factor needs to be present to determine that a relationship meets the required standard, and a relationship may not meet the required standard even if some factors are present.

⁸³ See *M v H*, [1999] 2 SCR 3 at para 59. See also *Bellerose v Reda*, 2023 BCSC 748, *Ruskin v Dewar*, 2003 SKQB 514 and *Romanchuk v Robin*, 2003 SKCA 50.

⁸⁴ *Adult Interdependent Partner Act*, SA 2022 c A-4.5, s 1(1) [*Alberta Adult Interdependent Partner Act*].

⁸⁵ *Alberta Adult Interdependent Partner Act*, SA 2022 c A-4.5, s 1(2).

⁸⁶ *Ross v Doehl*, 2021 ABQB 1020 at paras 9 and 140.

Common-law partners who seek property division in “opt-out” jurisdictions still bear the burden to prove that they fit the definition of “spouse” in the family property legislation. In BC, for instance, once a claimant successfully proves that they were in a marriage-like relationship and cohabited for two years, the couple is entitled to have the matrimonial property division rules in BC’s *FLA* apply to them.

This approach is termed the functional equivalence approach, whereby “marriage-like” is defined with a bundle of factors that indicate “the existence of an emotionally and economically interdependent relationship”.⁸⁷ Critics point out that this approach measures non-marital relationships against a norm of the idealized marital relationship.⁸⁸ Despite some flexibility around this approach, it nevertheless requires a judicially constructed “ideal” as a reference point.

In Part I of this paper, we identified the possibility of some common-law relationships not fitting the template “joint family venture” as a challenge to making unjust enrichment claims. A similar challenge can theoretically exist in “opt-out” jurisdictions when it comes to proving a common-law relationship under the family property statutes. However, in many cases, depending on the particular facts of the case, this point may not be an issue, as it may be clear that the parties meet the definition of “spouse” for the purposes of the relevant legislation. Even in more complicated cases where the nature of the relationship is less clear, the legal test for determining if a person is a “spouse” is more straightforward than the test to establish unjust enrichment. This means it will be an easier, less complicated legal test to meet.

Additionally, in Ontario, determining whether someone is in a common-law relationship for the purposes of being entitled to financial relief already arises when dealing with the issue of support. Using this same definition for property division would not substantially complicate litigation. Courts in Ontario already apply the legislated definition, and there is clear case law setting out the factors to consider.

Safety and Shelter – Availability of Exclusive Possession Orders⁸⁹

An interim order of exclusive possession can be extremely helpful in situations of IPV. As mentioned earlier in this paper, two statutory sources empower courts to order exclusive possession – 1) family violence statutes and 2) family property statutes. In “opt-out” jurisdictions, courts are empowered by the provincial/territorial family property statute to order exclusive possession to common-law partners (see Appendix –

⁸⁷ Brenda Cossman with the collaboration of Bruce Ryder, “What is Marriage-Like Like? The Irrelevance of Conjugalities” (2001) 18:2 Canadian Journal of Family Law 269 at 283 [Cossman].

⁸⁸ Brenda Cossman with the collaboration of Bruce Ryder, “What is Marriage-Like Like? The Irrelevance of Conjugalities” (2001) 18:2 Canadian Journal of Family Law 269 at 288.

⁸⁹ Statutes in different provinces and territories use variations of the term “exclusive possession”, including “exclusive occupation” and “exclusive occupancy”. They all have the same legal meaning in this context– the sole legal right to occupy a designated residence to the exclusion of others.

Table 2).⁹⁰ Ten common law jurisdictions in Canada also each have a family violence statute that enables the court to order exclusive possession for common-law spouses in situations of violence.⁹¹ Some of these jurisdictions have both statutory sources in place.⁹²

Among the common law jurisdictions in Canada, Ontario is the only jurisdiction where courts are not statutorily empowered to order exclusive possession to a non-titled common-law partner in situations of IPV. See Appendix – Table 2 for a summary of the relevant provisions existing in other jurisdictions.⁹³

In BC, courts are statutorily empowered by section 90 of the *Family Law Act* to order exclusive occupancy of a family residence on an interim basis and common-law partners who meet the definition of “spouse” can apply for it.⁹⁴ To apply for an order of exclusive possession, the applicant must establish that 1) it is no longer practically possible to

⁹⁰ As an example, in *Glowacki v Nesbeth*, 2021 BCSC 535 [*Glowacki*], the Supreme Court of BC granted exclusive occupancy to a common-law wife pursuant to s.90 of *BC Family Law Act*, *supra* note 109. The court summarized the test for exclusive occupancy: the applicant must show that 1) shared use of the family residence is a practical impossibility and 2) the applicant is the preferred occupant on a balance of convenience (para 69, citing *Bateman v Bateman*, 2013 BCSC 2026 at para 44). This case also notes an increasing emphasis on family violence in considering branch 1) of the test, “while the *FLA* does not directly link ss. 90 and 226 with family violence, if one found facts falling within the *FLA*’s definition of violence I expect that the court would be obliged to factor that into any application for exclusive occupancy” (para 70, citing *Evans v Mahtoy*, 2015 BCSC 2141 at para 28).

⁹¹ The ten jurisdictions are Alberta, Manitoba, Newfoundland and Labrador, New Brunswick, Northwest Territories, Nova Scotia, Nunavut, Prince Edward Island, Saskatchewan and the Yukon; As an example, in *Inscho v Inscho*, 2010 MBQB 90, the Court of King’s Bench of Manitoba granted the wife temporary exclusive occupancy of the family residence pursuant to section 14 of Manitoba’s *Domestic Violence and Stalking Act*, having considered a history of verbal and physical abuse by the husband. The order was made based on a finding that the wife remained fearful of the husband and that the husband was prone to aggressive and impulsive behaviours (para 122).

⁹² In Alberta, Manitoba, Northwest Territories, Nunavut and Saskatchewan, courts are empowered by both a family violence statute and the family property legislation to order exclusive possession. See Appendix – Table 2.

⁹³ We note that not all jurisdictions in which courts are empowered by the family property legislation to order exclusive possession (Alberta, BC, Manitoba, Northwest Territories, Nunavut, Saskatchewan) require their courts to consider family violence when making the order. Only in Northwest Territories and Nunavut are courts mandated under the relevant legislation to consider family violence as a factor when ordering exclusive possession. In Alberta and Manitoba, courts are not statutorily mandated to do so. BC’s *Family Law Act* does not explicitly link the section on exclusive occupation with family violence, but the case law suggests that the presence of family violence has become a part of the test to determine whether or not courts should grant the order (See *Evans v Mahtoy*, 2015 BCSC 2141 at para 28, citing *E (JR) v 07-----8 BC Ltd*, 2013 BCSC 2038: “...if one found facts falling within the *FLA*’s definition of violence I expect that the court would be obliged to factor that into any application for exclusive occupancy... It seems to me, then, that the immediate question is. Has there been, or is there likely to be, family violence? Such a finding would affect both occupancy and protection...”). Although Saskatchewan’s *Family Property Act* does not mention violence as a factor of consideration, one of the listed factors, “the conduct of the spouses towards each other and towards any children” can capture certain forms of family violence (*Family Property Act*, SS 1997 c F-6.3, s 7(b).). Because courts in Alberta and Manitoba are not required to consider family violence when dealing with applications for exclusive possession of the family home under the family property legislation, histories of family violence might be overlooked if survivor applicants do not know to bring up these facts in their application.

⁹⁴ *BC Family Law Act*, s 90.

share the use of the residence and 2) on a balance of convenience, the applicant is the preferred exclusive occupant.⁹⁵

Exclusive possession orders under family property legislation are difficult to obtain even in “opt-out” jurisdictions like BC. The person seeking the order must prove that living together would no longer be possible and that she should be the one to stay on a balance of convenience. Mere unwillingness to cohabit cannot satisfy the legal test. The same is also true of the current legal test in Ontario. The court will consider an extensive list of factors, including but not limited to the availability of alternative accommodation, financial positions of the parties, any delay and the parties’ conduct and, importantly, the presence of violence.⁹⁶

Nevertheless, statutory empowerment to grant exclusive possession eliminates the need to turn to other orders to indirectly make the claim. This is important for common-law partners, including those in situations of IPV, who do not own the family home and face the possibility of losing their housing upon separation. Applying the current matrimonial property rules to common-law partners is one effective way of addressing the safety and housing challenges that common-law partners subjected to IPV face, as can be seen in “opt-out” jurisdictions.

⁹⁵ *Bateman v Bateman*, 2013 ONSC 2026 at para 44 [*Bateman*].

⁹⁶ *Glowacki v Nesbeth*, 2021 BCSC 535.

PART III. Past Reform Calls in Ontario

In 1993, the Ontario Law Reform Commission published a report titled *Report on the rights and responsibilities of cohabitants under the Family Law Act*.⁹⁷ In it, the Commission recommended extending the definition of “spouse” in the *Family Law Act* to include common-law partners. The specific recommendation is as follows:⁹⁸

“For the purposes of recommendation 1, the definition of “spouse” contained in section 1(1) of the *Family Law Act* should be amended to include either of a man and woman who are not married to each other and have cohabited:

- a) continuously for a period of not less than three years [or some other period of time prescribed by statute], or
- b) in a relationship of some permanence, if they are the parents of a child.”

The Commission recommended law reform based on six main rationales. Although the report came out 30 years ago, most of these rationales still apply to the need for reform today.

1) The Ontario Human Rights Code protects against discrimination based on marital status. Although the Human Rights Code does not apply to the provincial FLA, it has symbolic importance as an expression of Ontario public policy.⁹⁹

This rationale still applies today. Section 1 of the Ontario Human Rights Code says “every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of [...] marital status [...]”.¹⁰⁰

2) It may be unconstitutional to exclude unmarried couples from the FLA everywhere other than the section on support obligations.¹⁰¹ If “marital status” were recognized as an analogous ground for discrimination under section 15(1) of the *Charter*, then this exclusion could become unconstitutional.

⁹⁷ Ontario Law Reform Commission, *Report on the rights and responsibilities of cohabitants under the Family Law Act: Executive Summary* (Toronto: Ontario Law Reform Commission, 1993) [OLRC Report]. Online: <https://archive.org/details/esreportonrights00onta/page/4/mode/2up?view=theater>.

⁹⁸ Ontario Law Reform Commission, *Report on the rights and responsibilities of cohabitants under the Family Law Act: Executive Summary* (Toronto: Ontario Law Reform Commission, 1993) Recommendation 6, *supra* note 131.

⁹⁹ Ontario Law Reform Commission, *Report on the rights and responsibilities of cohabitants under the Family Law Act: Executive Summary* (Toronto: Ontario Law Reform Commission, 1993) at 15..

¹⁰⁰ *Human Rights Code*, RSO 1990 c H 19, online: <https://www.ontario.ca/laws/statute/90h19>.

¹⁰¹ Ontario Law Reform Commission, *Report on the rights and responsibilities of cohabitants under the Family Law Act: Executive Summary* (Toronto: Ontario Law Reform Commission, 1993) at 15-27.

The Supreme Court of Canada's decision in *Nova Scotia (Attorney General) v Walsh* in 2002 addressed this very issue.¹⁰² In it, the majority concluded that the exclusion of unmarried partners from Nova Scotia's matrimonial property statute did not violate section 15(1) of the *Charter*. The majority reasoned that a decision not to enter marriage should be respected by not imposing marital obligations and entitlements onto unmarried partners. The majority cited evidence indicating that many partners remained in common-law relationships to deliberately avoid the institution of marriage. Notably, they wrote, "a decision not to marry [...] stems from a conscious choice of the parties".¹⁰³

The Supreme Court of Canada again addressed this issue in relation to Quebec's Civil Code in 2013, with the majority finding that the exclusion of de facto spouses from property sharing and support rights granted to married and civil union spouses did not violate the right to equality under s. 15(1) of the *Charter*.¹⁰⁴ The majority found that the Quebec legislature did not express a preference for marriage or civil unions at the expense of de facto partners, but rather preserved the right to choose and respect for the autonomy of de facto partners to determine their own rights and entitlements on separation. In Justice Abella's dissenting opinion, her Honour noted the shared characteristics between de facto partners and married and civil union spouses in Quebec, including the vulnerabilities stemming from a separation. Her Honour found that the exclusion of de facto partners from Quebec's Civil Code indeed violated s. 15(1) of the Charter, reasoning that "...fairness requires that we look at the content of the relationship's social package, not at how it is wrapped."¹⁰⁵

However, as discussed in more detail later in this paper, this assumption is not necessarily true. The decision to marry or not marry does not always stem from a conscious choice related to the preservation of property or financial rights and entitlements. In fact, research in Ontario shows that more than 70% of cohabitants in Ontario do not even know the legal rules that apply to them.¹⁰⁶

3) Married and unmarried couples share functional similarities. The proposed extension of matrimonial property rights to common-law partners in the report still allows flexibility for those who want to opt out by reserving the option to contract out through a domestic contract.

