Conversations about Families in Canadian Courts and Legislatures: Are there "Lessons" for the United States?

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CONVERSATIONS ABOUT FAMILIES IN CANADIAN COURTS AND LEGISLATURES: ARE THERE "LESSONS" FOR THE UNITED STATES?

Mary Jane Mossman*

I. TRENDS IN CANADIAN FAMILY LAW: TWO THEMES

I worry about governmental uses of relationships to serve governmental ends, like reducing governmental financial obligations. And I worry that by advocating expansive, functional definitions of family in some contexts, I may be fueling this kind of governmental control in others.¹

The field of family policy is not without controversy. . . . [But] there has been a new emphasis placed on strengthening families. Yet those who applaud new family forms are suspicious of the call for “a family policy” because they fear that it could represent a conservative agenda opposing greater equality for women, gays, and “families of choice.” Creating social policies which bring together these two opposing viewpoints and deal adequately with the multidimensional aspects of family life is indeed a challenge.²

As these quotations demonstrate, issues about defining and supporting families create dilemmas for legal and social policies in both the United States and Canada. This Article provides an overview of recent developments in Canadian family law, and some reflections on whether, or to what extent, Canadian developments offer “lessons” in

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relation to current American initiatives that challenge ideas about marriage, democracy, and families. For Americans seeking "lessons beyond borders," do recent experiences in Canada provide fruitful sources of inspiration and strategy?

In providing this brief assessment of Canadian developments, two interconnected themes are particularly significant. One is the new relationship between courts and legislatures in the recognition of "new families" in Canada. Like other western jurisdictions, Canadian legislatures have traditionally tended to enact guiding principles for family law, leaving Canadian courts to interpret and define how these principles should be applied in particular factual circumstances. However, the scope for expansive interpretation in Canadian courts has greatly increased in the past two decades, mainly as a result of constitutionally-entrenched guarantees of equality in the Canadian Charter of Rights and Freedoms ("Charter").

As a result of the Charter, it is courts that have provided most of the impetus for legal recognition of "new families" in Canada, including recent decisions in three Canadian provinces which have declared that legal principles restricting marriage to only heterosexual couples violates the equality guarantee in the Charter. In fact, many legislative reforms in Canada have been driven by these Charter-based judicial decisions, with legislatures often enacting reforms only after being compelled to do so by decisions of the courts. In relation to same-sex marriage, for example, the federal government has submitted a constitutional reference to the Supreme Court of Canada seeking the court's guidance with respect to proposed Parliamentary legislation.

From an American perspective, however, this significant activism on the part of Canadian courts and judges may reflect a critical difference between our two countries at the present time. As a former

3. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1). In a recent assessment of the Charter's impact, it was noted that the enactment of the Charter "was a turning point for the Canadian legal and political system and culture, prompting much speculation and a great deal of debate about what the effect of the Charter would, and should, be." Reflections on the Twentieth Anniversary of the Canadian Charter of Rights and Freedoms: A Symposium, 40 OSGOODE HALL L.J. 215, 215 (2002) (editors' introduction).


member of the Supreme Court of Canada suggested a few years ago, constitutional interpretation in Canada, particularly in relation to human rights jurisprudence, has increasingly diverged from United States approaches because Canada’s constitution reflects the culture of international human rights in the late twentieth century:

The United States Bill of Rights reads quite differently than most twentieth-century constitutions, which are drafted in language which has its sources in European and international human rights conventions, are more detailed, and frequently expressly permit limitations of the enumerated rights, either within the rights themselves or as a general limitation provision.6

Thus, Canadian family law currently reveals a pattern of activism on the part of courts and judges in interpreting the Charter’s guarantees to recognize “new families” in law, with legislative reform frequently flowing out of this judicial decision making. Whether this pattern offers useful “lessons” for the United States, in the context of a different culture of constitutional rights, is an important question for those seeking family law reform.

A second and related theme in recent Canadian developments is the relationship between families and the state with respect to responsibility for dependent “family” members. In addition to active intervention in the legal recognition of “new families,” Canadian courts have also been active in defining “new family obligations,” including much expanded entitlement to ongoing spousal support, and obligations to pay child support for both biological and non-biological children, after separation or divorce.7 Recent federal and provincial legislation has similarly confirmed that the primary obligation for support for children after separation or divorce rests with their parents, rather than the State.8 In all of these contexts, primary responsibility for dependent individuals has been assigned to (former) family members and governmental support for dependency has declined.9 In the context of social security, moreover,

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9. See Sherri Torjman, Crests and Crashes: The Changing Tides of Family Income Security, in CANADA’S CHANGING FAMILIES: CHALLENGES TO PUBLIC POLICY 69 (Maureen Baker ed., 1994) (indicating a trend of shrinking reliance by Canadian families on government resources); see also
several Canadian legislatures have significantly reduced the level of payments to needy individuals and families in recent years, and the Ontario legislature (re)defined family relationships in 1995 so as to disentitle sole support mothers who formed any kind of attachment to male persons.\textsuperscript{10} Interestingly, the Ontario Court of Appeal recently declared that this legislative action contravened the \textit{Charter}, striking down the relevant legislative provisions.\textsuperscript{11} Thus, paradoxically, expansive judicial intervention that has recognized "new families" and "new family obligations" in the family law context has also been employed to strike down a legislative effort to create family relationships for sole-support mothers and thus disentitle them from continuing to receive financial assistance from the state. Although the \textit{Charter} was once again significant in creating scope for this judicial activism, it is important to explore the underlying principles used by courts to define the obligations for \textit{families} and for the \textit{state} in these differing contexts of economic dependency. Moreover, since the Ontario Court of Appeal rejected the government's argument that its legislation was justified by the need to treat married and cohabiting couples in the same way,\textsuperscript{12} these principles may offer useful "lessons" for the American context.

This Article begins with an overview of Canadian developments in relation to the recognition of "new families." As explained above, this part of the Article focuses primarily on judicial decisions, but it also includes references to some legislative reforms that have resulted from \textit{Charter} claims. The Article then provides an overview of recent developments concerning "new family obligations" and the relationship between family and state responsibilities for economic dependency. In this context, both judicial and legislative actions frequently intersect. In relation to these two themes, the Article also focuses on some recent decisions of the Supreme Court of Canada which may signal a change in direction in relation to ideas about "new families," "new family obligations," or both, and on recent governmental policies concerning the definition and regulation of "families."\textsuperscript{13} In this context, the Article

\textsuperscript{12} \textit{See id.} at 513-14; \textit{see also} ANDY MITCHELL \textit{ET AL.,} \textit{FIVE YEARS LATER: WELFARE RATE CUTS ANNIVERSARY REPORT} 2 (2000).
\textsuperscript{13} \textit{See} Falkiner, 59 O.R.3d at 511.
\textsuperscript{13} \textit{See}, \textit{e.g.}, LAW COMM'N OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001) [hereinafter LCC REPORT]; DEP'T OF JUSTICE CANADA, MARRIAGE AND LEGAL RECOGNITION OF SAME-SEX UNIONS (2002)
offers some reflections on the extent to which there may be Canadian "lessons" that are relevant to current concerns about marriage, democracy, and families in the United States.

