



**The Honourable
Madam Justice
Marguerite Trussler**

The Law and Changing Relationships

**Changing Relationships: How the Law
and Governments Have Accommodated Them**

A Canadian Perspective

Madam Justice Marguerite Trussler

Court of Queen's Bench of Alberta

Ellen Vandergrift

Legal Counsel, Court of Queen's Bench of Alberta

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INTRODUCTION

The last thirty years in Canada, and other parts of the world, have seen extraordinary changes in intimate human relationships. As increasing numbers of traditional marriages have ended in divorce, “sanctity of marriage” seems to have become an outdated concept, and an increasing number of heterosexual couples have started to cohabit outside of marriage.¹ At the same time, the increasing openness of our society to homosexuality has resulted in more and increasingly visible same sex cohabitation.²

Governments in Canada and elsewhere have provided equality in many areas of the law for common law partners. However, in Canada as in many other countries, they have resisted granting similar rights to same sex partners. In Canada, the courts have led the way in extending the definition of spouse in various statutes to include common law and same sex partners, using section 15 of the *Canadian Charter of Rights and Freedoms* which guarantees equality. Section 15 provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Spousal benefits have been extended to common law partners on the basis of marital status, either through s. 15 litigation or through a voluntary extension by the legislature. Those extensions have encouraged same sex partners to seek an extension of those benefits through the courts, arguing discrimination on the basis of sexual orientation.

The current state of the law on cohabitation in Canada, as compared to that in other countries, reflects the fact that changes have been made in direct response to s. 15 litigation. Spousal benefits and rights have been extended, and obligations

¹ This group will be referred to as common law partners.

² This group will be referred to as same sex partners.

imposed, if the relationship looks like a traditional marriage, but the concept of marriage itself has been preserved as a union between a man and a woman. This result demonstrates the limits of simply amending legislation to comply with s. 15 and the need for a reconsideration of the way in which relationships are recognized and rights, benefits and obligations are extended.

SECTION 15 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The purpose of section 15 is “to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”³

To establish discrimination under s. 15, the complainant must show a denial of equal protection or equal benefit of the law as compared with some other person. The complainant must also show that the denial constitutes discrimination, in that it rests on one of the enumerated grounds in s. 15(1) or an analogous ground and that it reflects the stereotypical application of presumed group or personal characteristics or otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being.⁴ The onus then

³ *Law v. Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 at para. 88 (S.C.C.)

⁴Over the course of s. 15 Charter litigation, there have been differences of opinion in the Supreme Court of Canada as to the nature of the s. 15 inquiry. The Supreme Court now seems to have settled on the following analysis:

1. Does the impugned law:
 - (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or
 - (b) fail to take into account the claimants already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
 If so, there is differential treatment for the purpose of s. 15(1).

1. Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?
2. Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical advantage? (*Law, supra*, at para. 39).

shifts to the party seeking to uphold the law, usually the state, to justify the discrimination as “demonstrably justified in a free and democratic society under s. 1 of the Charter.”⁵In order to establish that a breach of s. 15 is justified, it must be shown that there is a sufficiently pressing government objective. Further, it must be shown that the means chosen to meet that objective are proportional to that objective. This involves three considerations: (a) the means must be rationally connected to the objective, (b) the means must result in a minimal impairment of the Charter right, and (c) the deleterious effects of the means chosen must be proportionate to the salutary effects.

In cases involving an extension of benefits, section 15 always involves a comparison between the claimant, as an individual, and the group who enjoys the benefits sought.⁶ In order to establish that the differential treatment results from a discriminatory distinction one must eliminate all other possible grounds for distinction, so that the only relevant distinction left is a discriminatory one. Successful Charter litigation requires characterizing the claimant as similarly as possible to the group with the benefit. The result is that common law and same sex partnerships are defined in relation to the traditional image of a married couple, and rights, benefits and obligations are extended to them if the individual before the court looks like a married spouse.