This still applies today. A functional approach that emphasizes the structure of relationships and the *de facto* merger of economic and emotional lives predominates in

¹⁰² *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83.

¹⁰³ *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 at para 55.

¹⁰⁴ *Quebec (Attorney General) v. A*, 2013 SCC 5.

¹⁰⁵ *Ibid* at para 285.

¹⁰⁶ Institut national de la recherche scientifique, *Economic Practices and Social and Legal Representations of Life Together* (April 2023), online: https://espace.inrs.ca/id/eprint/13538/1/RapportBelleau_2023.pdf.

the Canadian judicial history of family law.¹⁰⁷ The extension of matrimonial property rights would not impact the ability of the partners to opt out, as married spouses do, by executing a domestic contract.

4) The proposed extension of matrimonial property rights to common-law partners accords more with the reasonable expectation of these partners in Ontario. In the FLA, common-law spouses are included in the section dealing with support obligations. This fact, combined with the inclusion of common-law spouses in property-sharing laws in other Canadian jurisdictions, may give rise to public confusion and inconsistency when it comes to property-sharing rights in Ontario. In support of this, the Commission cited studies on foreign jurisdictions and anecdotal evidence suggesting the public confusion exists in Ontario.¹⁰⁸

This still applies today. A 2023 Ontario study examining legal knowledge among married and unmarried respondents found widespread misunderstanding regarding the rights and obligations of common-law partners. For example, only 20% of common-law spouses correctly understood that the sole owner of a home could exclude their partner from the home despite years of cohabitation. Approximately 48% of Ontario common-law partners believed they were entitled to an equal share of the value of the home upon separation, while a further 30% were unsure.¹⁰⁹ These findings provide empirical support for the longstanding concern that many Ontarians mistakenly assume common-law partners are entitled to the same property rights as married spouses. The false assumption that common-law partners are legally entitled to the same rights as married couples upon separation is often still cited as a reason for legal reform in this area.¹¹⁰

5) The proposed extension of matrimonial property rights to common-law partners reduces the risk that one spouse's contribution to property owned by the other will be unrewarded. It also reduces the evidentiary and cost hurdles associated with making claims for restitution.

This applies today. See Part I of this paper for a detailed discussion about the complexities and challenges associated with pursuing equitable remedies in court. Although the specific legal tests may have changed since the LCO completed its report,

¹⁰⁷ Carol Rogerson, “Canada: A bold and progressive past but an unclear future” in Elaine E Sutherland, ed, *The Future of Child and Family Law: International Predictions* (Cambridge: Cambridge University Press, 2012) 77 [Rogerson].

¹⁰⁸ Ontario Law Reform Commission, *Report on the rights and responsibilities of cohabitants under the Family Law Act: Executive Summary* (Toronto: Ontario Law Reform Commission, 1993) at 28.

¹⁰⁹ Institut national de la recherche scientifique, *Economic Practices and Social and Legal Representations of Life Together* (April 2023), online: https://espace.inrs.ca/id/eprint/13538/1/RapportBelleau_2023.pdf at 13.

¹¹⁰ See Bill 16 Debate at 8854, *supra* note 102: one of the unfortunate realities of that, though, is that for those, mainly women, who were in common-law relationships and had made the assumption that being in that common-law relationship for two years entitled them to a certain amount of property division, a very unhappy surprise met them when that relationship would break down.

the complexity and evidentiary challenges associated with equitable remedies available to common-law partners continue to persist.

6) The proposed extension of matrimonial property rights to common-law partners aligns more consistently with the goal of reducing demands on public assistance. The LCO recognizes that private support rights (e.g. entitlement to half of matrimonial property) and public assistance schemes (e.g. unemployment benefit) serve different functions. The two have different structures and rationales, but the latter will likely only provide minimal assistance.¹¹¹ The LCO reasoned that if reducing demands for public assistance is one of the rationales behind including common-law spouses in the support obligations section of the FLA, there appears little sense in not extending this definition to the *Act*'s property sharing provisions as well.¹¹²

This rationale still applies. If people had better access to a reasonable share of property accumulated during the relationship, it is reasonable to assume they would be less likely to require social assistance. It would help them to achieve economic self-sufficiency after separation and, for survivors of IPV, help them afford to leave their abusive ex-partner and secure safe housing for themselves and their children.

In 1993, a spokesperson for the Attorney General's Department told the press that the Ontario government had not decided whether to follow the LCO's recommendations.¹¹³ There is little other information available about the Ontario government's response to this call for law reform.

¹¹¹ Ontario Law Reform Commission, *Report on the rights and responsibilities of cohabitants under the Family Law Act: Executive Summary* (Toronto: Ontario Law Reform Commission, 1993) at 31.

¹¹² *Ibid.*

¹¹³ "Report urges law change for couples", *The Hamilton Spectator* (November 18, 1993) A7.

PART IV. Arguments For and Against Extending Matrimonial Property Rules to Common-Law Partners

In this Part, we present some arguments for and against extending matrimonial property rules to common-law partners. Most of these have been drawn from scholarly articles and many appeared in Hansard¹¹⁴ from “opt-out” jurisdictions when members of the legislature in those jurisdictions proposed the reform. The goal of this Part of the Paper is to produce recommendations for law reform in Ontario.

i. Why Matrimonial Property Rules Should Not Be Extended to Common-Law Partners

Blurry boundary about what constitutes a family unit

Some argue that adopting a functional approach and extending the matrimonial property rules to common-law partners opens up the “floodgates” of litigation over the definition and further erosion of the definition of spouse to other forms of relationships in the future. If marriage ceases to be the defining feature of family law, what is? Is it economic partnership, emotional attachment, or similarities to traditional family structures? Why stop at extending these rules to common-law couples, if a functional approach to family law is adopted?

The “floodgates” concern stems from the belief that a change to the definition of spouse would dramatically increase the number of people in family court. However, Professor Robert Leckey’s 2017 study on jurisdictions that have extended their matrimonial property rules to common-law partners¹¹⁵ found that former cohabitants litigating under the amended family statutes largely resemble their predecessors who claimed unjust enrichment. In other words, the “floodgates” concern was not realized. Moreover, in Ontario, courts are already addressing the issue of whether a common-law relationship exists for the purposes of claiming support. Having this same analysis apply to property-sharing would not be asking courts in Ontario to do something they aren’t already doing.

Laws need to be able to adapt to the changing realities of families. In Ontario, 16% of all couples lived in a common-law relationship in 2021. Adopting a functional approach, the law serves to reflect that reality. While there is little evidence to suggest that reform would result in a significant increase in family court proceedings, even if it did, this will

¹¹⁴ Hansard is the official record of debates that take place in parliament.

¹¹⁵ Robert Leckey, “Cohabitation, Law Reform, and the Litigants” (2017) 31:2 Int’l JL Pol & Fam 131.

only serve to show the pervasiveness of the current unmet legal needs of common-law partners in Ontario.

The concern that matrimonial property rules will be further extended to include other kinds of relationships in the future is not a reason not to advance the laws now. If, in the future, a new kind of relationship arises that is a functional alternative to marriage and common-law relationships, the law may have to change once again. The law must evolve to reflect the lived reality of the people who are using it. Resisting a change to the law on the basis that there may be another change in the future is not a sound basis upon which to stop progressive law reform designed to make laws more inclusive.

Discourage people from marriage

Some opponents argue that people who are married are more committed to their relationship than people in common-law relationships. They argue that blurring the line between marriage and common-law relationships would erode this commitment and destabilize families.

At first glance, this argument seems to be supported by statistics. Research on cohabitation and marriage in the U.S. found that married adults, compared to cohabiting adults, are more likely to report relationship satisfaction (51% vs 39%), have higher levels of relationship commitment (46% vs 31%) and enjoy higher levels of relationship stability (54% vs 28%).¹¹⁶ Even in countries where cohabitation has been normalized for longer, the break-up rate for people who live together without being married is significantly higher than for married relationships.¹¹⁷

However, there are different types of cohabiting relationships. Some people may intend to commit in the long term, while others may not. The former may view themselves as just as committed as people who are married.¹¹⁸ It is incorrect to assume that extending matrimonial property rules to common-law relationships would discourage people from getting married. Financial security and legal protection are not the main reasons that people in Canada choose to get married. Instead, the top reasons for marriage are to prove love and commitment, follow personal beliefs and make logical advancement.¹¹⁹

This point is supported by the statistics. The overall change in marriage rate per 1,000 from 1991 to 2019 is similar in all provinces and territories except for Prince Edward

¹¹⁶ Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, “Marriage and Cohabitation in the US”, *Pew Research Center* (6 November 2019), online: <https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/>.

¹¹⁷ Laurie DeRose, “Cohabitation Contributes to Family Instability Across the Globe”, *Institute for Family Studies* (6 February 2017), online: <https://ifstudies.org/blog/cohabitation-contributes-to-family-instability-across-the-globe>.

¹¹⁸ Julia Carter & Simon Duncan, *Reinventing Couples: Tradition, Agency and Bricolage*, ed by Graham Allan, Lynn Jamieson & David HJ Morgan (London: Palgrave Macmillan) at 95.

¹¹⁹ Peter Jon Mitchell, “Why Younger Adults in Canada Embrace Marriage – or Reject It”, *Institute for Family Studies* (3 November 2021), online: <https://ifstudies.org/blog/why-young-adults-in-canada-embrace-marriage-or-reject-it> [“Why Young Adults”].

Island, with a lower decrease rate and BC with a slightly higher decrease rate.¹²⁰ There is no statistical pattern among “opt-out” jurisdictions before and after the reform. For some, the decrease in marriage rate slowed following the reform while others experienced the opposite. Whether matrimonial property rules apply to common-law partners does not seem to be a strong predictor of marriage rates. The statistics on marriage do not support the assumption that extending matrimonial property rules to common-law partners would discourage marriage or lead to family instability.

Removing the freedom to choose

Opponents frequently argue that many people in common-law relationships remain unmarried to avoid the legal consequences and responsibilities of marriage. They worry that applying matrimonial property rules to common-law couples takes away their freedom of choice when it comes to legal responsibilities.

While this concern has some merit, the problem lies more in the lack of public legal awareness than in the proposed reform. In many cases, the reasons common-law partners remain unmarried are unrelated to the legal responsibilities of being married. Many common-law couples in Canada expect to enjoy the same legal protections when it comes to family property as married couples. As mentioned by the Law Commission of Ontario, there is public confusion about which laws apply to common-law relationships and which do not. Both BC’s and Alberta’s parliamentary debates on extending matrimonial property rules to common-law relationships also touched on clearing up public confusion and amending the law to reflect the common expectations.¹²¹ For many people in common-law relationships, there is no financial intent underlying the choice to enter or maintain a common-law relationship.¹²² In fact, 16.5% of partnered men and 10.5% of partnered women in Canada listed “never thought about it” as the number-one reason for not marrying in 2017,¹²³ indicating that a sizeable proportion of people maintain their common-law status not as a deliberate choice to avoid the legal consequences of marriage. In a world where people are ill-informed about the legal consequences of marriage and common-law relationships, talking about choice is not all that meaningful.

In relationships in which one person is perpetrating violence against the other, the idea that the nature of the relationship status is a mutual choice made by both people is an

¹²⁰ Statistics Canada, *Table 39-10-0057-01 Number of persons who married in a given year and marriage rate per 1,000 unmarried persons, by age group and legal marital status*, online: <https://doi.org/10.25318/3910005701-eng>

¹²¹ Bill 28 Debate, *supra* note 79; Bill 16 Debate at 8847, *supra* note 74.

¹²² See John Eekelaar & Rob George, *Routledge handbook of family law and policy* (Abingdon, Oxon UK: Routledge, 2014) at ch 5: ...there is no denying the fact that many couples are not making an active choice at all. They simply start living together and life goes on without either of them giving any thought to the law. It is not until something goes wrong – that is, when the relationship breaks down or one of the parties dies – that the legal consequences of their actions become apparent to them.