II. RECENT LEGAL DEVELOPMENTS ABOUT FAMILIES IN CANADA

A. "New Families": The Impact of Charter Jurisprudence

As in many western countries, Canada traditionally used marriage as the legal marker for "family." However, by 1995, married couples with children at home constituted only forty-five percent of all families in Canada, a figure that had fallen from sixty-four percent in 1961. Demographically, opposite-sex cohabitees have represented an increasing proportion of all Canadian families; in the province of Québec, for example, nearly fifty percent of babies were born in 1993 to mothers who were not legally married, and most of these births were to cohabiting couples. Precise numbers about same-sex couples are more elusive, although questions were included, for the first time, about same-sex couples in the census in 2001. The number of sole-parent families has also been rising; in 1995, for example, twenty-two percent of Canadian families were headed by only one parent, and in eighty percent of these families, the single parent was female. And, the proportion of blended families or step-families had also increased to about ten percent of all families in 1995. Moreover, recent longitudinal studies have tracked the dynamic nature of family life; as one commentator suggested, "the modern Canadian family is like a giant amoeba, constantly joining, splitting and rejoining in new configurations." However, the statistics also suggest that there are significant differences


15. See Elaine Carey, 'Alternate' Families Outweigh Tradition, TORONTO STAR (METRO EDITION), June 20, 1996, at A2 (quoting STATISTICS CANADA, CANADIAN FAMILIES: DIVERSITY AND CHANGE (1996)).
19. See id.
in levels of household income in different kinds of families, with single-mother families most at risk of living below the poverty line.\textsuperscript{21}

Traditionally, there has been some legal recognition of “family status” for opposite-sex couples who are not married, but such recognition for same-sex couples is relatively recent.\textsuperscript{22} Thus, in the twentieth century, a patchwork of legislative provisions across Canada provided some legal recognition for “spouses” in opposite-sex couples in defined circumstances.\textsuperscript{23} In addition, provincial family law statutes, which defined the entitlement of former spouses to ongoing financial support after separation, expanded the definition of “spouse” to include opposite-sex cohabitees.\textsuperscript{24} Although these same provincial statutes also created principles for property sharing at separation or divorce, these principles were reserved for married couples only; they were not available to opposite-sex cohabitees.\textsuperscript{25} Thus, although there was some legal recognition of opposite-sex couples as “families” in Canada, such families were nonetheless still excluded from some legal benefits provided to married couples.

However, same-sex cohabitees were not generally recognized at all in federal or provincial legislation, and there were a number of unsuccessful challenges to their exclusion from legal recognition as “families” even prior to the Charter.\textsuperscript{26} After the enactment of the Charter in the 1980s, however, the number of litigation challenges to the exclusion of same-sex couples from the benefits of “family status” increased, although initially they were not often successful. The lack of success of the first litigation challenges resulted from two problems:

\begin{enumerate}
\item \textsuperscript{21} See Vanier Institute of the Family, Profiling Canada’s Families 77 (1994) (stating that ninety-five percent of single-mother families with no earners lived below the poverty line in 1991). See generally Vanier Institute of the Family, Profiling Canada’s Families II (2000).
\item \textsuperscript{22} See Nicholas Bala, Alternatives for Extending Spousal Status in Canada, 17 Can. J. Fam. L. 169, 192-93 (2000).
\item \textsuperscript{23} See LCC Report, supra note 13, at 116; Modernization of Benefits and Obligations Act, ch. 12, 2000 S.C. (Can.) (extending certain spousal benefits under Canadian federal law to “common-law partners”).
\item \textsuperscript{25} See, e.g., Family Law Act, R.S.O., ch. F.3, § 1 (1990) (Ont.) (defining “spouse,” which applies in respect to property-sharing in Parts I and II of the Family Law Act). The courts have developed a lively jurisprudence to award proprietary interests to cohabitees, including both same-sex and opposite-sex cohabitees, pursuant to the equitable doctrines of unjust enrichment and constructive trust. See Ontario Law Reform Comm’n, Report on Family Property (1993); see also Regnier v. O’Reilly, [1997] 39 B.C.L.R.3d 178 (applying equitable principles to a will challenge brought by decedent’s same-sex partner).
\item \textsuperscript{26} See generally Martha A. McCarthy & Joanna L. Radbord, Family Law for Same Sex Couples: Chart(erin)ing the Course, 15 Can. J. Fam. L. 101 (1998).
\end{enumerate}
first, sexual orientation was not included as a prohibited ground of discrimination in the Charter, and second, early equality jurisprudence under the Charter strongly reflected the “similarly situated” test in American jurisprudence. However, beginning with Andrews v. Law Society of British Columbia in 1989, the Supreme Court of Canada began to articulate a new approach to equality jurisprudence that focused on the historic disadvantage experienced by persons such as a claimant in relation to immutable personal characteristics. In addition, by the early 1990’s, courts in Canada held that sexual orientation was an “analogous ground” to those listed in the Charter as prohibited grounds of discrimination. In the context of these developments in Charter jurisprudence, challenges to the exclusion of same-sex couples began to attract judicial support. For example, a 1992 decision held that the policy of the Canadian Armed Forces excluding homosexuals contravened the Charter. In relation to family status, moreover, a judge in Ontario wrote a compelling opinion in 1993, dissenting from the majority view that the exclusion of same-sex couples from marriage did not infringe the Charter, and a judge in British Columbia declared that a same-sex partner was entitled as a “spouse” to medical coverage under his partner’s insurance plan. Thus, although the issue of marriage for same-sex couples remained contested, same-sex partners were gradually being recognized by courts as entitled to equality of treatment and to some of the benefits of “family status.”

28. See, e.g., Andrews v. Ontario, [1988] 49 D.L.R.4th 584, 589 (finding that same-sex couples are not similarly situated as heterosexual couples and refusing to include same-sex partners as dependents under the Health Insurance Act).
30. See id. at 171 (McIntyre, J., dissenting in part) ("It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component") (emphasis added). For an overview of equality jurisprudence, see The Hon. Claire L’Heureux-Dubé, What a Difference a Decade Makes: The Canadian Constitution and the Family Since 1991, 27 QUEEN’S L.J. 361 (2001).
31. See Haig, 9 O.R.3d at 501.
In this context, the Supreme Court of Canada decided two cases in 1995 that required it to assess the fundamental nature of marriage, and to determine whether it was legally distinguishable from cohabiting relationships, including both opposite-sex and same-sex relationships. The court released decisions simultaneously in *Miron v. Trudel*, concerning opposite-sex cohabitees, and in *Egan v. Canada*, concerning same-sex cohabitees. In *Miron*, John Miron claimed accident benefits for injuries which he sustained in an automobile accident, on the basis that he was the “spouse” of the insured, his cohabitee Jocelyne Valliere. The insurance company refused to pay the benefits, claiming that the word “spouse” in the insurance policy was limited to married couples only. Although the insurance company succeeded in the lower courts, five of nine judges in the Supreme Court of Canada held that the policy discriminated on the basis of marital status, and that the discrimination could not be justified pursuant to section 1 of the *Charter*. Among other reasons for their different conclusions, the dissenting judges expressed concern that “where individuals choose not to marry, it would undermine the choice they have made if the state were to impose upon them the very same burdens and benefits which it imposes on married persons.” In spite of such concerns, however, *Miron* clearly established that a majority of the court was determined to adopt a functional approach to married and cohabiting relationships, and the benefits flowing from such relationships.

