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Illegitimacy in British Columbia, Saskatchewan, Ontario, and Nova Scotia: A Legislative History

Susan B. Boyd

Allard School of Law at the University of British Columbia, boyd@allard.ubc.ca

Jennifer Flood

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Illegitimacy in British Columbia, Saskatchewan, Ontario, and Nova Scotia: A Legislative History

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I. INTRODUCTION

Marriage has, historically, played a major role in determining the legalities of parent–child relations. At common law, a child was considered “legitimate” only if her or his parents were married either at the time of conception or at the time of birth.¹ A child born into a married relationship was presumed to be the child of the married couple,² while an illegitimate child was considered *filius nullius*, meaning the child of no one.³ Illegitimacy had severe legal and social consequences. It was a presumption of statutory interpretation and the construction of wills that any reference to a “child” excluded an illegitimate child.⁴ Illegitimate children thus had no rights of inheritance and no right to support from their parents. Likewise, parents had no rights of custody or guardianship of their illegitimate children.⁵

[†] Susan B. Boyd is Professor of Law and holds the Chair in Feminist Legal Studies at Allard Law School, University of British Columbia. She gratefully acknowledges the generous support of the Social Sciences and Humanities Research Council of Canada for this project and the assistance of several UBC Law research assistants over time, most notably Jennifer Lee, Bree Makohn, and Mary Murray.

[‡] Jennifer Flood graduated from UBC Law in 2013. She clerked at the Court of Appeal for British Columbia and is now an associate at Thorsteinssons LLP.

¹ Winifred H Holland, *Unmarried Couples: Legal Aspects of Cohabitation* (Toronto: Carswell, 1982) at 151.

² Law Reform Commission of Nova Scotia, *Final Report: The Legal Status of the Child Born Outside of Marriage in Nova Scotia*, (Halifax: Government of Nova Scotia, 1995) at 6.

³ Holland, *supra* note 1 at 152–53.

⁴ *Ibid* at 153.

⁵ Law Reform Commission of Nova Scotia, *supra* note 2 at 3.

Over time, provincial legislation in Canada modified the common law position, first, by imposing liability on parents for the support of illegitimate children, second, by providing for the legitimation of children whose parents subsequently married, and, finally, by abolishing the concept of illegitimacy. This article describes and compares the legislative histories in four Canadian provinces, which all took somewhat different approaches: British Columbia (BC), Nova Scotia, Ontario, and Saskatchewan. Part II is by far the longest and traces the complex history of the legislation dealing with the financial support of illegitimate children; Part III addresses the legislation dealing with legitimation; and Part IV the short history of the abolition of distinctions between legitimate and illegitimate children in all Canadian provinces and territories, except for Nova Scotia. We take a chronological approach within each Part.

Our purpose is to lay groundwork for future research that might further explore the context to these legislative changes and the law in action. Although law reform is typically connected to political and economic development,⁶ scant media coverage and archival information offered us little contextual evidence for our legislative histories. In addition, provinces did not keep full Hansard records until well into the 20th century. For instance, Nova Scotia did not keep printed records until the 1950s.⁷

As will become evident, the provinces developed (and tinkered with) elaborate legislative systems for trying to collect financial support from putative fathers especially, reflecting the construction of men as financial providers rather than caregivers.⁸ That said, as research on the law in action shows,⁹ the systems were geared less towards assisting single or abandoned mothers who had *de facto* responsibility for supporting their children

⁶ Chris Clarkson's study of family regulation in BC amply demonstrates this point: Chris Clarkson, *Domestic Reforms: Political Visions and Family Regulation in British Columbia, 1862-1940* (Vancouver: UBC Press, 2007).

⁷ Email correspondence with Information Services, Nova Scotia Legislative Library, 16 January 2009.

⁸ Richard Collier "'Waiting Till Father Gets Home': the Reconstruction of Fatherhood in Family Law" (1995) 4 *Social & Legal Studies* 5-30; see also Clarkson, *supra* note 6 at 164-65.

⁹ Lori Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969* (Toronto: University of Toronto Press, 2007).

and more towards alleviating financial pressure on public support mechanisms or on private citizens who supported the child. Clarkson's study of the laws on illegitimacy in BC also emphasizes the class and race-based 'nation-building' philosophy behind law reforms.¹⁰ The overall goal until recently was not to treat children born out of wedlock equally, but rather to privatize costs related to such children and to regulate the behaviour of unwed parents. The legislation demonstrated a paternalistic, judgmental, and often punitive approach to unwed mothers. As Lori Chambers has said, the Ontario legislation, particularly in how it was put into effect by social workers and judges, "both reflected and reinforced the discursive construction of the 'good' mother as Anglo-Saxon and legally married".¹¹ There was general concern that the legal recognition of the rights of "illegitimates" might inhibit the marriage imperative.¹²

The reforms were made against the backdrop of English Canada's development as a settler society and as a nation. From the mid to late 19th century to the 1940s, significant economic, demographic, and political changes occurred in Canada. Industrialization occurred quite rapidly, with a mainly agricultural economy shifting towards a more corporate economy based on the concentration of industry and finance.¹³ Urbanization accompanied the economic expansion, especially in Ontario, and reflected immigration patterns as well as the movement from farms to cities. During the period of our study, two world wars and the Depression also generated social upheavals.

Perceived "crises of the family" are often linked to social and economic transformation such as occurred during this time frame. As Dorothy Chunn puts it, "Among the new urban middle classes, a recurring perception of pervasive social disorganization and crisis was articulated in overlapping discourses about rampant immorality, family breakdown,

¹⁰ Clarkson, *supra* note 6.

¹¹ Chambers, *supra* note 9 at 167.

¹² Clarkson, *supra* note 6 at 161.

¹³ Dorothy E Chunn, *From Punishment to Doing Good: Family Courts and Socialized Justice in Ontario, 1880-1940* (Toronto: University of Toronto Press, 1992) at 25.

and race suicide.”¹⁴ Social and legal reforms can be understood in this context. By the 1920s, regulatory mechanisms were increasingly in place, as most of the institutions of what we now think of as the Canadian state took at least a nascent form.¹⁵ However, instead of moving to introduce universal social welfare to assist the working and dependent poor, reform efforts during this period were directed primarily at the moral and political regulation of those who were marginal. Introducing legal regulation of illegitimacy makes sense against this backdrop. For example, the evident concern for “child-saving” that characterized various strands of the reform movements was often premised on a racist, nationalist vision that prioritized the raising of “healthy, competitive Anglo-Saxon children”.¹⁶ That the provinces increasingly facilitated claims for economic support for a child born outside marriage to proceed against birth fathers to some degree required unmarried parents to emulate patterns in (Anglo-Saxon) middle class families.

Although all four provinces followed similar trajectories, these issues played out differently because of historically specific developments in different regions. For instance, Ontario experienced a pronounced economic transformation in contrast to the other provinces we study, but did not introduce laws on the support of illegitimate children against the backdrop of a Poor Law. The next section traces the similarities and differences in the provinces’ approaches to financial support of children born outside wedlock.

II. FINANCIAL SUPPORT OF CHILDREN BORN OUT OF WEDLOCK

1758 – 1877: Two Different Approaches: Nova Scotia and Upper Canada

Nova Scotia

¹⁴ *Ibid* at 28.

¹⁵ Mariana Valverde, *The Age of Light, Soap, and Water: Moral Reform in English Canada, 1885-1925* (Toronto: McClelland & Stewart Inc., 1991) at 15.

¹⁶ Clarkson, *supra* note 6 at 16 and 127-128.

Legislation that was introduced on the financial support of illegitimate children tended to diminish public responsibility for, or privatize, their support. Nova Scotia was the first of the four provinces to enact such legislation, and the only one to adopt the “poor laws”. After attaining colonial status, Nova Scotia incorporated the English poor laws, establishing public responsibility for poor relief.¹⁷ Support for illegitimate children under the English poor laws dates back to 1576, when mothers and fathers of illegitimate children in England were required to pay a weekly sum to ease the financial burden on parishes that supported the poor.¹⁸

In 1758, Nova Scotia enacted *An Act to provide for the support of Bastard Children, and the punishment of the Mother and reputed Father*,¹⁹ based on the English legislation. The aim was not to obtain support for unmarried mothers but to protect local governments from the costs of illegitimacy by requiring fathers to indemnify the organizations that cared for illegitimate children.²⁰ The Act required that if a woman was pregnant with a bastard child who was likely chargeable to any place in the Province, she had to name the father before a Justice of the Peace in writing under oath.

On application of the “overseers of the poor”²¹ or any “substantial householder” of the place, the Justice could issue a warrant for the man named as the father, who would be required to give security to indemnify the place charged with supporting the child, or else be imprisoned. He was then required to appear in court after the birth for adjudication of the paternity claim. If the woman died, miscarried, turned out not to have been pregnant, or got married before the delivery, the man was to be discharged. Thus, a child was not considered a bastard if the mother got married before the birth even if she was unmarried

¹⁷ W Peter Ward, “Unwed Motherhood in Nineteenth-Century English Canada” (1981) 16:1 Historical Papers 34 at 39–40.

¹⁸ *Poor Law Act*, 1576 (UK) 18 Eliz I, c 3.

¹⁹ *An Act to provide for the support of Bastard Children, and the punishment of the Mother and reputed Father*, SNS 1758, c 19 [*NS Bastard Children Act, 1758*].

²⁰ Ward, *supra* note 17 at 40.

²¹ The overseers of the poor were public officials in charge of collecting rates and administering poor relief. Definitions first appeared in the 1900 version of the Act, *infra* note 47.

at the time of conception. Instead, the presumption of paternity applied under which a child born within marriage was presumed to be the child of the husband, regardless of biological connection.²²

The mother or father could be ordered to give security so that the child would not become burdensome or chargeable to the Province, or to pay twenty pounds to the overseers for the support of the child.²³ Nova Scotia was unique in allowing orders to be made against mothers at this early stage; the other provinces focussed on obtaining support from fathers in their early legislation. Failure to obey an order would result in imprisonment for the party in default.²⁴ Some provisions exhibited distrust and disdain for the mothers. For example, if a woman falsely accused a man of being the father “to defame the person or cheat him of his money”, she would be whipped and sent to the house of correction for six months.²⁵ If a man thought himself wrongly accused, or if the person charging him was “a woman of ill fame or a common whore”, he could appeal from the order of the Justices to have the matter heard in court and tried by a jury.²⁶ At the same time, Nova Scotia was the only one of the four provinces that did not require the mother’s testimony as to the paternity of her child to be corroborated by other evidence.

Nova Scotia’s 1758 Act was repealed in 1846 and replaced with *An Act in relation to Bastard Children*,²⁷ which added more detail to the process of obtaining support. A significant change was made to allow an affidavit to be taken within six months of the birth if the woman had not named the father before the birth.²⁸ A warrant would be issued

²² Carol Smart, “‘There is of Course the Distinction Dictated by Nature’: Law and the Problem of Paternity” in Michelle Stanworth, ed, *Reproductive Technologies: Gender, Motherhood, and Medicine* (Minneapolis: University of Minnesota Press, 1987) at 107.

²³ *NS Bastard Children Act, 1758*, *supra* note 19, s 2.

²⁴ *Ibid.*

²⁵ *Ibid*, s 3.

²⁶ *Ibid*, s 4.

²⁷ *An Act in relation to Bastard Children*, SNS 1846, c 13 [*NS Bastard Children Act, 1846*].

²⁸ This time limit was reduced to three months in 1851 (*Of the Maintenance of Bastard Children*, RSNS 1851, c 91, s 5).

for the “reputed father” and he would be required to enter into a bond or be imprisoned.²⁹ After the birth, on application of the Overseers of the Poor or a substantial householder, a warrant would be issued to bring the mother and reputed father before two Justices of the Peace to hear the evidence of the mother, who was declared to be a legal witness, under oath. They would also hear other witnesses called by either party to corroborate or invalidate the testimony of the mother. The reputed father was not a competent witness until an amendment was made in 1864.³⁰

The Justices would either discharge the father or make an “order of filiation”, under which he was declared to be the father of the illegitimate child and required to pay certain expenses. First, he had to indemnify the township or district to which the child was chargeable for the expenses of lying in, birth, and maintenance of the child and mother up to the time of the hearing. Second, he had to pay a weekly sum, determined with regard to his ability to pay, to the township or district for as long as the child was chargeable. The father would then have to either enter a bond or pay a lump sum to the overseers of the poor to fulfill the order, or be committed to jail.³¹ The father’s payments did not go directly to the mother.