¹²³ Peter Jon Mitchell, “Why Younger Adults in Canada Embrace Marriage – or Reject It”, *Institute for Family Studies* (3 November 2021), online: <https://ifstudies.org/blog/why-young-adults-in-canada-embrace-marriage-or-reject-it>.

illusion. In many relationships involving IPV, women may be precluded from owning property in their names and may be misinformed about what rights they will have on relationship breakdown. In these relationships, it is highly unlikely that an abuser will agree to enter into any form of domestic contract whereby they agree to opt into matrimonial property sharing laws. Instead, abusers will use the relationship status as a further tool to exert power and control over the woman and make it financially impossible for her to leave the relationship. As some scholars have noted, placing the burden on vulnerable partners to proactively secure legal protection may allow the more powerful party to benefit from avoiding the legal obligations associated with marriage while still enjoying the economic benefits of a long-term relationship.¹²⁴

Freedom of choice is still maintained in opt-out jurisdictions through the execution of a domestic contract. There are of course challenges when partners have to opt out of the legislation, including legal costs of drafting a contract and unequal bargaining power in the relationship. However, at least with a default property sharing regime, the inequality of bargaining power is not exploited to the point of precluding someone from any automatic rights and entitlements on separation.

ii. Why Matrimonial Property Rules Should Be Extended to Common-Law Partners

Changing form of relationships in Ontario

The structure of Canadian families is changing. More and more people choose to stay in common-law relationships rather than marrying. From 1981 to 2021, the number of people in common-law relationships increased from 6.4% to 22.7% in Canada.¹²⁵ The actual number of common-law couples increased by 447% during the same time period. Quebec was responsible for a big part of that increase, but numbers also increased in each of the other Canadian provinces and territories.¹²⁶ In Ontario, 15.7% of couples were common law in 2021.¹²⁷

In BC, during the parliamentary debate on Bill 16 (which eventually became the *Family Law Act* that replaced the *Family Relations Act* in 2013), MLA Krog commented, "I think most Canadians... expect that... if that relationship fails, there will be some fundamental fairness; that our law will recognize that in the complexity of human relationships, someone at the end of it shouldn't suffer unduly...".

¹²⁴ See for example Brynne Thomas, "For Better or for Worse? The Need for Property Reform for Unmarried Partners in Ontario" (2025) 43:3 *Canadian Family Law Quarterly* 363.

¹²⁵ Statistics Canada, *Table 1 Proportion of couples living common law, Canada, provinces and territories, 1981, 2016, and 2021*, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220713/t001b-eng.htm>

¹²⁶ Statistics Canada, *Census of Population, 1996, 2016, and 2021*.

¹²⁷ Statistics Canada, *State of the union: Canada leads the G7 with nearly one-quarter of couples living common law, driven by Quebec*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 13 July 2022), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/220713/dq220713b-eng.htm?indid=32986-2&indgeo=1#data>

There is a need for the law to recognize and support a plurality of family structures beyond traditional marriage. In *Canada (Attorney General) v Mossop*, L'Heureux-Dubé J. comments in her dissenting opinion, "it is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values."¹²⁸

In *Leshner v Ontario*, the plaintiff successfully argued before the Ontario Human Rights Tribunal that people in same-sex relationships should be entitled to survivor pensions. The Tribunal writes, "we do not believe that we should accept the proposition that support for the traditional family or for the institution of marriage must entail the exclusion and disadvantaging of other family forms. The family is the cornerstone of society, and accordingly this core value should be fostered by governments. Marriage and the 'traditional' family are certainly sustaining institutions of society, but they should not be used as a means to impose discrimination and disadvantage on others".¹²⁹ Although the significance of this decision lies in its legitimization of same-sex relationships in the context of pension eligibility, the message that supporting traditional families does not necessitate disadvantaging other kinds of families applies to common-law couples in the context of family property legislation, too. This should be reflected in the *FLA*.

Greater consistency and predictability in the law

Extending matrimonial property rules to common-law partners can lessen the evidentiary burdens and increase the predictability of the judicial outcomes of these cases. This will help people more easily understand their legal rights and entitlements and the strength of their claims. It also eliminates the current confusion from having only part of the *Family Law Act* apply to common-law partners, thereby increasing consistency in the law. This may encourage more people to resolve their claims outside the courtroom.¹³⁰ While alternative dispute resolution is not always appropriate in situations of IPV, having clearer rules and increasing predictability of judicial outcomes nevertheless benefit survivors in navigating the legal process with or without a lawyer.

Jurisdictions across Canada should apply the same definition for the purposes of property division. To do otherwise is legally unfair and impedes equal access to justice. It also creates confusion among the general population who don't know whether they live in a jurisdiction that will include them in their statutory property sharing regime.

¹²⁸ *Canada (Attorney General) v Mossop*, 1993 CarswellNat 1365 at para 133.

¹²⁹ *Leshner v Ontario*, 1992 CarswellOnt 6680 at para 28.

¹³⁰ In support of this point, one rationale behind the equalization scheme for married couples is that "the presumption of equal division fosters settlement and reduces the need for costly litigation": Carol Rogerson, "Canada: A bold and progressive past but an unclear future" in Elaine E Sutherland, ed, *The Future of Child and Family Law: International Predictions* (Cambridge: Cambridge University Press, 2012) [at 77](#).

Protection of vulnerable people, including survivors of IPV

Vulnerability can stem from unequal economic positions and knowledge of legal rights and entitlements. As previously suggested, there is public confusion around which legal rights and responsibilities apply to common-law partners. Not everyone is in a common-law relationship to deliberately avoid marital consequences. Instead, they might assume that they are entitled to the same legal protection as if they were married and are surprised to find this is not the case when they separate.¹³¹ Particularly where people have unequal financial resources or power, the party with less can suffer from this lack of protection after separation. In situations of IPV, even if the survivor is aware of her legal rights, getting the abuser to sign a domestic contract that changes this lack of protection is likely not possible. Abusers may also provide misinformation about the law, resulting in even further confusion for their partner about their rights and entitlements upon separation. The woman may not know what property is registered in her name versus her partner's or what family law claims she is entitled to make upon separation.

Murdoch v Murdoch is an early case in which a married wife claimed half the interest in the family ranch that she contributed extensively to during her marriage but was registered solely in her husband's name.¹³² The Supreme Court of Canada denied her any interest in the ranch, which incited public controversy at the time. Subsequently, provinces created their own matrimonial property schemes to safeguard against the injustice that arose from this decision. Today, common-law partners may find themselves in the same vulnerable position as the wife in *Murdoch v Murdoch* when seeking an interest in the family property. If an important goal of the current matrimonial property rules is to recognize an equal sharing of family responsibilities, thereby protecting the vulnerable parties in a marriage, then the same protection should be extended to the increasing proportion of the population choosing a common-law relationship over marriage.¹³³

Under an "opt-out" scheme, the partner with more assets who also knows about the laws might want to contract out of the legislated matrimonial property scheme through a domestic contract. A vulnerable partner can be exploited if the partner with more resources and legal knowledge asks or coerces them to sign a contract without properly informing them of what that contract entails and how it impacts their rights and entitlements at separation. However, an "opt-out" scheme at least requires the signing of a domestic contract as an active step to opt out of legal protection, which is an

¹³¹ Anecdotal evidence suggests that many common-law couples don't give much thought to the potential consequences of their common-law status and only when separating do they find out about the legal protection (or a lack thereof) available to them. See for example Meghan Grant, "To Marry or Not? Legal Differences Between Marriage and Common-Law Relationships Still Surprise Many Canadians", *CBC News* (2016), online: <https://www.cbc.ca/news/canada/calgary/valentines-day-couples-legal-marriage-common-law-1.3443626>.

¹³² *Murdoch v Murdoch*, [1975] 1 SCR 423.

¹³³ Ontario's *FLA* explicitly acknowledges the equal positions of spouses as individuals within marriage in its preamble.

improvement to a scheme where legal protection is simply not available based on the operation of existing laws.

Overall, an “opt-out” scheme coupled with initiatives to increase public awareness better protects the vulnerable partner than does an “opt-in” scheme, particularly in situations of IPV in which survivors may have very little control over the nature of their relationship and their finances.

PART V. Reform Suggestions

In previous sections, we have identified challenges faced by people in common-law relationships living in Ontario who seek property division and exclusive possession of a home after separation, noting the particular difficulties for survivors of IPV:

- 1) The lack of statutory provisions giving equal family property division to people in common-law relationships leaves some survivors of IPV vulnerable, requiring them to make complicated legal claims in court.
- 2) The lack of judicial power to order exclusive possession for many common-law partners, even in situations of IPV, aggravates safety and housing concerns.

Four suggestions for law reform in Ontario:

- i. Extend the matrimonial property division scheme to common-law partners
- ii. Extend exclusive possession rights to common-law partners
- iii. Increase public legal awareness
- iv. Implement mandatory education about IPV for legal professionals

i. Extend the matrimonial property division scheme to common-law partners

The current matrimonial property division scheme needs to be extended to people in common-law relationships. To do so reflects the reality of the increasing proportion of common-law relationships in Ontario and Canada, more adequately protects the vulnerable partner in a common-law relationship, supports the legal recognition of non-traditional family structures and provides more consistency and clarity in the law.

An opt-out model better balances individual autonomy with the need to protect vulnerable partners. Rather than placing the burden on vulnerable individuals to proactively secure legal protections through marriage or domestic contracts, the onus would shift to those seeking to avoid the default property-sharing regime.¹³⁴

Preserving the right to opt out through a domestic contract would address those common-law partners who do not want to share their property equally.¹³⁵ This will simplify domestic contracting and will safeguard against the “choice” concern becoming a reality.

¹³⁴ See Brynne Thomas, "For Better or for Worse? The Need for Property Reform for Unmarried Partners in Ontario" (2025) 43:3 *Canadian Family Law Quarterly* 363.

¹³⁵ See Heidi Wudrick & Alex Walls, “Surprise, you’re married! What BC couples need to know about common-law spouse entitlements” (9 February 2023), online (blog): <https://beyond.ubc.ca/what-bc-couples-need-to-know-about-common-law-spouse-entitlements/>.

ii. Extend exclusive possession rights to common-law partners

Making exclusive possession rights available to people leaving common-law relationships could be accomplished by amending the FLA to extend the definition of “spouse” as it applies to the provisions dealing with the matrimonial home.

A second legislative pathway would be for the Ontario government to enact a specific family violence statute that would include the power for courts to order exclusive possession in situations of violence.¹³⁶

Careful research must be conducted in consultation with experts and survivors before drafting a family violence statute for Ontario. Scholars have compared the existing family violence legislation in Canadian jurisdictions, noting the differential impact on survivors’ experiences while going through the legal process. Legislators should consider the differences among these statutes, including the definitions of family violence, review mechanisms, eligible applicants, and availability of parenting provisions.¹³⁷

iii. Increase public legal awareness

Regardless of whether the current law changes, public awareness about the law needs to be increased. A lack of legal knowledge makes it easy for manipulation and abuse to take place. As already discussed, there is public confusion about whether people in common-law relationships have the same legal rights and responsibilities as married people. Some evidence suggests that such confusion also exists in jurisdictions where matrimonial property rules apply to common-law partners. There can be no real choice about whether to opt in or opt out without education and awareness of rights.

In a research paper on common-law property sharing, Professor Erez Aloni suggests that, regardless of whether matrimonial property rules apply to common-law spouses, standard lease agreements could explain the legal responsibilities that do and do not accompany cohabitation.¹³⁸ This is practical and effective, since every lessee will have access to the document before they sign it. A similar section could be included with the documents that buyers sign when purchasing property. In the same paper, Professor

¹³⁶ Ontario has no family violence legislation. In 2000, a *Domestic Violence Prevention Act* (Bill 117) was debated but never enacted. There was disagreement about whether gendered language should be used, and even the view that men needed special protections from women. There were also questions about whether the Bill would infringe upon equality rights under the *Charter*. See April Girard, “Ontario Domestic Protection Act: An analysis of the discourse.” in *Electronic Theses and Dissertations*. 2931. (Windsor: University of Windsor, 2006), online: <https://scholar.uwindsor.ca/etd/2931>.

¹³⁷ See Jennifer Koshan & Wanda Wiegers, “Theorizing Civil Domestic Violence Legislation in the Context of Restructuring: A Tale of Two Provinces” (2007) 19:1 Can J Women & L 145. See also Jennifer Koshan, “Preventive Justice? Domestic Violence Protection Orders and Their Intersections with Family and Other Laws and Legal Systems” (2023) 35 Can J Fam L 241.

¹³⁸ See Erez Aloni, “Compulsory Conjuality” (2021) 53:1 Conn L Rev 55.

Aloni suggests that the government could notify people when they have lived together long enough to be legally considered common-law partners under family law legislation, using information from past tax filings.¹³⁹

Notifying people of the legal implications of cohabitation or co-purchasing a property is not the only piece in the puzzle of increasing public awareness. People should be informed about the legal rights and responsibilities of different kinds of relationships before they enter into one. This information could be provided through mandatory education programs in high schools and post-secondary institutions.

iv. Implement mandatory education on IPV for legal actors

A gap remains in both awareness of the prevalence of family violence and understanding the impact of violence on a family and the many barriers a survivor may face when navigating the family law system.

Family law professionals who do not have an adequate understanding of family violence are a barrier to survivors attempting to access protection and justice. Family lawyers need to screen all clients for violence. In a study conducted with participants at a national family law conference in 2016, more than two-thirds of lawyers (69.0%) said that they often or almost always screen for IPV; more than half (53.1%) said that they don't use a standardized measure or instrument to screen for IPV, and another 25.5% said that they rarely do so.¹⁴⁰ These findings raise concerns about the consistency and effectiveness of IPV screening practices, particularly given that survivors may not disclose abuse unless specifically and appropriately asked about it. There are many reasons why a survivor of IPV might not raise the issue of abuse with her lawyer, which is why lawyers must screen so they can ensure that they are giving proper legal advice and suggesting a process and claims that will prioritize the safety and security of their client.