In the related case, *Egan*, the claimant was a partner in a gay relationship which had existed since 1948. When his partner became entitled to a pension pursuant to the Old Age Security Act, the claimant applied for an allowance that was payable to the “spouse” of a recipient within a married or cohabiting heterosexual relationship. His claim was rejected by the government, and, with the exception of one dissenting opinion, the lower courts held that there was no discrimination in this case. In the Supreme Court of Canada, however, all of the judges

38. See id. at 431.
39. See id. at 465-511. Section 1 of the *Charter* is an express “limit” in relation to constitutional violations. Thus, a violation may be upheld if it is a “reasonable limit[] prescribed by law as can be demonstrably justified in a free and democratic society.” CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.
41. See *Egan*, 2 S.C.R. at 528.
42. See id.
accepted that sexual orientation was an analogous ground of
discrimination pursuant to the *Charter*, and five of nine judges held that
the denial of the claim constituted discrimination on the basis of sexual
orientation.\(^4\) However, one of these five judges also held that the
discriminatory treatment could be justified pursuant to section 1 of the
*Charter*.\(^5\) Thus, in the end, the claim was unsuccessful by a vote of five
to four, with the majority asserting that marriage and opposite-sex
cohabitation could be distinguished from all other societal units because
of "the biological and social realities" of heterosexual relationships.\(^6\)

Both of these cases have continuing significance for defining
"families" in Canada, although most of the subsequent litigation has
focused on *Egan*, at least until very recently.\(^7\) Thus, in 1998, the
Supreme Court of Canada redefined the "pressing and substantial" test
for justifying discriminatory legislation pursuant to section 1,\(^8\) and the
federal government then announced that it would forego an appeal from
Ontario that had decided that the exclusion of same-sex partners as
"spouses" in relation to tax benefits in pension plans constituted
unjustifiable discrimination.\(^9\) More significantly, the Supreme Court of
Canada decided in May of 1999 that provincial legislation that excluded
same-sex couples from entitlement to post-separation spousal support
contravened the equality guarantee in the *Charter* and was not justified
pursuant to section 1.\(^10\) As a result, Ontario amended the definition of
"spouse" to include same-sex couples, on the same basis as opposite-sex
couples, in sixty-seven provincial statutes in late 1999; significantly, the
provincial government’s reluctance was aptly reflected in the name of
the amending legislation, *An Act to Amend Certain Statutes Because of
the Supreme Court of Canada Decision in M. v. H*.\(^11\) In early 2000, the

\(^4\) See *Egan*, 2 S.C.R. at 572 (Sopinka, J., concurring).
\(^5\) See *id.* (Sopinka, J., concurring) (agreeing with four other justices that the distinction
constituted discrimination contrary to section 15 of the *Charter*, but holding that the "infringement
[was] saved" under section 1).
\(^6\) Id. at 536.
\(^7\) See, e.g., *Rosenberg v. Canada (A.G.*), [1998] 38 O.R.3d 577, 582-84 (finding that the
exclusion of tax benefits on the grounds of sexual orientation violates section 1 of the *Charter*); *M.
Family Law Act, R.S.O., ch. F.3 (1990) (Ont.), infringes section 15(1) of the *Charter*, and, if so,
whether the legislation is saved by section 1 of the *Charter*).
\(^8\) See *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 554-57; *see also* Brenda Cossman, *Lesbians,
Gay Men, and the Canadian Charter of Rights and Freedoms*, 40 OSGOODE HALL L.J. 223, 231-32
(2002).
\(^9\) See *Rosenberg*, 38 O.R.3d 577 (applying the principles enunciated in *Vriend*).
\(^11\) Ch. 6, 1999 S.O. (Ont.) The amending legislation was enacted in October 1999, just
barely within the timeframe permitted by the court in *M. v. H.* See *M. v. H.*, 2 S.C.R. at 87
federal government similarly enacted amendments to provide for the extension of benefits to same-sex couples in federal statutes. Significantly, however, the federal legislation included an interpretation section, which was added during Parliamentary debate, stating that, "for greater certainty, 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." In this context, the Supreme Court's decision in M. v. H., and the legislation that resulted from it, confirmed that same-sex couples were entitled to "family status." Yet marriage still remained the preserve of heterosexual couples. However, shortly after the decision in M. v. H., same-sex marriage cases were initiated in the courts of three Canadian provinces: British Columbia, Ontario, and Québec. In October of 2001, a single judge in a British Columbia court decided that the common law limitation of marriage to heterosexual couples did not constitute discrimination pursuant to the Charter, and that if there was discrimination, it was justified under section 1. By contrast, in July 2002, a three member Ontario court unanimously held that the prohibition against same-sex marriage did constitute discrimination and was not justified pursuant to section 1 of the Charter. The Québec court followed the decision of the Ontario court. Although all of these decisions necessarily engaged with the nuances of Charter jurisprudence, one of the judgments in the Ontario court explicitly addressed the nature of marriage from a historical and societal perspective. Identifying the procreation function as the basis for the exclusion of same-sex couples from the entitlement to marry, Justice Blair assessed the competing arguments and concluded that "the underlying question, then, is whether the law in Canada today is sufficiently open and adaptable to recognize a broader rationale as the
defining characteristic of marriage than heterosexual procreation and its surrounding religious paraphernalia. In my view, it is.\(^5\)

In early 2003, the British Columbia Court of Appeal allowed the appeal in that province, but ordered that its decision would be suspended for two years to permit appropriate legislative action.\(^5\) In early June of 2003, the Ontario Court of Appeal released its decision confirming the lower court decision in Ontario; however, the Ontario appellate court held that there was no reason to suspend its declaration of invalidity.\(^6\)

As a result, same-sex marriage became available in Ontario on June 10, 2003. A subsequent motion in the British Columbia court a few weeks later, requesting that the court’s suspension be lifted, was unopposed by the federal and provincial governments.\(^6\) Thus, same-sex marriage is currently available in the provinces of Ontario and British Columbia.

Even this brief overview demonstrates how significant the Charter’s human rights protections have proved to be for advocates of same-sex family status, and even marriage: the broad scope for judicial activism pursuant to the Charter has been critical to the legal recognition of same-sex families. By contrast, legislatures in Canada have tended to play “catch up” as and when judicial decisions have required them to act. As a result, it is courts that have primarily shaped and expanded legal definitions of “families” in Canada in recent years. Thus, although the federal government established a Parliamentary committee to examine the issue of same-sex marriage, and the federal Department of Justice issued a discussion paper in the fall of 2002,\(^6\) they have been overtaken by these judicial decisions. As a result, the federal government has decided that legislation must be enacted to ensure uniformity of marriage law (a matter within federal constitutional jurisdiction) throughout Canada, and the government has now submitted a constitutional reference to the Supreme Court of Canada to determine how to shape such legislation to conform to Charter requirements.\(^6\) In this context, it appears that Parliament is seeking direction from the court with respect to its constitutional obligation to extend marriage to same-sex couples in all provinces and territories.