Under Nova Scotia’s 1846 Act, there was no longer punishment for a woman who falsely accused a man of being the father, and no reference to the reputation of the woman naming the father. The father or the overseers of the poor could appeal the decision to make or refuse a filiation order to the Supreme Court to have the matter tried by a jury.³² This version of the Act was much more focussed on obtaining support from the father, but the Justices could still order that the mother bear a part or the whole of the expense of maintaining the child, including by nursing the child.³³ This sort of order illustrates the

²⁹ *NS Bastard Children Act, 1846, supra note 27, s 1.*

³⁰ *Ibid, s 2; Of the Maintenance of Bastard Children, RSNS 1864, c 91, s 3 [NS Bastard Children Act, 1864].*

³¹ *NS Bastard Children Act, 1846, supra note 27, s 2.*

³² *Ibid, s 5.*

³³ *Ibid, s 6.*

paternalism of the regime and the lack of autonomy accorded to mothers with respect to the care of their children. An 1866 amendment enhanced the enforcement provisions against fathers, allowing for a warrant of distress to be made against a father who failed to fulfil a filiation order.³⁴

Upper Canada

Unlike Nova Scotia, Upper Canada (later Ontario) did not adopt the English Poor laws, and therefore had no history of public responsibility for the care of illegitimate children.³⁵ Mothers and fathers could not be held liable for the care of illegitimate children, although mothers often had *de facto* responsibility and custody,³⁶ and English and Canadian courts eventually held that mothers had a *prima facie* right to custody.³⁷ In 1837, Upper Canada enacted legislation that made fathers potentially liable for the support of illegitimate children.³⁸

In contrast to Nova Scotia's legislation, which focussed on indemnifying public institutions with illegitimate children in their care, Upper Canada allowed private citizens, including the mother, to sue the reputed father for the value of necessaries they provided to illegitimate children. The *Seduction and Illegitimate Children Act* provided that "in order that some check may be imposed upon the unfeeling conduct of persons who refuse to make provision for the support of their illegitimate children", a person who furnished food, clothing, lodging or other necessaries to a minor illegitimate child could sue the father for the value thereof, provided that the child was not in the care of the reputed father.³⁹

³⁴ *NS Bastard Children Act, 1864*, *supra* note 30, as amended by *An Act to amend Chapter 91 of the Revised Statutes, "Of the maintenance of Bastard Children"*, SNS 1866, c 14, s 1.

³⁵ Ward, *supra* note 1717 at 40.

³⁶ Chambers, *supra* note 9 at 16–17.

³⁷ *Barnardo v McHugh*, [1891] 1 AC 388, followed in *Re Baby Duffell Martin v Duffell*, [1950] SCR 737.

³⁸ *An Act to make the remedy in cases of seduction more effectual, and to render the Fathers of Illegitimate Children liable for their support*, SUC 1837, c 8 [*UC Seduction and Illegitimate Children Act*].

³⁹ *Ibid*, s 4.

No action was possible, however, unless the mother voluntarily filed an affidavit declaring who the father was while she was pregnant or within six months of the birth. The fact that the person named was actually the father had to be proved by independent legal evidence.⁴⁰ In addition, if the mother was the person suing for the value of necessaries, the fact of the defendant being the father had to be proved by testimony other than that of the mother.⁴¹ According to Chambers, despite the liability imposed on fathers, the legislation did not prove to be very effective in allowing unmarried mothers to support their children: “Perhaps because of the adversarial nature of the proceedings, or the requirement that the woman’s testimony be corroborated by a third party, . . . unwed mothers and their offspring continued to find refuge in charitable institutions.”⁴²

The Upper Canada Act also modified the tort action for seduction, allowing a father to sue his unmarried daughter’s master for her seduction, which was not possible at common law.⁴³ In 1877, by which time Ontario was a province, the Act was divided into two separate pieces of legislation, one dealing with the support of illegitimate children⁴⁴ and the other with the action for seduction,⁴⁵ but the provisions remained unchanged.

1900 – 1912: Creeping Privatization

⁴⁰ *Ibid*, s 5.

⁴¹ *Ibid*.

⁴² Chambers, *supra* note 9 at 17.

⁴³ *UC Seduction and Illegitimate Children Act*, *supra* note 38, s 1. At common law, a master could sue a third party for seducing his female servant if she became pregnant and he therefore lost her services. This right to sue was extended to the father via the legal fiction that a daughter is the servant of her father. He could bind out her services to a third party via contract, and if he did so, he lost the right to sue for seduction at common law (Martha Bailey, “Servant Girls and Masters: The Tort of Seduction and the Support of Bastards” (1991) 10 Can J Fam L 137 at 142, 155–56).

⁴⁴ *An Act respecting the Support of Illegitimate Children*, RSO 1877, c 131 [*ON Illegitimate Children Act, 1877*]

⁴⁵ *An Act Respecting the Action of Seduction*, RSO 1877, c 57.

The early 20th century revealed an interest on the part of governments in privatizing the costs of reproduction, encouraging families to be self-reliant.⁴⁶ During this period, BC and Saskatchewan, which became provinces in 1871 and 1905 respectively, introduced their first legislation on financial support for illegitimate children. The “privatized” approach adopted by Ontario prevailed and Nova Scotia also introduced a privatized element to its legislation. We address Nova Scotia first.

Nova Scotia

In 1900, Nova Scotia’s legislation was repealed and replaced by *The Bastardy Act*,⁴⁷ adding for the first time a definitions section. “Poor district” was defined to include a poor district within the meaning of *The Poor Relief Act*, which set up the public system of poor relief.⁴⁸ The council of each municipality would annually appoint three freeholders in every poor district to be overseers of the poor, responsible for providing support to all indigent persons having a “settlement” in the poor district.⁴⁹ The overseers reported annually to the council the amount to be collected from the ratepayers of the poor district.⁵⁰ Persons who lived in the district for five consecutive years after reaching the age of 21 and who had not received aid from the overseers during that period, or who had paid at least one year’s poor and county rates in the district, had a settlement in the district, entitling them to relief and support.⁵¹ Illegitimate children had the mother’s

⁴⁶ See Jane Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women’s Press, 1992).

⁴⁷ *The Bastardy Act*, RSNS 1900, c 51 [*NS Bastardy Act, 1900*] (Curiously, *Of the Maintenance of Bastard Children*, RSNS 1884, c 37 was repealed and replaced by *An Act respecting the Maintenance of Illegitimate Children*, SNS 1900, c 14. In the same year, this new Act was repealed and replaced with *The Bastardy Act, 1900*).

⁴⁸ *The Poor Relief Act*, RSNS 1900, c 50.

⁴⁹ *Ibid*, ss 10–11.

⁵⁰ *Ibid*, s 13.

⁵¹ *Ibid*, ss 2, 17.

settlement, while legitimate children had the settlement of the father. If a child had no settlement by parentage, then her or his settlement was the place of birth.⁵²

The Nova Scotia *Bastardy Act* was divided into two main parts. The first part was similar to the previous versions and was applicable to proceedings against the “putative father” taken in the interest of a poor district. The second part introduced proceedings against the father on behalf of the mother and child, following Ontario’s approach. Private parties could sue the father for contributions made to the maintenance of an illegitimate child. However, no action was possible under this second part if the putative father fulfilled the terms of an order of filiation under the first part.⁵³

The first part of the Act underwent several changes. A woman pregnant with a child likely to be born a bastard and to become chargeable to a poor district was now required to make an information in writing under oath at the instance of a ratepayer of the poor district, or could also do so of her own accord.⁵⁴ If she did not make an information while she was pregnant, she could do so up to 12 months after the birth.⁵⁵ Under a filiation order, the putative father could be required to pay a weekly sum for maintenance as before, according to his ability and prospective means.⁵⁶ He could also be required to pay the funeral expenses if the child died before the order was made.⁵⁷ The section dealing with the mother’s contribution was reworded to require her to bear part of the expense and to suckle the child for at least ten months, or until she produced the certificate of a duly qualified medical practitioner stating that she was unable to do so.⁵⁸ The enforcement provisions to ensure payment by the father were enhanced, with more severe punishments for failure to fulfil an order, including imprisonment with hard labour or a

⁵² *Ibid*, s 18.

⁵³ *NS Bastardy Act, 1900, supra* note 47, s 28.

⁵⁴ *Ibid*, s 5.

⁵⁵ *Ibid*, s 8(4).

⁵⁶ *Ibid*, s 9(2)(c).

⁵⁷ *Ibid*, s 9(2)(b).

⁵⁸ *Ibid*,s 9(4).

warrant of distress under which his goods and chattels would be seized and sold.⁵⁹ A new provision allowed a putative father against whom an order of filiation was made to pay to the overseers of the poor or to the town or city, at any stage of the proceedings, a lump sum fixed by two justices and costs incurred up to that time. The lump sum was to be applied to the expenses covered by the filiation order, and the father was entitled to be discharged from further proceedings under the first part.⁶⁰

The second part of the Act set out the civil liability of a putative father in relation to the mother and child:

- 21.—(1.) The putative father of every bastard child shall be liable to contribute, —
- (a) to the medical and all other expenses connected with the birth of such child, its maintenance and education until the child is able to maintain itself, and with its burial in case it dies before becoming able to maintain itself, and
 - (b) to the expenses of the maintenance and care, medical and otherwise, of the mother of such child during three months next previous to its birth, and during such period after its birth as medical or other special or unusual care and nursing are necessary in connection with or as a consequence of the birth of such child, and
 - (c) to the expenses of the burial of the mother in case of her death at or in consequence of the birth of such child.
- (2.) No such child who is under the age of fifteen years shall be deemed able to maintain itself.⁶¹

An action in debt could be brought against the putative father by the mother of the child, her mother or father, or any other person who had maintained the child, not more than once per month.⁶² The court would decide, in view of the circumstances of both parents, what proportion of the reasonable and necessary expenses the putative father would pay. In addition, if the mother brought the action, the court could order the putative father to pay a weekly sum for the future maintenance and education of the child.⁶³ A filiation

⁵⁹ *Ibid*, ss 13.

⁶⁰ *Ibid*, s 15.

⁶¹ *Ibid*, s 21.

⁶² *Ibid*, ss 22(1)–(2), 24.

⁶³ *Ibid*, ss 25–26.

order was considered *prima facie* evidence of paternity, but no action was possible if the putative father had fulfilled the terms of a filiation order under the first part.⁶⁴

BC and Saskatchewan

In 1903, BC⁶⁵ and Saskatchewan⁶⁶ enacted legislation providing for the support of illegitimate children. The BC Act was sponsored by lawyer and legislator Albert Edward McPhillips, based on the Ontario precedent, and reflected his child welfare concerns, pressure from charities (who often ended up caring for illegitimate children), and an ongoing anxiety about interracial relationships and their threat to the national wellbeing.⁶⁷ These acts were identical to Ontario's *Illegitimate Children Act, 1877*,⁶⁸ allowing any person to sue the father for the value of necessaries provided to an illegitimate child. Ontario's Act underwent a minor change in 1911, allowing a mother's testimony to be proof of paternity if corroborated by other evidence.⁶⁹ The Ontario and BC legislation remained unchanged until the 1920s, despite their flaws from the point of view of unwed mothers,⁷⁰ while the Saskatchewan legislation diverged significantly from the other two, offering somewhat more autonomy to mothers. This difference possibly reflects the fact that men in western Canada were generally sympathetic to the suffrage movement.⁷¹

⁶⁴ *Ibid*, s 28.

⁶⁵ *Support of Illegitimate Children Act, 1903*, SBC 1903, c 6.

⁶⁶ The Act was originally an Act of the Northwest Territories, of which Saskatchewan was a district until 1905: *An Ordinance respecting the Support of Illegitimate Children*, SNWT 1903 (2d Sess), c 9. Saskatchewan enacted its own version of the Act in 1909: *An Act respecting the Support of Illegitimate Children*, RSS 1909, c 137.

⁶⁷ Clarkson, *supra* note 6 at 120.

⁶⁸ *ON Illegitimate Children Act, 1877*, *supra* note 44.

⁶⁹ *The Illegitimate Children's Act*, SO 1911, c 36, s 2(2).

⁷⁰ Clarkson, *supra* note 6 at 121.

⁷¹ Alison Prentice et al, *Canadian Women: A History* (Toronto: Harcourt Brace Jovanovich, 1988) at 196. Between 1910 and 1919 all three prairie provinces passed legislation giving wives more rights: Prentice, *ibid* at 199. BC also showed action on women's and children's equality during that period (*Ibid* at 200), remedying the less elevated status of women in that province: Elsie Gregory MacGill, *My Mother the*

In 1912, the Saskatchewan Act⁷² was divided into two parts. Under Part I, a single woman could name the father of her child within six months of the birth and apply for a summons requiring him to appear in court.⁷³ After the birth, the court could hear the evidence of both parties and, if the mother's evidence was corroborated "in some material particular", could adjudge the man to be the putative father and order him to pay for the child's support.⁷⁴ The amount would be a weekly sum for the maintenance and education of the child calculated from the birth of the child. He could also be ordered to pay expenses incidental to the birth, funeral expenses if the child had died, and the costs incurred in obtaining the order.⁷⁵ There was no specific requirement at this stage that the father's ability to pay be taken into account. While this procedure was similar to Nova Scotia's filiation order process, the money went directly to the mother,⁷⁶ rather than to a public institution. Saskatchewan was unique in respecting mothers' autonomy by giving them control over the support payments. Unlike in Nova Scotia, which focussed on getting payments from the father in order to privatize the costs incurred by the overseers of the poor, there was no requirement that the mother name the father and seek support.

