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BEYOND *BEYOND CONJUGALITY*

Brenda Cossman* and Bruce Ryder**

FIFTEEN YEARS BEYOND *BEYOND CONJUGALITY*

In 2001, the Law Commission of Canada (LCC) released its report *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships*.¹ In the report, the LCC sought to rethink the ways in which conjugality has been used by legislatures and governments as a proxy for the recognition of adult personal relationships and the legal distribution of rights and responsibilities. Conjugality, it argued, was a poor proxy for the relational attributes relevant to legislative objectives. The LCC argued that the law should more carefully tailor its definitions of adult personal relationships to the underlying objectives of state regulation.

The *Beyond Conjugality* report has been extensively debated and cited since its release. Even though it is too early, from the Law Commission's long-term perspective, to come up with a final assessment of the contributions made by the *Beyond Conjugality* report, this paper assesses the report's impact on scholarly and political debates thus far. We consider whether the assumptions and methodology underlying the report remain

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¹ Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Adult Relationships* (Ottawa: Public Works and Government Services Canada, 2001) [*Beyond Conjugality*].

valuable. By stopping short of recommending that the state cease to regulate marriage altogether, and by not recommending the repeal of conjugal offences such as polygamy, did the report not go far enough? With the benefits of hindsight, would we urge the Commission to write the report differently now? To what extent did the recognition of same sex marriage in Canada in 2005 close down any further reconsideration of adult personal relationships? Is the model of conjugality that the report criticized more entrenched today? Should the Commission have written the report differently to give further political and legal resonance to alternatives to conjugality? Specifically, how might the report have better addressed the question of the dyadic couple versus multiple party relationships?

I – THE RECOMMENDATIONS AND METHODOLOGY OF *BEYOND CONJUGALITY*

In *Beyond Conjugality*, the LCC sought to rethink the ways in which conjugality has been used by legislatures and governments as a proxy for the recognition of adult personal relationships and the distribution of rights and responsibilities. Conjugality, it argued, was a poor proxy for the relational attributes relevant to legislative objectives. The LCC argued that the law should more carefully tailor its definitions of adult personal relationships to the underlying objectives of state regulation. For any existing or proposed law that employs relational terms to accomplish its objectives, it proposed a four-part methodology for considering the relevance and regulation of relationships. First, government should consider whether the objective of the particular law is legitimate. Second, if the law's objective is sound, the government should consider whether relationships are actually relevant. Third, government should expand the options to allow people to determine status for themselves through various self-designation mechanisms, including an expansion of registration options and marriage to same-sex couples. Fourth, when government imposition or ascription of relationship status is appropriate (because

relationships do matter, and self-designation is not feasible), then the operative definitions of the relevant relationships need to be revised.²

This tiered methodology aimed to create momentum towards more careful thinking about legislative reliance on relationships. Where relationships are relevant, the report sought to put the power to determine which relationships are most important in individuals' hands. When that is not feasible, the report encouraged governments and legislatures to rethink the functional definitions they use to ascribe relational status so that the focus is on relevant criteria. In particular, the report focused on emotional intimacy and economic interdependence as two functional relational attributes important across a number of contexts. The report's language also suggested that shared residence should be a third potentially relevant functional attribute in some circumstances. Instead of focusing on whether individuals were living in "spousal" or "conjugal" relationships, it proposed a focus on whether they were living in relationships "characterized by emotional and economic interdependence."³ While the Commission ultimately recommended that a range of definitions need to be carefully tailored to particular statutory contexts, the themes of economic and emotional intimacy ran through the solutions that the report proposed.

At the time of the LCC's work on the *Beyond Conjugal* report, the struggle to achieve legal recognition of same-sex marriage in Canada was at an intense stage. Gay and lesbian couples were on the brink of a wave of litigation success across the country.⁴ The Commission was firmly of the view that

² *Ibid* at 29–30.

³ *Ibid* at 114.

⁴ See Donald G Casswell, "Moving Toward Same-Sex Marriage" (2001) 80:3 Can Bar Rev 810; Bruce MacDougall, "The Celebration of Same-Sex Marriage" (2001) 32:2 Ottawa L Rev 235.

the exclusion of same-sex couples from the right to marry was discriminatory on the basis of sexual orientation, and that the logic of the equality rights in section 15 of the *Canadian Charter of Rights and Freedoms* led inexorably to that conclusion, even though it had been resisted by the courts up to that point. As the LCC put it in the *Beyond Conjugal* report, “the capacity to form conjugal relationships characterized by emotional and economic interdependence has nothing to do with sexual orientation.”⁵ Therefore, “[i]f governments are to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion.”⁶

In the years immediately following the release of *Beyond Conjugal*, a series of courts reached the same conclusion, culminating in appeal court rulings legalizing same-sex marriage in British Columbia, Ontario, and Quebec.⁷ Faced with this speedy emergence of a new judicial consensus about the appropriate legal bounds of conjugal coupledness, the federal government abandoned any further appeals. Shortly thereafter, the government unveiled the *Civil Marriage Act*. After receiving

⁵ *Supra* note 1 at 130.

⁶ *Ibid.*

⁷ *Hendricks c Québec (Procureure générale)*, [2004] RJQ 851, 238 DLR (4th) 577 (CA); *EGALE Canada Inc v Canada (Attorney General)*, 2003 BCCA 251, 225 DLR (4th) 472; *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 (CA). See also *Dunbar & Edge v Yukon (Government of) & Canada (AG)*, 2004 YKSC 54, 8 RFL (6th) 235; *NW v Canada (Attorney General)*, 2004 SKQB 434, 11 RFL (6th) 162. For accounts of the litigation story, see John Fisher, “Outlaws or In-laws: Successes and Challenges in the Struggle for LGBT Equality” (2004) 49:4 McGill LJ 1183; Robert Wintemute, “Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985–2005) and Its Limits” (2004) 49:4 McGill LJ 1143.

a seal of approval from the Supreme Court of Canada,⁸ the *Act* was adopted by Parliament in 2005.⁹ The central provision of the *Act* redefined civil marriage for the nation as a whole as “the lawful union of two persons to the exclusion of all others.”¹⁰

While the LCC had no doubts about adding its voice in 2001 to the condemnation of the exclusion of gay and lesbians from the right to marry, this was not its priority for the *Beyond Conjugal* report. Indeed, we think it is fair to say the LCC was frustrated by the failure of opponents and proponents of same-sex marriage to engage with the larger issues. The LCC’s priority in the *Beyond Conjugal* project was to move beyond and unsettle the parameters of the equal marriage debate by interrogating the state’s role in recognizing and supporting adult personal relationships more generally. The timing of *Beyond Conjugal* was not accidental. The LCC aimed to take advantage of the discursive space opened up by the struggle for same-sex marriage to interrogate the legal relevance of conjugality to contemporary state objectives.

The boundaries of who was included in coupled conjugality had been shifting for some time and were about to shift even more dramatically. Largely submerged in the public and legal debates about the boundaries of coupled conjugality was any sustained critical interrogation of the legal content and consequences of conjugality. The LCC assumed that conjugality had to be defined without discrimination on the basis of marital status or sexual orientation; the more urgent project, from the point of view of its mandate, was to bring a critical reassessment of the uses of conjugality as a legal category to the fore. This choice is evident in the structure of the LCC’s report: the issue of same-sex marriage is deferred until the last section of the

⁸ *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.

⁹ SC 2005, c 33.

¹⁰ *Ibid*, s 2.

report, and received only two pages of discussion.¹¹ Some advocates of same-sex marriage were unhappy with the LCC's approach. Strategically, they thought it wisest to defer a critical conversation about conjugality until after the achievement of same-sex marriage. And they were suspicious of the LCC's attempt to promote a fundamental reconsideration of marriage's legal design at the precise moment that gay and lesbian couples were on the threshold of inclusion.