Yet, the “success” of this human rights litigation for gay and lesbian families masks an important aspect of the litigation process: the

58. Id. at 356 (Blair, R.S.J., concurring).
62. See LEGAL RECOGNITION, supra note 13.
63. See Lunman & Fagan, supra note 5.
fact that it has required advocates to argue that same-sex relationships are functionally the same as heterosexual relationships. As scholars in both Canada and the United States have argued, this emphasis on functional similarity may necessitate the suppression of individual aspirations and undermine the efforts of same-sex couples (particularly lesbians) to (re)define their intimate relationships "outside" the law. Yet, while their family relationships may not be fully recognized by law, the family lives of same-sex couples are nonetheless shaped by law, at least in some respects. As Shelley Gavigan argued, "[l]esbians do not live outside the law in a kind of legal limbo, nor do they exist in a legal vacuum." In their engagement with the courts, both in human rights challenges and in other family law disputes, and in the law's definition of family rights and responsibilities, same-sex couples are both shaping and being shaped by legal and social relations in Canada. Thus, according to Gavigan, the "success" of a test case in Ontario, which permitted the lesbian partners of biological mothers to legally adopt their children, was flawed because it required the court to hold that the partners were "spouses."

As profound as the challenge of the lesbian adoptions is, it is clear that striking down of the opposite sex requirement alone does not, cannot, address the constraints and assumptions that are embedded in the adoption legislation in Ontario. Under this legislation, it is not enough for the lesbian social parents to be "parents." In order to make a joint application, . . . they must also be spouses . . . . In order for the lesbian parents to be full parents, they had to be spouses, same-sex spouses to be sure, but spouses nonetheless.

Thus, while it is clear that human rights challenges pursuant to the Charter have succeeded in expanding the legal definition of families to include same-sex couples, issues about precisely how to define families

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in law remain profoundly contested and challenging. In this context, a major report of the Law Commission of Canada attempted in 2001 to reexamine fundamental issues for defining families in Canada in the twenty-first century, but its impact has been muted by the same-sex marriage debate. The report’s significance for future developments in Canada is addressed later in this Article.

B. "New Family Obligations": Responsibilities for Dependency for Families and the State

In spite of law’s acceptance of the ideas of autonomy and independence for individuals within classical liberalism, it is evident that "dependence can be viewed as a necessary part of the human condition." Although age, infirmity, and other conditions may render an individual adult dependent, children are inevitably dependent when they are born, even though the extent of their continuing dependence into adulthood varies according to economic and other circumstances within their families. Economic dependence may also occur for adult caregivers, whose ability to continue to engage in paid work is compromised by their care-giving responsibilities, a situation which commonly affects custodial parents (usually mothers) at separation or divorce. More systemically, governmental economic policies that assume a level of national unemployment contribute to the economic dependency of workers and their families, as do levels of minimum wages that do not result in family incomes above the poverty line. Yet, recognizing that economic dependence is part of everyday life is much easier than determining who is responsible to support dependent individuals and families.

Although Canada has a history of support for publicly funded health-care, education, and other social services, the division of legislative authority between the federal and provincial governments has often inhibited coordinated policy initiatives in relation to social security. In the context of governmental concerns about deficit reduction in recent decades, moreover, there has been a trend to replace

68. See generally LCC REPORT, supra note 13.
69. See infra text accompanying notes 147-61.
71. See generally Torjman, supra note 9; Linda Duxbury & Christopher Higgins, Families in the Economy, in CANADA’S CHANGING FAMILIES, supra note 2, at 29.
72. See Maureen Baker, The Effectiveness of Family and Social Policies, in CANADA’S CHANGING FAMILIES, supra note 2, at 129.
universal programs with benefits that target the poor and disadvantaged, an approach which has arguably reinforced the stigma of poverty.\textsuperscript{73} In addition, some of these changes have been reflected in judicial decisions about responsibilities for economic support for dependent family members.\textsuperscript{74} As sociologist Margrit Eichler argued, familial obligations to provide support may have both functional and normative aspects:

As far as the support function of families is concerned, there is widespread consensus that families not only do support their own, but should do so. What is often overlooked is that there tends to be a direct opposition between the notion of the family as a support system and social security programmes: to the degree that the proper locus of support for an individual is seen to lie within that individual’s family, the individual becomes disentitled from public support.

\ldots

[To the degree that we make social security programmes available to individuals, we guarantee, as a society, some income security to individuals. Conversely, to the degree that we let eligibility for the social security programmes be determined by family status, we disentitle individuals from access to social support on the basis of their family status. This disentitlement is usually justified by reference to the support function of “the family” \ldots\textsuperscript{75}]

In my view, the trend of judicial decision making and legislative initiatives in the past two decades has reflected an expansion of the scope of family obligations for dependent individuals, with a corresponding reduction in the role of state support for dependency. Moreover, this trend has not simply occurred as a result of the functional vacuum created by the state’s retreat from social security programs, but has also been characterized in normative terms. Thus, in spite of permanent separation or the finality of a divorce order, former spouses and their children have been categorized by the Supreme Court of Canada as a “post-divorce family unit” who should have continuing economic and other obligations to provide support for dependent family

\begin{itemize}
\item \textsuperscript{73} See Torjman, \textit{supra} note 9, at 71.
\item \textsuperscript{74} See Bracklow v. Bracklow, [1999] 1 S.C.R. 420, 438 (“[A spousal support award] places the primary burden of support for a needy partner \ldots on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.”).
\item \textsuperscript{75} MARGRIT EICHLER, FAMILIES IN CANADA TODAY 110 (1983).
\end{itemize}
This development was evident in relation to the issue of ongoing financial support after separation or divorce. For example, although the Supreme Court of Canada appeared to narrow the circumstances for enforcing responsibilities of ongoing spousal support in 1987 in the *Pelech* trilogy of cases, even when former spouses had negotiated a binding separation agreement that limited their continuing economic relationship, the principles of spousal support have increasingly been interpreted as recognizing ongoing obligations of the “post-divorce family unit.” Significantly, the principles were initially expanded to recognize a need to provide effective compensation to former spouses (particularly wives) for their contributions to unpaid labour during the marriage. Thus, in 1992, the Supreme Court of Canada expressly recognized “the feminization of poverty [as] an entrenched social phenomenon” in Canada, and declared that the objectives of spousal support set out in the *Divorce Act* (which included compensation for the disadvantages of marriage or its breakdown) required Mr. Moge to continue to pay spousal support to his former wife almost twenty years after they had separated. Judicial recognition of this “family obligation” was further expanded in 1999, when the Supreme Court of Canada determined in *Bracklow v. Bracklow* that economic need on the part of a former spouse was all that was required to ground the obligation of a former family member to provide support. As Chief Justice McLachlin stated, the “mutual obligation” view of marriage recognizes that spouses’ lives become intermingled as a result of cohabitation over a period of time in a family relationship, and that it is unrealistic to assume that all separating couples will be able to move immediately from mutual support to absolute independence. In

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78. See *Richardson*, 1 S.C.R. at 866 (explaining that the *Pelech* line of cases suggests that it is within a court’s discretion to alter a settlement agreement in the event there has been a “radical change in the circumstances of a former spouse,” provided that the change is the product of “economic dependency generated by the marriage relationship”).
83. See id. at 448.
84. Id. at 437-38.
addition, however, she suggested that this view of marriage "places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls."5

These cases revealed the court's commendable recognition of the precarious financial circumstances experienced by many women after separation and divorce, and they took into account both the need to compensate women for their unpaid contributions in intact families, as well as the post-divorce circumstances that often lead to economic need even in the absence of compensatory entitlement. This recognition is, of course, laudable in terms of ensuring that legal principles reflect the economic reality of women's lives. At the same time, however, both Moge and Bracklow conflated the clear economic need of former spouses (mostly women) with an assertion that the obligation to respond to this need belonged entirely to (former) family members, and not to the state. Of course, in a context in which the state was withdrawing support, any other decision would leave dependent family members in poverty. Yet, these judicial decisions may create difficulty in cases where former spouses, unlike those in Moge and Bracklow, do not have sufficient financial resources to support both current and former families. Regardless of these issues, however, my point here is the narrower one of demonstrating how these decisions evidence a shift away from state-funded support programs for dependents and towards "new family obligations." More significantly, because of the expanded definition of "spouse" in family law legislation, these new family obligations extend to former cohabitees, both opposite-sex and (as a result of M. v. H.) same-sex partners. In this way, both the expansion of the category "spouse" and the shift to family, rather than state, obligations for economic support for dependency work together to make the family, including the "post-divorce family," the primary site for ensuring economic security for individuals.