Part I of the Saskatchewan Act also contained an enforcement provision, but it required the mother to again apply to court in the case of non-payment to get another summons requiring the putative father to appear. Another hearing would then allow the man to show cause why the order should not be enforced, and the mother and other witnesses could again be examined. The court could enforce the order if the putative father did not satisfy the court that he was unable to pay the amount owing.⁷⁷ Thus, in order to enforce

Judge: A Biography of Judge Helen Gregory MacGill (Toronto: The Ryerson Press, 1955) at 119. Yet BC did not offer unmarried mothers the autonomy that Saskatchewan did, at least on the face of the legislation.

⁷² *An Act respecting the Support of Illegitimate Children*, RSS 1912, c 39 [*SK Illegitimate Children Act, 1912*].

⁷³ *Ibid*, s 2.

⁷⁴ *Ibid*, s 4.

⁷⁵ *Ibid*, s 4.

⁷⁶ *Ibid*, s 6.

⁷⁷ *Ibid*, s 5.

an order, the mother had to initiate proceedings a second time, which could be a prohibitively costly step, given the precarious financial situation of single mothers. The court also had the power to vary the order on application of either party, upon proof that the means of the putative father had changed. On application of the father, the court also could rescind or vary any order.⁷⁸

Part II of the Act included the content of the previous version, which allowed parties to sue the father for the value of their contributions to an illegitimate child. However, a new limitation was added: no action was possible unless the mother had obtained an order under Part I against the putative father.⁷⁹ If a person other than the mother obtained a judgment under Part II, the court could direct that payment due to the mother under a filiation order be paid over to that person.⁸⁰ It was not useful for a mother to obtain a Part II judgment if she had already obtained a filiation order, as a judgment obtained by her would operate to satisfy her filiation order.⁸¹

1920 – 1930: “Child-saving” and Bureaucracy in BC, Ontario, and Saskatchewan

The post First World War period of the early 1920s saw significant social changes and social legislation introduced in an effort to deal with these changes. Many women obtained suffrage rights and also engaged in the war effort. It is, however, unclear to what extent the status of unmarried mothers shifted during this time, as there remained a huge emphasis on motherhood within marriage and stigma against unwed mothers and their children.⁸² BC and Ontario introduced significant reforms to its illegitimacy laws, while Saskatchewan left its legislation unchanged, perhaps because it had already made changes in 1912.⁸³ Nova Scotia changed its *Bastardy Act* to the *Illegitimate Children's*

⁷⁸ *Ibid*, ss 8-9.

⁷⁹ *Ibid*, s 14(b).

⁸⁰ *Ibid*, s 16.

⁸¹ *Ibid*, ss 16–17.

⁸² Prentice, *supra* note 71 at 260–61. Clarkson, *supra* note 6 at 161.

⁸³ *The Illegitimate Children's Act*, RSS 1920, c 156.

Act in 1923,⁸⁴ eliminating the use of the word “bastard” but otherwise maintaining the status quo until 1938.

BC and Ontario repealed their acts in 1922 and 1921 respectively, replacing them with the *Children of Unmarried Parents Act* (“CUPA”).⁸⁵ This legislation was much more extensive and part of a “child-saving” movement that emerged after the First World War due to concerns over the high infant mortality rate. Although children were not to be included in the fathers’ legal families, a second best approximation of the nuclear family was to try to keep mothers and babies together.⁸⁶ The reform movement simultaneously called for aid to children in poverty and laid blame for their condition at the feet of their mothers.⁸⁷ Accordingly, a public official was placed in charge of administering the Act and taking action in the interest of illegitimate children. This paternalistic approach can be contrasted to the 1912 Saskatchewan legislation, which allowed mothers to take action themselves.⁸⁸ In this section, we describe the BC and Ontario CUPAs in some detail, given the bureaucratic structures that they established, before looking at Saskatchewan’s overhaul and BC’s changes in 1927, and, finally, Ontario’s new version of its CUPA in 1927.

BC’s CUPA (1922)

In BC, the “Superintendent of Neglected Children”⁸⁹ was to be notified by the Registrar of Vital Statistics of the birth of every child born out of wedlock.⁹⁰ It was the duty of this

⁸⁴ *The Illegitimate Children’s Act*, RSNS 1923, c. 49 [*NS Illegitimate Children’s Act, 1923*].

⁸⁵ *ON CUPA, 1921*, *supra* note 85; *BC CUPA, 1922*, (BC first repealed the act and re-enacted it as Part 3 of the *Infants Act*, RSBC 1911, c 107, which was then repealed when the CUPA came in).

⁸⁶ Clarkson, *supra* note 6 at 162.

⁸⁷ Chambers, *supra* note 9 at 17–18. See Clarkson, *supra* note 6 at 163–64.

⁸⁸ *SK Illegitimate Children Act, 1912*, *supra* note 72.

⁸⁹ Defined as the Superintendent of Neglected Children appointed under the *Infants Act*, or any municipal officer or person appointed by the Attorney-General (*BC CUPA, 1922*, *supra* note 85, s 2).

⁹⁰ *Ibid*, s 3.

“bureaucratic father”⁹¹ to obtain all information possible on every illegitimate child, and to take proceedings in the interest of the child. However, the Superintendent was not required to interfere with the care of a child who was legitimated by the subsequent marriage of her or his parents, adopted, or being cared for voluntarily by a person he considered suitable.⁹²

Some provisions were designed to assist mothers and children by improving the process of obtaining aid from fathers. Mothers of illegitimate children and unmarried pregnant women were allowed to apply to the Superintendent for advice and protection in any matter connected with the child or the birth, and the Superintendent was directed to take such action in the interest of the mother and child as he thought advisable.⁹³ Other provisions were potentially punitive against mothers. For example, the Superintendent was given the extraordinary power to apply to the Supreme Court to be appointed guardian of a child born out of wedlock, either alone or jointly with the mother.⁹⁴ This intrusion into a mother’s guardianship of her child significantly undermined the presumption that she had *de facto* custody.

In terms of financial support, the BC *CUPA* contained the same provisions as the earlier Acts allowing private parties to sue the father for necessaries provided to an illegitimate child, but new provisions allowed the court to make an “affiliation order” adjudging the man to be the father and requiring him to pay maintenance. The mother, the next friend or guardian of an illegitimate child, or the Superintendent could make a complaint to a Magistrate, who would order the father to appear.⁹⁵ The complaint had to be made within the father’s lifetime and within either one year of the birth, one year of any act by the putative father acknowledging paternity, or one year of the father returning to the

⁹¹ Clarkson, *supra* note 6 at 167.

⁹² BC *CUPA*, 1922, *supra* note 85, s 4. We examine legitimation below, in Part III.

⁹³ *Ibid*, s 5.

⁹⁴ *Ibid*, s 6.

⁹⁵ *Ibid*, s 7.

province if he had been absent at the expiration of one year from the birth.⁹⁶ If the mother was testifying as to paternity, her evidence had to be corroborated.⁹⁷ With the exception of Nova Scotia, this provision was common to all of the provinces, indicating the suspicion with which single mothers were viewed. That said, Clarkson’s research on the law in action under the BC *CUPA* found that the presiding magistrate could fix the standard of corroborating evidence, so a sympathetic magistrate could make an important difference to the success of a claim.⁹⁸ Reflecting the social stigma surrounding illegitimacy was the addition of a provision directing that proceedings were not to take place in a court open to the public.⁹⁹

If an affiliation order was made, the BC father was liable to pay expenses similar to those set out in section 21 of the Nova Scotia *Bastardy Act, 1900*.¹⁰⁰ He was responsible for the maintenance and care of the mother for three months before the birth and for a period after, if medically necessary. He had to pay a weekly sum, albeit not directly to the mother, for the maintenance of the child until the age of sixteen, and burial expenses if the mother died as a result of the birth or if the child died before the affiliation order. The Magistrate could also require the mother to contribute a weekly sum until the child reached the age of sixteen.¹⁰¹

The Magistrate would fix the weekly sum not only having regard to the father’s ability and prospective means, but also such that the child would be maintained according to a “reasonable standard of living”, considering the probable standard of living that would have been enjoyed had the child been legitimate. In addition, the order could be varied upon proof that the means of either parent or the needs of the child had been altered.¹⁰² All payments were due to the Superintendent, whose duty it was to see that all money

⁹⁶ *Ibid*, s 8.

⁹⁷ *Ibid*, s 14.

⁹⁸ Clarkson, *supra* note 6 at 179—81.

⁹⁹ *BC CUPA, 1922, supra* note 85, s 17.

¹⁰⁰ *NS Bastardy Act, 1900, supra* note 47.

¹⁰¹ *BC CUPA, 1922, supra* note 85, s 9.

¹⁰² *Ibid*, s 11.

collected was applied to or for the persons entitled to relief and to take all necessary proceedings to enforce the order if it was not paid.¹⁰³

The Act introduced new enforcement provisions, including imprisonment for a father who did not give security for an order, and proceedings under the *Summary Convictions Act* for failure to comply with an order.¹⁰⁴ If the father died, his estate was bound by an affiliation order, but the order, including payments that came due before the father's death, would become subject to review and variation by a Magistrate. The Superintendent could bring an action to recover from the estate only with leave of a Magistrate and notice to any widow and legitimate children of the father.¹⁰⁵

The BC Act also dealt with agreements between the putative father and the mother, which were not a bar to proceedings. If a man admitted paternity, he could enter into an agreement with the Superintendent for the maintenance of the child. If he failed to comply with the agreement, the Superintendent could apply for an affiliation order, with the agreement as sufficient proof of paternity.¹⁰⁶

With respect to the private action to sue the father for necessaries provided to an illegitimate child, BC updated its Act, as Ontario had in 1911, to allow the mother to testify, with corroboration, as to the paternity of her child if she was the one suing for necessaries. If an affiliation order had been made against the father, that order was sufficient evidence.¹⁰⁷

Ontario's CUPA

¹⁰³ *Ibid*, ss 18–19.

¹⁰⁴ *Ibid*, ss 12–13, 20.

¹⁰⁵ *Ibid*, s 21.

¹⁰⁶ *Ibid*, ss 22–23.

¹⁰⁷ *Ibid*, s 25.

Ontario's *CUPA* echoed BC's, with variations. The "provincial officer" had the same duties as the BC Superintendent. In addition to the ability to apply for guardianship of an illegitimate child, the officer could consent to have the child dealt with as a "neglected child" and maintained in accordance with *The Children's Protection Act*.¹⁰⁸ Under this Act, Children's Aid Societies had the power to remove children from the custody of unfit parents, to make them Crown wards, and release them for adoption without the parents' consent.¹⁰⁹ The *CUPA* expanded this power in relation to illegitimate children, making it available when the father could not be found or could not provide adequate support, and the mother was dead, absent, or was through lack of means "unable," or through misconduct, "unfit" to have care of the child.¹¹⁰ Thus, mothers could lose their children simply on the basis of their poverty and lack of support from fathers.¹¹¹

Under an affiliation order, the Ontario father was liable for the same expenses as in BC. Judges could order the mother to contribute a weekly sum, and also had the discretion to make any other order in respect of the care and custody of the child as he deemed just.¹¹² But unlike BC, the Ontario father was not required to provide a "reasonable standard of living" as if the child had been legitimate. Chambers found that the support ordered was rarely enough to support the child.¹¹³ Further, the Judge had the power to vary orders upon proof that the father's means had changed, but was not directed to consider the changing needs of the child.¹¹⁴ Thus, the needs of the father explicitly superseded those of the child.¹¹⁵ The father would not be required to pay beyond his means, and the mother could lose custody of her child as a result. Collection was the greatest challenge faced by mothers in Ontario due to the minimal and ineffective enforcement of orders by courts.¹¹⁶

¹⁰⁸ *The Children's Protection Act of Ontario*, RSO 1914, c 231.

¹⁰⁹ Chambers, *supra* note 9 at 30.

¹¹⁰ *ON CUPA, 1921*, *supra* note 85, s 11.

¹¹¹ Chambers, *supra* note 9 at 30.

¹¹² *ON CUPA, 1921*, *supra* note 85, s 19.

¹¹³ Chambers, *supra* note 9 at 118.

¹¹⁴ *ON CUPA, 1921*, *supra* note 85, s 21.

¹¹⁵ Chambers, *supra* note 9 at 31.

¹¹⁶ *Ibid* at 124.