EXTENSION OF BENEFITS TO COMMON LAW PARTNERS

While the federal and provincial governments have extended various spousal rights to common law partners, many spousal rights have still been exclusively

⁵ Section 1 of the *Charter* provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

⁶The relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as the claimant: *Egan, infra.*, at para. 56, cited with approval in *Law, supra.*, at para. 59.

reserved for married couples.⁷ Furthermore, the spousal rights that are extended to common law partners and those that are excluded vary widely between provinces.⁸ Many of these exclusions would be susceptible to a Charter challenge, based on the Supreme Court of Canada ruling in *Miron v. Trudel*.⁹

Miron v. Trudel was a landmark case which established marital status as an analogous ground of discrimination under s. 15. In *Miron v. Trudel*, the Court held that the exclusion of common law partners from no fault insurance protection available to the insured and his or her spouse was discriminatory contrary to s. 15, and was not justified under s. 1. The majority found that discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination, because it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. The Court also found that common law partners constitute an historically disadvantaged group, as they have been regarded as less worthy than married persons and have been denied status and benefits.

The Court dealt with the argument that unmarried partners are free to choose to marry. The majority stated that while in theory, the individual is free to choose to marry, in practice reality may be otherwise. Factors such as the law, the reluctance of one's partner to marry, or financial, religious, or social constraints may all prevent partners who otherwise operate as a family unit from formally marrying. The argument that marital status could not be a ground of discrimination because marriage is a good thing which should be promoted was rejected. The only relevant question is whether the complainant has been denied equal treatment based on grounds which have nothing to do with his or her true worth as an individual.

⁷ Law Commission of Canada, *Marriage and Marriage-Like Relationships* by M. Bailey, online: <http://www.lc.gc.ca/en/papers/rapport/bailey.html>, 1999, Appendices A and B, (date accessed, August 20, 2000). (Note: all page references to this document will refer to the html document (ie. page 1 of 71).)

⁸*Ibid.*, Appendix B.

⁹(1995), 124 D.L.R. (4th) 693 (S.C.C.).

The discrimination was not justified, because the purpose of the legislation was to sustain families in the event of injury, and marital status, as a criterion for eligibility for family accident benefits, had the effect of depriving a substantial number of deserving candidates of protection. Better tests, such as length of cohabitation, were available.

Miron v. Trudel was followed in *Taylor v. Rossu*¹⁰ in which the support provisions of Alberta's *Domestic Relations Act*¹¹ which excluded common law partners, were declared unconstitutional. Similarly in *Re. Gruending*¹², s. 265(2) of Alberta's *Insurance Act*¹³, which protects insurance proceeds of married spouses from execution or seizure, was declared unconstitutional. In both cases, the Alberta government responded by amending only the statute affected.¹⁴

Most recently, in *Walsh v. Bona*¹⁵ the Nova Scotia Court of Appeal declared the definition of spouse in Nova Scotia's *Matrimonial Property Act* to be unconstitutional, since it is discriminatory for a married spouse to have the benefit of a presumption of an equal split of property, whereas a common law spouse did not.¹⁶ Up to this point, the Courts had been applying the remedy of unjust enrichment to award property division to common law couples.¹⁷ Only recently had the Northwest Territories, and, by extension, Nunavut, become the first jurisdictions in Canada to

¹⁰(1998), 161 D.L.R. (4th) 266 (Alta. C.A.)

¹¹R.S.A. 1980, c. D-37.

¹²(1999), 170 D.L.R. (4th) 541 (Alta. Q.B.).

¹³R.S.A. 1980, c. I-5.

¹⁴*Domestic Relations Amendment Act, S.A. 1999, c. 20; Insurance Amendment Act, S.A. 1999, c. 31. Changes to several statutes had been recommended 10 years earlier in a June 1989 Alberta Law Reform Institute report entitled *Towards Reform of the Law Relating to Cohabitation Outside Marriage*.*

¹⁵[2000] N.S.J. No. 117 (N.S.C.A.)

¹⁶The Attorney-General of Nova Scotia's Application for Leave to Appeal to the Supreme Court of Canada has been granted: [2000] S.C.C.A. No. 517.

¹⁷*Peter v. Beblow*, [1993] 1 S.C.R. 980. It had also been applied to same sex relationships: *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).

enact legislation to extend the presumption of equal sharing of property to common law partners.¹⁸ Similar legislation has just been introduced in Saskatchewan.¹⁹

Other statutes which have recently been declared unconstitutional as a result of discrimination on the basis of marital status include Saskatchewan's *Administration of Estates Act*,²⁰ and British Columbia's *Wills Variation Act*.²¹ The common law rule of spousal incompetency in criminal proceedings was declared to be of no force or effect because it constituted discrimination on the grounds of marital status.²²

EXTENSION OF BENEFITS TO SAME SEX COUPLES

Governments in Canada have been far more reluctant to extend benefits to same sex partners. In fact, prior to the decision in *M. v. H.*²³ the only government which accorded same sex partners spousal rights was British Columbia.²⁴ The decision in *M. v. H.* has brought into question the constitutionality of any distinction in the law between same sex and common law partners.