These conclusions in relation to spousal support obligations were also reflected in the enactment of a system of national child support guidelines in 1997,6 prescribing tables for defining the amount payable on the part of a non-custodial parent for their children after separation or

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5. Id. at 438 (emphasis added).
divorce. In this context, the state opted to use its resources to enforce support payments by parents, rather than to transfer benefits, economic and social, directly to children. Moreover, both the federal and provincial statutes define “parent” so as to include non-biological children for whom an adult stands “in the place of a parent.” Thus, in its 1999 decision in Chartier v. Chartier, the Supreme Court of Canada ordered a former husband to pay child support to his former wife, not only for their biological child but also for the wife’s child from a previous relationship because he had stood “in the place of a parent” to this child. In this case, the adults had been married for only a little over one year, and although the court’s decision was consistent with the authorities in Canada, its policy implications were questioned by a commentator on the Chartier case:

The fact that adults live together does not amount to a commitment that they will remain together. Many relationships are of short duration. Many people are not inclined to make the accommodations necessary to ensure that their relationship will continue. In light of this, should the courts impose a long-term financial commitment on a person who was pleasant to a partner’s child for a short time? The Supreme Court of Canada apparently believes that it should.

The task facing many lawyers will be to advise their clients on how to prevent that from happening to them. It appears that the only way to prevent a long-term child-support commitment is never to establish a parent-child relationship with a partner’s child. Social scientists will have to decide whether that is a good way to force people to interact.

Notwithstanding these concerns, Canadian courts have tended to enforce parental relationships with non-biological children, even when the relationship with a child’s parent has terminated. As a recent

90. See id., 168 D.L.R.4th at 557.
91. See id. at 543.
92. See id. at 556-57.
94. See, e.g., Samson v. Samson, [2003] 2003 N.L.C. LEXIS 140 at 24 (holding that when respondent took on role of father figure for eleven years to his wife’s children from prior
decision in Manitoba declared, "[j]ust as the status of a biological parent continues after the relationship between the adults has ceased, so one who stands *in loco parentis* continues to do so after cohabitation ceases. Neither bond can be unilaterally terminated by a parent." Although there are important policy issues about law and family relationships in such cases, my point here is to demonstrate the shift in responsibility for dependency, once again, from the state to the "family," including the "post-divorce family."

In addition to this shift in family law principles, legislative changes concerning social security have also tended to limit state obligations for dependency. For example, when the newly-elected government in Ontario wished to implement its election promises about reducing the welfare rolls in 1995, it adopted two strategies: reducing levels of welfare payments by over twenty percent, and redefining "spousal" relationships. Poverty activists challenged both of these actions, using the *Charter*. In relation to the government’s right to set the levels of welfare payments, the challenge was unsuccessful, with the courts deferring to the legislature. However, after protracted procedural challenges, the Ontario Court of Appeal held in 2002 that the new definition of "spouse" in the 1995 legislation violated the equality guarantee of the *Charter*. The definition particularly affected single mother families in receipt of welfare if the mother resided with a male with whom she shared any expenses. The claimants were all single mothers who were living with men who were not the fathers of their children, and they had arrangements for sharing rent, food costs, and other household expenses. They argued that, pursuant to Ontario law, none of these male cohabitees had responsibility to provide financial support to the mothers or their children. Significantly, some of the mothers had previously experienced abusive relationships and were hoping that these new relationships might become permanent, but they all wished to "test" the relationships for a time and to maintain their

relationships, he stood in the place of a parent and was obligated for their support upon divorce from their mother); Beaudry v. Gillcash, [2001] 2001 Man. R.2d LEXIS 272 at*5 (granting visitation to a non-biological parent who was "the only father [the child had] ever known").

97. See id.
98. See Masse v. Ontario, [1996] 134 D.L.R.4th 20, 42 (finding no right to social assistance benefits as the legislature was free to repeal or amend the statutes providing for it).
100. See id. at 496.
101. See id.
financial independence from these male partners while doing so. In characterizing the regulations as violations of the Charter's equality guarantee, the court stated:

[T]he impact [of the Regulations] is severe, compromising, as it does, the respondents' ability to meet their own and their children's basic needs. Because of the definition, each [claimant] lost her entitlement to social assistance as a single person.

Beyond purely financial concerns, more fundamental dignity interests of the [claimants] have been affected. Being reclassified as a spouse forces the [claimants] and other single mothers in similar circumstances to give up either their financial independence or their relationship.... Forcing them to become financially dependent on men with whom they have at best try-on relationships strikes at the core of their human dignity.

Thus, while the governmental regulation defining "spouse" in relation to welfare entitlement was consistent with family, rather than state, support for dependency, this judicial decision in the welfare context reassigned responsibility for the economic dependency of single-mother families to the state. Clearly, this judicial decision appears initially incongruous with cases that have expanded "family obligations" in the family law context. At the outset, it may be possible to find a distinction in the fact that "family obligations" were enforced, in cases like Moge and Bracklow, where the "spouses" had been married. By contrast, support obligations are not generally enforceable against cohabitees until their relationships meet the legislative threshold for liability, usually by the expiration of a three-year period or the birth or adoption of a child. Thus, the claimants in Falkiner argued that they suffered discrimination because they were treated differently, and less advantageously, than single mother families who were not in receipt of welfare payments. Moreover, since their cohabiting partners acquired no legal responsibility to support them until the expiration of the three-year period, the claimants were particularly vulnerable in their economic dependency.

These arguments may be important in relation to governmental assertions that welfare programs, and particularly these impugned
regulations, were consciously designed to ensure equality in the treatment of married and cohabiting (opposite-sex) couples. In rejecting this argument, the court held that the definition of “spouse” in the regulations did not “capture spousal relationships reasonably accurately [because] it embrace[d] many relationships that [were] not marriage-like in their economic component.” From this perspective, the court struck down legislation that was designed to reduce welfare expenditures by creating “new family” relationships. Thus, although the legislation did not function to encourage marriage per se, as does the recent proposal in the United States, the overall purpose of the Ontario statute was to transform relationships into “families” and to replace state support for economic dependency with “new family obligations.” In striking down the definition of “spouse” in welfare legislation, the court thus established one limit on the extent to which governments may transfer responsibility for dependency from the state to families. However, other than this limited situation, Canadian family law policy has tended to create expectations that families, expansively defined to include opposite-sex and same-sex cohabitees, will be the primary source of responsibility for economic dependency—rather than the state. Moreover, Canadian legal policy has achieved this goal without the need to enact legislation encouraging marriage.