As in BC, if the father died, an Ontario affiliation order bound his estate, subject to review and variation. Additionally, if carrying out the order would deprive his widow or legitimate children of necessary maintenance, the Judge was to vary the order such that they would be provided for before any children born out of wedlock.¹¹⁷ Agreements were also dealt with differently. Any agreement between the mother and putative father, or between the father and any other person relating to the maintenance and support of the mother and child, required a judge's approval; otherwise it was voidable at the instance of the provincial officer.¹¹⁸ The provision dealing with agreements between the father and provincial officer was the same as in BC.¹¹⁹

Ontario's *CUPA* also preserved the action for necessities, but made several changes. It broadened the liability of the father to include the same expenses that he could be held liable for under a filiation order in addition to any expenses incurred by a person for food, clothing, lodging, or other necessities for the child until the age of sixteen.¹²⁰ The Judge would decide, in view of the circumstances of both parents, what proportion of the reasonable and necessary expenses the father should pay.¹²¹ If the action was brought by the mother, her parents, the provincial officer, or any person having care and custody of the child, the Judge could require the father to pay a weekly sum to provide for the further maintenance and education of the child for a specified period.¹²²

Saskatchewan (1927)

In 1927, Saskatchewan also enhanced its bureaucratic structure, replacing its Act with Part VII of the *Child Welfare Act*,¹²³ entitled "Children of Unmarried Parents". The

¹¹⁷ *ON CUPA, 1921, supra* note 85, s 31(2).

¹¹⁸ *Ibid*, s 32.

¹¹⁹ *Ibid*, s 33.

¹²⁰ *Ibid*, s 34.

¹²¹ *Ibid*, s 37.

¹²² *Ibid*, s 38.

¹²³ *The Welfare of Children Act, 1927, SS 1927, c 60 [SK Child Welfare Act, 1927]*.

Commissioner of Child Protection was now involved in the administration of the Act, as was the minister.¹²⁴ The registrar of vital statistics was obligated to notify the commissioner of the birth of a child whose parents were not legally married, as was any institution which received an unmarried girl or woman for care during pregnancy.¹²⁵ However, unlike the BC and Ontario legislation, the commissioner was not required to take any action upon notification.

In order to get a filiation order, an unmarried woman could apply to court for a summons for the father of the child as before. It was now possible for her father or mother, an officer of a children's aid society, or the commissioner or any officer of the Bureau of Child Protection to apply on her behalf.¹²⁶ The application had to be made within twelve months of either the birth, the last payment by the father for the maintenance of the child, or his return to the province if he left before twelve months after the birth.¹²⁷ No summons was possible if the mother and father of the child had entered into an agreement for the support of the child approved by the commissioner, unless the father neglected or refused to carry out its terms.¹²⁸ The Act specified that a woman under the age of twenty-one was capable of entering into an agreement.¹²⁹

Payments were still to be paid to the mother, but the judge now could order that payments be made to any person or charitable organization or society, or to the commissioner on behalf of the mother and child.¹³⁰ The father's ability and prospective means were to be considered in determining the weekly or monthly payment,¹³¹ and the judge could vary the order upon proof that the father's means had changed. The judge could also vary or

¹²⁴ Defined as a member of the Executive Council assigned to the administration of the Act (*ibid*, s 1).

¹²⁵ *Ibid*, s 157–58.

¹²⁶ *Ibid*, s 110.

¹²⁷ *Ibid*, s 114.

¹²⁸ *Ibid*, s 111(1).

¹²⁹ *Ibid*, s 111(2).

¹³⁰ *Ibid*, s 119.

¹³¹ *Ibid*, s 119.

rescind the order on application of the father.¹³² In addition, filiation orders could be made against one or more possible fathers.¹³³

A new provision allowed the judge to order that the mother bear part of the expense of maintaining the child, and to nurture and care for the child for at least six months or until she produced a certificate of a medical practitioner stating that she was unable to do so.¹³⁴ As in BC, the judge could declare the child to be “neglected” and commit the child to the care and custody of the commissioner or a children’s aid society, opening the path to possible adoption. The father or mother or both could continue to be liable to pay for the support of the child.¹³⁵ The judge could order the father to pay the costs in obtaining an order of filiation, and if no order was made, the father was entitled to the payment of his costs of defence by the mother or applicant on her behalf.¹³⁶ This possibility could represent a strong disincentive for a single mother to bring an action.

The Saskatchewan Act contained enhanced enforcement provisions,¹³⁷ and removed the provision allowing for a second hearing in the case of non-payment by the father. At any stage, a father against whom an order of filiation was made could pay a cash deposit fixed by the judge, which would discharge him from further proceedings under the Act.¹³⁸ In 1929, a change was made so that the cash deposit no longer went directly to the mother but to the commissioner to apply to the payment of the expenses.¹³⁹

The action for necessaries was changed significantly from the previous version, bringing it more in line with Nova Scotia’s version in the *Illegitimate Children’s Act, 1923*.¹⁴⁰ The

¹³² *Ibid*, s 120.

¹³³ *Ibid*, s 135.

¹³⁴ *Ibid*, s 122.

¹³⁵ *Ibid*, s 123.

¹³⁶ *Ibid*, s 124–25.

¹³⁷ *Ibid*, ss 129, 137–38.

¹³⁸ *Ibid*, ss 131–33.

¹³⁹ *Ibid*, s 127, as amended by *An Act to Amend the Child Welfare Act, 1927*, SS 1928-1929, c 65.

¹⁴⁰ *NS Illegitimate Children’s Act, 1923*, *supra* note 84.

two divisions were almost identical, with the commissioner in Saskatchewan added as one of the parties who could bring an action for necessaries against the father. The Saskatchewan Act also specified that the mother's evidence was not sufficient proof of paternity unless corroborated by other evidence,¹⁴¹ which was not a requirement in Nova Scotia.

In 1930, Part VII of Saskatchewan's *Child Welfare Act, 1927* was replaced,¹⁴² but many of the provisions remained the same. "Single woman" was defined to include "a widow, and a married woman living apart from her husband if the child is the offspring of an adulterous intercourse".¹⁴³ The Act now specified that all provisions applied even if the mother, father, or possible father were under the age of 21 years.¹⁴⁴

The weekly or monthly sum for the child's maintenance was to be determined with regard to the ability and prospective means of both the father and the mother.¹⁴⁵ The judge still had the ability to declare the child to be neglected and order delivery of the child to a children's aid society, but the mother and father were no longer liable to pay support in such a case. Further, the judge now had the ability, having regard to the welfare of the child, to order the child to be delivered to the father or to some person on his behalf.¹⁴⁶ The possibility of a father obtaining custody of an illegitimate child was unique to Saskatchewan.

The action for necessaries remained, but the father's liability was limited to situations in which no filiation order was made. He was no longer liable for the mother's burial if she died in consequence of the birth, and there was no longer a specified period of time for

¹⁴¹ *SK Child Welfare Act, 1927*, *supra* note 123, ss 145–55.

¹⁴² *Ibid*, as amended by *An Act to Amend The Child Welfare Act, 1927*, SS 1930, c 70.

¹⁴³ *Ibid*, s 104.

¹⁴⁴ *Ibid*, s 149.

¹⁴⁵ *Ibid*, s 119.

¹⁴⁶ *Ibid*, s 119.

which he was liable for her maintenance before and after the birth.¹⁴⁷ The section allowing the judge to order future maintenance was also removed.

BC (1927)

In 1927, BC amended its *CUPA*. It introduced a definition of “mother” that encompassed the notion of married women conceiving through an extra-marital relationship:

‘Mother’ means any single woman who has been delivered of an illegitimate child, or who is pregnant and likely to be delivered of an illegitimate child, or any married woman who is living apart from her husband and who has been delivered of an illegitimate child, or who is pregnant and likely to be delivered of an illegitimate child, and who was living apart from her husband at the time of the conception of the child.¹⁴⁸

Another significant change was made to affiliation orders, removing consideration of the father’s ability to pay and prospective means in determining the amount payable.¹⁴⁹ The enforcement provisions were also strengthened, introducing a provision allowing for garnishment if an affiliation order was unsatisfied.¹⁵⁰

Ontario (1927)

Ontario repealed its *CUPA* and introduced a new version in 1927.¹⁵¹ The action for necessaries was completely removed. Some powers to take custody of illegitimate children away from mothers were eliminated; the provincial officer could no longer apply for guardianship of an illegitimate child, and the judge was no longer allowed to make an order in respect of the custody of the child when making an affiliation order.¹⁵² The judge could now issue a warrant for the arrest of a man if there was good cause for believing

¹⁴⁷ *Ibid*, s 136.

¹⁴⁸ *Children of Unmarried Parents Act*, RSBC 1924, c 34, s 2 [*BC CUPA, 1924*], as amended by the *Children of Unmarried Parents Act Amendment Act, 1927*, SBC 1927, c 9.

¹⁴⁹ *Ibid*, s 9.

¹⁵⁰ *Ibid*, ss 7, 13A, 19A.

¹⁵¹ *The Children of Unmarried Parents Act, 1927*, RSO 1927, c 188 [*ON CUPA, 1927*].

¹⁵² *ON CUPA, 1921*, *supra* note 85.

that he was the father and was about to quit the jurisdiction with the intention of evading his obligations. Upon arrest, he could be required to give security or be imprisoned for up to three months.¹⁵³

All payments were to be made to a Public Trustee or as the judge directed in the case of periodic payments.¹⁵⁴ The agreements section was broadened to allow the provincial officer to enter into an agreement for the payment of expenses with any person, and not just with the putative father.¹⁵⁵ Finally, two new sections allowed the judge to make an order as to the costs of any proceedings under the Act, and provided a right of appeal by leave of a judge.¹⁵⁶ A case law review by Chambers reveals that, while very few appeals appeared in the law reports, the vast majority were appeals brought by fathers, who were successful in one third of the reported cases.¹⁵⁷

In 1928, a change was made requiring all payments due under an order or agreement to be made in the first instance to the provincial officer. Where the payment was a lump sum, the provincial officer was to pay to the Public Trustee any portion not immediately required for the maintenance of the child or other charges, to be invested subject to withdrawal from time to time by the provincial officer.¹⁵⁸ For women who had gone into debt while attempting to enforce arrears, the fact that they received not the lump sum, but only payments at the discretion of the officer, could cause significant financial hardship.¹⁵⁹

¹⁵³ *ON CUPA, 1927*, *supra* note 151, s 12(2).

¹⁵⁴ *Ibid*, s 27.

¹⁵⁵ *Ibid*, s 28.

¹⁵⁶ *Ibid*, ss 29–30.

¹⁵⁷ Chambers, *supra* note 9 at 34–35.

¹⁵⁸ *ON CUPA, 1927*, *supra* note 151, s 30, as amended by *The Children of Unmarried Parents Act Amendment Act, 1928*, SO 1928, c 28.

¹⁵⁹ Chambers, *supra* note 9 at 126.

1933 – 1956: Changing Procedure and Recognizing Unmarried Cohabitation

This period encompassed the difficult economic times of the Depression and then the Second World War. New opportunities for women arose in the workplace as a result, but marriage remained a key societal institution and illegitimacy remained a stigmatized state. BC and Ontario made a number of minor amendments to their legislation, mainly related to enforcement and procedure, and generally enhancing the power of the state vis-à-vis unmarried fathers. Saskatchewan and Nova Scotia introduced changes to their legislative schemes, including new recognition of children born within unmarried cohabitation.

BC

In 1934, the Superintendent in BC was given the power to request legal assistance from the municipality for himself and the mother in respect of any action to be taken in the interests of the mother and child.¹⁶⁰ In 1956, a new subsection provided that if a defendant was found to be the father of a child, but no order for the payment of money was made, then the Magistrate could decide to rehear the evidence or hear new evidence as to the means of the father.¹⁶¹ This provision reveals an attempt to address the potential problem of men being adjudged to be father but escaping liability.

Ontario

In 1933, Ontario broadened the father's liability to include burial expenses if the children died before the age of sixteen.¹⁶² Agreements were *prima facie* proof, not only of

¹⁶⁰ *BC CUPA, 1924, supra* note 148, s 5, as amended by the *Children of Unmarried Parents Act Amendment Act, 1934*, SBC 1934, c 10.

¹⁶¹ *Children of Unmarried Parents Act, RSBC 1948, c 48, s 10(2)*, as amended by the *Children of Unmarried Parents Act Amendment Act, 1956*, SBC 1956, c 6.