Prior to *M. v. H.*, gays and lesbians had mounted several court challenges using s. 15 of the Charter. In *Layland v. Ontario (Minister of Consumer and Commercial Relations)*²⁵ a challenge to the common law definition of marriage as a union of a man

¹⁸ *Family Law Act*, S.N.W.T. 1997, c. 18; *Family Law Act (Nunavut)*, S.N.W.T. 1997, c. 18 (as adopted pursuant to the *Nunavut Act*, S.C. 1993, c. 28, s. 29; as amended S.C. 1998, c. 15, s. 4.).

¹⁹ Bill 48: An act to amend certain statutes respecting Domestic Relations (No. 2), First reading, May 30, 2001.

²⁰ *Ferguson v. Armbrust*, [2000] S.J. No. 312 (Q.B.).

²¹ *Grigg v. Berg Estate*, [2000] B.C.J. No. 1080 (B.C.S.C.).

²² *R. v. Edelenbos*, [2000] O.J. No. 2147 (Ont. Sup. Ct.). This ruling is flawed because the common law is not subject to constitutional review in the same way as a statute. The common law must develop in accordance with Charter principles, and, where an extension is being sought, is not to be declared of no force and effect in the same way as a statute.

²³ (1999), 171 D.L.R. (4th) 577 (S.C.C.).

²⁴ *Bailey*, *supra.*, footnote 7, Appendix C.

²⁵ (1993), 104 D.L.R. (4th) 214 (Ont.C.A.)

and a woman was unsuccessful. The majority relied on the definition of marriage contained in an old English case²⁶ as “the voluntary union for life of one man and one woman, to the exclusion of all others.” The “for life” requirement in the definition was ignored by the majority. In upholding the “man and a woman” requirement, the majority relied on the position that the purpose of marriage is procreation, and that homosexuals are not discriminated against because they may marry members of the opposite sex.

*Egan v. Canada*²⁷, decided two years later, was both a victory and a disappointment for same sex partners seeking extensions of benefits. It was a victory because the Supreme Court of Canada unanimously held that sexual orientation was an analogous ground under s. 15. It was a disappointment because the majority held that the denial of pension benefits to same sex partners was not unconstitutional. Four judges found that the denial of benefits did not constitute discrimination because the distinction was relevant in that the social objectives of marriage, most importantly procreation, cannot be satisfied by same sex partners. The fifth judge, who made up the majority, found that the distinction was justified since, for the time being, deference should be given to the government to deal with the new realities of same sex relationships.

One day before *Egan* was decided, an Ontario Provincial Court decision amended the definition of spouse in Ontario’s *Child and Family Services Act* to allow same sex partners to apply jointly for adoption.²⁸ The judge considered extensive evidence, and found that there is no evidence that families with heterosexual parents are better able to meet the physical, psychological, emotional or intellectual needs of children than families with homosexual parents. In 1999, in the face of a Charter challenge to the spousal adoption provisions of its *Child Welfare Act*, the province of

²⁶*Hyde v. Hyde* (1866), L.R. 1 P. & D. 130, 35 L.J.P. & M. 57.

²⁷(1995), 124 D.L.R. (4th) 609 (S.C.C.)

²⁸*Re K*, (1995), 23 O.R. (3d) 679.

Alberta amended the provisions to permit adoption by a step-parent.²⁹

In April 1998, a successful challenge was made to the definition of spouse in the *Income Tax Act* as it related to survivor benefits under registered pension plans.³⁰ The federal government, to the surprise and consternation of some, decided not to appeal the decision to the Supreme Court of Canada. In response to that decision, the Foundation for Equal Families challenged the definition of spouse in 58 federal statutes.³¹ Before that challenge could be heard, the landmark decision of *M. v. H.* was released.