C. Converging/Diverging Principles in Current Family Law and Policies

This overview of recent Canadian developments reveals how courts have significantly contributed to an expanded definition of “families.” Using the constitutionally-entrenched equality guarantee in the Charter, courts have responded positively to a number of claims presented by opposite-sex cohabitees and by gay and lesbian activists for legal recognition of their “families,” including entitlement to marry. However, such claims for judicial recognition of same-sex families have generally been designed to attain equal access to the benefits of “family status,” many of which were previously available only to families involving marriage and/or heterosexual cohabitation. Yet, as this overview has also demonstrated, courts have at the same time been redefining

107. See id. at 485, 514.
108. Id. at 498.
responsibility for economic dependency within families, including "post-divorce families," and in shifting primary responsibility away from the state by creating "new family obligations" for dependency. Unlike the same-sex family status cases, which have been driven by principles reflecting fundamental human rights and equality, the cases that have defined "family obligations" have reflected courts' increasing recognition of the reality of economic need, particularly for women and children post-divorce or separation, and they have been decided against a political backdrop of declining levels and categories of eligibility for social security. Although there has not been much political debate about roles and responsibilities for economic dependency in Canada, courts have responded to clear and demonstrable needs by creating "new family obligations." In this way, judicial decisions about "new families" and the evolving jurisprudence about "new family obligations" appear to have converged to expand not just the *rights*, but also the *obligations*, of Canadian families, including same-sex families.

Recent decisions of the Supreme Court of Canada, however, may signal changes in these judicial views about "new families" and "new family obligations." In *Gosselin v. Québec*, for example, the court reviewed a legislative scheme in Québec that significantly reduced the level of welfare benefits payable to recipients who were under thirty years of age, unless they participated in education or work experience programs. A majority of five to four held that the age distinction, which determined different levels and qualifying criteria for persons over age thirty, by contrast with the claimant and others who were under age thirty, did not violate the equality guarantee of the *Charter*. The majority concluded that the ameliorative purpose of creating incentives for young persons in receipt of social assistance to participate in education and work programming removed the possibility of discrimination:

> Even if one does not agree with the reasoning of the legislature or with its priorities, one cannot argue based on this record that the legislature's purpose lacked sufficient foundation in reality and common sense to fall within the bounds of permissible discretion in establishing and fine-tuning a complex social assistance scheme. Logic and common sense support the legislature's decision to structure its social assistance programs to give young people, who have a greater

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111. See id. at 276.
112. See id. at 275-309. The arguments focused not only on the section 15 equality protection, but also on the guarantee of "liberty" and "security of the person" in section 7. See id. at 301-04.
potential for long-term insertion into the workforce than older people, the incentive to participate in programs specifically designed to provide them with training and experience.\footnote{Id. at 290.}

In addition to this approach to Charter protection for equality, which seems to insulate from judicial scrutiny any program for which the government can identify beneficent objectives, the court also rejected the claimant’s arguments that the government’s failure to provide sufficient places for education and work opportunities for all social assistance recipients under thirty consigned her to living in poverty.\footnote{See id. at 291-92.} Interestingly, it was the views of a dissenting judge that revealed that the rationale for this treatment of recipients under the age of thirty was a governmental assumption that they would receive assistance, particularly in relation to housing, \textit{from their parents}.\footnote{See id. at 360-61.} Yet, as Justice Bastarache concluded, “no effort was made to establish what living conditions were and a presumption was adopted that all persons under [thirty] received assistance from their family.”\footnote{Id. at 361 (Bastarache, J., dissenting).} Unfortunately, this normative assumption about “family obligations” was untrue for Ms. Gosselin, so that she was forced to live on an amount of social assistance that was less than the amount defined by Québec legislation as the basic survival amount.\footnote{See id. at 361-62 (Bastarache, J., dissenting).} Thus, by contrast with the Ontario court’s decision in \textit{Falkiner}, the Supreme Court’s recent decision in \textit{Gosselin} appears to reinforce the scope for governments to shift responsibility for economic dependency to families, and to legislate on the basis of normative assumptions about “family obligations,” whether they really exist in fact or not.

However, the outcome in \textit{Gosselin} was achieved by a close vote,\footnote{See id. at 275-309.} with a number of dissenting opinions,\footnote{See id. at 309-24 (L’Heureux-Dubé, J., dissenting), 324-85 (Bastarache, J., dissenting); 386-424 (Arbour, J., dissenting), 424-37 (Lebel, J., dissenting).} a feature that may suggest a significant divergence of opinion among judges on the court. By contrast, much greater unanimity was evident in another recent decision, \textit{Nova Scotia v. Walsh},\footnote{[2002] 221 D.L.R.4th 1.} where eight of nine judges confirmed that Nova Scotia legislation did not violate the equality guarantee of the Charter when it restricted access to the statutory property-sharing regime to
married couples who separated or divorced.\textsuperscript{121} Walsh and her opposite-sex cohabitee had lived together for ten years and they were the parents of two children, but her cohabiting partner held title to most of the accumulated property of the relationship.\textsuperscript{122} Thus, at separation, Walsh applied for a declaration that her exclusion from the statutory regime, which entitled each party to a marriage to an equal share of accumulated property, violated her Charter equality rights.\textsuperscript{123} Although the appellate court in Nova Scotia had unanimously upheld her claim,\textsuperscript{124} the Supreme Court concluded, with one dissenting opinion, that Walsh had not suffered discrimination on the basis of her status as a cohabitee.\textsuperscript{125} Thus, the court held that there was no violation of Walsh’s equality rights pursuant to the Charter.

Did Nova Scotia v. Walsh signal a new direction in the court’s views about “new families” or “new family obligations?” In responding to this question, relationships between Walsh and some of the earlier cases must be assessed. For example, there were obvious similarities between the plaintiff’s claim to be a “spouse” pursuant to an insurance policy in Miron v. Trudel,\textsuperscript{126} and Walsh’s claim to be a “spouse” for purposes of accessing property-sharing principles in the provincial statutory scheme at separation. In both cases, opposite-sex cohabitees were seeking legal recognition for their “spousal” relationships, even though they were not married.\textsuperscript{127} Moreover, since opposite-sex cohabitees had long been recognized in legislative provisions across Canada,\textsuperscript{128} it was widely expected that the court would decide that the exclusion of opposite-sex couples in Walsh violated the Charter.\textsuperscript{129} In addition, since the Supreme Court of Canada had held in 1999 that the distinction between opposite-sex and same-sex cohabitees violated the equality guarantee in the Charter,\textsuperscript{130} a decision that the exclusion of opposite-sex cohabitees from the statutory scheme for property-sharing

\textsuperscript{121} See id. at 36.
\textsuperscript{122} See id. at 14.
\textsuperscript{123} See id.
\textsuperscript{125} See Nova Scotia (A.G.) v. Walsh, 221 D.L.R.4th 1 at 36; see id. at 37-89 (L’Heureux-Dubé, J., dissenting).
\textsuperscript{126} [1995] 2 S.C.R. 418.
\textsuperscript{127} In both Miron and Walsh, legal recognition of these claims did not result in courts creating new financial obligations for governments by extending such benefits to new categories of families, a concern that has often been used to distinguish the differing outcomes in Miron, and Egan. See text accompanying notes 34-45.
\textsuperscript{129} See R. Thompson, Annotation to Nova Scotia v. Walsh, R.F.L.
at separation contravened the *Charter*'s equality guarantees appeared likely to apply to same-sex cohabitees as well. In this context, a decision confirming the decision of the Nova Scotia Court of Appeal would have significantly enhanced the convergence of legal principles applicable to married couples, opposite-sex couples, and same-sex couples at the point of separation or family breakdown.