¹⁶² *ON CUPA, 1927, supra* note 151, s 14(1)(d), as amended by *The Statute Law Amendment Act, SO 1933, c 59*.

paternity, but of the ability and prospective means of the father to make the payments required by the agreement.¹⁶³ In 1935, the limitation period for an affiliation order application was removed when the father failed in whole or in part to carry out the terms of an agreement.¹⁶⁴ The section allowing an illegitimate child to be treated as a neglected child was repealed in 1949.¹⁶⁵

In 1954, the law dealing with Ontario children was consolidated into the *Child Welfare Act*,¹⁶⁶ with the provisions of the former *CUPA* contained in Part 3. Few substantial changes were made. The Act was now administered by the Director of Child Welfare, who had most of the powers of the provincial officer in the earlier Act. However, investigating with regard to an illegitimate child was no longer compulsory.¹⁶⁷ Few changes were made to the procedure for obtaining an affiliation order. The provision regarding agreements or orders binding the father's estate was rewritten to be more fair to the illegitimate child. If the terms of an agreement or order would deprive the widow or legitimate children of necessary maintenance, the judge could vary it to make equitable provision for the widow, the legitimate children, and the children born out of wedlock.¹⁶⁸

In 1956, Part 3 of the *Child Welfare Act* was repealed and replaced.¹⁶⁹ The sections permitting the Director to obtain information with respect to illegitimate children, to act in the child's interest, and to provide advice and protection to a mother were eliminated, signalling a diminishing role for the Director. The Act now showed a preference for matters to be settled by agreement. Where no agreement between the mother and putative father was in force, a local director and the mother could enter into an agreement with the putative father for the payment of expenses that would be covered by an affiliation order.

¹⁶³ *Ibid*, s 27(2).

¹⁶⁴ *Children of Unmarried Parents Act*, s 10(d), as amended by *An Act to amend the Children of Unmarried Parents Act*, SO 1935, c 7.

¹⁶⁵ *Children of Unmarried Parents Act*, s 7, as repealed by *The Statute Law Amendment Act*, SO 1949, c 95.

¹⁶⁶ *The Child Welfare Act, 1954*, SO 1954, c 8 [*ON Child Welfare Act, 1954*].

¹⁶⁷ *Ibid*, s 40.

¹⁶⁸ *Ibid*, s 61(3).

¹⁶⁹ *Ibid*, as amended by *The Child Welfare Amendment Act, 1956*, SO 1956, c 8.

Any money payable under an agreement was to be paid to the local director and then dealt with in the same way as a payment under an affiliation order.¹⁷⁰

Under an affiliation order, money was to be paid to the judge making the order, and then any payments for expenses were to be paid to the person who incurred them, and periodic maintenance payments were to be paid over to the person having care and custody of the child, giving some autonomy to the caregiver over the use of the funds. Any money paid as a fixed amount for maintenance that was not immediately required by the local director or by the judge to pay expenses or maintenance was to be paid to the Public Trustee to be invested, subject to withdrawal from time to time by the judge or local director.¹⁷¹ A new enforcement measure was available only where an illegitimate child was, or was likely to become, a public charge, which suggests a heightened concern with reimbursing the state for the costs of the child as compared with providing support to mothers. In that situation, the judge could order any person required to make payments to report to a probation officer for the purpose of ensuring that they were in compliance.¹⁷²

Saskatchewan

Saskatchewan's legislation underwent a series of changes, some procedural, but others more substantive. In 1937, the commissioner, subject to the approval of the minister, was now able to engage counsel to represent himself or a single mother, as the Superintendent could in BC, if he deemed it in the public interest to do so.¹⁷³ In 1938, a judge was required to release a father from jail if he married the mother.¹⁷⁴ As discussed below, marriage would result in the child being legitimated, which was viewed as one of the solutions to the problem of illegitimacy. In 1945, payments were no longer to be made

¹⁷⁰ *Ibid*, s 41.

¹⁷¹ *Ibid*, s 57.

¹⁷² *Ibid*, s 52.

¹⁷³ *SK Child Welfare Act, 1927, supra note 123, s 150a, as amended by An Act to amend The Child Welfare Act, SS 1937, c 82.*

¹⁷⁴ *Ibid*, s 128a, as amended by *An Act to amend The Child Welfare Act, SS 1938, c 81.*

directly to the mother, but to the department,¹⁷⁵ bringing Saskatchewan more in line with the approach taken in the other three provinces, and removing the autonomy that mothers in Saskatchewan used to have over the funds. Moneys received were to be paid by the department in reasonable monthly sums to the person with custody of the child.¹⁷⁶ Consistent with this shift to more bureaucratic control, the provision dealing with agreements between the mother and father was repealed, but agreements could still be entered between the father and director.¹⁷⁷

In 1946, Part VII of Saskatchewan's *Welfare of Children Act, 1927* was again repealed and replaced. The action for necessities was completely eliminated, while several changes were made to the filiation order process. The definition of "single woman" was rewritten as follows:

[A] mother or expectant mother who at the date of conception of the child was single, a widow or divorced or a married woman who for a period of at least six months prior to the date of conception has been living separate and apart from her husband and has continued so to live up to the date of the commencement of any proceedings under this Part.¹⁷⁸

Compared to the previous version, which included a married woman living apart from her husband whose child was "the offspring of an adulterous intercourse",¹⁷⁹ this definition broadened the class of children who would be considered legitimate despite the fact that they were the product of adultery. In this version, a child of an extra-marital affair would not be considered illegitimate unless the mother had been living apart from her husband for at least six months.

¹⁷⁵ At this time, the commissioner was replaced by the Director of Child Welfare (the "director") and the Bureau of Child Protection by the Department of Social Welfare (the "department"). The "minister" was defined as the Minister of Social Welfare (*SK Child Welfare Act, 1927, supra* note 123, s 2, as amended by *An Act to amend The Child Welfare Act*, SS 1945, c 100).

¹⁷⁶ *SK Child Welfare Act, 1927, supra* note 123, s 114(1)(a).

¹⁷⁷ *Ibid*, s 127.

¹⁷⁸ *The Child Welfare Act, 1946*, SS 1946, c 91, s 95 [*SK Child Welfare Act, 1946*].

¹⁷⁹ *SK Child Welfare Act, 1927, supra* note 123.

The procedure to apply for a filiation order was updated. The single woman, her father or mother, the director, or any officer of the department could institute proceedings by filing an affidavit.¹⁸⁰ A judge could order the mother to make payments to the director for the maintenance of the child, but could no longer require her to nurture and care for the child herself, nor declare the child “neglected” or to have the child delivered to the father. Periodic maintenance payments would terminate if the child were legally adopted.¹⁸¹ Apart from marriage, adoption was viewed as the other solution to illegitimacy, as adopted children gained the full legal status enjoyed by legitimate children.¹⁸²

In addition to these modernizing amendments, unique new provision recognized unmarried cohabitation:

[W]here a man and a single woman have been cohabiting as man and wife and a child or children is or are the offspring of such intercourse, filiation proceedings with respect to any such child may be commenced at any time within the period of two years succeeding the cessation of such cohabitation.¹⁸³

This provision extended the limitation period so that an unmarried mother who had cohabited with her child’s father could seek support for the child after a break up. While this provision did not exist in Ontario, Chambers found that Ontario mothers who had cohabited with the fathers of their illegitimate children received support orders more often than single unwed mothers, whose credibility was more often questioned.¹⁸⁴

A series of new enforcement provisions was added to the Saskatchewan Act, including execution against the father’s goods and lands if he was in default,¹⁸⁵ as were new provisions to assist mothers. Like BC and Ontario, Saskatchewan introduced a section allowing a single woman to apply to the director for advice and protection in matters

¹⁸⁰ *SK Child Welfare Act, 1946, supra* note 178, s 96.

¹⁸¹ *Ibid*, s 101.

¹⁸² *Fifth Report of the Commission on Family and Children’s Law: The Status of Children Born to Unmarried Parents*, Part II (Vancouver, BC, 1975) at 4 [*Fifth Report*].

¹⁸³ *SK Child Welfare Act, 1946, supra* note 178, s 102(2).

¹⁸⁴ Chambers, *supra* note 9 at 140.

¹⁸⁵ *SK Child Welfare Act, 1946, supra* note 178, s 110(1).

connected with her child, and he could take action in the interests of the single woman and child.¹⁸⁶ It also introduced a section allowing a single woman to apply to the Social Welfare Board¹⁸⁷ for financial assistance, and provided that

The board shall determine whether or not such mother has made reasonable effort to provide a suitable home for the child, has assumed the duties and responsibilities of motherhood and has made reasonable effort to obtain support from the father pursuant to the provisions of this Act or has given, in the opinion of the board, a satisfactory explanation as to why any or any further effort to obtain such support has not been or should not be made.

If successful, the mother would receive a monthly allowance, which could be cancelled at any time on the director's recommendation.¹⁸⁸ Thus, the mother's unwed status effectively gave the Board considerable power to pass judgment on their parenting abilities and to deny them assistance. Similarly, mothers of illegitimate children in BC were not eligible to receive social assistance unless they first attempted to get payments from the father.¹⁸⁹ Unwed mothers in Ontario were outright denied the mothers' allowance until reforms in 1956, when they finally became eligible provided they first attempted to procure payment from the father.¹⁹⁰ In general, the first wave of mothers' allowances and social assistance legislation reveals a reinforcement of a particular type of family unit formed by marriage. Women and children who fell outside the parameters of that traditional nuclear family were initially ineligible and, once eligibility slowly emerged, strict conditions attached.¹⁹¹

¹⁸⁶ *Ibid*, s 115.

¹⁸⁷ Established under *The Department of Social Welfare Act, 1944*, SS 1944 (2d Sess), c 10.

¹⁸⁸ *SK Child Welfare Act, 1946*, *supra* note 178, s 116.

¹⁸⁹ *Fifth Report*, *supra* note 182 at 2.

¹⁹⁰ Chambers, *supra* note 9 at 130–31.

¹⁹¹ For an overview of six provinces, including the four we have studied, see Shelley AM Gavigan & Dorothy E Chunn, "Women, the State and Welfare Law: The Canadian Experience" in Gavigan & Chunn, eds, *The Legal Tender of Gender: Welfare, Law and the Regulation of Women's Poverty* (Oxford and Portland, Oregon: Hart Publishing, 2010) 46–72.

The marriage of a single woman before the birth abated all proceedings under Part VII of the *Child Welfare Act*.¹⁹² Thus, as long as the mother was married at the time of birth, the child would be considered legitimate regardless of her marital status at conception. Two new evidentiary provisions were added for the purposes of proving whether a child was the child of the father and whether the child was legitimate. First, notwithstanding any law to the contrary, a married woman and her husband were permitted to give evidence as to whether she or he had sexual intercourse with the other party at any time before or during the marriage.¹⁹³ Second, the mother or other applicant could call the alleged father as a witness and cross-examine him with leave of a judge, but would not be bound by his testimony.¹⁹⁴ Additionally, in 1947, it was specified that if a man in jail married the mother, he could be released from jail.¹⁹⁵ The father's release is consistent with the legitimation legislation, discussed below, which deemed a child to be legitimate if her or his parents married after the birth.

In 1949, the minister was given the discretion to excuse a father from making further payments required by any agreement, providing the father with another possible route to avoid payment.¹⁹⁶ In 1953, further changes were made to the filiation order provision. Notably, the amount of maintenance for the mother was now limited to \$100 total in addition to the medical and hospital expenses incidental to the lying in and birth,¹⁹⁷ whereas previously the father would have been required to pay all expenses incidental to the lying in and maintenance of the mother prior to the order. Further, the father's ability and prospective means were to be considered in determining all expenses he was to be ordered to pay, and not just in determining the amount of future maintenance for the child.¹⁹⁸ Thus, he would not necessarily be ordered to pay in full the expenses related to the birth of the child, maintenance prior to the order, and costs incurred to obtain the

¹⁹² *SK Child Welfare Act, 1946, supra* note 178, s 127.

¹⁹³ *Ibid*, s 124.

¹⁹⁴ *Ibid*, s 125.

¹⁹⁵ *Ibid*, s 110(4), as amended by *An Act to Amend the Child Welfare Act*, SS 1947, c 94.

¹⁹⁶ *Ibid*, s 113a, as amended by *An Act to Amend the Child Welfare Act*, SS 1949, c 106.

¹⁹⁷ *Ibid*, s 101, as amended by *An Act to Amend the Child Welfare Act*, SS 1953, c 104.

¹⁹⁸ *Ibid*, s 101(1)(b).

filiation order. The provision allowing a mother to apply for financial assistance was modified so that *The Social Aid Act, 1947*¹⁹⁹ would apply to such an application.²⁰⁰

Nova Scotia

Having remained the same since 1923, Nova Scotia's legislation was amended in 1938 to add a new definition of "possible father", which included "any two or more persons who have had sexual intercourse with the mother of a child and by any one of whom it is possible that she was pregnant with such child".²⁰¹ Filiation orders could be made against any one of the possible fathers, or against two or more of the possible fathers, fixing an amount to be paid by each.²⁰² This change made it possible to obtain support from a possible father even though paternity could not be proved. In 1941, the Director of Child Welfare appointed under the *Children's Protection Act* first became involved in the *Illegitimate Children's Act*. A copy of every filiation order, or order confirming, reversing, or modifying an order, was required to be transmitted to the Director.²⁰³

In 1951, Nova Scotia repealed its *Illegitimate Children's Act* and introduced the *CUPA*.²⁰⁴ The Act was divided into three parts: "Filiation Proceedings", "Civil Liability of the Father", which dealt with the action for necessaries, and "General", which dealt with legitimation, discussed below in Part III. A definition of "single woman"²⁰⁵ was introduced, identical to that in Saskatchewan's *Child Welfare Act, 1946*.²⁰⁶

¹⁹⁹ *The Social Aid Act, 1947*, SS 1947, c 95.