In *M. v. H.*, the Supreme Court of Canada found that the exclusion of same sex partners from the spousal support provisions of Ontario's *Family Law Act* was unconstitutional. The majority found that the exclusion of same sex couples from the spousal support provisions had no rational connection with the purpose of the Act, which was to provide for the resolution of economic disputes on relationship breakdown, and alleviate the burden on the public purse to provide for dependant spouses. The Court clarified that the notion of judicial deference to legislative choices should not be applied in a general way so as to completely immunize certain kinds of legislative decisions from Charter scrutiny.³²

In *M. v. H.*, the Supreme Court of Canada was clear about the limited scope of the case in which benefits were extended to opposite sex partners but not same sex partners.³³ Iacobucci J. specifically states that "this appeal does not challenge traditional concepts of marriage."³⁴

To date, all of the legislative responses have reflected that statement, and

²⁹Re A, [1999] A.J. No. 1349 (Q.B.), *Miscellaneous Statutes Amendment Act*, S.A. 1999, c. 26, s. 4.

³⁰*Rosenberg v. Canada (Attorney General)* (1998), 158 D.L.R. (4th) 664 (Ont. C.A.).

³¹INFOEGALE newsletter, Fall 1999, p. 2.

³²*Supra*, at para. 78.

³³*Ibid.*, at paras. 7, 134.

³⁴*Ibid.*, at para. 134.

benefits have only been extended to the extent that they were available to common law partners. In fact, Ontario adopted the most exclusive response possible in light of the Supreme Court of Canada's suggestion that it address all of its statutes in light of the ruling in *M. v. H.*, prompting an application for a rehearing before the Supreme Court of Canada.

Ontario's reluctant response to *M. v. H.*, entitled "An Act to amend certain statutes because of the Supreme Court of Canada decision in *M. v. H.*," extended 67 provincial statutes to provide same sex partners with many of the rights and responsibilities of common law partners. However, it did this by establishing a separate category of "same sex partner." A motion for rehearing was filed before the Supreme Court of Canada, on the basis that the differential terminology adopted by Ontario fails to comply with the ruling in *M. v. H.*, but the Court denied the motion.³⁵

Following *M. v. H.*, Quebec was the first to amend all of its statutes to extend benefits available to common law partners in that province to same sex partners.³⁶ British Columbia, which had already extended many benefits to same sex partners, soon followed, even including inheritance rights on intestacy of one partner.³⁷ Some provinces, such as New Brunswick and Newfoundland, simply amended legislation to extend spousal support to same sex partners. Manitoba and Saskatchewan just introduced, on May 30, 2001, bills amending the definition in numerous statutes.

Nova Scotia has adopted the most interesting response to date, by enacting partnership legislation.³⁸ Two individuals, who are cohabiting in a conjugal relationship, may make a domestic-partner declaration. Upon registration of that

³⁵INFOEGALE newsletter, Summer 2000, p. 5-6.

³⁶ **Bill 32:** *Loi modifiant diverses dispositions législatives concernant les conjoints de fait*, passed June 10, 1999.

³⁷**Bill 21:** *Definition of Spouse Amendment Act*, passed July 5, 2000.

³⁸*Law Reform (2000) Act*, passed November 30, 2000. This type of legislation was studied and recommended by the British Columbia Law Institute in 1998, but has not yet been adopted in B.C., see discussion in T.G. Anderson, "Models of Registered Partnership and their Rationale: The British Columbia Law Institute's Proposed Domestic Partner Act" (2000), 17 *Can J. Fam. L.* 89.

declaration, the partners have the same rights and obligations as married persons under the major pieces of legislation which apply to spouses.³⁹

Alberta, which had been forced to amend its *Domestic Relations Act* to include common law partners, did so only six days before *M. v. H.* was released, defining “common law relationship” as a relationship between two people of the opposite sex.⁴⁰ Furthermore, in response to the introduction of omnibus legislation in the federal government extending benefits to same sex partners, the Alberta legislature passed a bill defining marriage as a marriage between a man and a woman.⁴¹ The legislature also invoked the notwithstanding clause,⁴² exercising its authority to provide that the definition will operate notwithstanding s. 15 of the Charter.⁴³ More recently, in response to a successful challenge to Alberta’s *Intestate Succession Act*⁴⁴, Premier Ralph Klein and Justice Minister Dave Hancock indicated that the province will undertake a review of the province’s family law statutes before deciding how to overhaul the over sixty statutes that define couples as exclusively heterosexual.⁴⁵

Meanwhile, on June 8, 1999, the House of Commons, by a vote of 216 to 55, voted in favour of a motion stating that marriage is and should remain the union of one man and one woman to the exclusion of all others, and further stating that Parliament will take all necessary steps to preserve that definition of marriage in Canada.⁴⁶

³⁹See s. 54(2) for a list of acts which apply equally to domestic partners.