By contrast with this reasoning, however, the Supreme Court of Canada held that the exclusion of opposite-sex couples from access to the statutory scheme for property-sharing at separation did not violate the *Charter*'s equality guarantee, and distinguished *Miron*. According to the court, *Miron* represented a claim against a third party in which the opposite-sex cohabitees were in agreement about the nature of their relationship, while *Walsh* involved a claim by one cohabiting partner against the other in circumstances where they had chosen to cohabit, rather than to marry. For the majority of the court, the opportunity for individual choice in defining “families,” whether by marriage or cohabitation, was critical:

Where the legislation has the effect of dramatically altering the legal obligations of partners, as between themselves, choice must be paramount. The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious, and financial considerations by the individual. While it remains true that unmarried spouses have suffered from historical disadvantage and stereotyping, it simultaneously cannot be ignored that many persons in circumstances similar to those of the parties, that is, opposite sex individuals in conjugal relationships of some permanence, have chosen to avoid the institution of marriage and the legal consequences that flow from it. . . . To ignore these differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual’s freedom to choose alternative family forms and to have that choice respected and legitimated by the state.

By contrast with this majority view, Justice L’Heureux-Dubé’s lone dissenting opinion focused on evidence of the rise in the numbers of cohabiting relationships in Canada, arguing that “[t]he increased incidence of heterosexual unmarried cohabitation as a means by which children are raised and socialized and as a form of economic, emotional

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132. See id.
133. Id. at 28-29.
134. See id. at 56-58 (L’Heureux-Dubé, J., dissenting).
and social interdependence dictates some form of recognition of the functional equality displayed by both heterosexual married and unmarried cohabitants. Moreover, she expressly rejected the government's argument that the distinction in the legislation reflected different choices that were defined by the agreements between married couples by contrast with those of cohabiters about the nature of their relationships:

[T]he fact that marriage gives rise to legal obligations does not, by itself, signal that the source of those obligations is some bargained-for exchange or the product of a consensus. While the price of a haircut is known in advance and can be contracted for (with a higher price for perms than for brushcuts), the same cannot be said about marriage. The marital relationship changes over time. Houses and other assets are bought and sold, one of the partners is promoted or loses their job, children are born, accidents occur, or a member of the family becomes ill. These and other events are rarely anticipated at the outset and appropriately bargained for. Further, neither spouse can anticipate who will contribute what to the marriage. As a consequence, even the most intelligent of adults lacks the capacity to evaluate the commitments involved in any agreement dealing with the consequences of a dissolution that will only come after great change occurs in the relationship.

Citing empirical research in the United Kingdom about the wide range of intentions among heterosexual cohabiters, Justice L'Heureux-Dubé suggested a need to take account of the fact that:

[T]he choice not to marry is not a matter belonging to each individual alone. The ability to marry is inhibited whenever one of the two partners wishes to marry and the other does not. In this situation, it can hardly be said that the person who wishes to marry but must cohabit in order to obey the wishes of his or her partner chooses to cohabit. This results in a situation where one of the parties to the cohabitation relationship preserves his or her autonomy at the expense of the other . . . . Under these circumstances, stating that both members of the

135. Id. at 58 (L'Heureux-Dubé, J., dissenting); see also LAW REFORM COMM'N OF NOVA SCOTIA, FINAL REPORT: REFORM OF THE LAW DEALING WITH MATRIMONIAL PROPERTY IN NOVA SCOTIA 21 (1997) (discussing changes to the laws of property-sharing at separation as necessitated by the functional equivalent of heterosexual married and unmarried cohabitants).
137. See id. at 67 (L'Heureux-Dubé, J., dissenting) (citing Carol Smart, Stories of Family Life: Cohabitation, Marriage and Social Change, 17 CAN. J. FAM. L. 20, 50 (2000)).
relationship chose to avoid the legal consequences of marriage is patently absurd.\footnote{138}

Interestingly, in 2003, the Supreme Court also allowed the appeal from the Ontario Court of Appeal in Miglin, with the majority concluding that choices reflected in private agreements between divorcing spouses should be respected, particularly where both spouses were represented by counsel in their negotiations.\footnote{139} By contrast, the two dissenting judges articulated the problems of vulnerability and economic need for such spouses, particularly women.\footnote{140} Thus, like the Supreme Court's decision in Walsh, the views in Miglin also emphasized ideas of choice in the formation and dissolution of different kinds of family relationships. Moreover, while Walsh appears difficult to reconcile with the Supreme Court's earlier decision in M. v. H., which recognized a violation of the Charter's equality guarantee in the differential treatment accorded to opposite-sex and same-sex relationships for purposes of spousal support at the end of the relationship,\footnote{141} some of the views expressed by the majority in Miglin may signal a different approach to spousal support principles enunciated in Bracklow. As a result, these cases raise perplexing questions: is it significant that the claim in Walsh concerned property while the claim in M. v. H. concerned only spousal support? More fundamentally, what is the significance of "choice" for individuals who are involved in "family" relationships, and for governmental obligations to provide support for dependency? How should individual choices about family relationships and state regulation of the consequences of such choices be connected, if at all, in the twenty-first century?

III. RECONCEPTUALIZING "FAMILIES" AND "FAMILY OBLIGATIONS"

particularly as a result of the "same-sex marriage" cases, the federal government in Canada is now actively involved in reviewing the status of marriage. In the discussion paper issued by the federal Department of Justice in 2002, the government has suggested three alternatives,

\footnotesize{\textsuperscript{138}} Walsh, 221 D.L.R.4th at 68 (L'Heureux-Dubé, J., dissenting).
\footnotesize{\textsuperscript{140}} See id. at *182-93.
\footnotesize{\textsuperscript{141}} See M. v. H., [1999] 2 S.C.R. 3, 26-27. Significantly, one partner in M. v. H. was seeking entitlement to spousal support at the breakdown of the relationship, while the other partner objected to being treated as functionally similar to opposite-sex cohabitees for this purpose. See id. at 30, 42. On its face, this claim appears substantially similar to the situation in Walsh, in which one partner was claiming access to property-sharing principles available to married couples, while the other partner resisted.
including the *status quo* (marriage only between a man and a woman), and secondly, the extension of marriage to same-sex couples.¹⁴² The “third option” proposed would eliminate legal marriage, and replace it with “registered partnerships”; although the third option would not prohibit religious ceremonies of marriage, such ceremonies would have no legal impact in the absence of registration.¹⁴³ However, the discussion paper’s proposals have been substantially overtaken as a result of the judicial decisions about same-sex marriage in Ontario and British Columbia, and federal legislation concerning marriage is expected to be introduced in Parliament in 2004, following release of the decision in the government’s constitutional reference to the Supreme Court of Canada.¹⁴⁴ On the basis of the jurisprudence, it seems likely that Canada will enact same-sex marriage legislation applicable to all provinces and territories, although any such legislative proposals will also continue to attract political controversy.¹⁴⁵