Rise Women's Legal Centre, a legal service and resource centre for women in BC, also observed an unspoken "hierarchy" in court when it comes to different forms of IPV. Economic abuse, for instance, is generally much more difficult to prove than physical assaults because it is usually evidenced by a pattern rather than a single instance of abuse. It follows that protection orders can be harder to obtain on the basis of this type of abuse.¹⁴¹

Tragedies arise when judges are not well-informed about IPV. In 2020, four-year-old Keira Kagan was found dead with her father at the bottom of a cliff in Ontario. The

¹³⁹ *Ibid.*

¹⁴⁰ Lorne D Bertrand et al, "The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program" (October 2016), online: <https://www.justice.gc.ca/eng/rp-pr/jr/nflp-cndf/index.html>.

¹⁴¹ Conversation with Rise Clinic on June 16, 2023.

investigation found that she was likely killed in a murder-suicide by her father.¹⁴² Keira's mother, Jennifer, believed that, during her family court case, the judge's dismissal of her spousal abuse evidence led to orders that did not properly protect Keira.¹⁴³ Following this tragedy, in April 2023, the Parliament of Canada enacted *Bill C-233* to expand education for judges on IPV and coercive control by abusers. Pursuant to this amendment, the Canadian Judicial Council is now empowered to offer continuing education to judges on IPV.¹⁴⁴ Similar changes were made to the Ontario Court of Justice Act for provincially appointed judges.¹⁴⁵

Ongoing advocacy is needed to ensure that Keira's Law is meaningfully implemented by those in charge of creating judicial education programming. This education needs to be ongoing and should be developed in association with survivors and the community organizations who support them.

¹⁴² Sean Davidson, "Ontario girl found dead at bottom of cliff was likely killed by father as revenge against ex-wife, report finds", *CTV News Toronto* (9 February 2023), online: <https://toronto.ctvnews.ca/ontario-girl-found-dead-at-bottom-of-cliff-was-likely-killed-by-father-as-revenge-against-ex-wife-report-finds-1.6266855>

¹⁴³ Jessica Mundie, "Keira's Law" passes Senate, signalling a change to the way courts approach domestic violence", *CBC News* (19 April 2023), online: <https://www.cbc.ca/news/politics/keira-kagan-domestic-violence-coercive-control-1.6815711>

¹⁴⁴ See *Judges Act*, RSC 1985 c J-1, s 60(2)(b); This amendment also allows judges to order individuals who committed an offence against their intimate partner and who pose safety risks to wear an electronic monitoring device, pursuant to section 515(4.2)(a.2) of the *Criminal Code*; Ontario enacted the same thing for provincially appointed judges, now included in the *Courts of Justice Act*, RSO 1990 c C 43.

¹⁴⁵ See *Courts of Justice Act*, RSO 1990, c. C.43, s. 51.10.1(1) and (2)

Conclusion

The legal distinctions between married and common-law relationships in Ontario create significant barriers, particularly for people in vulnerable situations such as survivors of IPV. These barriers are not only legal but also financial and emotional, perpetuating inequality for survivors in common-law relationships.

By learning from other Canadian provinces and territories that have addressed these gaps, Ontario can move toward a more just and inclusive framework. Reforms such as extending property rights to common-law partners, increasing public awareness, and ensuring legal professionals are educated to understand IPV are crucial steps.

Ultimately, these changes would reflect the evolving nature of relationships in modern society, ensuring that all individuals, regardless of marital status, have access to legislated legal remedies that help promote their financial security following separation. Addressing these disparities is not just a legal necessity but also a moral imperative for a more equitable society.

Appendices

Appendix A, Table 1: Family Property Rules as Applied to Common-Law Partners in Canadian Common Law Jurisdictions

	British Columbia	Alberta	Saskatchewan
Applies to unmarried couples?	Yes "spouse" = married/ has lived with another person in a marriage-like relationship (i) for a continuous period of at least 2 years, or (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person	Yes <i>Adult Interdependent Partner Act</i> s.1(1) "relationship of interdependence" means a relationship outside marriage in which any 2 persons (i) share one another's lives, (ii) are emotionally committed to one another, and (iii) function as an economic and domestic unit. s.3(1) 3(1) subject to subsection 2, a person is the adult interdependent partner of another person if (a) the person has lived with the other person in a relationship of interdependence (i) for a continuous period of not less than 3 years (ii) of some permanence, if there is a child of the relationship by birth or adoption, or	Yes s.1 spouse = married/cohabiting continuously not less than 2 years

		(b) the person has entered into an adult interdependence agreement with the other person under s.7.	
What is Family Property	s.84 all personal/real property owned by at least one spouse at the time of separation subject to exceptions	s.7(5) all property acquired after the interdependent relationship began, subject to s.7(2)(3) and other fairness considerations s.1(a) family home = property owned or leased by at least one spouse/adult int partner, occupied as family home...	s.1 any personal or real property at the time of application owned/an interest is held by at least one spouses family home = family home owned by/leased to/has interest by one or both spouses, occupied by one or both spouses, mutually intended to be occupied by one or both as family home
Exclusions to assets subjected to equalization	s.85 - pre-relationship assets - inheritances and gifts - insurance proceeds - personal injury awards - discretionary trust - trust	s.7(2) - pre-relationship assets - inheritances and gifts - insurance proceeds - tort awards or settlement to one spouse	s.23 - pre-relationship acquisition - pre-relationship acquisition by inheritance - pre-relationship ownership - tort award/settlement - insurance proceeds - acquisition made after decree nisi of divorce/judicial separation/more than 24 months after cohabitation ceased for unmarried spouses - acquisition as a result of an exchange of property - proceeds from excluded property
Equal right to possession of family home?	no specification BUT: - court is empowered by s.90 to order exclusive occupation	no specification BUT: - court is empowered by s.19(1) to order exclusive occupation	s.4 equal right of possession to the family home and household goods subject to any court order or interspousal/other appropriate contracts/agreements

	- spouses entitled to share residence acquired after marriage or increase in value of residence acquired during marriage	- family home is usually shared and divided equally upon separation	
Unequal division where equalization would be	s.95(1) "significantly unfair"	s.7(4)(5) not "just and equitable"	s.21(2) "unfair and inequitable"
Considerations for unequal division	- duration - agreements other than property division agreements - spousal contribution to career - ability to pay share of debt - whether family debt was incurred in the normal course of the relationship - any significant change in value caused by one spouse post-separation - other factors	- contribution to the relationship - contribution to the property - financial capacity at the start of relationship and at trial - duration - any agreement - whether property acquired during separation - prior order - prior distribution of property by gift, agreement, or order - detrimental dissipation of property - any tax liability that might ensue - other factors	- date of family property acquisition - contribution by third party on behalf of a spouse to the family property - contribution to spouse's career - effect of a spouse's duties and other circumstances on the other's financial situation - substantial gift/transfer to third parties - prior distribution of property by gift, agreement, or order - dissipation of fam property - any tax liability that might ensue - benefit received due to death of a spouse - third party interests - child support - debts and liabilities - value of fam property outside SK - other factors
Exclusive Possession	s.90(2) The Supreme Court may make an order granting a spouse, for a specified period of time,	empowered by s.5(1) to order exclusive possession, eviction, or restrain a spouse/partner from entering or attending at or near the family home	empowered by s.5(1) to order exclusive possession, eviction, or restrain a spouse/partner from entering or attending at or near the family home

	(a) exclusive occupation of a family residence, or Regardless of title, a common-law spouse can apply for exclusive occupancy. Must establish: 1) no longer practically possible to share use of the residence 2) on a balance of convenience, the applicant is the preferred exclusive occupant. Other factors include child's best interest when it involves children		
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	Manitoba	Ontario	Newfoundland and Labrador
Applies to unmarried couples?	Yes ss.1&2.1 common-law partner = registered under s.13.1 of the Vital Statistics Act/cohabiting in a conjugal relationship for at least 3 years	No (except for support obligations)	No (e) "spouse" means either of 2 persons who (i) are married to each other, (ii) are married to each other by a marriage that is voidable and has not been voided by a judgment of nullity, or (iii) have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year, and, for the purposes of an application under this Act, includes a widow or widower.
What is Family Property	s.1(1) "family asset" = asset owned by one or both spouses/CL-partners and used for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes... "commercial asset" = asset that is not family asset family home = property in which a spouse/CL partner has an interest and that is or has been occupied by the spouses/CL partner as their family residence	s.4(1) " net family property " means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting, (a) the spouse's debts and other liabilities, and (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities, other than debts or liabilities related directly to the acquisition or significant improvement of a matrimonial home, calculated as	s.18(1)(c) " matrimonial assets " includes all real and personal property acquired by either or both spouses during the marriage

	equalization of assets	of the date of the marriage; ("biens familiaux nets")	
Exclusions to assets subjected to equalization	ss.6-10 - gift - inheritance - damage award for personal injury - insurance proceeds - assets already shared	s.4(2) - gift (except matrimonial home) - inheritance (except matrimonial home) - income from gifted/inherited property - insurance proceeds - damage award for personal injury - unadjusted pensionable earnings	s.18(1)(c) - gifts and their appreciation in value - inheritance and its appreciation in value - injury awards - personal effects - business assets - family heirlooms - real and personal property acquired after separation
Equal right to possession of family home?	s.6(2) equal right to use and enjoyment of the family home, subjected to exclusive possession court orders	s.19(1) equal right to possession of a matrimonial home	s.8(1) ...has the same right of use, possession and management of the matrimonial home...
Unequal division where equalization would be	s.14(1) "grossly unfair or unconscionable"	s.5(6) "unconscionable"	s.22 "grossly unjust or unconscionable"
Considerations for unequal division	s.14(2) - unreasonable impoverishment of family asset - debts and liabilities of each spouse/partner - CL/spousal agreement - duration of cohabitation - duration of separation - significant asset of each spouse by gift or inheritance - nature of assets - effect of a spouse's duties and other circumstances on the other's financial situation	s.5(6) - failure to disclose debts/liabilities - debts/liabilities incurred recklessly or in bad faith - part of net family property made by gift from one spouse to the other - intentional/reckless depletion of net family property - disproportionately large amount received during cohabitation period of less than 5 years - one spouse has incurred disproportionately large debts/liabilities	s.22 - income, earning capacity, property and other financial resources each spouse has/likely to have - financial needs, obligations and duties each spouse has/likely to have - living standards - age - marriage duration - disabilities - contribution to the family

		- other circumstances	- loss of potential benefit by reason of marriage - unreasonable impoverishment or dissipation of matrimonial assets - length of living separately during marriage - date of acquisition of each asset
Exclusive Possession	s.6(2) Family Maintenance Act/ The Court's of King's Bench Act	Empowered by s.24(1) to order exclusive possession regardless of ownership	empowered by s.15(1) to order exclusive possession regardless of ownership

	Nova Scotia	Prince Edward Island	New Brunswick
Applies to unmarried couples?	Yes Matrimonial Property Act applies to both married spouses and registered domestic partners <i>Vital Statistics Act</i> s.54(2) Upon registration of a domestic-partner declaration, domestic partners, as between themselves and with respect to any person, have as of the date of registration the same rights and obligations as (g) a spouse under the Matrimonial Property Act	No - Property Division s.1(1) spouse = an individual who, in respect of another person, (i) is married to the other person, or (ii) has entered into a marriage with the other person that is voidable or void Yes - PART III - Support Obligations s.29(b) spouse = an individual who, in respect of another person, (iii) is not married to the other person but is cohabiting with him or her in a conjugal relationship and has done so continuously for a period of at least three years; (iv) is not married to the other person but is cohabiting with him or her in a conjugal relationship and together they are the natural or adoptive parents of a child;	No spouse = a married person
What is Family Property	s.4(1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of s.3(1) matrimonial home = the dwelling and real property	s.4(1)(b) net family property = value of all the property, including the income from the property, that a spouse owns on the valuation date after deducting... s.19 Family home = every property in which a married person has an interest and that is or, if the spouses are living	s.1 marital property = (a) family assets (b) property owned by one spouse or by both spouses that is not a family asset and that was acquired while the spouses cohabited, or in contemplation of marriage (c) property acquired by one spouse after the cessation of

	occupied by a person and that persons spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest	separate and apart, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence is their family home	cohabitation and that was acquired through the disposition of property that would have been marital property had the disposition not occurred marital home = property that is or has been occupied by a person and his or her spouse as their family residence is a marital home, and if property that includes a marital home is used for a purpose in addition to a family residence, the marital home is that portion of the property that may reasonably be regarded as necessary to the use and enjoyment of the family residence (s.16(1))
Exclusions to assets subjected to equalization	s.4(1) - gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children; (b) an award or settlement of damages in court in favour of one spouse; (c) money paid or payable to one spouse under an insurance policy; (d) reasonable personal effects of one spouse; (e) business assets;	s.4(1)(b) - pre-marriage debts and liabilities and assets - gift/inheritance from third person - personal injury awards - life/accident/sickness insurance proceeds - domestic contract	s.1 - business asset - gift from third party or spouse - insurance proceeds - domestic contract