²⁰⁰ *SK Child Welfare Act, 1946*, *supra* note 178, s 116, as amended by *An Act to Amend the Child Welfare Act*, SS 1953, c 104.

²⁰¹ *NS Illegitimate Children's Act, 1923*, *supra* note 84, s 2, as amended by *An Act to amend Chapter 49 of the Revised Statutes, 1923*, "The Illegitimate Children's Act", SNS 1938, c 20.

²⁰² *Ibid*, s 20A.

²⁰³ *Ibid*, s 19A, as amended by *An Act to Amend Chapter 49 of The Revised Statutes, 1923*, "The Illegitimate Children's Act", SNS 1941, c 25.

²⁰⁴ *Children of Unmarried Parents Act*, SNS 1951, c 3 [*NS CUPA, 1951*].

²⁰⁵ *Ibid*, s 2.

²⁰⁶ *SK Child Welfare Act, 1946*, *supra* note 178.

The first part of the Act dealing with Filiation Proceedings now had many similarities with the proceedings in Saskatchewan. A single woman or any of the “informants” could lay an information stating the name of the father, or the names of all possible fathers.²⁰⁷ Thus it was no longer mandatory for the woman to lay an information herself. The justice would issue a summons or warrant for the putative father,²⁰⁸ but could no longer issue a warrant to apprehend the mother.

After the birth, the judge could make a filiation order requiring the father to pay the same expenses as in the previous Act, with the addition of the funeral expenses of the mother if she died in consequence of the birth.²⁰⁹ The judge could no longer order the mother to nurse the child, but could still require her to bear part of the expense of maintenance.²¹⁰ The means of both the father and the mother were to be considered in determining a periodic or lump sum towards the child’s maintenance until the child reached sixteen, died, or was legally adopted.²¹¹ The money was no longer paid to the overseers of the poor, but to a person who agreed to receive the money and who in the opinion of the magistrate could be relied upon to apply the money properly for the benefit of the mother and child.²¹² In 1954, this changed so that filiation order payments were to go to an officer of a municipality, the Director of Child Welfare, a Children’s Aid Society, a charitable corporation or organization, or to a capable and reliable person who consented to receive and apply the money.²¹³

²⁰⁷ *NS CUPA, 1951, supra* note 204, ss 3, 6. The informants could be her father or mother, the Director of Child Welfare, an agent of a Children’s Aid Society, one of the Overseers of the Poor, or the Clerk of the municipality in which the child was likely to have settlement.

²⁰⁸ *Ibid*, s 4.

²⁰⁹ *Ibid*, s 5(3)(d).

²¹⁰ *Ibid*, s 5(5).

²¹¹ *Ibid*, s 5(3)(b).

²¹² *Ibid*, s 5(3).

²¹³ *Children of Unmarried Parents Act*, RSNS 1954, c 31, s 5(3).

Orders could be varied if changed conditions made it just to do so.²¹⁴ If the single woman died before proceedings were taken or completed, any of the informants were entitled to institute or continue proceedings on behalf of the child.²¹⁵ The Director was given the power to intervene at any stage of any proceedings under Part I.²¹⁶

Nova Scotia also introduced the same provision as Saskatchewan dealing with cohabitation, providing that proceedings with respect to a child of a man and woman cohabiting could be commenced within two years of the cessation of cohabitation.²¹⁷ A man could now enter into an agreement with the Director or Children's Aid Society to provide for the maintenance and education of the child and to pay the other expenses covered by filiation orders, and if he did so, no proceedings under Part I could be instituted against him while he was not in default.²¹⁸

As in Saskatchewan, no filiation proceedings were possible if the single woman married between the date of conception and birth, so that children of married parents at birth were to be considered legitimate regardless of the parents' status at conception,²¹⁹ and a married woman and her husband could give evidence as to whether they had sexual intercourse at any time before or during the marriage in order to establish paternity.²²⁰ Filiation proceedings were to be closed hearings.²²¹ Nova Scotia still did not require that a mother's testimony be corroborated; only that the magistrate was satisfied that the putative father was the father of the child.²²²

²¹⁴ *NS CUPA, 1951, supra* note 204, s 7.

²¹⁵ *Ibid*, s 13.

²¹⁶ *Ibid*, s 24.

²¹⁷ *Ibid*, s 14(2).

²¹⁸ *Ibid*, s 15.

²¹⁹ *Ibid*, s 26.

²²⁰ *Ibid*, s 22.

²²¹ *Ibid*, s 23.

²²² *Ibid*, s 5.

1957 – 1967: Modernizing and Updating Language

Over the course of this decade, stigmatizing language dealing with “illegitimacy” and poverty was updated, and other modernizing changes were introduced. In 1957, Ontario’s requirement that the director be notified of illegitimate births was removed. The children’s aid societies took over the powers of the local directors and all references to the “local director” were replaced with the “society”.²²³ In 1961, the mother and the society were given the power to apply for an order to enforce an agreement when a putative father was in default, rather than having to apply for an affiliation order.²²⁴

In 1960, Nova Scotia updated its *CUPA*, changing all references to the *Poor Relief Act* to the *Social Assistance Act*, and “overseers of the poor” to “the welfare committee”.²²⁵ In 1963, around the time that blood tests were developed that could negate paternity, the judge or magistrate was given the power to order the mother, her child and the putative father to blood-grouping tests to determine whether the putative father could be excluded as being the father of the child. If the mother refused, the court could infer that the test would have established that he could not be the father. The admissibility of this evidence was very restrictive, with results admissible only where they established definite exclusion of the man as father.²²⁶

In 1962, Saskatchewan updated the filiation order provision to no longer limit the amount of maintenance that could be ordered for the mother to \$100.²²⁷ In 1967, payments under

²²³ *ON Child Welfare Act, 1954*, *supra* note 166, s 1, as amended by *The Child Welfare Amendment Act, 1954*, SO 1957, c 12.

²²⁴ *Ibid*, s 43(5), as amended by *The Child Welfare Amendment Act, 1961-62*, SO 1961-62, c 14.

²²⁵ *An Act to Amend Chapter 31 of the Revised Statutes, 1954, the Children of Unmarried Parents Act*, SNS 1960, c 18.

²²⁶ *NS CUPA, 1951*, *supra* note 204, s 41, as amended by *An Act to Amend Chapter 31 of the Revised Statutes, 1954, the Children of Unmarried Parents Act*, SNS 1963, c 16.

²²⁷ *SK Child Welfare Act*, RSS 1953, c 239, s 94(2)(b), as amended by *An Act to Amend the Child Welfare Act*, SS 1962, c 11.

filiation orders were to be made to “the mother or other person who consents thereto”,²²⁸ rather than to the department, signalling a return to greater financial autonomy for unwed mothers. The Act also dealt with payments under orders or agreements from prior to 1967. Moneys due to the department could, if the director, mother, and putative father agreed, be paid directly to the mother. If they did not agree, moneys were to be held in a special trust and, after payment of expenses, paid in reasonable monthly sums towards the maintenance of the child to the person or institution having custody.²²⁹

In 1963, the *BC Statute Law Amendment Act*²³⁰ removed the use of the word “illegitimate” where it still appeared in the *CUPA* and replaced it with “born out of wedlock”. In the same year, a few other changes were made. The requirement of a proof of change in circumstances in order to vary an affiliation order was removed.²³¹ The agreements section was modified to include a somewhat greater role for mothers; the putative father could enter into an agreement with the Superintendent, alone or with the mother, for the maintenance and education of the child, but it was still not possible to make an agreement with the mother alone. He could also enter an agreement with the Superintendent and the mother for a lump sum in cash, which would rescind any affiliation order and bar proceedings under the Act in respect of the child.²³²

Ontario introduced a new version of the *Child Welfare Act* in 1965, which required the appointment of a guardian *ad litem* to safeguard the interests of the putative father or mother if he or she was under the age of 21 years.²³³ The judge could make any order notwithstanding the infancy of either parent.²³⁴ This provision, and the similar provision

²²⁸ *SK Child Welfare Act*, RSS 1965, c 268, s 100(2) [*SK Child Welfare Act, 1965*], as amended by *An Act to Amend The Child Welfare Act*, SS 1967, c 63.

²²⁹ *Ibid*, s 115(1)-(2), as amended by *An Act to Amend The Child Welfare Act*, SS 1967, c 63.

²³⁰ *Statute Law Amendment Act, 1963*, SBC 1963, c 42.

²³¹ *Children of Unmarried Parents Act*, RSBC 1960, c 52, s 11 [*BC CUPA, 1960*], as amended by the *Children of Unmarried Parents Act Amendment Act, 1963*, SBC 1963, c 7.

²³² *BC CUPA, 1960*, *supra* note 231, s 26.

²³³ *The Child Welfare Act, 1965*, SO 1965, c 14, s 52(1) [*ON Child Welfare Act, 1965*].

²³⁴ *Ibid*, s 65.

in Saskatchewan for making orders notwithstanding the age of the parents,²³⁵ may indicate concern with teenage pregnancy. While some studies found increasing numbers of teenage illegitimate births,²³⁶ Chambers found that the women seeking support for illegitimate children in Ontario were not overwhelmingly young. Stereotypes that non-cohabiting mothers were unintelligent or delinquent also proved to be false.²³⁷

1970 – present: Modernizing and Convergence with Children Born Within Marriage

Over time, as the previous section suggests, there was a gradual convergence between the treatment of children of unmarried parents and children of married parents. As well, the role of public officials diminished in favour of an increasing focus on parents working out the financial arrangements for illegitimate children themselves.

In 1970, Ontario's Act was amended to allow the mother, putative father, society, or mother and society together to apply to a judge to vary the terms of an agreement.²³⁸ Agreements could be made, and affiliation orders could be applied for, before the birth of the child if it appeared that the child was likely to be born out of wedlock.²³⁹ An application for an affiliation order was only possible if there was no agreement or where the putative father was in default under an agreement.²⁴⁰ In 1972, maintenance could be ordered for a child up to the age of eighteen if in full-time attendance at an educational

²³⁵ *SK Child Welfare Act, 1927*, *supra* note 123.

²³⁶ Social Planning Council of Metropolitan Toronto, *Maternity Homes in Metropolitan Toronto* (Toronto, 1960) at 10; Phillips Cutright, "The Teenage Sexual Revolution and Myth of the Abstinent Past" (1972) 4:1 *Family Planning Perspectives* 24.

²³⁷ Chambers, *supra* note 9 at 61.

²³⁸ *ON Child Welfare Act, 1965*, *supra* note 233, s 50(6), as amended by *The Child Welfare Amendment Act, 1970*, SO 1970, c 96.

²³⁹ *Ibid*, s 50(1).

²⁴⁰ *Ibid*, s 51.

institution.²⁴¹ In 1975, section 61, which dealt with the enforcement of payments where the child was a public charge, was repealed.²⁴²

In 1973, Part III was removed from the Saskatchewan *Child Welfare Act* and was made into an independent enactment, the *CUPA*, administered by the Department of Social Services.²⁴³ The parties who could apply for a filiation order were now the single woman whether or not she was under eighteen, her father or mother on her behalf if she was under eighteen, or her father, mother, guardian, or interested friend if she was mentally incapacitated at any age.²⁴⁴ The director no longer had standing to bring an application and the agreements provision was modified to give more autonomy to mothers. Where the father admitted paternity in writing and made, in the opinion of the mother, an adequate offer for the maintenance of the child, he could enter into an agreement directly with the mother unless the child had been committed to the minister. Upon default, the mother could apply for a filiation order.²⁴⁵ In 1983, many of the enforcement provisions were repealed, with orders to be enforced in the same way as ordinary court orders.²⁴⁶

In 1975, BC repealed its requirement that affiliation proceedings be held in private.²⁴⁷ In 1978, it repealed many of the Act's enforcement provisions.²⁴⁸ Instead, the enforcement provisions of the *Family Relations Act*²⁴⁹ applied.²⁵⁰ In 1979, the title of the Act was

²⁴¹ *The Child Welfare Act*, RSO 1970, c 64, s 59(1)(b)-(2) [*ON Child Welfare Act, 1970*], as amended by *The Child Welfare Amendment Act, 1972*, SO 1972, c 109.

²⁴² *ON Child Welfare Act, 1970*, *supra* note 241, s 61, as repealed by *The Child Welfare Amendment Act, 1975*, SO 1975, c 1.

²⁴³ *The Children of Unmarried Parent Act, 1973*, SS 1973, c 12, s 2.

²⁴⁴ *Ibid*, s 3.