⁴⁰*Domestic Relations Amendment Act, S.A. 1999, c. 20.*

⁴¹*Bill 202: Marriage Amendment Act, 2000, passed March 15, 2000.* It is important to note that it is the federal government, not the provincial government, which has the jurisdiction to decide who may get married.

⁴²Section 33 of the *Canadian Charter of Rights and Freedoms*.

⁴³*Supra*, s. 5.

⁴⁴R.S.A. 1980, c. I-9.

⁴⁵*Johnson v. Sand*, [2001] A.J. No. 390 (Q.B.); “Klein says province won’t fight court ruling expanding gay rights” *Edmonton Journal* (April 4, 2001).

⁴⁶http://parl.gc.ca/36/1/parlbus/chambus/house/debates/240_1999_06_08/han240-e.htm.

Just over half a year later, the Justice Minister introduced an omnibus bill amending the definition of common law partner in 68 federal statutes to extend benefits to any person living in a conjugal relationship for at least one year. However, opposition was so strong to legislation that might jeopardize the definition of marriage that an amendment was made to the Bill to clarify that “the amendments made by this Act do not affect the meaning of the word ‘marriage,’ that is, the lawful union of one man and one woman to the exclusion of all others.”⁴⁷ Bill C-23 was passed on April 11, 2000.

Marriage itself has become the new battleground. Currently in British Columbia, marriage challenges are being launched by EGALE (Equality for Gays and Lesbians Everywhere) and by the Government of British Columbia.⁴⁸ Challenges are also proceeding in Quebec and Ontario. If these challenges are successful, which is more likely than not,⁴⁹ the question will be whether the government will invoke the notwithstanding clause. As discussed above, Alberta has already invoked the notwithstanding clause in relation to the definition of marriage.

Another issue which must now inevitably be addressed is whether a same sex marriage validly entered into in the Netherlands⁵⁰ will be recognized in Canada.

COMPARISON AND BRIEF ANALYSIS OF VARIOUS APPROACHES TO COHABITATION

In analyzing and comparing various approaches to cohabitation it is important to distinguish between public benefits, in areas such as insurance, pensions and taxation, granted to the couple as a couple, and private rights, in areas

⁴⁷Bill C-23: An Act to modernize the Statutes of Canada in relation to benefits and obligations, s 1.1.

⁴⁸“B.C. goes to court to support equal marriage for same-sex couples” EGALE Press Release (July 20, 2000) <http://www.egale.ca/pressrel/000720.htm>.

⁴⁹See, for a well-developed argument, D.G. Casswell, “Moving Towards Same-Sex Marriage”, as yet unpublished.

⁵⁰Same sex marriages are now legal in the Netherlands, effective April 1, 2001.

such as maintenance and property division, which may be exercised by one partner against the other on relationship breakdown. The distinction is important because the reasons for extending each may be very different, and therefore, the appropriate basis for extension may be different as well.⁵¹

Public benefits, such as tax benefits, are ordinarily granted by the government as a means of encouraging a type of behaviour. In the case of spousal benefits, the ordinary justification is the promotion of the family group, particularly as it relates to the welfare of children. The public also has an interest in the economic partnerships of marriage or analogous relationships in that they can provide for the efficient exchange of labor for financial support and security, thus decreasing demand on the public purse.⁵²

On the other hand, protection of vulnerable persons is generally the justification for an interference into private relationships, such as an imposition of obligations on a former common law partner. While the government should generally not interfere with an individual's autonomy in structuring his or her private relationships, there is clearly a need to protect vulnerable persons on relationship breakdown. As was pointed out in *Miron v. Trudel*, the flip-side of one person's autonomy is often another's exploitation.⁵³ Further, the government has an interest in preventing a shift of dependency from a partner onto the public purse.