	(f) property exempted under a marriage contract or separation agreement; (g) real and personal property acquired after separation unless the spouses resume cohabitation.		
Equal right to possession of family home?	s.6(1) A spouse is equally entitled to any right of possession of the other spouse in a matrimonial home	s.20(1) Both spouses have an equal right to possession of a family home	s.18(1) a spouse is equally entitled to any right of possession the other spouse has in a marital home, subject to an order for exclusive possession and subject to the provisions of a domestic contract
Unequal division where equalization would be	s.13 "unfair or unconscionable"	s.6(5) "unconscionable"	s.7 "inequitable"
Considerations for unequal division	s.13 - unreasonable impoverishment by either spouse of the matrimonial assets - debts and liabilities - separation agreement - cohabitation duration - date and manner of acquiring assets - domestic specialization and contribution - contribution to spousal career potential - child needs - value of asset appreciation during marriage - insurance proceeds/injury awards	s.6(5) - failure to disclose debts or other liabilities - debts or other liabilities claimed were incurred recklessly or in bad faith; - the part of a spouse's net family property that consists of gifts made by the other spouse; - intentional or reckless depletion of net family property - the amount a spouse would otherwise receive under subsection (1) or (2) is disproportionately large in relation to a period of cohabitation within the marriage that is less than five years;	s.7 - agreement other than domestic contract - duration of cohabitation - duration of living separate and apart - property acquisition date - extent to which acquired by inheritance/gift - any other circumstances

	- pension and other benefits that will be lost upon separation - taxation consequences upon separation	- the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family; - written agreement between the spouses that is not a domestic contract; or - any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, deterioration, destruction, division or transfer of property	
Exclusive Possession	s.11(1) Notwithstanding the ownership of a matrimonial home and its contents, the court may by order, on the application of a spouse, (a) direct that one spouse be given exclusive possession of a matrimonial home, or part thereof, for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Act;	s.25(1) Regardless of the ownership of a family home and its contents, and despite section 20 (spouse's right of possession), the court on application may, by order (b) direct that one spouse be given exclusive possession of the family home or part of it for the period that the court directs and release other property that is a family home from the application of this Part;	s.23(1) Despite the ownership of a marital home and household goods, and despite section 18 or 26, the Court on application may, by order, (a) direct that one spouse be given exclusive possession of a marital home or part of it for such period as the Court directs;

	Yukon	Northwest Territories	Nunavut
Applies to unmarried couples?	No sections on property division doesn't apply to common-law spouses. Spousal support obligations apply (37(1) Either of two persons who, not being married to each other, have cohabited in a relationship of some permanence, may, during cohabitation or after the cohabitation has ceased, apply to a court for an order for support...). The Yukon has extremely short period (3 months) during which a common-law partner must apply for spousal support. If you don't apply to court for support, or make an agreement about it with your spouse, within 3 months of your separation date, you can't get an order for spousal support.	Yes spouse = married/cohabited in a conjugal relationship outside marriage for at least 2 years or the relationship is of some permanence, and they are the natural or adoptive parents of a child	Yes spouse = married/lived together in a conjugal relationship outside marriage for at least two years or the relationship is of some permanence, and they are the natural or adoptive parents of a child
What is Family Property	"Family assets" means a family home as determined under Part 2 and property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation, or for household, educational, recreational, social, or aesthetic purposes...	s.33 property = any interest, present or future, vested or contingent, in real or personal property and includes...	s.33 property = any interest, present or future, vested or contingent, in real or personal property and includes...

Exclusions to assets subjected to equalization	/	s.35(1)(2) - pre-marriage asset and debts and liabilities - property acquired by gift/inheritance from third person - life insurance proceeds - domestic contract - personal injury award	s.35(1)(2) - pre-marriage/relationship assets and debts - property acquired by gift/inheritance from third person - life insurance proceeds - domestic contract - personal injury award
Equal right to possession of family home?	s.22(1) A spouse is equally entitled to any right of possession of the other spouse in a family home	s.51(1) Both spouses have an equal right to possession of a family home	s.51(1) Both spouses have an equal right to possession of a family home
Unequal division where equalization would be	s.13 "inequitable"	s.36(6) "unconscionable"	s.36(6) "unconscionable"
Considerations for unequal division	s.13 - duration of cohabitation - duration of living separate and apart - when the property was acquired - extent to which property was acquired by gift/inheritance - other circumstances - date of valuation of family assets	s.36(6) - failure to disclose debts or other liabilities - debts or other liabilities claimed were incurred recklessly or in bad faith; - intentional or reckless depletion of net family property - the amount a spouse would otherwise receive under subsection (1) or (2) is disproportionately large in relation to duration of spousal relationship - the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;	s.36(6) - failure to disclose debts or other liabilities - debts or other liabilities claimed were incurred recklessly or in bad faith; - intentional or reckless depletion of net family property - the amount a spouse would otherwise receive under subsection (1) or (2) is disproportionately large in relation to duration of spousal relationship - the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

		- written agreement between the spouses that is not a domestic contract; or - children's needs and parental responsibilities - substantial change after the valuation date - any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, deterioration, destruction, division or transfer of property	- written agreement between the spouses that is not a domestic contract; or - children's needs and parental responsibilities - substantial change after the valuation date - any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, deterioration, destruction, division or transfer of property
Exclusive Possession	s.27(2) Despite the ownership of a family home as between spouses, and despite section 22, the Supreme Court on application by or on behalf of a spouse may a) direct that one spouse be given exclusive possession of a family home...	s.55(1) Regardless of the ownership of a family home and its contents, and notwithstanding section 51, the court may, on application, (b) direct that one spouse be given exclusive possession of the family home or part of it for the period that the court directs and release other property that is a family home from the application of this Part	s.55(1) Regardless of the ownership of a family home and its contents, and notwithstanding section 51, the court may, on application, (b) direct that one spouse be given exclusive possession of the family home or part of it for the period that the court directs and release other property that is a family home from the application of this Part

Appendix B, Table 2: Sources of Statutory Empowerment to Order Exclusive Possession to Common-Law Partners in Canadian Common Law Jurisdictions

Province/ Territory	Empowered by family violence statute?	Empowered by family property statute?
AB	× <i>Protection Against Family Violence Act</i> s.2(3)(c), 4(2)(c)	× <i>Family Property Act</i> s.19(1)(a)
BC		× <i>Family Law Act</i> s.90(2)(a)
MB	× <i>Domestic Violence and Stalking Act</i> s.14(1)(d)	× <i>Family Law Act</i> s.80(2)
NL	× <i>Family Violence Protection Act</i> s.6(a)	
NB	× <i>Intimate Partner Violence Intervention Act</i> s.4(5)(c)	
NS*	× <i>Domestic Violence Intervention Act</i> s.8(1)(a)	
NWT	× <i>Protection Against Family Violence Act</i> s.7(2)(b)	× <i>Family Law Act</i> s.55(1)(b)
NU	× <i>Family Abuse Intervention Act</i> s.7(7)(a), 18(3)(a)	× <i>Family Law Act</i> s.55(1)(b)
ON		

PEI	× <i>Victims of Family Violence Act</i> s.4(3)(a)	
SK	× <i>The Victims of Interpersonal Violence Act</i> s.3(3)(a), 7(1)(a)	× <i>Family Property Act</i> s.5(2)(b)
YT	× <i>Family Violence Prevention</i> s.4(3)(a)	

*In Nova Scotia, pursuant to s.54(2)(g) of the *Vital Statistics Act*, couples who have registered as domestic partners enjoy the same rights granted by the *Matrimonial Property Act* as married couples, which include the right to apply for exclusive possession. Common-law couples, however, do not enjoy the same rights.

Appendix C, Table 3: Change in Marriage Rates Per 1,000 Before and After Reform in Canadian Common Law Jurisdictions

	Overall Change in Marriage Rate Per 1,000	Change Before Reform	Change Since Reform
ON	-49.8%	/	/
BC	-59.0%	-44.9%	-25.6%
AB	-51.0%	/	/
MB MB	-51.3%	-32.3%	-28.1%
SK	-51.6%	-27.1%	-33.6%
NS	-49.2%	-15.4%	-39.9%
NB	-51.0%	/	/
PEI	-38.1%	/	/
NL	-48.8%	/	/
NWT		- 15.7% (NWT+NU)	~-30.7% (1999-2019)
YT	-57.6%	/	/
NU		- 15.7% (NWT+NU)	~-57.6% (1999-2019)

Legend	
Category I	"opt-out" jurisdictions - Provinces/territories where matrimonial property rules apply to common-law partners
Category II	"registration" jurisdictions - Provinces/territories where matrimonial property rules apply to registered common-law partners
Category III	"opt-in" jurisdictions - Provinces/territories where matrimonial property rules don't apply to common-law partners

Appendix D, Table 4: Proportion of couples in common-law relationships in Canadian provinces and territories (1996, 2016, 2021)

	1996	2016	2021
ON	8.9%	14.1%	15.7%
BC	11.7%	16.2%	18.0%
AB	11.3%	16.3%	16.7%
MB	9.8%	15.2%	16.9%
SK	9.6%	15.9%	17.0%
NS	11.1%	18.7%	22.9%
NB	12.5%	20.4%	15.2%
PEI	8.9%	15.0%	17.7%
NL	9.7%	16.8%	18.6%
NWT	32.0%	35.5%	35.7%
YT	26.8%	31.0%	32.8%
NU	/	48.6%	51.7%
QC	24.1%	39.1%	42.7%

Appendix E, Table 5: Family Violence Legislation in Canadian Common Law Jurisdictions

	BC	AB	SK
Statute	<i>Family Law Act</i>	<i>Protection Against Family Violence Act</i>	<i>The Victims of Interpersonal Violence Act</i>
Date in force	March 18, 2013	June 1, 1999	1995
Definition of Family Violence Victim/Survivor	s.182 "at-risk family member" = a person whose safety and security is or is likely at risk from family violence carried out by a family member;	s.1(1) "family members" = married/interdependent relationship/living together in intimate relationship, child, parents, related by blood/adoption by virtue of adult interdependent relationship, living together under care pursuant to court order	s.2(a) "cohabitant" = are/have resided together in a family/spousal/intimate relationship; parents; caregiving relationship
Definition of Family Violence	s.1 "family violence" includes - (attempts to) physical abuse - (attempts to) sexual abuse - psychological/emotional abuse (e.g. intimidation, harassment, unreasonable restriction on financial/personal autonomy, stalking) - exposing child to family violence	s.1(1)(e) "family violence" includes - physical act/omission causing injury or property damage that intimidates/harm family member - (threatened) act that intimidates family member by creating reasonable fear of property damage or injury - sexual abuse - stalking - forced confinement	s.2(e.1) "interpersonal violence" includes - act/omission causing bodily harm or property damage - (threatened) act causing reasonable fear of bodily harm or prop damage - forced confinement - sexual abuse - harassment - deprivation of necessities - human trafficking
Scope of Order	s.183(3) - restraining order - direct police to accompany/remove - any other measure necessary	s.2(3) - justice of peace - restraining order - exclusive possession of residence	s.3(3) - restraining order - direct police to remove/supervise/accompany - exclusive possession of residence

		- direct police to accompany/remove - seize weapon - any other necessary s.4(1) - King's Bench - similar to justice of peace, additionally, counselling	- other measures necessary
Order Criteria	s.183(2) (a) family violence is likely to occur, and (b) the other family member is an at-risk family member (a person whose safety and security is or is likely at risk from family violence carried out by a family member)	s.2(1) (a) family violence has occurred (a.1) claimant has reason to believe respondent will continue/resume family violence, and (b) by reason of seriousness or urgency, order should be granted to provide immediate protection	s.3(1) (a) interpersonal violence has occurred, and (b) by reasons of seriousness or urgency, the order should be made to ensure immediate protection
Limitation	s.183(4) 1 year unless provides otherwise	s.7 may not exceed 1 year. King's Bench can extend for 1 year max at a time	