II – POLITICAL AFTERMATH OF *BEYOND CONJUGALITY*

The *Law Commission of Canada Act*¹² grants the LCC an expansive mandate, one that seeks to address fundamental questions rather than more narrow or technical issues of law reform. The role of the LCC set out in the statute is to keep the law and its effects “under systematic review” in order to provide “independent advice on improvements, modernization and reform that will ensure a just legal system that meets the changing needs of Canadian society”.¹³ The preamble provides that “the commission should adopt a multidisciplinary approach to its work that views the law and the legal system in a broad social and economic context”.¹⁴

We had the privilege of working with the LCC for several years on its work that culminated in the *Beyond Conjugality* report. We wrote a background paper for the commission in 2000, and we were hired by the commission to continue working on the preparation of the final report in 2000 and 2001. The LCC's research process consisted of a

¹¹ *Beyond Conjugality*, *supra* note 1 at 129–31.

¹² SC 1996, c 9 [*LCC Act*].

¹³ *Ibid*, s 3.

¹⁴ *Ibid*, Preamble, para 4.

preliminary identification of issues related to its broader research focus on personal relationships, drawing on a series of background papers prepared by scholars in law and other disciplines.¹⁵ The commission's initial consultations led to the release of a discussion paper in May 2000 that set out broad questions about the policy objectives, principles, and legal modalities that should guide the regulation of close personal

¹⁵ Many of the impressive array of background papers prepared for the LCC's *Beyond Conjugal* report are available at the Government of Canada Publications website, online: <www.publications.gc.ca>. They include Law Commission of Canada, *Spousal Testimony in Criminal Cases*, by Allan Manson (Ottawa: LCC, August 2001); Law Commission of Canada, *Registered Partnerships: A Model for Relationship Recognition*, by Nicole LaViolette (Ottawa: LCC, August 2001); Law Commission of Canada, *Compensation for Relational Harm*, by Shauna Van Praagh (Ottawa: LCC, July 2001); Law Commission of Canada, *The Evolution and Diversity of Relationships in Canadian Families*, by Teresa Janz (Ottawa: LCC, September 2000); Commission du droit du Canada, *Le contrat en contexte d'intimité*, by A Roy (Ottawa: Commission du droit du Canada, June 2001); Law Commission of Canada, *The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation*, by B Cossman & B Ryder (Ottawa: LCC, May 2000); Law Commission of Canada, *Personal Relationships of Support Between Adults: The Case of Disability*, by Roeher Institute (Ottawa: LCC, March 2001); Law Commission of Canada, *Close Personal Relationships between Adults: 100 Years of Marriage in Canada*, by K Arnup (Ottawa: LCC, March 2001); Law Commission of Canada, *The Benefit/Penalty Unit in Income Tax Policy: Diversity and Reform*, by K Lahey (Ottawa: LCC, September 2000); Law Commission of Canada, *Division of Powers and Jurisdictional Issues Relating to Marriage*, by J Fisher, K Lahey & L Arron, EGALE (Ottawa: LCC, June 2000); Law Commission of Canada, *What's Sex Got to Do with It? Tax and the "Family"*, by C Young (Ottawa: LCC, May 2000). A full list of the background research papers that informed the report is included in *Beyond Conjugal*, *supra* note 1 at 148–50.

relationships between adults.¹⁶ The first two presidents of the LCC, Roderick Macdonald (who served in this capacity from 1997–2000) and Nathalie Des Rosiers (2000–2004), were instrumental in shaping the expansive vision that animated the commission’s investigations into the legal regulation of adult personal relationships. Under their leadership, the LCC engaged a multidisciplinary study panel of researchers with a commitment to tailoring the law’s objectives and reach to measurable social conditions.¹⁷ The LCC’s work was also guided by its commissioners, a citizens’ Advisory Council,¹⁸ and extensive public consultations.¹⁹ When the commission identified gaps in its research, or other flaws in its draft reports, it would seek additional input from scholars and other advisers. The collaborative and collective nature of the commission’s work, drawing upon and constantly informed by a wide range of interdisciplinary expertise, was impressive and made working with the commission a particularly enlightening and rewarding experience.

When we worked with the LCC on researching and drafting the *Beyond Conjugal* report, we were instructed not to concern ourselves with short-term acceptability of the report’s analysis and recommendations. The LCC emphasized that its goal was to issue a report that explored fundamental questions in an innovative manner, would stand the test of time, and might be influential a few generations down the road. The impressive and growing body of scholarship in Canada and abroad engaging

¹⁶ Law Commission of Canada, *Recognizing and Supporting Close Personal Relationships Between Adults: Discussion Paper* (Ottawa: Public Works and Government Services Canada, May 2000).

¹⁷ Study panels were authorized by the *LCC Act*, *supra* note 12, s 20.

¹⁸ *Ibid*, ss 7, 18.

¹⁹ For further discussion of the LCC’s approach to its work, see Nathalie Des Rosiers, “In Memoriam: La Commission du Droit du Canada / The Law Commission of Canada, 1997–2006” (2007) 22:2 CJLS 145.

with the principles and methodology of the *Beyond Conjuality* report suggests that it is contributing to debates in the manner the LCC sought.²⁰

²⁰ See e.g. Elizabeth Brake, *Minimizing Marriage: Marriage, Morality and the Law* (Oxford: Oxford University Press, 2012); Elizabeth Brake, "Recognizing Care: The Case for Friendship and Polyamory", (2014) 1:1 Syracuse L & Civic Engagement Forum, online: <slace.syr.edu>; Elizabeth Brake, ed, *After Marriage: Rethinking Marital Relationships* (Oxford: Oxford University Press, 2016); Jamie R Wood, "Moving Beyond the Bedrooms of our Nation: Redefining Canadian Families from the Perspective of Non-Conjugal Caregiving" (2008) 13 Appeal 7; Angela Campbell, "I Do, I Will" (2014) 47:2 UBC L Rev 367; Susan G Drummond, "Polygamy's Inscrutable Criminal Mischief" (2009) 47:2 Osgoode Hall LJ 317; Megan Gaucher, "One Step Forward, Two Steps Back? Relationship Recognition in Canadian Law Post-Same-Sex-Marriage" (2014) 36:2 Atlantis 61; Megan Gaucher, *Keeping it in the Family: The (Re-) Production of Conjugal Citizens Through Canadian Immigration Policy and Practice* (PhD Thesis, Queen's University Department of Political Studies, 2013) [forthcoming]; Caroline A Thomas, "The Roles of Registered Partnerships and Conjuality in Canadian Family Law" (2006) 22:2 Can J Fam L 223; "Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships: July 1, 2006" (2008) 9:2 Studies in Gender & Sexuality 161; Nancy D Polikoff, "Ending Marriage As We Know It" (2003) 32:1 Hofstra L Rev 201; Nancy D Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Boston: Beacon Press, 2008) [Polikoff, *Beyond (Straight and Gay) Marriage*]; Ethan J Lieb, "Friendship and the Law" (2007) 54:3 UCLA L Rev 631; Heather Brook, *Conjuality: Marriage and Marriage-like Relationships Before the Law* (New York: Palgrave Macmillan, 2007); Nicola Barker, "Sex and the Civil Partnership Act: The Future of (Non)Conjuality?" (2006) 14:2 Fem Legal Stud 241; Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (New York: Palgrave Macmillan, 2012); Nicola J Barker, "Rethinking Conjuality as the Basis for Family Recognition: A Feminist Rewriting of the Judgment in *Burden v. United Kingdom*" (2016) 6:6 Oñati Socio-Legal Series 1249; Elsje Bonthuys, "A Patchwork of Marriages: The Legal Relevance of Marriage in a Plural Legal System" (2016) 6:6 Oñati Socio-Legal Series 1303; Aeyal

Notwithstanding its admirable research process, important and original contributions to scholarship, and principled commitment to its statutory mandate, the LCC paid a high political price for its critical assessment of the legal value of conjugality as a category of regulation. Stinging from the removal of the legal barrier to same-sex marriage, in 2006 the newly-elected Conservative government cancelled funding to the Court Challenges Program (which supported litigation invoking constitutional equality or language rights). At the same time, the government cut all funding to the LCC, forcing it to shut down its operations even though the government did not introduce a bill to repeal the LCC's constituent statute.²¹ The LCC still exists, at least in the statute book, which sustains hope that it might rise again from the ashes.²²

Gross, "The Burden of Conjugality" in E Brems ed, *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge: Cambridge University Press, 2013) 265; Amanda Head, "The Legal Recognition of Close Personal Relationships in New South Wales—A Case for Reform" (2011) 13:1 Flinders LJ 53; Margaret Briggs, "Rethinking Relationships" (2015) 46:3 VUWLR 649; Melina Constantine Bell, "Gender Essentialism and American Law: Why and How to Sever the Connection" (2016) 23:2 Duke J Gender L & Pol'y 163.