CONJUGAL COHABITATION BASED APPROACH

As discussed above, the conjugal cohabitation based approach is the one currently followed in all jurisdictions in Canada, with the exception of Nova Scotia, which also offers a registration based approach. Under the cohabitation based

⁵¹See H. Krause, "Marriage for the New Millenium: Heterosexual, Same Sex - Or Not at All?" (2000), 34(2) *Fam. L. Q.* 271, at 294-5 in which the author present numerous questions which should be addressed in deciding how to extend spousal rights and benefits.

⁵²A. Harvison Young, "The Changing Family, Rights Discourse and the Supreme Court of Canada" (2001), 80 *Can. Bar. Rev.* 749, at 790.

⁵³*Supra*, footnote 9, at 729.

approach, benefits, rights and obligations which previously attached only to married spouses are extended to common law and same sex partners on the basis of the existence or length of conjugal cohabitation. This result is not surprising since the law has developed to address s. 15 Charter concerns.

The conjugal cohabitation based approach is also followed, to varying extents, in Hungary, Brazil, and Australia. In some jurisdictions it is limited to common law or same sex partners, and in some the legislation extends to both. In most states in the United States and in most Western European jurisdictions, common law and same sex partners have little or no legislated rights, but some are extended by the courts based on length and nature of cohabitation.⁵⁴ In typical common law form, the government in England has not instituted statutory reforms, but judges are given extremely wide powers to impose obligations on cohabitants.⁵⁵

The dominant Australian approach has been to extend spousal benefits or rights based on the existence of a “de facto relationship.” The term “de facto relationship” is widely used in both federal and state legislation, but it has varying meanings: sometimes it is defined, and sometimes it is left for the courts to define.⁵⁶ In some states de facto relationships are limited to members of the opposite sex, but in others it has been extended to same sex couples. In New South Wales, for example, most spousal benefits and rights are extended to persons, regardless of gender, who establish that they are living together as a couple in a de facto relationship. Several relevant factors are set out in the legislation, including duration, existence of a sexual relationship, financial interdependence, degree of

⁵⁴C. Forder, “European Models of Domestic Partnership Laws: The Field of Choice” (2000), 17 *Can. J. Fam. L.* 371, at 371; S.N. Katz, “Emerging Models for Alternatives to Marriage” (1999), 33(3) *Fam. L. Q.* 663.

⁵⁵D. Bradley, “Regulation of Unmarried Cohabitation in West-European Jurisdictions - Determinants of Legal Policy” (2001), 15 *International Journal of Law, Policy, and the Family* 22 at 41; A. Barlow and R. Probert, “Addressing the Legal Status of Cohabitation in Britain and France: Plus ca change...?”, online: <http://webjcli.ncl.ac.uk/1999/issue3/barlow3.html>.

⁵⁶R. Graycar and J. Millbank, “The Bride Wore Pink...to the *Property (Relationships) Legislation Amendment Act 1999: Relationships Law Reform in New South Wales*” (2000), 17 *Can. J. Fam. L.* 227, at 238.

mutual commitment to a shared life, care and support of children, and public aspects of the relationship.⁵⁷

PRIVATE RIGHTS: ADVANTAGES AND DISADVANTAGES

The benefits of the conjugal cohabitation based approach is that it recognizes that most people do not consciously consider the legal implications before entering into intimate relationships. The conjugal cohabitation based approach gives, particularly to the more vulnerable partner, the rights that he or, most often, she should have bargained for before entering the relationship.

The disadvantage is that it imposes obligations on those that may have chosen not to marry for the express purpose of avoiding those sorts of obligations. While this is not so much of an issue in relation to spousal support, since what is granted is simply a right to apply, it becomes more of an issue in relation to property division, where there is a presumptive split, with generally a limited discretion given to the judge to override the presumption.⁵⁸ The conjugal cohabitation based approach forces these partners to contract out of the application of the legislation.⁵⁹

Dr. Martha Bailey presents an interesting approach to balancing autonomy and protection of the vulnerable in the extension of private rights and obligations to cohabiting couples:

The difference between the benefits, burdens, rights, and obligations associated with marriage or registered partnerships and those associated with cohabiting couples should be comparable to the difference between the “expectation” measure of damages in contract, where the parties have willingly assumed an obligation, and the “reliance” measure of damages in tort.⁶⁰

⁵⁷*Property (Relationships) Act 1994, s. 4(2), as amended by the Property (Relationships) Legislation Amendment Act 1999. Similar legislation has been passed in New Zealand, to come into effect in February 2002.*

⁵⁸ This issue is discussed in C. Davies, *Matrimonial Property Legislation: Justifiably Restrictive or Offensively Narrow? An Examination of the Limited Applicability of the Legislation with a Side Glance at M. v. H.* (Paper presented at the Family Law Seminar of the National Judicial Institute, 2000)[unpublished].