	MB	NL	NS
Statute	<i>The Domestic Violence and Stalking Act, CCSM c D93</i>	<i>Family Violence Protection Act, 2005 cF-3.1 s1</i>	<i>Domestic Violence Intervention Act, 2001 c 29 s 1</i>
Date in force	June 29, 1998	July 1, 2006	April 1, 2003
Definition of Family Violence Victim/Survivor	s.2(1) - is/has cohabited in a spousal/conjugal/intimate relationship - has/had family relationship - has/had dating relationship parents together		s.2(g) "victim" = has/is cohabiting in a conjugal relationship; is parent of child with perpetrator
Definition of Family Violence	s.2(1.1) "domestic violence" includes - (threatened)act/omission that causes bodily harm or prop damage - conduct that reasonably in all circumstances constitute psychological/emotional abuse - forced confinement - sexual abuse 2(2) stalking	s.3(1) - physical assault - act/omission causing bodily harm or prop damage - forced physical confinement - (threat of) sexual assault/exploitation/molestation - act that causes fear for safety (contacting, communicating, recording, observing, following) - causes psychological/emotional harm - conduct that controls, exploits or limits the applicant's access to financial resources for the purpose of ensuring the applicant's financial dependency - deprivation of necessities of life	s.5(1) "domestic violence" includes - physical assault - act/omission that causes reasonable fear of bodily harm or damage to property - forced physical confinement - (threat of) sexual assault/exploitation/molestation - act that causes fear for safety (contacting, communicating, recording, observing, following)

Scope of Order	s.7(1) - justices of peace - restraining - direct police to remove/supervise/accompany - temporary possession of necessary personal effects - seize weapon 14(1) - King's Bench - similar to additionally, exclusive possession of residence subject to Family Maintenance Act order	s.6 - restraining order - directing police to accompany/remove - temporary exclusive possession - temporary child custody - other measures necessary	s.8(1) - exclusive possession of residence/personal property - removal of person - temporary child custody - restraining order - anything else necessary
Order Criteria	s.6(1) (a) respondent is committed/has committed domestic violence against subject, or is stalking/has stalked the subject (b) subject believes DV/stalking will continue (c) subject requires protection because of likelihood of DV continuing (d) due to seriousness/urgency, order shall be made	s.5(1) (a) family violence has occurred, and (b) by reason of seriousness or urgency the emergency protection order should be made without delay to ensure the immediate protection of the applicant who is at risk of harm or the property that is at risk of damage	s.6(1) (a) domestic violence has occurred; and (b) the order should be made forthwith
Limitation	s.8.1(1) Protection order (by justices of peace) expires in 3 years unless specified otherwise	s.7(2) shall not exceed 90 days s.7(4) emergency protection order cannot be renewed/extended	s.8(2) not exceeding 30 days

	NB	YT	NWT
Statute	<i>Intimate Partner Violence Intervention Act</i> , SNB 2017 c 5	<i>Family Violence Prevention Act</i> , RSY 2002 c 84	<i>Protection Against Family Violence Act</i> , SNWT 2003 c 24
Date in force	May 1, 2018	January 1, 2003	April 1, 2005

Definition of Family Violence Victim/Survivor	s.1 "intimate personal relationship" = are/have been a) married, b) conjugal, c) dating/romantic	s.1 "cohabitants" = reside/have resided in a family/spousal/intimate relationship, or parents	s.2(1) - spouse/former spouse - reside in intimate/family relationship - parent of child - parent/grandparent of the above
Definition of Family Violence	s.2(1) "intimate partner violence" includes (a) abusive, threatening, harassing or violent behaviour used as a means to psychologically, physically, sexually or financially coerce, dominate and control the other member of the relationship; (b) deprivation of food, clothing, medical attention, shelter, transportation or other necessities of life	s.1 "family violence" includes - physical assault - act/omission that causes reasonable fear of bodily harm or damage to property - sexual abuse - forced confinement - deprivation of necessities	s.1(2) - physical assault - act/omission that causes reasonable fear of bodily harm or damage to property - sexual abuse - forced confinement - psychological abuse, emotional abuse or financial abuse that causes harm or the fear of harm to the applicant, any child of the applicant or any child who is in the care of the applicant
Scope of Order	s.4(5) - restraining order - temporary exclusive possession of residence/personal property - directing peace officer to remove - temporary child custody	s.4(3) - justices of peace - emergency intervention orders - restraining order - direct police to accompany/remove - surrender of firearms - exclusive possession - other measures necessary s.7(1) court - victim's assistance order - similar to emergency intervention orders. in addition: - temporary possession of personal property - recommendation for counselling	s.4(1) - emergency protection order - restraining order - direct police to accompany/remove - surrender of firearms - exclusive possession - other measures necessary s.7(1) - protection order - similar to emergency protection orders, additionally provision requiring respondent to attend/pay for counselling
Order Criteria	s.4(1) on a balance of probabilities:	s.4(1)	s.4(1) - family violence has occurred

	(a) IPV has occurred or is likely to occur (b) seriousness and urgency of the situation warrant the making of the order	- family violence has occurred/is likely to occur, and - seriousness or urgency	- seriousness or urgency
Limitation	s.5(1) no more than 180 days	up to justice of peace	s.4(5) must not exceed 90 days

Appendix F: Glossary of Legal Terms

Constructive Trust: a remedy for unjust enrichment that provides the claimant with an ownership interest in a property based on contributions that are directly linked to the maintenance or improvement of a property.

Domestic contracts: the term used in the *Family Law Act* to describe agreements between two people setting out certain agreed-upon terms related to their family and their finances. Some contracts are signed while the relationship is intact, such as a cohabitation agreement or marriage contract, both of which may set out what each person's financial entitlement will be following separation. Other contracts are signed following separation, such as a separation agreement, setting out, among other things, any agreed terms for financial arrangements post-separation.

Equalization: the process for dividing property for married spouses under the *Family Law Act*. It involves calculating each spouse's net family property value and then equalizing these values as between them by having the person with the higher net family property value make a payment to the person with the lower net family property value to split the difference.

Exclusive Possession: refers to the sole legal right to occupy the matrimonial home following separation to the exclusion of others, regardless of legal title.

Joint family venture: a claim that can be made in family court as a basis for finding unjust enrichment. It involves a claim that two people were significantly financially integrated and worked together to accumulate wealth for the benefit of the family, with one person solely retaining this benefit after separation, resulting in unfairness to the other person.

Matrimonial Home: every property in which a person has an interest, and that is, or, if the spouses have separated, was at the time of separation ordinarily occupied by the person and his or her spouse as their family residence. You can have more than one matrimonial home; for instance, some people may have a home and a cottage that they are ordinarily occupying together at the time of separation. This term and definition only apply to homes that married spouses are ordinarily occupying at the time of separation. It does not apply to common law partners.

Net Family Property: the value of all property owned on the date of separation minus property brought into the marriage (except the matrimonial home) and current debts and liabilities.

Property: property is defined broadly in the *Family Law Act* to include any interest, present or future, vested or contingent, in real or personal property. It includes real property such as a home or cottage as well as personal property, such as a car, bank account, investments, or a business. See s.4(1) for the full definition. There is some

property that is specifically excluded from this definition, including for instance, property that was acquired by gift or inheritance from a third party during the marriage (except for the matrimonial home).

Spouse: defined under Ontario's *Family Law Act* as either of two persons who "are married to each other." In the sections addressing child and spousal support, the definition extends to persons who have cohabited continuously for at least three years or are in a relationship of permanence if they are parents of a child.

Unjust Enrichment: A claim in equity focusing on correcting the unfairness where one person receives a benefit at the expense of another person. The legal test requires proof of the following:

- a. The defendant was enriched.
- b. The plaintiff was deprived.
- c. There is no valid legal reason for the defendant to retain the benefit.

Appendix G: Complicated Web of Legal Claims Available to Common-Law Partners in Ontario to get Exclusive Occupation of a Family Home After Separation

Exclusive possession orders are not available to common law partners under the *Family Law Act* in Ontario. This means that a common law partner cannot ask the court to formally make an order for exclusive possession in the same way a married spouse can.

Although the court cannot directly order exclusive possession, there are some claims that can be made in family court that have the effect of giving someone exclusive occupancy of a family home pending trial. These claims are as follows:

- a) a vesting order¹⁴⁶ under section 34(1)(c) of the *FLA* to:
 - a. satisfy support arrears
 - b. secure the payment of lump-sum support
- b) a vesting order under section 100 of the *Courts of Justice Act* to secure other amounts owed
- c) as a form of support under section 34(1)(d) of the *FLA*
- d) pending final successful outcome of any equitable claims against the property
- e) as protection from violence through a criminal court no-contact order or a family court restraining order

The above options were confirmed in the decision of *Perks v. Lazaris*, where the court made the following statement about common-law partners and their right to claim exclusive possession of a family home in response to a father's motion to evict the mother from the home:

Neither is it a given that a non-titled spouse has no basis upon which to continue living in a family home post separation. The *Family Law Act* excludes common law spouses from the protection afforded by section 24, but other remedies exist. Three come to mind. If a common law spouse has a pending trust claim, there may be grounds for an injunction allowing him or her to remain in the home pending the outcome of the trial. Second, there is some authority that possession of a home can be a form of support under s. 34 (1) (d) of the FLA. Third, a restraining order per section 46 (1) FLA or 35 (1) CLRA, may be appropriate. In such occurrences, the non-titled spouse's occupation is an effect of the order, rather than its object.¹⁴⁷

If the non-owning partner is not able to make out any claims identified above, they have no right to continue staying in the home or to exclude the partner who owns the

¹⁴⁶ A vesting order is an order the court can make that transfers legal ownership of property from one person to another.

¹⁴⁷ *Perks v. Lazaris*, 2016 ONSC 1356 at para 27.

property. The person who owns the property could seek to evict them through a Notice under the *Trespass to Property Act* or through a court order to vacate the property. Even if the common-law partner jointly owns the home, they have limited legal recourse to exclude their co-owning partner. These limitations on the exclusive possession provisions in Ontario pose particular challenges for survivors of IPV who may have no access to alternative, safe housing and, as a result, may be forced to continue residing with an abusive partner.

The methods of obtaining *de facto* exclusive possession are an imperfect solution for common-law partners, as each claim brings about additional challenges as set out below. And for most of these options, save and except a restraining order or other form of no-contact order, any violence they have been subjected to is not expressly relevant to the legal test they have to meet.

i) Vesting Orders Under Section 34(1)(C) FLA

A vesting order is a legal remedy that involves the transfer of legal ownership from one person to another. The court has broad discretion to make vesting orders in the family-law context under section 34(1)(c) of the *FLA*. This section states that, in support applications under section 33 of the *FLA*, the court may make an order requiring that a payor's property be transferred to or in trust for, or vested in, a dependent.¹⁴⁸ These orders can be made absolutely, for life, or for a term of years. The jurisdiction granted by section 34(1)(c) of the *FLA* is quite flexible, allowing the court to craft proprietary remedies to familial support issues as it sees fit, within the boundaries of the legislation. In addition, sections 33 and 34 of the *FLA* fall under the "Support Obligations" heading of the *FLA*, extending the court's ability to craft these remedies from married parties to common-law partners as well. As such, these provisions could be used to argue that the court has jurisdiction to vest title of a home owned by a payor common-law spouse who had failed to meet their support obligations in their non-owning common-law spouse. This order would effectively grant the non-owning spouse *de facto* exclusive possession of the family home by vesting title to that property in their name.

While the court's power to make vesting orders in the context of familial support issues is very broad, they are highly intrusive remedies.¹⁴⁹ As a result, there are not many reported court decisions where a common-law partner was given a vesting order in relation to a family home as part of a support order.¹⁵⁰ As discussed below, the court

¹⁴⁸ Family Law Act, RSO 1990, c F3, s 34(1).

¹⁴⁹ In *Lynch v Segal*, 2006 CarswellOnt 7929 [*Lynch*], the court elaborated on the intrusive and unique nature of vesting orders, stating that "a vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). The rationale for the vesting power, therefore, is to permit the court to direct the parties to deal with property in accordance with the judgment of the court."

¹⁵⁰ Although there are few reported decisions involving common-law spouses seeking a vesting order under section 34(1)(c) of the *FLA*, it's important to recognize that these cases may not fully reflect the prevalence or nature of such

has considered making this type of order in one of two scenarios: to satisfy support arrears or as security for lump-sum support.

ii) Satisfaction of Support Arrears

The leading case in which section 34(1)(c) of the *FLA* was considered in the context of a common-law spouse's unpaid support arrears is *Lynch v. Segal*, where a vesting order was granted against a common-law partner who had paid very little of his court-ordered spousal and child support. The facts of this case are complicated, but the outcome was that the trial judge transferred to, and vested in, the common-law partner title to lands deemed to be owned by the payor partner to ensure that his child and spousal support arrears were paid. The Court of Appeal upheld the trial judge's decision, reinforcing the court's broad and discretionary power to make vesting orders of this nature.¹⁵¹ *Lynch* also clarified that to meet the high legal threshold associated with a vesting order, the court must be satisfied that:

- 1) "the previous conduct of the person obliged to pay, and his or her reasonably anticipated future behaviour, indicate that the payment order will not likely be complied with in the absence of more intrusive provisions; [and]
- 2) ... the spouse seeking the vesting order will have already established a payment liability on the part of the other spouse and the amount of that liability, and will need to persuade the court that the vesting order is necessary to ensure compliance with the obligation; [and]
- 3) ...there is some reasonable relationship between the value of the asset to be transferred and the amount of the targeted spouse's liability; [and]
- 4) the interests of any competing execution creditors or encumbrancers with eligible claims against the specific property in question are not an impediment to the granting of a vesting order."¹⁵²

There are a few key points to take away from this case. The lands vested in the wife were not the family home but farmlands that the couple rarely visited.¹⁵³ In addition, the legal test set out in the decision imposes a very high burden on people seeking to obtain a vesting order. This may explain why there are few reported cases of common-law spouses attempting to obtain such orders in relation to a family home based on

arguments in practice. Our research is constrained by the availability of reported decisions, which does not account for similar cases that were settled out of court, did not proceed to trial, or were resolved through endorsements rather than formal court orders. Consequently, the insights provided in this section are limited by the scope of available reference material and may not fully capture the broader context of how these arguments are used in practice.