²¹ *LCC Act*, *supra* note 12. Members of the House of Commons objected to the closure through funding cuts of the LCC and characterized the government's failure to introduce amending legislation as contempt of the House of Commons. Speaker Peter Milliken ruled that he "cannot conclude that the government's action on the Law Commission is flouting the authority of the House. While members may have deep concerns about the decision to no longer fund the Law Commission of Canada, this decision does not constitute a breach of privilege." House of Commons Debates, 39th Parl, 1st Sess, No 65 (19 October 2006) at 4105.

²² For a typically engaging and thoughtful description of the life and times of the Law Commission, including an assessment of whether it should be resurrected, see Roderick A Macdonald, "Jamais deux sans trois.... Once Reform, Twice Commission, Thrice Law" (2007) 22:2

In his appearance before the House of Commons Standing Committee on Justice and Human Rights in 2006, then Justice Minister Vic Toews said cutting the LCC's entire budget was simply an efficiency measure undertaken to save 3.2 million dollars of taxpayers' money. The elimination of funding was justified, he said, because "there was nothing the Law Commission of Canada did that was particularly unique or that could not and was not being carried out by other institutions."²³ He characterized the LCC "as simply . . . an administrative mechanism to hire individuals to do research."²⁴ Conservative supporters of the cancellation of funding frequently cited the LCC's temerity in questioning the state's role in relation to

CJLS 117. See also Roderick A Macdonald, "Recommissioning Law Reform" (1997) 35:4 *Alta L Rev* 831 at 872-73: "the pedagogic and therapeutic roles of law reform are precisely to challenge the manner in which a problem is presented . . . Law reform is about asking better questions. . . . [b]reaking free of posited sources of law and enacted doctrinal categories is a key task for any recommissioned law reform agency."

²³ *Standing Committee on Justice and Human Rights*, 39th Parl, 1st Sess, No 29 (6 November 2006) at 1.

²⁴ *Ibid* at 3. The Canadian Bar Association opposed the cancellation of funding to the LCC and particularly objected to the suggestion that it could fill the role played by the LCC: "We were frankly surprised to hear some Ministers suggest that the CBA could fill [the LCC's] role . . . The CBA is not primarily a legal research body. There is an important need for an independent legal research body that can undertake broad-based research and advise on emerging legal policy issues. It is simply unrealistic to expect this work to be done by an organization with a different mandate and no funds for the task . . . The Law Commission of Canada has made a valuable contribution to Canada's current dialogue on such issues as legal recognition of adults' personal relationships, how to redress the abuse of children in Canadian institutions, and the future of policing in Canada.": J Parker MacCarthy, QC to Art Hanger, Chair, *Standing Committee on Justice and Human Rights*, 2 November 2006.

marriage as reason enough for shutting it down. The *Beyond Conjugal* report featured highly in their critique before and after the government's cuts were announced.²⁵ Indeed, supporters of legal marriage as the privileged and exclusive domain of opposite-sex couples have frequently decried what they see as the radical potential of the report.²⁶

The LCC's resistance in its work on *Beyond Conjugal* to short-term political pressures, its focus on seeking to

²⁵ Iain Benson said the report was "not well done" because it failed to adequately address "the role of the state in relation to marriage": *Ibid* at 21. Senator Anne Cools referred to *Beyond Conjugal* as "a scandalous report, not worth the paper it's written on": Mark Abbey, "Symposium United on Marriage" *The [Montreal] Gazette* (24 March 2002). In a press release supporting the cancellation of the LCC's funding, REAL Women singled out *Beyond Conjugal* as an example of the failings of the LCC because it "not only recommended that same-sex marriage be legalized but also recommended that marriage be eliminated altogether": REAL Women of Canada, "Conservative Government Cuts Left-Wing Agencies", Newsletter, *REALity* (November 2006) online: <www.realwomenofcanada.ca>. John Carpay, the executive director of the Canadian Constitution Foundation at the time, described what he saw as the controversial nature of the Law Commission's work in his testimony, including the recommendations in the *Beyond Conjugal* report. At the same time, he insisted that "everything that the Law Commission is providing is already done elsewhere": *Standing Committee on Justice and Human Rights*, 39th Parl, 1st Sess, No 28 (1 November 2006) at 5.

²⁶ Jane Adolphe, "The Principles and Canada's 'Beyond Conjugal' Report: The Move Toward Abolition of State Marriage Laws" in Robin Fretwell Wilson, ed, *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge: Cambridge University Press, 2012) 351; Daniel Cere & Douglas Farrow, eds, *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* (Montreal: McGill-Queen's University Press, 2004); Stanley Kurtz, "Beyond Gay Marriage: The Road to Polyamory" *The Weekly Standard* 8:45 (4 August 2003), online: <www.weeklystandard.com/article/4186>.

contribute to reframing questions and reshaping discourse over the long term, the breadth of its consultations and interdisciplinary research—in other words, its integrity and fidelity to its constitutive legislation—were precisely the features of its work that spelled its doom when a Conservative government with a strikingly neo-liberal, managerial, and anti-intellectual approach to governance was elected in 2006.²⁷

²⁷ As Liberal Member of Parliament Derek Lee commented in the House of Commons when the government cut funding to the Court Challenges Program and the LCC,

“I recall the report from the Law Commission entitled ‘Beyond Conjuality’. It was a discussion of the law relating to spousal and non-spousal relationships. Part of the discussion dealt with many of the same-sex marriage issues which this House has dealt with. I could not help but detect some disfavour on the part of many Conservative members about it. I have seen it at the justice committee. It is not always on the record, but it is there. The court challenges program brings court charter challenges into the courts. Members will recall the same sex marriage issue, the redevelopment of the definition of civil marriage, was accomplished primarily as a result of litigation charter challenge. I am not certain whether the court challenges program funded any of that; it may have, but it is passing strange. I see a connection there. I mentioned the Law Commission’s report and now the judges who made these decisions that essentially required Parliament to act a year or two ago. I have simply had no choice but to draw the inference that the Conservatives’ distaste for those decisions was a prime motivator in this, because I cannot see any economic or fiscal reason to turn attention to these very viable working mechanisms in our judicial sector. The Law Commission which is being scrapped now was the reincarnation of the old Law Reform Commission, which was scrapped by the previous Conservative government in 1990 or 1991. A very strange thing. The Conservatives do not like law reform commissions. They junk them.”:

For those troubled by any disruption of the legal boundaries of conjugality or of its legal uses, the report amounts to a radical rethinking of marriage. Ironically, given the LCC's efforts to situate the same-sex marriage issue as a modest part of its broader project of legislative rationalization, its demise was fuelled by the heightened anxieties of moral conservatives provoked by the arrival of gays and lesbians into the inner sanctum of legal marriage.²⁸ But from most other points of view, a report aimed at achieving legislative rationality to better achieve liberal principles of equality, autonomy, personal security, privacy, and efficiency is hardly radical.