²⁴⁵ *Ibid*, s 20(1)-(3).

²⁴⁶ *The Statute Law Amendment Act, 1983*, SS 1983, c 66.

²⁴⁷ *Children of Unmarried Parents Act*, s 18, as repealed by the *Provincial Court Act*, SBC 1975, c 57.

²⁴⁸ *Children of Unmarried Parents Act*, ss 13(2), 14, 21, 22, 23, as repealed by *Miscellaneous Statutes Amendment Act*, SBS 1978, c 28.

²⁴⁹ *Family Relations Act*, RSBC 1979, c 121.

²⁵⁰ *Children of Unmarried Parents Act*, s 18, as amended by the *Miscellaneous Statutes Amendment Act, 1978*, SBC 1978, c 28.

changed to the *Child Paternity and Support Act*,²⁵¹ without altering the substance of the legislation. In 1981, the section requiring the judge to order maintenance for a child according to a “reasonable standard of living”²⁵² was repealed and replaced with the following:

9 (1) Where a judge finds that a putative father is the father of the child, he shall fix maintenance and in making an order for maintenance the judge shall consider that the father is responsible and liable for the reasonable and necessary support and maintenance of the child, taking into account

- (a) the cost of reasonable residential accommodation, housekeeping, food, clothing, education, recreation and supervision for the child,
- (b) the child’s need for a stable and supportive environment, and
- (c) the financial circumstances and obligations of each person liable for the support and maintenance of the child.

The same criteria were applicable to determining whether the mother would be required to contribute weekly to the maintenance of the child.²⁵³ These were the same factors to be considered in determining the amount of maintenance for a child born within marriage.²⁵⁴

In 1971, Nova Scotia’s *CUPA* was amended, increasing the maximum age at which maintenance could be ordered from sixteen to eighteen.²⁵⁵ The language of the statute was updated to refer to child using the pronoun “him” rather than “it”. In 1980, the *CUPA* was repealed by the *Family Maintenance Act*,²⁵⁶ which dealt with the maintenance of both children of married parents and children of unmarried parents. In the interpretation section, “single woman” was defined as a mother or expectant mother who, at the date of conception, was not married to the father of the child.²⁵⁷ The Part of the act dealing with

²⁵¹ *Child Paternity and Support Act*, RSBC 1979, c 49.

²⁵² *Ibid*, s 9.

²⁵³ *Ibid*, ss 8–9, as amended by the *Miscellaneous Statutes Amendment Act (No 1)*, SBC 1981, c 20.

²⁵⁴ *Family Relations Act*, *supra* note 249, s 56.

²⁵⁵ *The Children of Unmarried Parents Act*, RSNS 1967, c 32, ss 4(3)(b), 27(2)(a) [*NS CUPA*, 1967], as amended by *An Act to Amend Chapter 32 of the Revised Statutes, 1967, the Children of Unmarried Parents Act*, SNS 1971, c 30.

²⁵⁶ *Family Maintenance Act*, SNS 1980, c 6, s 53 [*NS Family Maintenance Act*, 1980].

²⁵⁷ *Ibid*, s 2(1).

maintenance for children of unmarried parents was much more compact than the *CUPA*, comprising only four sections. Section 11 provided that upon complaint during or after pregnancy, the court could order the possible father, the single mother, or both to pay towards the expenses incidental to the lying in and birth of the child, towards the maintenance of the child for so long as the child was a “dependent child”,²⁵⁸ the funeral expenses of the child if the child died prior to the date of the order, and of the mother if she died in consequence of the birth.

Section 12 set out the factors that a court had to consider in determining the amount of maintenance to order: (a) the reasonable needs of the child, (b) the reasonable needs and ability to pay of the person obliged to pay, (c) the reasonable needs and means of the mother during lying in, and (d) the ability of the child to contribute to his own maintenance. The factors to be considered in determining the amount of maintenance for a child of married parents were the same, except that (c) was replaced with the ability to pay of another parent or guardian supporting the child.²⁵⁹ Under section 13, no action was possible against a father who admitted paternity and was carrying out the terms of an agreement with an agency filed with the Minister. Such an agreement could be registered with a judge and would then have the same effect as an order. Finally, section 14 set the limitation period, unchanged from the previous version. In 1983, a new factor was added: the court could consider, as a minimum standard, the amount of family benefits paid by the Province pursuant to the *Family Benefits Act*²⁶⁰ for a dependent child.²⁶¹

²⁵⁸ Defined as “a child who is under the age of majority or, although over the age of majority, unable to withdraw from the charge of the parents or provide himself with reasonable needs but does not include a child twenty-four years of age or older who is attending a post-secondary educational institution”: *ibid*, s 2(c).

²⁵⁹ *Ibid*, ss 9–10.

²⁶⁰ *Family Benefits Act*, SNS 1977, c 8.

²⁶¹ *NS Family Maintenance Act, 1980*, *supra* note 256, s 12(2), as amended by *An Act to Amend Chapter 6 of the Acts of 1980, the Family Maintenance Act*, SNS 1983, c 64.

The 1989 *Maintenance and Custody Act*²⁶² is the statute currently in force in Nova Scotia, and applies to children of both married and unmarried parents. It contains the same provisions with respect to children of unmarried parents as in the 1980 version. In 1997, section 12 was repealed, leaving no list of factors to be considered in determining the amount of maintenance for a child of unmarried parents. At the same time, the *Child Maintenance Guidelines* were introduced by regulation,²⁶³ setting the amount of maintenance for all children, regardless of whether their parents are married,²⁶⁴ by reference to the *Federal Child Support Guidelines*.²⁶⁵

Having reviewed the legislation on financial support at length, we turn to the much shorter story of how the legal system provided for legitimation of children born outside marriage.

III. LEGITIMATION

1919 – 1980

Even approaching the middle of the 20th century, marriage remained by far the privileged environment for motherhood: “Wherever possible the unwed mother was encouraged to marry, even if the prospective husband was unsuitable, because marriage was seen as the only means of achieving a respectable living other than entering the convent.”²⁶⁶ In the early twentieth century, legitimation legislation was introduced alongside the legislation on financial support of illegitimate children, allowing for children of unmarried parents to be deemed legitimate if their parents subsequently married. According to Chambers, this legislation “was intended not only to improve the legal and social status of illegitimate children but also to provide an incentive for cohabiting couples to formalize their relationships and for couples caught pregnant to have shotgun weddings; the state

²⁶² *Maintenance and Custody Act*, RSNS 1989, c 160.

²⁶³ *Child Maintenance Guidelines*, NS Reg 53/98.

²⁶⁴ *Maintenance and Custody Act*, *supra* note 262, s 10(1).

²⁶⁵ *Federal Child Support Guidelines*, SOR/97-175.

²⁶⁶ Prentice, *supra* note 71 at 260.

rewarded conformity rather than explicitly punishing non-marital cohabitation.”²⁶⁷ Clarkson’s BC study found that in some cases, a mother’s *CUPA* claim might result in marriage of the parties, which then gave her and the children property and other rights.²⁶⁸ Clarkson’s research also reveals that earlier failed attempts to introduce legitimacy legislation in the 19th century reflected concerns about generating legal responsibilities within interracial marriages, in particular “country marriages”, or marriages between white colonists and Native wives.²⁶⁹

BC enacted legislation regarding the legitimation of children in 1919,²⁷⁰ with Saskatchewan following in 1920,²⁷¹ Ontario in 1921,²⁷² and Nova Scotia in 1924.²⁷³ BC, Saskatchewan, and Ontario each enacted a separate statute dealing only with legitimation, called the *Legitimation Act*, while Nova Scotia added legitimation provisions to the *Illegitimate Children’s Act*, which also provided for the maintenance of illegitimate children, as discussed above.

The BC and Saskatchewan versions of the *Legitimation Act* were identical, providing that:

Where the parents of any child born out of lawful wedlock have intermarried after the birth of the child . . . the child shall for all purposes be deemed to be and to have been legitimate from the time of birth.²⁷⁴

²⁶⁷ Chambers, *supra* note 9 at 27.

²⁶⁸ Clarkson, *supra* note 6 at 179.

²⁶⁹ *Ibid* at 54–62.

²⁷⁰ The *Marriage Act*, RSBC 1911, c 151 was first amended to include a section on legitimation in 1919 (*Marriage Act Amendment Act, 1919*, SBC 1919, c 52), until the *Legitimation Act*, SBC 1922, c 43 came into force and contained substantially the same provision [*BC Legitimation Act, 1922*]. See Clarkson, *supra* note 6 at n 132, for the background to this legislation.

²⁷¹ *The Legitimation Act, 1920*, SS 1919–20, c 83 [*SK Legitimation Act, 1920*].

²⁷² *The Legitimation Act, 1921*, SO 1921, c 53 [*ON Legitimation Act, 1921*].

²⁷³ *An Act to amend Chapter 49, Revised Statutes, 1923, “The Illegitimate Children’s Act”*, SNS 1924, c 20, s 6.

²⁷⁴ *BC Legitimation Act, 1922*, *supra* note 270, ss 2–3; *SK Legitimation Act, 1920*, *supra* note 271, ss 2–3.

The provision did not, however, affect any vested right, title, or interest in property. If the marriage took place before the passing of the Act, the provision did not affect property rights that vested prior to the passing of the Act. If the marriage took place after the passing of the Act, it did not affect rights vested prior to the marriage.²⁷⁵ This limitation reflected the cautious approach to extending inheritance rights to illegitimate children.²⁷⁶

Ontario's *Legitimation Act* differed in two respects. First, the inheritance rights of a legitimated child were qualified, setting up a hierarchy vis-à-vis children born legitimate. Notwithstanding the subsequent marriage of her or his parents, a child born out of lawful wedlock was "postponed as to inheritance to a child born in lawful wedlock to the same father under a previous marriage to another woman or to the same mother under a previous marriage to another man."²⁷⁷ Second, the Act provided some protection to a woman who unknowingly married an already married man whose wife was living. If the man died, such a woman and her children by the man were entitled to a lien or charge on his estate for sums advanced by them for the purchase, maintenance, upkeep, discharge of encumbrances, or improvement of property of which the man died possessed. However, other just debts and funeral and testamentary expenses took priority.²⁷⁸

Nova Scotia's 1924 amendment to the *Illegitimate Children's Act* spelled out the rights of an illegitimate child whose parents intermarried after her or his birth. Such a child was deemed to have had from birth and for all purposes: "all the civil rights and privileges of a child born in lawful wedlock, including, but not so as to restrict the generality of the foregoing, the right to inherit property upon an intestacy in the same manner and to the same extent as a child born in lawful wedlock" and "the status and capacity of a child born in lawful wedlock . . . and for all purposes to be a lawful lineal descendant and a

²⁷⁵ *Ibid.*

²⁷⁶ *Fifth Report*, *supra* note 182 at 2.

²⁷⁷ *ON Legitimation Act, 1921*, *supra* note 272, s 2.

²⁷⁸ *Ibid.*, s 4.

child of said mother and putative father.”²⁷⁹ As in BC and Saskatchewan, these sections did not affect vested property rights.²⁸⁰ In addition, the mother was made the lawful heir of her illegitimate child in the same manner as if the child had been legitimate.²⁸¹

Ontario’s *Legitimation Act* was repealed and replaced with a new version in 1927. The qualification on inheritance rights was reworded so that “a child born while its father was married to another woman or while its mother was married to another man shall not inherit in competition with the lawful children of either parent.”²⁸² In addition, the parents and siblings of a child legitimated under the Act would inherit upon the child’s death as though he had been legitimate.²⁸³ The provision dealing with the rights of a woman who had unknowingly gone through a marriage ceremony with a married man was changed significantly. It became gender-neutral and dealt only with the case where a second marriage took place in the *bona fide* belief of the death of a former spouse in circumstances where the crime of bigamy was not committed. Ontario was the first of the four provinces to introduce a provision dealing with the situation of a remarriage after a former spouse was presumed dead but turned out to be alive. In such a case, children conceived before knowledge that the former spouse was living would inherit equally with lawful children if the mother or father died intestate.²⁸⁴

In 1944, Ontario added a new section giving some inheritance rights to illegitimate children. If a mother died intestate leaving no legitimate issue, the illegitimate child or his issue could inherit as though she or he were legitimate. Likewise, the mother was entitled to inherit from the illegitimate child, unless the child was adopted.²⁸⁵ Similarly, the other

²⁷⁹ *NS Illegitimate Children’s Act, 1923*, *supra* note 84, ss 32–33, as amended by *An Act to amend Chapter 49, Revised Statutes, 1923*, “*The Illegitimate Children’s Act*”, SNS 1924, c 20.

²⁸⁰ *NS Illegitimate Children’s Act, 1923*, *supra* note 84, s 34.

²⁸¹ *Ibid*, s 31.

²⁸² *The Legitimation Act, 1927*, RSO 1927, c 187, s 2.