⁵⁹For a more complete analysis of the advantages and disadvantages of this approach see W. Holland, “Intimate Relationships in the New Millenium: The Assimilation of Marriage and Cohabitation?” (2000), *Can. J. Fam. L.* 114, at 116.

⁶⁰Bailey, *supra*, footnote 7, at 60.

This approach might provide the right balance between respecting the autonomy of individuals, and protecting those who are vulnerable.

PUBLIC BENEFITS: ADVANTAGES AND DISADVANTAGES

If one accepts that conjugal cohabitation is an appropriate basis on which to extend public benefits, then this approach may be appropriate for common law partners. However, the conjugal cohabitation based approach is an unsatisfactory alternative to marriage for same sex partners, as they do not have the option to immediately obtain the benefits, rights and obligations of marriage as do common law partners. They must first cohabit for what might be termed a “qualifying period.” For this reason, this approach discriminates against same sex partners and leaves marriage vulnerable to a Charter challenge.

REGISTRATION BASED APPROACH

This approach, recently adopted in Nova Scotia, has been mainly followed in civil law jurisdictions, where statutory solutions are paramount. It was also the approach taken in Vermont in response to a ruling which required the government to either open up marriage to same sex partners or grant them all the benefits of marriage under another name.

In Germany, Denmark, Norway, Greenland, Sweden, and Iceland registration is restricted to same sex partners, for the reason that common law partners can always choose marriage. Registration in France and the Netherlands is open to both common law and same sex partners.

The extension of registration to common law partners in the Netherlands has been queried, since registration results in a status nearly identical to marriage. However, registered partnership has proven rather popular for opposite sex couples.⁶¹ Now that marriage is open to same sex couples, it is questionable whether

⁶¹Forder, *supra*, footnote 54, at 393.

registered partnership will be abolished.⁶² However, registered partnerships may remain available for those couples who are interested in regulating their financial matters, but who wish to avoid the institution of marriage.

PRIVATE RIGHTS: ADVANTAGES AND DISADVANTAGES

The main advantage of this approach is that it results in less interference in the private sphere. It allows partners to opt in to the rights and obligations that normally attach to marriage, without requiring the formalities of marriage. Most importantly, it gives same sex partners equal access to the rights and obligations which attach to marriage.

The disadvantage is that it may not adequately protect a person who is stuck in a relationship and cannot force her partner to register the relationship, any more than she could force her partner to get married.

PUBLIC BENEFITS: ADVANTAGES AND DISADVANTAGES

The main disadvantage of a registration based approach in Canada is our system of federalism, in which certain benefits are federal and others are provincial.⁶³ A Nova Scotian domestic partnership is meaningless in the federal sphere, and domestic partners will still need to qualify for federal benefits based on length of conjugal cohabitation. In order for a registration based approach to adequately allocate benefits, there would need to be co-operation on the federal level, and by all the provinces. Co-operation on such a sensitive issue, where, for instance, the conservative province of Alberta lags behind other provinces, is unrealistic.

Some promote registered partnership as a means by which to counter a

⁶²Registered partnerships are scheduled to be reviewed five years after they were instituted: Forder, *supra*, footnote 54, at 434.

⁶³ See N. Bala "Alternatives for Extending Spousal Status in Canada (2000), 17 *Can. J. Fam. L.* 169 for a discussion of the various constitutional problems. He suggests that the only way one government could deal with the issue completely is for the federal government to use its s. 91(26) marriage power to create a new category of relationship which would be treated identically to marriage.

Charter challenge to marriage. However, registered partnership may be considered to be, at best, a separate but equal institution,⁶⁴ and as long as there is legal significance attached to marriage it will remain vulnerable to a Charter challenge. Further, as long as the definition of marriage remains as “the voluntary union of a man and a woman,” marriage as an institution is fundamentally discriminatory.⁶⁵ This has led some to question whether, if rights, benefits, and obligations for all types of domestic partnerships can be dealt with under a registration system, the state should get out of the “marriage business,” and leave “marriage” to religious institutions.⁶⁶ In some ways this viewpoint recognizes the fact that the state’s involvement in marriage at present is effectively through a system of registration.