III – LEGISLATIVE DEVELOPMENTS SINCE 2001

The bulk of the *Beyond Conjugality* report—a section titled “application” of its methodology²⁹—was directed at a detailed analysis of ten federal statutory contexts to illustrate how the report's methodology could lead to reforms that would better support the principled accomplishment of the state's objectives of recognizing and supporting adult personal relationships. These ten examples were intended to illustrate the benefits of following the LCC's four-step methodology to achieve “a more comprehensive and systematic approach to law reform.”³⁰

House of Commons Debates, 39th Parl, 1st Sess, No 80 (9 November 2006) at 4945.

²⁸ The expression and management of anxieties produced by the reconstitution of legal borders, and the processes of becoming and unbecoming sexual citizens, is explored in Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford: Stanford University Press, 2007). See especially chapter 4, “Queer as Citizens” (*ibid* at 159–93).

²⁹ *Beyond Conjugality*, *supra* note 1 at 37–111.

³⁰ *Ibid* at 37.

As far as we know, only one of the recommendations directed at the reform of federal statutes in this part of the report has been implemented (the repeal of the common law rule that a married spouse is not a competent witness for the Crown, discussed below). From the LCC's perspective—aiming to shift the parameters of debates and reshape the fundamental questions over the long term—this should not be too discouraging. A lack of immediate legislative adoption of its recommendations could be seen as much as a sign of success as one of failure.

The only “comprehensive and systematic” law reforms undertaken by the Parliament of Canada in this area over the past few decades have been those aimed at the ongoing project of bringing cohabiting opposite-sex couples and same-sex couples within the conjugal space previously reserved for married opposite-sex couples. While the LCC strongly supported these trajectories toward a non-discriminatory conception of conjugality, it was more focused on decentring conjugality from legal regulation. In this sense, from a federal legislative perspective, the aftermath of the *Beyond Conjugal* report has been precisely what it feared and the opposite of what it sought to achieve: the legal definition of coupled conjugality has been extended to the previously excluded and as a result has become more deeply entrenched at the heart of the state's approach to relationship recognition and support.³¹

³¹ Human rights discourse has played a significant role in directing and limiting legislative reform of the coupled conjugal regime. Prohibitions on sexual orientation and marital status discrimination have been enlisted effectively by same-sex couples and unmarried opposite-sex couples respectively to achieve inclusion. Non-conjugal cohabitants and those living in plural conjugal relationships have not yet had the same kind of success invoking prohibitions on discrimination or other human rights to challenge their exclusion from legal rights or benefits. Their relative absence from relationship regulation rules is mirrored by a similar absence from human rights law—so far. See, for example, the rejection of the challenge brought by two cohabiting sisters to inheritance tax laws in *Burden v The United Kingdom*, No 13378/05,

Indeed, the conservative anxieties provoked by the achievement of equal coupled conjugality led the federal government headed by Prime Minister Harper to focus on finding new barbarians at the gates, and on shoring up—or at least creating the perception of shoring up—the remaining borders of entry to conjugality based on age, voluntary and informed consent, and dyadic or coupled relationships. Thus, to

[2008] III ECHR 357, 47 EHRR 38 [GC]. For similar stories in Canada, see Cassie Williams, “Nova Scotia Sisters Who’ve Lived Together 38 Years Want Survivor Benefits”, *CBC News* (28 October 2016), online: <www.cbc.ca>. See also the comments of cohabiting twin sisters included in *Beyond Conjugality*, *supra* note 1 at 119. On the rights of polyamorists, see Alison Crawford, “Canadian Polyamorists Face Unique Legal Challenges, Research Reveals”, *CBC News* (14 September 2016); CBC The Current, “Polyamorous Families Want Canadian Law to Catch up with Their Relationships”, (16 September 2016), online: <www.cbc.ca/radio/thecurrent/the-current-for-september-16-2016-1.3765094> at 00h:25m:12s; John-Paul E Boyd, “Polyamorous Relationships and Family Law in Canada” (April 2017), online Canadian Research Institute for Law and the Family <www.crilf.ca>; and the arguments made by the Canadian Polyamory Advocacy Association (CPAA) in the polygamy reference: *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, [2012] 5 WWR 477 [*Polygamy Reference*]. The submissions of the parties and intervenors are collected online: CPAA <www.polyadvocacy.ca>. While the majority opinion of the U.S. Supreme Court finding a constitutional right to same-sex marriage limited its ruling to couples, Chief Justice Roberts in dissent noted that the majority’s logic extended to plural relationships: “One immediate question invited by the majority’s position is whether States may retain the definition of marriage as a union of two people. . . . Although the majority randomly inserts the adjective “two” in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. . . . It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.” *Obergefell v Hodges*, Roberts J. Dissenting, 192 L Ed 2d 609, 135 S Ct 2584 (2015) at 20.

ward off the new threats to conjugality apparently posed by child marriage, forced marriage, and plural marriage, and to position them clearly as uncivilized and unenlightened practices of cultural outsiders, in 2015 Parliament passed the *Zero Tolerance for Barbaric Cultural Practices Act*.³² It amended the *Civil Marriage Act* by adding these provisions:

2.1 Marriage requires the free and enlightened consent of two persons to be the spouse of each other.

2.2 No person who is under the age of 16 years may contract marriage.

2.3 No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null by a court order.

A further example of the federal government's lack of interest in displacing conjugality from the heart of legal regulation of relationships are the 2015 amendments to the evidentiary rules regarding spousal competence and compellability, and to the marital communications privilege.³³ The LCC recommended the repeal of the common law rule of spousal incompetence on the grounds that the rationale for the rule—a spouse's testimonial choices should not be allowed to put his or her marriage at risk—is inconsistent with values of equality and autonomy and therefore no longer legitimate.³⁴ As for the rule that a spouse is not a compellable witness, and the marital communications privilege, the LCC recommended that these rules should be more flexible and should extend to a wide

³² SC 2015, c 29, s 4.

³³ *Victims Bill of Rights Act*, SC 2015, c 13, ss 52–53.

³⁴ *Beyond Conjugality*, *supra* note 1 at 50.

range of close personal relationships.³⁵ In the Commission's view, judges should have discretion, in the particular circumstances of a case, to decide whether the harm caused to the witness or to the relationship by having to testify or disclose communications outweighs the desirability of admitting the testimony.³⁶

Judges have frequently criticized the incoherence of the existing spousal testamentary rules and noted the need for Parliament to revise them.³⁷ Some courts have found that the prohibition on marital status discrimination in the *Charter* requires that the marital communications privilege be extended to unmarried conjugal cohabitants.³⁸ Courts divided on whether the now-repealed rule regarding spousal non-compellability was constitutionally sound: some found it discriminatory and extended it to unmarried cohabitants;³⁹ others found the special treatment given to married spouses to be justifiable under section 1 of the *Charter*.⁴⁰

³⁵ *Ibid* at 55.

³⁶ *Ibid*.

³⁷ See e.g. *R v Salituro*, [1991] 3 SCR 654, 8 CRR (2d) 173; *R v Hawkins*, [1996] 3 SCR 1043, 141 DLR (4th) 193; *R v Couture*, 2007 SCC 28, [2007] 2 SCR 517; *R v Masterson* (2009), 194 CRR (2d) 165, 245 CCC (3d) 400 (ONSC) [*Masterson*].

³⁸ See e.g. *Masterson*, *supra* note 37; *R v Hall*, 2013 ONSC 834, 114 OR (3d) 393, *aff'd* on other grounds, 2016 ONCA 13, 128 OR (3d) 641 [*Hall*]; *R v Nero*, 2014 ONSC 1896, 304 CRR (2d) 320, *rev'd* in part, 2016 ONCA 160, 351 CRR (2d) 143 [*Nero*].

³⁹ *R v Legge*, 2014 ABCA 213, [2014] 9 WWR 260.

⁴⁰ *R v Nguyen*, 2015 ONCA 278, 125 OR (3d) 321; *R v Martin*, 2009 SKCA 37, [2009] 5 WWR 16. See also *R v Nuttall*, 2015 BCSC 943, [2015] B.C.W.L.D. 5765 (common law marital defence to conspiracy should not be extended to unmarried conjugal couples).