¹⁵¹ *Lynch* at para 30, *supra* note 149.

¹⁵² *Ibid*. Note that in the original case, the legal test is not laid out in four parts but provided in a single paragraph. It is broken down in this paper for clarity and ease of reference.

¹⁵³ *Ibid* at para 3 and para 7.

support arrears.¹⁵⁴ The only reported decision involving common-law partners that we found did not grant the vesting order.

There are, however, numerous cases in which **married** spouses have successfully made this argument. An analysis of this case law reveals several recurring themes in cases where a vesting order was granted:

- 1) The property-owning party owed significant support arrears, which they never made any effort to pay;¹⁵⁵
- 2) Outstanding cost awards were owed to the moving party in addition to support arrears;¹⁵⁶
- 3) The property-owning party had already vacated the property and had alternative accommodations¹⁵⁷ (this consideration was given greater weight where the owning party had left the country altogether¹⁵⁸)
- 4) The property-owning party was unresponsive or uncooperative during the court proceedings;¹⁵⁹
- 5) The estimated equity of the home in question was similar in value to the arrears owed;¹⁶⁰
- 6) The property in question was at significant risk of foreclosure due to the property-owning partner's failure to make the required payments¹⁶¹ (this

¹⁵⁴ Extensive research efforts were undertaken to canvass case law on this matter. The following search terms, alone and in combination with one another, were used in Westlaw and LexisPlus: (unmarried or unwed or cohabiting or common-law or common law or "not married" or "never married" or "non-marital partners") & 34 & (vest or vesting or vested or *Lynch*) & (arrears or unpaid or outstanding).

¹⁵⁵ See *Patel v. Patel*, 2021 CarswellOnt 3918 [*Patel*], where the non-owning wife successfully argued to have title of the matrimonial home vested in her. Her husband had never paid any of his child support obligations and owed roughly \$31,467 to his ex-wife which was comprised of child support arrears, unpaid section 7 expenses, and outstanding cost awards. See also *Nikfar v. Nikfar* 2022 CarswellOnt 2322 [*Nikfar*], where the court considered the respondent husband's arrears of \$250,942.60, and see also *Raisfirooz v. Dajmar* 2022 CarswellOnt 14145 [*Raisfirooz*] where the court considered the respondent husband's arrears of \$700,000.00.

¹⁵⁶ *Patel* at para 31, *supra* note 155; *Nikfar* at para 93, *supra* note 155; and *Raisfirooz* at para 19, *supra* note 155. Note that while unpaid cost awards were taken into consideration, costs alone are not enough to entitle a spouse to a vesting order under section 34(1)(c) of the *FLA*, as this section applies only to support.

¹⁵⁷ *Patel* at para 6, *supra* note 155.

¹⁵⁸ See *Patel*, where the owning party had moved to India without any notice or any plans to return to Canada. The court considered the difficulty that the Family Responsibility Office would thus face in enforcing his outstanding arrears. See also *Raisfirooz*, where the court considered the fact that the husband moved to Iran, which would make enforcing previous support orders very difficult.

¹⁵⁹ See *Patel* at para 7, *supra* note 155. See also *Verch v. Verch*, 2012 ONSC 2621 [*Verch*] where a husband's uncooperative behaviour during litigation led the court to conclude that he would continue to disregard court orders. Relying on rule 1(8) and 14(23) of the *Family Law Rules*, the court held that when a party chooses not to follow the *Family Law Rules*, or fails to abide by a court order, the court has the discretion to "make any order that it considers necessary for a just determination of the matter, on any conditions, that the court considers appropriate."

¹⁶⁰ *Patel* at para 31, *supra* note 155.

¹⁶¹ *Raisfirooz* at para 19, *supra* note 155.

consideration was given greater weight where children of the relationship continued to reside in the home¹⁶²).

In the cases used to identify these themes, each presiding judge considered some or all of the factors listed above, ultimately determining that the property-owning partner's conduct met the criteria for a vesting order. Although the decisions referenced were in the context of people who were married, the vesting orders made were under the "Support Obligations" section of the *FLA*. Therefore, the principles derived from these cases could be used by unmarried litigants arguing for vesting orders against their non-owning former partners in factually similar situations, which could ultimately result in a common-law party obtaining title and, as a result, exclusive possession of their family home.

iii) Security for Lump-Sum Support

Another way a non-titled unmarried partner may obtain *de facto* exclusive possession through a vesting order under section 34(1)(c) of the *FLA* is as security for the payment of lump-sum support. Only a few reported decisions could be found where this claim was successfully made by a common-law partner,¹⁶³ however, the court has acknowledged that there is clear authority for orders made on this basis.¹⁶⁴

In the case of *Broman v. Dark*,¹⁶⁵ a vesting order was made in favour of a common-law partner solely as security for lump sum support.¹⁶⁶ In *Broman*, the common-law partners jointly owned their home and regularly pooled their income for expenses. After separating, the man vacated the property and stopped paying his share of home expenses, prompting the woman to seek sole ownership and spousal support. The court determined that she was entitled to support due to her financial dependence on her partner during their relationship. The court calculated lump sum support and found that the amount still exceeded her partner's remaining equity in the home. For a clean

¹⁶² See *Nikfar* at para 96, *supra* note 155. The court vested title of the matrimonial home in the wife largely because the property was at significant risk of foreclosure. The court considered what was in the best interests of the children in coming to its decision, wanting to ensure that they enjoyed the security of the matrimonial home for as long as reasonably possible.

¹⁶³ *Broman v. Dark*, 2013 CarswellOnt 8471 [*Broman*], *Thoo v. Daoust* 1995 CarswellOnt 1982, and *Glasco v. Bilz*, 2014 CarswellOnt 18034. The following search terms, alone and in combination with one another, were used in Westlaw and LexisPlus to canvass case law on this subject: (unmarried or unwed or cohabiting or "common-law" or "common law" or "not married" or "never married" or "non-marital partners") & 34 & (vest or vesting or vested) & (lump or "lump-sum" or "lump sum" or "lump-sum support" or "lump sum support"). However, it is important to note that numerous *married* parties have successfully used section 34(1)(c) of the *FLA* to obtain possession of a family home. The precedent set by these cases likely applies to unmarried parties as well, since this section of the legislation considers both types of relationships. For example, see *Crump v. Crump*, 1984 CarswellOnt 207; see also *Kennedy v. Sinclair*, 2001 CarswellOnt 1634.

¹⁶⁴ *McLean v. Danicic* 2009 CarswellOnt 3289 [*McLean*] at para 109.

¹⁶⁵ *Broman v. Dark*, 2013 CarswellOnt 8471 [*Broman*].

¹⁶⁶ Note that there are numerous cases where a lump-sum support payment is just *one* of *multiple* values being secured by a single vesting order made by the court. Some of these cases are discussed in the following section of this paper.

break, she was willing to accept her former partner's share of the home as satisfaction of his support obligation, despite being of a lesser value than she was entitled to in lump sum support. To accomplish this tradeoff, the court made an order for lump-sum support for the exact same amount as his equity in the home and subsequently made an order under section 34(1)(c) of the *FLA* vesting the 50% equity in his former partner as satisfaction of the lump-sum support amount.

A similar argument was successfully made in *Risto v. Marcelais*,¹⁶⁷ although the vesting order made in this case was against a military pension as opposed to a family home.¹⁶⁸ The court in *Risto* provided a thorough analysis of the circumstances that may entitle a common-law partner to lump-sum support, which would be useful for parties seeking to obtain an order on that basis. First, the court assessed the woman's entitlement to spousal support. It found that the couple's 15-year cohabitation, the man's capacity to provide support through his military pension, and their clear income disparity entitled her to support under sections 33(8) and 33(9) of the *FLA*.¹⁶⁹ Next, the court contemplated whether a lump-sum award was appropriate, considering his failure to pay an existing support award from a previous order, his failure to pay his share of the joint line of credit payments, and the fact that he had assets with which to pay the lump-sum award. The court concluded that a lump-sum award was warranted.¹⁷⁰ With respect to a vesting order under section 34(1)(c) of the *FLA*, the court considered whether support was likely to be paid otherwise based on his previous behaviour and determined that a vesting order was necessary to secure the lump-sum payment.¹⁷¹

iv) As a form of support under section 34(1)(d) of the *FLA*

In section 34(1)(d) of the *FLA*, the court can make an order for exclusive possession as a form of spousal support. However, the applicability of this remedy to common-law relationships is complicated by the fact that this particular provision refers back to the section of the *FLA* that deals with exclusive possession and is otherwise not available to common-law partners as a legal remedy.

In their paper, "Can a Common Law Spouse Obtain Exclusive Possession by Injunction or Other Means?"¹⁷² Gerald Sadvari and Ann Velez explore the possibility of obtaining an exclusive possession order under this section of the *FLA* for common-law partners, a concept they refer to as "support-based exclusive possession." Sadvari and Velez review the highly conflicted case law on this topic, demonstrating that different judges have

¹⁶⁷ *Risto v. Marcelais*, 2014 CarswellOnt 3904 [*Risto*].

¹⁶⁸ Note that while vesting orders with respect to property (including the family home) were made in *Risto* as well, they were done under a slightly different authority than the order made as security for lump-sum support (see section below where this is discussed at length).

¹⁶⁹ *Risto* para 96, *supra* note 167.

¹⁷⁰ *Ibid* at para 99.

¹⁷¹ *Risto* para 105, *supra* note 167.

¹⁷² Gerald Sadvari and Ann Velez, "Can a Common Law Spouse Obtain Exclusive Possession by Injunction or Other Means?" (2007).

provided varying answers to this question: some judges have said yes,¹⁷³ more have said no,¹⁷⁴ and more still have refused to answer the question at all.¹⁷⁵ As noted by Sadvari and Velez, this lack of consensus means that the applicability of section 24 to common-law partners via section 34(1)(d) of the *FLA* remains unclear, rendering it a theoretical remedy until further clarified by an appellate court or through changes to legislation. While unmarried people may still argue this point in court, they should proceed with caution, recognizing that outcomes will depend on the presiding judge. Leave to appeal on this issue was granted by the court in *Williams v. Hudson*, but the appeal was never pursued. In this case, the court found that the “time has come for an authoritative decision on this issue”¹⁷⁶, which unfortunately still continues to be the case to this day.

Notably, in two cases where the court refused to grant exclusive possession to a common-law partner, the triers of fact expressed regret for the lack of statutory power to grant the order. Master Nolan in *Barkley v. Demars* commented, “...had the parties been married and, thus, had the property rights accorded by Part 1 of the *FLA*, I would have had no hesitation in granting the applicant an order for exclusive possession on the grounds that it is in the best interest of the child that the child remains in that home at least for the time being”.¹⁷⁷ Mackinnon J. in *Souleiman v. Yuusuf* reasoned that all previous cases in which exclusive possession was given to a common-law spouse involved a property that was already vacated, but *Souleiman* involved two spouses who still presently occupied the home. He regrettably comments, “had section 24 of the *FLA* applied, I would have granted exclusive possession to the applicant” with the

¹⁷³ See *Young-Foong v. Leong-Foong*, 1980 CarswellOnt 87 [*Young-Foong*]. This case, the first to address this issue, involved a common-law couple who separated after eight years. The plaintiff continued to live in the home with the defendant's agreement, but the defendant later sought to regain exclusive possession. The court denied this request, allowing the plaintiff to remain until further order (para 15). Master Cork affirmed that exclusive possession can be granted to a common-law spouse under the *FLA*, interpreting the legislative intent as maintaining the status quo and preventing economic overreach during the trial period (para 11). Note that this case involved the *Family Law Reform Act* of 1978, which was replaced by the *Family Law Act* in 1990. Like the *FLA*, Part II of the *Family Law Reform Act*, concerning support obligations, applied to common-law spouses who had cohabited for five years or had a child together, while other parts of the *Act* applied only to married spouses.

¹⁷⁴ See *Barkley v. Demars*, 1997 CarswellOnt 5814 [*Barkley*], *Czora v. Lonergan*, 1987 CarswellOnt 323 [*Czora*], and *Souleiman v. Yuusuf*, 2021 ONSC 6994 [*Souleiman*].