²⁸³ *Ibid*, s 3.

²⁸⁴ *Ibid*, s 5.

²⁸⁵ *The Legitimation Act*, RSO 1937, c 216, s 6, as amended by the *Legitimation Amendment Act, 1944*, SO 1944, c 32.

three provinces recognized the mother–child relationship for inheritance purposes in their intestate succession legislation.²⁸⁶

The aftermath of the Second World War led to the enactment in BC of the *Equal Rights for Children Act*²⁸⁷ in 1945. This Act dealt with situations where a court had made an order of presumption of death under the *Marriage Act*, or where the Department of National Defence had given official notification of death or presumption of death of a member of the Naval, Military, or Air Force. As in Ontario's *Legitimacy Act*, if the spouse of a person presumed dead remarried, and the person turned out to be alive, the children of the second marriage were deemed to have been legitimate from birth. They were given the same rights under the *Administration Act*, and were deemed for the purpose of assessing succession and probate duties to have the same status and relationship, as they would have had if the person presumed dead had in fact died.²⁸⁸

In 1950, Ontario replaced the provision dealing with void marriages with a more detailed version giving more rights to an illegitimate child conceived where a marriage took place in the *bona fide* belief of the death of a former spouse or where a judge had made an order of presumption of death pursuant to the *Marriage Act*. Children conceived before knowledge of the fact that the former spouse was living were deemed to have been legitimate from birth and were given the same rights, benefits, and obligations under any law that they would have had if they person had in fact died, unless the marriage was otherwise invalid.²⁸⁹

In 1960, the BC *Legitimation Act* and the *Equal Rights for Children Act* were repealed and replaced by the *Legitimacy Act*,²⁹⁰ which combined and expanded upon the two

²⁸⁶ *The Intestate Succession Act*, RSS 1930, c 89, ss 16-17; *Administration Act*, RSBC 1936, c 5, ss 124–25; *Intestate Succession Act*, RSNS 1967, c 153, s 15.

²⁸⁷ *Equal Rights for Children Act*, SBC 1945, c 8.

²⁸⁸ *Ibid*, s 2.

²⁸⁹ *The Legitimation Act*, RSO 1950, c 203, s 5.

²⁹⁰ *Legitimacy Act*, SBC 1960, c 25 [*BC Legitimacy Act, 1960*].

repealed Acts. Similarly, in 1961, Saskatchewan and Ontario each repealed their *Legitimation Act*, replacing it with the *Legitimacy Act*,²⁹¹ which was identical to the version in BC. The substance of the provision relating to legitimation by marriage remained the same,²⁹² as did the provision dealing with a remarriage after a former spouse was presumed dead, which now simply provided that the child of such a marriage was “legitimate for all purposes of the law of the Province.”²⁹³

The *Legitimacy Act* contained several new sections dealing with void and voidable marriages. Where a decree of nullity was granted in respect of a voidable marriage, or where a void marriage was registered in substantial compliance with the law and either of the parties reasonably believed that it was valid, the child of the parties was nevertheless legitimate.²⁹⁴ The provisions on void and voidable marriages, including the section dealing with presumptions of death, applied regardless of whether the child was born before or after the marriage, but did not apply where the child was born eleven months after the marriage was annulled or declared to be void. The Act applied to legitimate a child notwithstanding the death of the child before the marriage of the parents.²⁹⁵ Finally, the provisions on void and voidable marriages did not affect vested property rights prior to the coming into force of the *Legitimacy Act* or prior to the marriage,²⁹⁶ unlike the *Equal Rights for Children Act*.

In contrast to the other provinces, Nova Scotia’s legitimation provisions did not change until 1970 when a new section deemed a child of a void marriage to be legitimate if the parents celebrated a marriage in accordance with the laws of the place in which the marriage was celebrated and either party believed that the marriage was valid.²⁹⁷ The

²⁹¹ *The Legitimacy Act, 1961*, SS 1961, c 4; *The Legitimacy Act, 1961-62*, SO 1961-62, c 71.

²⁹² *BC Legitimacy Act, 1960*, *supra* note 290, s 2.

²⁹³ *Ibid*, s 4.

²⁹⁴ *Ibid*, ss 3, 5.

²⁹⁵ *Ibid*, s 6.

²⁹⁶ *Ibid*, s 7.

²⁹⁷ *NS CUPA, 1967*, *supra* note 255, s 35A, as amended by *An Act to Amend Chapter 32 of the Revised Statutes, 1967, the Children of Unmarried Parents Act*, SNS 1970, c 32.

1980 *Family Maintenance Act* added that “for the avoidance of doubt,” a child continued to be legitimate notwithstanding the annulment of a voidable marriage.²⁹⁸

IV. ABOLISHING THE STATUS OF ILLEGITIMACY

1977 – Present

By the 1970s, many calls were being made for the abolition of the distinction between children born within and outside marriage, in part due to the increasing recognition that significant numbers of children were being born within unmarried unions and also in the name of children’s rights. For instance, in 1975, the Royal Commission on Family and Children’s Law in BC recommended abolishing the status of illegitimacy. This recommendation was based on the principle that children should be treated equally regardless of whether their parents are married. The Report also focussed on the rights and interests of fathers, noting that “[i]n return for a sixteen-year obligation for child maintenance, the father is guaranteed no rights to even apply for custody, access, or an opportunity to be heard in adoption proceedings.”²⁹⁹

Ontario was the first Canadian province to abolish the status of illegitimacy and was the only province to do so prior to the advent of the *Charter of Rights and Freedoms*.³⁰⁰ In 1977, the *Children’s Law Reform Act* of Ontario repealed the *Illegitimacy Act* and abolished the legal distinction between legitimate and illegitimate children via the following language:

1.—(1) Subject to subsection 2, for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.

²⁹⁸ *NS Family Maintenance Act, 1980, supra* note 256, s 45.

²⁹⁹ *Fifth Report, supra* note 182 at 10. For further detail, see Susan B. Boyd, Dorothy E Chunn, Fiona Kelly & Wanda Wieggers, *Autonomous Motherhood? A Socio-Legal Study of Choice and Constraint* (Toronto: University of Toronto Press, 2015) at Ch 3.

³⁰⁰ *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, c 11.

...

(4) Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section.

2.—(1) For the purposes of construing any instrument, Act or regulation, unless the contrary intention appears, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be construed to refer to or include a person who comes within the description by reason of the relationship of parent and child as determined under section 1.

...

In 1978, Ontario's *Family Law Reform Act*³⁰¹ repealed Part 3 of *The Child Welfare Act*.

BC's repeal of the *Legitimacy Act* came in 1985 with the *Charter of Rights Amendments Act*.³⁰² At the same time, a new section was added to the *Law and Equity Act*, which abolished the legal distinction between legitimate and illegitimate children.³⁰³ In 1988, BC's *Family Relations Amendment Act*³⁰⁴ repealed the *Child Paternity and Support Act*.

Saskatchewan's *Children's Law Act* repealed the *Legitimacy Act* and abolished the status of illegitimacy in 1990.³⁰⁵ In the same year, the new *Family Maintenance Act*³⁰⁶ repealed the *CUPA*. Children were entitled to the same support under this Act regardless of whether their parents were married.

Nova Scotia has yet to formally abolish illegitimacy, though some of the distinctions between legitimate and illegitimate children in the *Maintenance and Custody Act* and other statutes have been struck down for violating equality rights under section 15 of the

³⁰¹ *The Family Reform Act, 1978*, SO 1978, c 2.

³⁰² *Charter of Rights Amendments Act, 1985*, SBC 1985, c 68.

³⁰³ *Law and Equity Act*, RSBC 1979, c 224, s 56, as amended by the *Charter of Rights Amendment Act, 1985*, *supra* note 302.

³⁰⁴ *Family Relations Amendment Act*, SBC 1988, c 36.

³⁰⁵ *The Children's Law Act*, SS 1990–1991, c C-8.1, ss 40–42.

³⁰⁶ *The Family Maintenance Act*, SS 1990–91, c F-6.1.

Charter. Most significantly, the Nova Scotia Court of Appeal struck down a provision of the *Intestate Succession Act* that allowed an illegitimate child to inherit only from the natural mother and not the natural father, on the basis that the equality rights of illegitimate children were violated by this provision.³⁰⁷ A Nova Scotia Family Court also struck down the time limitation for an application for maintenance of an illegitimate child, since no similar time limit existed for a child whose parents were married. This distinction discriminated against both children of unmarried parents, and custodial parents of such children.³⁰⁸

All of the other provinces and territories of Canada, except for Nova Scotia, have legislatively abolished the status of illegitimacy, although some differences arise in relation to the status of birth fathers.³⁰⁹ The Law Reform Commission of Nova Scotia recommended in 1995 that that status of illegitimacy be abolished;³¹⁰ yet the *Maintenance and Custody Act* still retains its distinctions between legitimate and illegitimate children. Whereas child support for all children is determined by the *Federal Child Support Guidelines*,³¹¹ possible fathers of an illegitimate child can be required to pay for certain other expenses including the expenses of lying in and birth, funeral expenses of the child, and funeral expenses of the mother if she dies in consequence of birth.³¹²

V. CONCLUSION

This article has set out the details of the legislative treatment of illegitimacy and legitimation in four Canadian provinces in different regions in Canada: east, central, prairie, and west. As we have seen, the legislation focused primarily on financial support

³⁰⁷ *Tighe (Guardian ad litem of) v McGillivray Estate*, (1994) 112 DLR (4th) 201, 127 NSR (2d) 313.

³⁰⁸ *PAD v LG*, (1988) 89 NSR (2d) 7, 13 ACWS (3d) 272.

³⁰⁹ See Boyd, Chunn, Kelly & Weigers, *supra* note 299 at 91–93.

³¹⁰ Law Reform Commission of Nova Scotia, *supra* note 2.

³¹¹ *Federal Child Support Guidelines*, *supra* note 265.

³¹² *Maintenance and Custody Act*, *supra* note 262, s 11.

of children and encouraging marriage as a remedy where possible. Ideologically, the primacy of motherhood within marriage was bolstered, and financial remedies were established largely in order to relieve the public of responsibility for those who transgressed social norms. Little meaningful concern can be detected for maternal interests or autonomy, or the interests of children, reflecting that for much of the period, unwed motherhood was viewed as an undesirable status, to be avoided or regulated in the interests of the strengthening of the (Anglo-Saxon) nation. The studies by Chambers and Clarkson reveal that the *CUPA* legislation appears to have benefitted few unwed mothers and their children overall.³¹³

Throughout the histories that we have reviewed, Nova Scotia and Saskatchewan took relatively unique approaches. Nova Scotia started off by using legislation to empower actions against unwed parents by public authorities, whereas the other provinces focused on private actions, albeit they established bureaucracies to assist with, and monitor, such actions over time. Nova Scotia never required corroboration of the testimony of mothers concerning putative fathers, whereas the other provinces were more anxious about maternal credibility. Saskatchewan's legislative history demonstrates somewhat more respect for the autonomy of unwed mothers, in terms of enabling them more control over the support payments. Over time, the legislation began to reflect increasing convergence between the treatment of children born within and outside marriage, although the determination of who is a father responsible for support inevitably remains more complicated when a child is not born within marriage.

Although a study of the law in action remains to be done for Nova Scotia, and Saskatchewan, our study of the legislation on financial support for children born outside marriage points to a conclusion similar to that which Chambers drew based on a detailed study of the law's application using social workers' case records in Ontario.³¹⁴ The elaborate system put into place to pin financial responsibility on fathers ended up being available only to some unmarried mothers and generally failed to alleviate the poverty

³¹³ Chambers, *supra* note 9; Clarkson, *supra* note 6.

³¹⁴ Chambers, *supra* note 9.

that they and their children experienced. Chambers found that only 6.7% of mothers who had never cohabited with the putative fathers were successful in obtaining agreements or orders for child support.³¹⁵ Women went to considerable lengths to try to keep their children, and a significant minority (27.8%) of non-cohabiting mothers ended up relinquishing their babies rather than retaining custody.³¹⁶ Mothers who had cohabited tended to be believed by and supported by social workers to a much greater extent and, of those who sought support, 87.9% were successful either through an informal agreement or via court proceedings.³¹⁷ This success did not necessarily mean that money would be received, however, or that it would be awarded in the amount that was needed. Enforcement was clearly an issue. It is difficult to disagree with Chambers' conclusion that the legislation reinforced a preference for women to marry, thus legitimating their children, or to relinquish their babies for adoption. It was not until much later in the 20th century, when most jurisdictions abolished legal distinctions between children born within and outside marriage that single motherhood might be a status that women might consider choosing, albeit it remains a complicated and often constrained choice.³¹⁸

³¹⁵ *Ibid* at 119.

³¹⁶ *Ibid* at 96–101.

³¹⁷ *Ibid* at 150.

³¹⁸ Boyd, Chunn, Kelly & Wieggers, *supra* note 299.