Rather than enter into the complications of defining the relevant close relationships, and balancing the goal of supporting those relationships with the state interest in prosecuting crime, Parliament chose a blunter approach. It used the *Victims Bill of Rights Act* to repeal the rule of spousal non-compellability and show that its commitment to facilitating prosecutions and supporting victims of crime outstrips its commitment to supporting marriage (or at least the marriages of those accused of crime). While married spouses are now competent and compellable witnesses against their spouses at the behest of the prosecution, Parliament left the marital communications privilege in section 4(3) of the *Canada Evidence Act*⁴¹ intact, despite the findings of the LCC⁴² and some courts⁴³ that it is under inclusive because it promotes trust and candour only in marital relationships, and thus discriminates on the basis of marital status.

While the comprehensive approach to federal law reform set out in the *Beyond Conjugal* report has thus far had little concrete success, one can discern some glimmers of its recommended attention to the rights of non-conjugal cohabitants by provincial legislatures.⁴⁴ Most provinces, like the federal Parliament, have enacted legislation to remove barriers to the equal treatment of conjugal couples,⁴⁵ but have not pursued law reforms to include non-conjugal cohabitants. Alberta notably

⁴¹ RSC 1985, c C-5.

⁴² *Beyond Conjugal*, *supra* note 1 at 52–53.

⁴³ *Masterson*, *supra* note 37; *Hall*, *supra* note 38; *Nero*, *supra* note 38.

⁴⁴ The same is true with regard to expanding legal conceptions of parental status and parent-child relationships. See Kim Brooks, “Cameos from the Margins of Conjugal” in Robert Leckey ed, *After Legal Equality: Family, Sex, Kinship* (Abingdon: Routledge, 2015) 99.

⁴⁵ See e.g. *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, SO 1999, c 6.

took a step towards the recognition of the rights of non-conjugal cohabitants in 2002 with the passage of the *Adult Interdependent Relationships Act*.⁴⁶ The Act defines “adult independent partners” (AIP) as two people who have entered into an AIP agreement, or, if they are not related to each other by blood or adoption, have lived together in a “relationship of interdependence” for three years, or have a child through birth or adoption.⁴⁷ A “relationship of interdependence” is defined as one in which any two persons “share one another’s lives”, are “emotionally committed to each other”, and “function as an economic and domestic unit”.⁴⁸ To assist judges in deciding when two people are functioning as the required “economic and domestic unit”, the legislation provides a list of relevant factors, such as the degree of emotional and economic support they provide each other, the degree of exclusivity of the relationship, and the degree they hold themselves out to the public as a unit.⁴⁹ The existence of a conjugal element to the relationship—which presumably means whether they have sex—is but one factor listed.⁵⁰

The passage of the Alberta legislation was motivated by the desire to preserve marriage and spousal status exclusively as the domain of opposite-sex couples, safe from gay and lesbian invaders.⁵¹ Hence, the new status of AIPs: if two people are

⁴⁶ SA 2002, c A-4.5.

⁴⁷ *Ibid*, s 3(1).

⁴⁸ *Ibid*, s 1(1)(f).

⁴⁹ *Ibid*, s 1(2).

⁵⁰ *Ibid*, s 1(2)(a).

⁵¹ Lisa Glennon, “Displacing the ‘Conjugal Family’ in Legal Policy—A Progressive Move?” (2005) 17:2 *Child & Fam LQ* 141 at 160 (Glennon notes that the Act’s “primary intention was to Charter-proof Alberta legislation, whilst entrenching the traditional definition of marriage and its superiority. . . . although the Act was held out as progressive, in

AIPs, they are accorded some of the same rights as married spouses in Alberta.

Some scholars have praised the passage of the Alberta legislation as an important step forward. For example, Nancy Polikoff, in her book urging governments to shift their approach to valuing all committed family relationships, wrote that “Canada will achieve even greater justice for all families if the law embraces the principles of the *Beyond Conjuality* report and considers the *Alberta Adult Interdependent Relationships Act* a model from which to build other protections for nonconjugal relationships.”⁵²

Others are not so sure. Lois Harder, for example, is more ambivalent. She agrees that the legal recognition of nonconjugal relationships poses a radical challenge to the presumed naturalness and ensuing privilege of the heteronormative married family. She also worries that the recognition of AIPs is more consistent with a neo-liberal agenda of privatizing support than it is with achieving other goals: “policy makers are more interested in establishing a social order in which private obligations between citizens are reinforced and social outlays are reduced than they are in ensuring the autonomy of citizens or limiting their vulnerability.”⁵³

Harder’s concerns are supported by a review of the case law in Alberta interpreting the *Adult Interdependent*

reality it was introduced as a smokescreen to avoid the express recognition of same-sex couples.”).

⁵² Polikoff, *Beyond (Straight and Gay) Marriage*, *supra* note 20 at 115.

⁵³ Lois Harder, “The State and the Friendships of the Nation: The Case of Nonconjugal Relationships in the United States and Canada” (2009) 34:3 *Signs* 633 at 652. See also Lois Harder, “Rights of Love: The State and Intimate Relationships in Canada and the United States” (2007) 14:2 *Social Politics: Intl Studies in Gender, State & Society* 155.

Relationships Act; most of the cases involve claimants seeking access to support from an alleged AIP or to dependants' relief under an alleged AIP's will.⁵⁴ It is striking how similar the situations of claimants on the borders of conjugality is in this context to the account of the lives of claimants in the income tax case law compiled by Kim Brooks.⁵⁵ In one context, claimants seek recognition as AIPs to qualify for privatized benefits; in the other, they sought exclusion from conjugality to qualify for tax credits they would be denied if they had to report the income of an alleged common law spouse. In either context, one can see that the boundaries between AIP and non-AIP, between conjugal and non-conjugal, are elusive, unstable, and shift in peoples' lives. Brooks observes that "[m]any people move along the spectrum of relationship proximity over the course of their relationship", engaging in some practices (like living together or having sex) at some points in time but not others."⁵⁶

While the recognition of AIPs in Alberta legislation is an innovative development on the books, it may be that it plays out in unmarried people's lives in a way that is essentially similar to how the conjugal/non-conjugal divide does. We have noted elsewhere that having sex is no longer a requirement for recognition as a conjugal cohabitant in Canada.⁵⁷ As a result, the lines between conjugal and non-conjugal relationships are

⁵⁴ See e.g. *Rockey v Hartwell*, 2016 ABQB 438, 68 RFL (7th) 395; *Re Lang Estate*, 2016 ABQB 16, 16 ETR (4th) 106; *Knight v Wowk*, 2015 ABPC 286; *Nelson v Balachandran*, 2015 ABCA 155, 6 ETR (4th) 79; *Re Riley Estate*, 2014 ABQB 725, 5 ETR (4th) 46; *Re Paull Estate*, 2013 ABQB 709; *Re Racz Estate*, 2013 ABQB 668, 95 ETR (3d) 214; *Re Charles Estate*, 2013 ABQB 632, 94 ETR (3d) 56; *Kostin v Eaket*, 2012 ABQB 756.

⁵⁵ Brooks, *supra* note 44.

⁵⁶ *Ibid* at 112.

⁵⁷ Brenda Cossman & Bruce Ryder, "What is Marriage-Like Like? The Irrelevance of Conjugality" (2001) 18:2 Can J Fam L 269 at 294–300.

blurring if not dissolving altogether.⁵⁸ As the meaning of conjugality and non-conjugality are subtly redefined and transformed in the application and interpretation of law to the murkiness of people's actual relationships, the law is creeping incrementally beyond conjugality as the LCC imagined it.⁵⁹

IV – BEYOND THE CONJUGAL COUPLE

The LCC's analysis in *Beyond Conjugal* was aimed at decentring conjugality in legal regulation by encouraging a

⁵⁸ *Ibid* at 298–99.