¹⁷⁵ In *Thorne v. Buss*, 1993 CarswellOnt 1802, the application was denied because the defendant had ample means to pay for interim support and exclusive possession ought not to be granted when the support obligation could otherwise be fulfilled. In *Bathie v. Munro*, 2002 CarswellOnt 3621, the court rejected the defendant's request for exclusive possession because even if it applies to common-law spouses as a form of spousal support, the defendant's request relying on financial positions between the spouses (*FLA* s 24(3)(c), *supra* note 13) was not made out. While the plaintiff earned twice as much as the defendant did, the defendant was not without resources and the discrepancy between the parties was not great enough. Similarly, without answering the question of statutory interpretation, the court in *Akman v. Burshtein*, 2009 CarswellOnt 1941 rejected the respondent's request for exclusive possession as spousal support because she could not meet any of the criteria for exclusive possession listed in s 24(3) of the *FLA*. In *Cass v. Dyke* the common-law wife sought exclusive possession of the jointly owned family home as satisfaction of spousal support. Although the court acknowledged her entitlement to support and agreed that the amount she sought was appropriate, it found no reason to grant an order vesting full title of the home to her. This decision was influenced by the fact that her partner still resided in the family home and used it for his business operations.

¹⁷⁶ *Williams v. Hudson*, 1997 CarswellOnt 4400 at para 3.

¹⁷⁷ *Barkley* at para 4, *supra* note 49.

awareness that continued occupation of the home by both spouses would likely expose their children to “parental conflict and tension until their parents’ case is finalized”.¹⁷⁸

v) Pending Litigation of a Triable Issue

Another indirect method of obtaining *de facto* exclusive possession for common-law partners is where the non-owning partner has a valid claim for an ownership interest in the property.

Sadvari and Velez also flagged this temporary solution in their paper, where the authors specifically discussed the case of *Morningstar v. Holley*.¹⁷⁹ In this case, the untitled common-law partner and her child were living by themselves in a house owned by her former partner following their separation. He sought to evict his former partner and regain control of the property so he could sell it, but the court refused his request. In reaching their decision, the court considered that the untitled partner had a strong claim for an equitable interest in the property that could result in a proprietary remedy being ordered at trial and she also had a reasonable claim for support and was seeking a vesting order pursuant to section 34(1)(c) of the *FLA*. Considering these factors, in conjunction with the fact that there was an upcoming trial on these issues, the court refused to grant the titled partner the exclusive possession order he sought. This resulted in the woman being permitted to remain in the house alone with her child until trial.

Following *Morningstar*, numerous decisions have allowed untitled or jointly owning partners in common-law relationships to retain exclusive possession of their homes on a “balance of convenience” basis, pending a final decision on their ownership claim to the property.¹⁸⁰ As explained by the court in *Souleiman*, the court has the “inherent jurisdiction to decline to order a common-law spouse out of a family home pending trial of [their] meritorious claims that, if successful, could result in a declaration of ownership, from which rights of possession would flow.”¹⁸¹ However, the court also noted that these decisions do not establish a substantive right to exclusive possession. Instead, they merely delay the enforcement of the property-owning partner’s legal right to possession until trial, where claims about ownership that may impact rights of possession could be decided.¹⁸² The reported case law involving this issue reveals that the court’s jurisdiction is flexible, ranging from denying eviction motions brought by the property-owning partner to granting exclusive possession to a non-owning partner until trial.¹⁸³ An analysis of these cases reveals several themes:

¹⁷⁸ *Souleiman* at paras 6 and 24, *supra* note 50.

¹⁷⁹ *Morningstar v. Holley*, 2007 CarswellOnt 4530 [*Morningstar*].

¹⁸⁰ For example, see *Joyce v. O’Neill*, 2008 CanLII 68120; *Morrison v. Barbosa*, 2017 CarswellOnt 12197 [*Morrison*]; *Anness v. Kovacs*, 2012 ONSC 7298 [*Anness*]; and *Lewis v. Oriji*, 2009 CarswellOnt297 [*Lewis*].

¹⁸¹ *Souleiman* at para 11, *supra* note 50.

¹⁸² *Ibid*; *Abdulaziz v El Zahabi*, 2022 ONSC 2591 at para 19.

¹⁸³ See *Morrison* at para 29, *supra* note 180. The court explicitly ordered that the untitled common-law wife retain exclusive possession of the family home pending trial or further order of the court.

- 1) In many cases, the court was attempting to enforce the “status quo” by maintaining the existing state of affairs until trial¹⁸⁴
 - a. A non-frivolous (aka possibly successful)¹⁸⁵ proprietary claim was going to be raised by the untitled partner at trial, such as a claim for an ownership interest in the property¹⁸⁶ or for a vesting order¹⁸⁷
- 2) In the absence of a triable claim raised by the non-owning partner, their presence in the home constituted “lawful justification”¹⁸⁸ due to other factors, such as:
 - a. there were children living with the non-owning partner in the family home¹⁸⁹
 - b. the non-owning partner had been living in the property for several years post-separation, with some acquiescence by the property-owning partner to the other’s presence.¹⁹⁰

It is important to note that this argument is typically only raised by non-owning partners in response to motions from the property-owning partner to evict them. Consequently, these orders generally prevent eviction to preserve the status quo in favour of a partner still living in the home. In situations of violence, where the woman and her children may have left the home to escape further violence, preserving the status quo may not be a helpful solution, as she may not be safely able to return to the home unless and until the other partner has left.

vi) Protection From Violence Through No-Contact Orders

When police are involved in cases of IPV, the abuser may be charged and then subject to bail conditions pending a resolution of the charges that preclude the abusive partner from returning to the family home. As a result, the survivor, even in a common-law relationship, may be able to temporarily remain exclusively in the family home, regardless of ownership and without a formal court order for exclusive possession. This is what happened in *Joyce v. O’Neil*, where the property-owning partner was removed from the home by police, charged and released on bail conditions that precluded him from returning to the home that he solely owned and lived in with his common-law

¹⁸⁴ The effect of maintaining *status quo* accords with Master Cork’s interpretation of the legislative intent behind the two sections in question in *Young-Foong*, see note 173.

¹⁸⁵ See *Morningstar* at para 7, *supra* note 179. See also *Abdulaziz v. El Zahabi*, 2022 CarswellOnt 5825 [*Abdulaziz*] at para 17.

¹⁸⁶ See the following: *Gonzalez v. Trobradovic*, 2014 CarswellOnt 12842 at para 45; *Lewis*, *supra* note 69; *Anthony v. Oqunbiyi* 2023 CarswellOnt 1216 [*Anthony*]; *Joyce*, *supra* note 69; *Morrison*, *supra* note 69.

¹⁸⁷ See *Morningstar*, *supra* note 68.

¹⁸⁸ *Lewis*, *supra* note 180.

¹⁸⁹ See *Anness*, *supra* note 180. The untitled party didn’t raise a triable issue, but the court delayed the issuance of a writ of possession in favour of the owner for two months to provide the occupying parent time to relocate with the parties’ child. See also *Abdulaziz*, *supra* note 185, where the court dismissed the untitled spouse’s argument that she had a meritorious constructive trust claim, but declined to order her to vacate the home as the balance of convenience favoured her remaining there with the children pending sale of the property.

¹⁹⁰ See *Anthony* para 29, *supra* note 186.

partner.¹⁹¹ On an interim motion for possession, the court acknowledged the property-owning partner's argument that there was no legal basis for a common-law partner to claim exclusive possession in the *FLA*, but found that on a balance of convenience, the non-owning partner should continue to have exclusive possession of the home. The non-owning partner claimed an equitable interest in the property and had been living there for a number of years. The property-owning partner had dementia and was already living in a seniors' residence with assisted living at the time of the motion, and the judge did not foresee that he would be able to return to the family home without a caregiver.

In circumstances where there isn't a corresponding court order expressly for exclusive possession like in *Joyce v. O'Neil*, the conditions listed in a criminal no-contact order do not afford the survivor the same level of security when it comes to exclusive possession of the home because she has no control over these conditions and whether they are changed in the future. Since she is not a party to the criminal case, she may not be aware of or have input to changes to these conditions and these conditions are only in place until the charges are resolved.

Survivors can also seek a peace bond through the provincial criminal court. A peace bond can impose restrictions on the abuser, such as prohibiting contact or requiring them to stay a certain distance away from the survivor and where the survivor lives, effectively providing *de facto* exclusive possession of the home for the duration of the bond. However, peace bonds are only issued after a hearing and presentation of evidence, and they are not granted by consent alone. A judicial official, such as a judge or justice of the peace, may be reluctant to issue a peace bond that prevents the abuser from accessing the home, especially if the abuser is the sole owner of the property.

Lastly, survivors can apply for a restraining order against their abusers in family court under section 46 of the *FLA*¹⁹² or section 35 of the *Children's Law Reform Act (CLRA)*.¹⁹³ To get a restraining order, the applicant has to prove that she has reasonable grounds to fear for her safety and/or the safety of her child(ren).¹⁹⁴ Restraining orders can be

¹⁹¹ *Joyce v. O'Neil*, 2008 CanLII 68120 (ON SC), <https://canlii.ca/t/220d9>,

¹⁹² *Family Law Act*, RSO 1990, c F3, s 46(1): On application, a court may make an interim or final order restraining the applicant's spouse or former spouse from molesting, annoying or harassing the applicant or children in the applicant's lawful custody, or from communicating with the applicant or children, except as the order provides, and may require the applicant's spouse or former spouse to enter in the recognizance that the court considers appropriate.

¹⁹³ *Family Law Act*, RSO 1990, c F3, s 35(1): On application, the court may make an interim or final restraining order against any person if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody.

¹⁹⁴ Community Legal Education Ontario, "What is a restraining order?" (March 1 2021), online: <https://stepstojustice.ca/questions/abuse-and-family-violence/what-restraining-order/>.

difficult to get¹⁹⁵ and even more difficult to enforce.¹⁹⁶ Judges might also be skeptical of a woman's claims for a restraining order if they view it as a tactic to gain *de facto* exclusive possession where it otherwise would not be available.¹⁹⁷

In the case of *Perks v. Lazaris*, the court made an order that had the effect of giving the non-owning common-law partner exclusive possession by ordering that the property-owning partner not come within 250 meters of the family home.¹⁹⁸ The order made was not an official restraining order, but it stipulated that, if necessary, it could be enforced through an official restraining order through a 14B motion. In this case, a nesting order had been in place and the father, who was the sole owner of the property, was increasingly engaging the children in the litigation and exposing them to adult conflict while in the home. The mother was also planning to amend her pleadings to include a trust claim in relation to the home.

Police arrests, no-contact orders, peace bonds, and restraining orders can all result in *de facto* exclusive possession of the family home for survivors for a period of time. However, since these protection orders are not intended to grant exclusive possession of the family residence, any changes to the orders can easily lift this exclusivity. This leaves survivors in a precarious situation, highlighting the need for more robust legal protections to ensure their safety and stability.

¹⁹⁵ As an example, see *Piacenti v Thomson*, 2018 ONSC 4108, although the husband engaged in extensive verbal abuse, the judge concluded that there was insufficient evidence of recent abuse and therefore a restraining order was not granted. See also *LAB v JAS*, 2020 ONSC 3376, where a woman's emergency motion for a restraining order against her ex-partner was dismissed because she did not convince the judge that it was an urgent matter, even though the ex-partner exhibited stalking behaviour.

¹⁹⁶ A protection order is just a piece of paper. There are many problems associated with the immediate enforcement of such an order, including low police responsiveness, women's fear of contacting police in the first place, the likelihood of prosecution upon breach, women's unwillingness to be dragged into the criminal and family systems can all deter enforcement. The law enforcement authorities have no means to prevent an immediate breach of the order. According to the Ontario government, "disobeying a restraining order is a criminal offence. If you think the person restrained has disobeyed the order, you should call the police." This indicates that subjecting a person who breached a protection order to criminal liabilities often hinges on reporting by either the protected party or a third party, which goes to show the extreme ineffectiveness of these orders in situations of immediate danger. See Ontario Government, "Getting a restraining order" (March 16 2021), online: <https://www.ontario.ca/page/getting-restraining-order#section-3>.

¹⁹⁷ In *Stoker v Boyle*, 2021 ONSC 1565, for instance, the common-law husband moved to set aside the motion for a restraining order against him, alleging that the common-law wife was using it as a tactic to gain *de facto* exclusive possession of their jointly owned home. The judge granted the motion, concluding that the wife had no reasonable ground to fear for her life given recent exchanges between the parties. Similarly in Alberta, judges are alerted to the possibility of protection orders being used as an *ex parte* backdoor to obtain child custody, exclusive possession, etc.: see Jennifer Koshan, "Preventive Justice? Domestic Violence Protection Orders and Their Intersections with Family and Other Laws and Legal Systems" (2023) 35 Can J Fam L 241 ["Preventive Justice?"].

¹⁹⁸ *Perks v. Lazaris*, 2016 ONSC 1356.