NON-SPOUSAL BASED APPROACH

The non-spousal based approach is one in which benefits, rights and obligations are extended not on the basis of the characterization of the relationship as spousal in nature, but rather on the basis of the characteristics which justify their extension. In other words, if the justification for granting maintenance rights to, and imposing corresponding obligations on, individuals is the dependency which has developed between them, then maintenance rights and obligations should be extended wherever that dependency arises, regardless of whether the relationship is conjugal in nature. Similarly, if a benefit is extended by the government to encourage relationships of interdependency, or to encourage a healthy, stable environment for the raising of children, then benefits should be granted where there is interdependency or where children are being raised, regardless of whether that relationship is spousal in nature. This approach may also take the form of a reduction in the rights and obligations of spouses and partners.

⁶⁴Bailey, *supra*, footnote 7, at 19-20.

⁶⁵W Holland, “Intimate Relationships in the New Millenium: The Assimilation of Marriage and Cohabitation?” (2000) 17 *Can. J. Fam. Law* 114, at 126.

⁶⁶Bailey, *supra*, footnote 7, at 13, 61.

The non-spousal based approach has been adopted in various jurisdictions in various forms. Denmark has, to some extent, pursued the “individual principle”, by which benefits are extended on a purely individual basis, without regard to marital status.⁶⁷ In the Australian Capital Territory and New South Wales, legislation extends benefits, rights and obligations to persons in a domestic relationship, which is defined in terms of interdependence and support.⁶⁸ In Hawaii and the Catalonia region of Spain, any two people may register their relationship and thereby obtain certain benefits, rights and obligations.⁶⁹

PRIVATE RIGHTS: ADVANTAGES AND DISADVANTAGES

The advantage of this approach is that it does not impose marriage based rights and obligations on the parties, simply because it is determined that their relationship looked like a marriage. Instead the rights and obligations would be imposed because the parties allowed themselves to structure their relationship in such a way that dependency was created. The party seeking to avoid the obligation arising from that dependency created and benefitted from that relationship, and therefore should not be able to avoid that obligation.

Another advantage of this approach is that it moves the debate away from sexuality which is a sticking point for some social conservatives. In the debates over Bill C-23 in the House of Commons granting benefits on the basis of conjugal cohabitation was referred to as “benefits for sex.”⁷⁰

Further, some common law and same sex partners oppose being defined in relation to marriage, which they view as patriarchal and oppressive.⁷¹

⁶⁷Bailey, *supra*, footnote 7, at 45.

⁶⁸Graycar and Millbank, *supra*, footnote 56, at 245 and 249.

⁶⁹Bailey, *supra*, footnote 7, at 52 and 56.

⁷⁰http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/049_2000-02-15/han049_1135-e.html.

⁷¹ *Litigating for Lesbians: LEAF's Report on Consultations with the Lesbian Community (June 1993)*; K.L. Kuffner, “Common-Law and Same-Sex Relationships Under the Matrimonial Property Act” (2000), 63

The main disadvantage is that it is not easy to define “dependency,” and therefore the law in this area may be more uncertain. However, a determination in the area of spousal support, for instance, always involves an examination of dependency, and therefore this problem is likely not insurmountable.

PUBLIC BENEFITS: ADVANTAGES AND DISADVANTAGES

The advantage of public benefits being extended on this basis is that it is more principled to extend the benefit on the same basis as that on which it is justified.

However, this may result in more expense to government departments, and it may also be more difficult to administer.

CONCLUSION

The legal status of personal relationships is currently being addressed in a variety of forums.⁷² Consideration must be given to the varying needs and reasonable expectations of people who cohabit in a personal relationship rather than interest group rhetoric. In making changes the competing interests of various viewpoints should be weighed. The ultimate goal is a system which provides equality and fairness for all cohabitants, regardless of the form that their relationship takes.

Sask.L.Rev. 237-273, at notes 41-44 and surrounding discussion. .

⁷²See Bailey, *supra*, footnote 7, as well as volume 17 of the *Canadian Journal of Family Law* which contains papers presented at a Conference on Domestic Partnerships held in October 1999. For an indication of international interest in the issue of cohabitation, see volume 15 of the *International Journal of Law, Policy and the Family*, which is dedicated to the topic.