⁵⁹ Because the *Beyond Conjugal* report was focused on the law's response to "close personal adult relationships" in federal areas of jurisdiction, it did not address, and we have not discussed here, law reforms related to parental status or parent-child relationships. While the law in these areas has also responded to the diversity of family forms in halting and uneven ways, there have been important steps forward. See e.g. *AA v BB*, 2007 ONCA 2, 83 OR (3d) 561; *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016, SO 2016, c 23. See also Roxanne Mykitiuk, "Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies" (2001) 39:4 Osgoode Hall LJ 771; Angela Campbell, "Conceiving Parents through Law" (2007) 21:2 Intl JL Pol'y & Fam 242; Lois Harder & Michelle Thomarat, "Parentage Law in Canada: The Numbers Game of Standing and Status" (2012) 26:1 Intl JL Pol'y & Fam 62; Fiona Kelly, "One of These Families Is Not Like the Others: The Legal Response to Non-Normative Queer Parenting in Canada" (2013) 51:1 Alta L Rev 1; Fiona Kelly, "Multiple-Parent Families Under British Columbia's New *Family Law Act*: A Challenge to the Supremacy of the Nuclear Family or a Method by which to Preserve Biological Ties and Opposite-Sex Parenting" (2014) 47:2 UBC L Rev 565; Stu Marvel, "The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage" (2015) 64:6 Emory LJ 2047. For a discussion of the links between the struggle for conjugal equality and expanding conceptions of parenthood, see Douglas NeJaime, "Marriage Equality and the New Parenthood" (2016) 129:5 Harv L Rev 1185.

range of self-designation mechanisms and, where that is not feasible, adopting definitions of the relevant relationships tailored to the accomplishment of legislative objectives in specific contexts.⁶⁰ But an important question left lingering over much of the discussion and the solutions proposed was whether the LCC intended legal regulation to move beyond its focus on the dyad or couple.

The logic of the report, fuelled by the principles of equality, autonomy, and state neutrality it articulated,⁶¹ pointed towards the legal recognition and support of interdependent relationships of all shapes and sizes. Moreover, many of the solutions that the LCC proposed had the potential to apply beyond the dyad.⁶² Still, there were many obvious ways in which the report remains shackled within a dyadic concept of marriage, conjugality, and even non-conjugality. The discussion of marriage in the final chapter of the report epitomized the monogamous, dyadic conception of relationships within which we were working. While the LCC considered a range of controversial options, such as getting the state out of marriage altogether, marriage remained defined as monogamous. Indeed, the only reference in the report to polygamy was in a footnote

⁶⁰ *Beyond Conjugality*, *supra* note 1 at 32–37.

⁶¹ The value of autonomy, the report noted, “requires that governments put in place the conditions in which people can freely choose their close personal relationships. The state must also avoid direct or indirect forms of coercive interference with adults’ freedom to choose whether or not to form, or remain in, close personal relationships. . . . Autonomy is compromised if the state provides one relationship status with more benefits or legal support than others, or conversely, if the state imposes more penalties on one type of relationship than it does on others. . . . The state ought to support any and all relationships that have the capacity to further relevant social goals, and to remain neutral with respect to individuals’ choice of a particular form or status.” *Beyond Conjugality*, *supra* note 1 at 18.

⁶² See discussion in Part IV(a), below.

and it bracketed the question for the future: “[i]n this report, the Law Commission of Canada does not address the issue of polygamy.”⁶³

The report’s discussion of registration regimes was somewhat more open-ended. It never stated that registration should be limited to couples, but the question was again only addressed awkwardly in a footnote: “in principle, the Law Commission sees no reason to limit registration to two people.”⁶⁴ Yet the examples provided—“three siblings or four housemates”—steered clear of non-dyadic conjugal relationships. It is perhaps more than a little ironic that in a report intended to think beyond conjugality the LCC was able to allude to multiple relationship recognition only in a non-conjugal context.

Clearly, the LCC had chosen to avoid the question of plural relationships, particularly in a conjugal context. The decision was a conscious and politically pragmatic one: the report was already controversial and subject to harsh critiques from left and right alike. Same-sex marriage remained politically divisive and its future far from certain. The allegation from moral conservatives of an inevitable slippery slope from same-sex marriage to polygamy created a real political challenge for equal marriage advocates. Moreover, as the reaction to the release of the report discussed above made clear, the idea of critiquing conjugality itself was provocative. The idea of fundamentally rethinking the way government regulated relationships—the very objective of the report—was on the cutting edge of the imaginable. The LCC did not believe that it

⁶³ *Beyond Conjugal*, *supra* note 1 at 134 n 32. After mentioning that a previous iteration of the federal law reform commission had recommended the repeal of the polygamy offence, the report offered, rather meekly, that “it is reasonable to question whether use of the *Criminal Code* is the best way to respond to these issues” (*ibid*).

⁶⁴ *Ibid* at 133, n 16.

could throw polygamy or polyamory into this politically explosive mix. All of us who worked on the report understood that the choice to exclude multiparty adult conjugal relationships was an obvious omission. We dodged the issue of poly relationships. We would not do so today.

(A) DEFINITIONS OF CLOSE PERSONAL RELATIONSHIPS

Yet, as we return to the report's four-step methodology and the tailored definitions for the recognition of adult personal relationships that emerged in the "application" section, many have the potential to apply to multiple party relationships—whether conjugal or not. Indeed, several of the report's actual recommendations did apply beyond the dyadic couple to potentially multiple party relationships, although these were largely framed in terms of non-conjugal relationships. Many of the report's suggested solutions could be applied to polyamorous spouses—provided that they fit the definition of economic and emotional interdependence. The LCC did not frame the report in this way; it did not give these kinds of examples. But, if we were to take a polyamorous relationship, and work the relationship through the proposed redefinitions of relevant relationships, many would qualify for inclusion in the legal rights or obligations at issue.

The four basic questions could and should be applied to multiparty relationships. The first two questions—is the law itself legitimate and are relationships relevant—would apply equally to dyadic and multiple party relationships. Indeed, the number of individuals in a relationship is, we believe, entirely irrelevant to these first two questions.

The third question asked whether, instead of having government decide in advance which relationships are included, it is possible to redesign the law or program to allow individuals to designate the relationships that are most important to them

and ought to be included. This question regarding the possibility of self-designation could be applied to multiple party relationships.

Indeed, the LCC did apply this third question to multiple party relationships. Consider for example the LCC's recommendation regarding immigration and family sponsorship. The current regime allows individuals to sponsor a relatively narrow list of family members—as “accompanying dependents” or as within the “family class”. These included the sponsor's spouse, fiancé(e), dependent children, parents, grandparents, siblings, nieces/nephews, grandchildren under the age of majority, or one more distant relative if the sponsor does not have any close family members in Canada. Instead, the LCC recommended that individuals be allowed to decide for themselves which relationships are most important to them, regardless of marital, conjugal, or blood relationships.⁶⁵ However, the report also recommended that the definition not be entirely open-ended. In order to avoid possible abuse of the immigration system, by allowing individuals to sponsor virtual strangers who would then be able to “jump the queue”, the report suggested two possible approaches. On the first approach, the self-designation would be limited to persons who were “known and emotionally important” to the sponsor.⁶⁶ Or alternatively, a slightly more restrictive option would allow designation of “persons who have had a close personal relationship characterized by emotional or economic interdependence for at least one year.”⁶⁷

⁶⁵ *Beyond Conjugal*, *supra* note 1 at 46.

⁶⁶ *Ibid* at 45. The report also suggested a possible limit on the total number of individuals that one could sponsor: “[t]he number of persons an individual could sponsor over the course of a lifetime could be capped, as suggested by the [Legislative Review] Advisory Group” (*ibid*).

⁶⁷ *Ibid*.

Either of these self-designations would apply beyond conjugal and blood relationships. They were intended to allow individuals to decide for themselves who is most important to them. Moreover, they were never intended to be restricted to the dyadic couple: the nature of the immigration sponsorship regime is to allow individuals to bring a range of family members. Although the definition of spouse was itself restricted at the time—to opposite-sex couples—there is no reason that the new definition of individuals who are “known and emotionally important” or “in a close personal relationship” would not apply beyond this traditional definition. The report imagined the inclusion of same-sex couples within the definition of spouse, as well as unmarried couples (at the time of writing in 2001, both would be included in the new *Immigration and Refugee Protection Act*⁶⁸ that was about to be passed by Parliament). Individuals in multiple party conjugal relationships would certainly fall within the definition of “known and emotionally important” and/or “in a close personal relationship”. The only obstacle to the recognition of multiple party conjugal relationships under this definition resides elsewhere: the prohibition on polygamy and other plural conjugal unions in section 293 of the *Criminal Code*. If this prohibition were removed, there would be no reason that an individual in a polygamous or polyamorous relationship would not be able to sponsor their partners.

The fourth step of the report’s proposed methodology, and some of the tailored definitions it pointed to in the “application” section, could also be applied to polyamorous relationships. At this stage, the report asked “if relationships matter, and self-designation is not feasible or appropriate, is there a better way to include relationships?”⁶⁹ More specifically,

⁶⁸ SC 2001, c 27.

⁶⁹ *Beyond Conjuality*, *supra* note 1 at 33.

the LCC considered ways to include relationships where individuals had not self-designated, or self-designation was not feasible, but where inclusion of emotionally or economically interdependent relationships was important to the “state’s interests in recognizing and supporting the full range of committed, mutually supportive personal adult relationships.”⁷⁰

Some of the LCC’s recommendations regarding targeted definitions would, we believe, also apply to multiple party relationships. Consider for example the LCC’s recommendations regarding the *Bank Act* and the avoidance of conflict of interest. The existing definition of “related parties” applied to spouses, common law partners, and minor children. Other individuals in a close personal relationship with bank officials were not covered by the conflict of interest rules, creating a regime that was obviously under-inclusive. The Commission recommended that the definition be broadened to include individuals in a “close personal relationship.”⁷¹ The definition thereby included individuals in an emotional or economically interdependent relationship, beyond marriage, conjugality, and blood. It is a definition that we believe would and should equally apply to multiple party conjugal relationships. Individuals in a polygamous or polyamorous relationships would be in an obvious conflict of interest position vis-à-vis any of their multiple partners. Once again, the only obstacle to their recognition is the law’s prohibition on polygamy and polyamory. However, in this instance, excluding these multiple spouses rather obviously undermines the law’s interest in preventing conflicts of interest.

There are many more recommendations in the report regarding a broad range of federal laws. Although the LCC did not frame the report in this way, we believe that asking the four

⁷⁰ *Ibid* at 34.

⁷¹ *Ibid* at 62–63.

questions—and applying the recommendations to polygamous and polyamorous relationships—would result in their inclusion, from a policy perspective. If individuals are living in emotionally and economically interdependent relationships, the same rationales apply regardless of conjugal, marital, or blood relationships. Polygamous and polyamorous spouses largely live in these kinds of emotionally and economically interdependent relationships, and their exclusion from rights and responsibilities undermines a range of important and legitimate government objectives. Their exclusion also runs counter to the principles of equality, autonomy, and state neutrality articulated in the report: “the state ought to support any and all relationships that have the capacity to further relevant social goals, and to remain neutral with respect to individuals’ choice of a particular form or status.”⁷²

(B) THE LEGAL ORGANIZATION OF PERSONAL RELATIONSHIPS

If it were up to us, we would urge the LCC to write the report differently today. We would tackle the dyadic conception of conjugality throughout the development of the report’s principles, methodology, and application, although the solutions and definitions adopted might not change dramatically. But, it is the final chapter of the report on the state’s role in committed relationships that would present the biggest challenge. As described above, the report was written at a particular political moment—where public debate about whether the state should recognize same-sex marriage was intense. The LCC’s position was clearly yes, so long as the state stays in the marriage business, it should recognize same-sex marriage—even as it rethought conjugality as the basis for the distribution of rights and responsibilities. Fast forward to 2017, and the legal right to a civil same-sex marriage has been a national reality for more than a decade. What would a chapter on the state’s role in

⁷² *Ibid* at 18.

committed relationships look like now, more than a decade after the legal recognition of same-sex marriage? We can of course only address what we would do differently, not speculate what the LCC (if resurrected) might do differently.

Most obviously, we would not relegate polygamy to a footnote. Rather, we would address polygamous and polyamorous relationships, and the extent to which the criminal law continues to target non-monogamous intimate relationships through section 293 of the *Criminal Code*. In telling the history of marriage, we would broaden the narrative to include the history of polygamous and monogamous marriage, drawing on the materials produced for and cited in the *Polygamy Reference*.⁷³ While the British Columbia Supreme Court upheld the constitutionality of section 293 in the *Polygamy Reference*, we do not believe that the ruling is or should be the final word on the constitutionality and/or political legitimacy of the continued criminalization of polygamy in Canada.⁷⁴ In law

⁷³ *Polygamy Reference*, *supra* note 31.

⁷⁴ There is extensive literature undertaking critical evaluations of the criminal prohibition on polygamy and the opinion in the *Polygamy Reference*. See Gillian Calder & Lori G Beaman, eds, *Polygamy's Rights and Wrongs: Perspectives on Harm, Family, and Law* (Vancouver: UBC Press, 2013); Jessica P Barnett, "Polyamory and Criminalization of Plural Conjugal Unions in Canada: Competing Narratives in the s.293 Reference" (2014) 11:1 *Sexuality Research & Social Policy* 63; Erin Fowler, "A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity" (2012) 21:1 *Dal J Leg Stud* 93. For critiques of the opinion in the *Polygamy Reference*, see Margaret Denike, "Evolutionary Psychology, Racial Animus, and the Affective Politics of the Polygamy Prohibition" (2017) 7 *Onati Socio-Legal Series* [forthcoming]; Suzanne Lenon, "Intervening in the Shadow of Claims to White Settler Sovereignty: West Coast LEAF, Gender Equality and the Polygamy Reference" (2017) 7 *Onati Socio-Legal Series* [forthcoming]; Micheal Vonn, "The Polygamy Reference and Hutterian Brethren of Wilson Colony v. Alberta: Why Are We Doing So Poorly in Protecting the Religious Freedoms of Minority

report fashion, we would consider the arguments for and against the criminal prohibition and the non-recognition of polygamous relationships in Canadian law.⁷⁵ While the federal and provincial governments have argued that the protection of women and children is a legitimate state objective justifying the criminalization of polygamy, we believe that the legislation is overbroad and disproportionate. Just as the LCC argued that conjugality was a poor proxy for the relational attributes relevant to legislative objectives, so we would believe that the criminal prohibition of polygamy is a poor proxy for achieving legitimate government objectives. The harms that may come to some women and children in some polygamous communities could and should be addressed through more narrowly targeted regulations, many of which currently exist. Sexual assault, assault, age of consent, and trafficking laws, to name a few, could be deployed against harmful practices when evident, rather than using the criminal prohibition against polygamy as a proxy for these harms. Moreover, many polygamous and polyamorous relationships are not characterized by any of these harms, and yet they are caught by the blanket prohibition on

Religious Communities?” (2013) 7 JPPL 263.

⁷⁵ See e.g. the papers in Status of Women Canada, *Polygamy in Canada: Legal and Social Implications for Women and Children: A Collection of Policy Research Reports* (Ottawa: SWC, November 2005), which took a range of positions on the legality of polygamy in Canada. See also Martha Bailey & Amy J Kaufman, *Polygamy in the Monogamous World: Multicultural Challenges for Western Law and Policy* (Santa Barbara: Praeger, 2010); Susan Drummond, “Polygamy’s Inscrutable Mischief” (2009) 47:2 Osgoode Hall LJ 317; Angela Campbell, *Sister Wives, Surrogates and Sex Workers: Outlaws By Choice?* (Farnham, UK: Ashgate 2013); Benjamin L Berger, “Polygamy and the Predicament of Contemporary Criminal Law”, in Calder & Beaman, *supra* note 74 at 69.

multiple party conjugal relationships in section 293 of the *Criminal Code*.⁷⁶

Finally, rethinking the dyadic couple—conjugal or not—is not without its conceptual challenges. The rights and responsibilities within federal jurisdiction were largely public rights and responsibilities. But, how would we think about the private rights between the parties? Although within provincial jurisdiction, the division of marital property illustrates some of the challenges. Consider a polyamorous family with three adults: if one party chooses to leave the unit, how would property be divided? Provincial division of property regimes are predicted on a sharing of the value of assets between two people. If applied to the polyamorous family, would the first person to leave be entitled to one half? Or one third? Should the value of the property of all three adults be calculated, and a presumption of equal division be put in place, subject to any revisions agreed to by the parties in a domestic contract? What if, as in polygamous relationships, the marriage was between one man and multiple

⁷⁶ The overbreadth of section 293 was limited to some extent by Justice Bauman's conclusion in the *Polygamy Reference* that the offence requires multiple "marriages" that involved a "sanctioning event": *supra* note 73 at para 1036. As he explained, "[t]he offence is not directed at multi-party, unmarried relationships or common law cohabitation, but is directed at both polygyny and polyandry. It is also directed at multi-party same sex marriages" (*ibid* at para 1037). He recognized the absurdity of his conclusion, since parties could avoid prosecution "by the simple expedient of not undergoing a sanctioning event" (*ibid* at para 1039). But, absent a constitutional violation, he pointed out that it is not the courts' role to revise absurd laws; that role belongs to Parliament (*ibid* at para 1040). Whether courts in B.C. and other provinces will follow Justice Bauman's interpretation of section 293 remains to be seen. The ongoing proceedings involving charges of engaging in polygamy against Winston Blackmore could provide one context in which Justice Bauman's reference opinion will be challenged. See *Blackmore v British Columbia*, 2016 BCCA 233, 356 CRR (2d) 239.

wives? Would the law consider only the assets held by the husband, or by all of the sister wives? These are not unanswerable questions, but they do require taking the poly unit seriously to consider the appropriate rights and responsibilities.

A not dissimilar scenario would play out in at least a few areas of federal jurisdiction. How might Canada Pension Plans credits be divided between multiple spouses? Who would be entitled to the survivor's benefit? The report recommended that the survivor's benefit be expanded beyond the spousal and conjugal to allow an individual to designate their beneficiary, regardless of conjugal or non-conjugal status, provided that they were in an economically interdependent relationship. Specifically, the report recommended that "[c]ontributors in non-conjugal relationships should be able to designate the persons with whom they live in close personal relationships as their beneficiaries for the survivor's pension."⁷⁷ The recommendation did not consider multiple spouses. However, the Commission did consider the implications of individuals having both a separated spouse and a new common law spouse: it worried that allowing a designation to the new common law spouse could disentitle the former spouse, and suggested that some limitations might need to be imposed such that only a portion of the benefits could be designated to the new spouse. But, imagine instead that the competing spouses are not serial but contemporaneous: there are two or more surviving spouses. How should the survivor's benefit be allocated? Equally amongst the surviving spouses? Can an individual designate one spouse over the others?

Notwithstanding the challenges of working through these technical issues, it is clear that the principles that guided the LCC's report, and the methodology it proposed, pointed towards the recognition and support of multiple party conjugal relationships in a range of contexts. Indeed, once the primary

⁷⁷ *Beyond Conjuality*, *supra* note 1 at 97.

objective of marriage recognition is conceived of as supporting committed and caring relationships, it is hard not to see how the focus on a conjugal dyad can be preserved.

A rewriting of *Beyond Conjugal*—particularly Chapter Four—along these terms would result in the rest of the report reading somewhat differently. While, as we have just argued above, many of the redefinitions of adult personal relationships proposed in the report could apply to poly relationships, the report did nothing to bring these relationships into view. A rewriting of Chapter Three would require that these poly relationships be examined as examples of the application of the definitions. Our sense is that a consideration of these relationships would not actually change the definitions, but rather, that these relationships would simply be brought into sharper relief.

Yet, it is important to recognize that although much has changed in the intervening years—same sex marriage has been firmly embedded into Canadian law—the central ideas contained in the report of moving beyond conjugality remain controversial. And despite the increasing visibility of polygamy in the Canadian legal context, with multiple law reports, constitutional challenges,⁷⁸ and a proliferation of journal articles and books on the topic,⁷⁹ polygamy remains extremely

⁷⁸ *Polygamy Reference*, *supra* note 31.

⁷⁹ See e.g. Maura I Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory” (2003) 31:3 *Capital UL Rev* 439; Meg Barker & Darren Langdridge, eds, *Understanding Non-Monogamies* (New York: Routledge, 2010); Deborah Anapol, *Polyamory in the 21st Century: Love and Intimacy with Multiple Partners* (Lanham, Md: Rowman & Littlefield Publishers, 2010); Dossie Easton & Janet W Hardy, *The Ethical Slut: A Practical Guide to Polyamory, Open Relationships and Other Adventures*, 2nd ed (Berkeley: Celestial Arts, 2009); Tristan Taormino, *Opening Up: A Guide to Creating and Sustaining Open Relationships* (San Francisco: Cleis Press, 2008); Ann E Tweedy, “Polyamory as a Sexual

controversial and divisive with an overwhelming majority of popular opinion opposing its recognition. We recognize that rewriting *Beyond Conjuality* today, with a view to the explicit inclusion of poly relationships would still risk breaching a taboo topic in Canadian policy debates and public opinion. However, the developments in the intervening years have at least made the idea of the recognition of poly relationships imaginable, if not uncontroversial.

V – CONCLUSION

More than a decade and a half after its publication, the Law Commission of Canada's *Beyond Conjuality* report remains a radical vision for reimagining the legal regulation of intimate relationships. Despite the passage of same-sex marriage laws, there has been little political appetite for reforming marriage and conjuality. Indeed, the move by the Conservative government to use marriage as a wedge issue, including the age of marriage, marriage fraud, and duress with the *Zero Tolerance of Barbaric Cultural Practices Act*⁸⁰ in 2015, seemed to backfire, as many have speculated that despite its passage, its anti-immigrant sentiment contributed to the government's defeat in the 2015 election. Even anachronistic marriage and divorce laws, like the consummation of marriage requirements, and fault based

Orientation" (2011) 79:4 U Cin L Rev 1461; Hadar Aviram & Gwendolyn M Leachman, "The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle" (2015) 38:2 Harv JL & Gender 269; Jack B Harrison, "On Marriage and Polygamy" (2015) 42:1 Ohio NU L Rev 89; Pablo Pérez Navarro, "Beyond Inclusion: Non-monogamies and the Borders of Citizenship" (2016) 21:2 Sexuality & Culture 441; Margaret Denike, "What's Queer About Polygamy" in Robert Leckey & Kim Brooks, eds, *Queer Theory: Law, Culture, Empire* (Abingdon: Routledge, 2010) 137; Zoe Duff, *Love Alternatively Expressed: The Scoop on Practicing Polyamory in Canada* (Victoria, BC: Filidh Publishing, 2014).

⁸⁰ *Supra* note 32.

divorce laws, remain untouched. Marriage and conjugality seem to remain a third rail in Canadian politics, with little to be gained by touching them, and much to be lost by doing so.

But, the relevance of the legal regulation of adult personal relationships has not diminished. From the increasing visibility of poly families to novel relationships produced through reproductive technologies, federal, provincial, and territorial governments will continue to be called upon to respond and regulate, and in the absence of proactive legislative action, courts will be called upon to adjudicate the appropriate recognition of these relationships. We would continue to make the claim that we did fifteen years ago—it is (still) time to fundamentally rethink the way in which Canadian law regulates adult personal relationships.