By contrast with recommendations focusing explicitly on marriage, a broader perspective about defining families in Canada was proposed by the Law Commission of Canada in 2001.¹⁴⁶ Although the Commission’s report has not attracted much discussion in the context of the same-sex marriage decisions in the courts, it was considered carefully in the lower court decision in Ontario.¹⁴⁷ Indeed, the options proposed by the Commission persuaded Justice Blair that the issues should be addressed by legislatures so as to take into account the range of possible reforms to the law of marriage.¹⁴⁸ According to the Commission, “marriage” law should respect values of equality, autonomy, and choice in personal adult relationships, and its recognition of these relationships should ensure certainty, stability, and publicity.¹⁴⁹ Although conceding that marriage currently demonstrates some of these

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¹⁴². *See generally* LEGAL RECOGNITION, supra note 13.
¹⁴³. *See id.* at 26. This proposal would require agreement between the federal, provincial and territorial governments, because of the division of legislative authority for “family law” in Canada. *See id.* All references to marriage would be eliminated and federal divorce law would apply only to existing marriages. Registered partnerships and their breakdown would be governed by provincial law. *See id.*
¹⁴⁴. *See supra* note 5 and accompanying text.
¹⁴⁵. *See id.*
¹⁴⁶. *See LCC REPORT, supra* note 13; *see also* LEGAL RECOGNITION, supra note 13, at 8 n.4. (stating that “further study would be needed before Parliament can decide whether it is appropriate to treat non-conjugal relationships in the same way as spouses or common-law partners in all federal laws”).
¹⁴⁸. *See id.* at 375-76 (Blair, R.S.J., concurring).
¹⁴⁹. *See LCC REPORT, supra* note 13, at xi, xv-xvi.
features, the Commission concluded that it was no longer sufficient because it does not “respond to the variety of relationships that exist in Canada today”: older people living with adult children, adults with disabilities living with their caregivers, or cohabiting siblings, whose relationships may also be “characterized by emotional and economic interdependence, mutual care and concern and the expectation of some duration.”

In considering how to foster these differing relationships, the Law Commission’s report reviewed four arrangements: private contracts (the only model available to conjugal and non-conjugal relationships outside marriage); ascription; registration; and marriage. Interestingly, in the context of recent decisions in the Supreme Court of Canada, the Law Commission’s report identified serious disadvantages with private ordering in personal relationships: problems of inadequate knowledge and inaccessible legal advice, as well as issues of potential inequality between the parties. As the report noted, “[t]he contractual model may respect the value of autonomy but often falls short of fulfilling other values such as equality or efficiency since too few individuals are prepared to negotiate the terms of their close personal relationships.”

In addition, it assessed the ascription model as less useful because it must treat all relationships as just the same; thus, it is “a blunt policy tool in that it treats all conjugal relationships alike, irrespective of the level of emotional or economic interdependency.” By contrast with these models, the report suggested that registration would permit greater personal autonomy, while providing models for achieving the partners’ goals.

A registration scheme provides a way in which a broad range of relationships, including non-conjugal relationships, can be recognized, while also promoting and respecting the value of autonomy. A registration scheme has a number of advantages specifically related to the value of autonomy and choice. In such a scheme, rights and responsibilities are based on the mutual and voluntary decisions of the individuals in the relationship.

In addition to individual autonomy with respect to such registered partnerships, however, the report also recognized a continuing state interest in restructuring financial relationships at the breakdown of such

150. Id. at 113-14.
151. Id. at 115.
152. Id. at 116.
153. Id. at 117-18.
relationships: "[t]he state should ensure that the reasonable expectations of partners are not undermined on the breakdown of the relationship."\textsuperscript{154}

The report also carefully addressed the fourth model: marriage.\textsuperscript{155} At the outset, it assessed the continuing role for marriage in the context of proposed registered partnerships, suggesting that it was advantageous to remove the link between marriage and legal consequences: "[b]y establishing a civil registration scheme open to all persons in committed relationships, the state could focus more clearly and effectively on accomplishing the underlying objective currently accomplished incompletely by marriage, namely, recognizing and supporting committed personal adult relationships by facilitating an orderly regulation of their affairs."\textsuperscript{156} Yet, as the report also noted, this recommendation may be inconsistent with established patterns of marriage in Canada, since civil marriage ceremonies now constitute a growing proportion of marriages solemnized in many parts of the country.\textsuperscript{157} Partly for this reason, the report also considered the desirability of requiring a civil marriage for legal consequences (as is the custom in a number of European jurisdictions).\textsuperscript{158} More significantly, however, the report reviewed the arguments about same-sex marriage and concluded that the reservation of marriage to heterosexual couples can no longer be justified.

There is no justification for maintaining the current distinctions between same-sex and heterosexual conjugal unions in light of current understandings of the state's interest in marriage. The secular purpose of marriage is to provide an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations. The current law does not reflect the social facts: as the Supreme Court of Canada has recognized, the capacity to form conjugal relationships characterized by emotional and economic interdependence has nothing to do with sexual orientation. . . . If governments are to continue to maintain an institution called marriage, they cannot do so in a discriminatory fashion.\textsuperscript{159}

Such comments reveal both a functional analysis of the nature of family relationships as well as recognition of new normative principles

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\textsuperscript{154}. Id. at 120.
\textsuperscript{155}. See id. at 123-31.
\textsuperscript{156}. Id. at 123.
\textsuperscript{157}. See id.
\textsuperscript{158}. See id. at 126.
\textsuperscript{159}. Id. at 130.
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for governing the state’s relationships to families. Interestingly, moreover, the views of the Law Commission’s report are similar to the results of opinion polls in Canada, conducted between June 1999 and June 2001, which revealed “that between [forty] percent and [sixty-five] percent of Canadians [then] favour[ed] recognition of same-sex marriages.”\textsuperscript{160} In such a context, however, it is also clear that individuals’ aspirations for recognition of their “new families” in accordance with the Charter’s human rights protections are increasingly congruent with the state’s interest in transferring “new family obligations” for economic dependency to families. As a result, some Canadians may wish to embrace judicial decisions which grant the dignity of legal recognition to “new families,” while lamenting at the same time the privatizing agenda of governments that are abandoning public responsibility for economic dependency by implementing “new family obligations.” In the result, the level of financial support for dependency is entirely determined by the economic resources of former family members, and economic relationships must continue long after emotional ties may have shattered, or at least fluctuate as time and circumstances change. In this way, the concerns identified by the two scholars, one American and one Canadian, at the outset of this Article clearly represent similar and significant challenges for family law and policy in both countries. At the same time, the current policy contexts in our two countries differ significantly: while the American government wishes to promote marriage as a panacea for welfare problems, and to exclude same-sex partners from entitlement to marry, recent trends in Canadian courts and legislatures appear to be in flux in relation to issues about family and state obligations for dependency, but recognition of same-sex marriage appears very likely. Moreover, the report of the Law Commission of Canada suggests that there are fundamental issues about families, and their relationships to law, which require serious consideration in both of our countries. In such a context, there may be a continuing need for all of us to examine “lessons beyond borders.”

\textsuperscript{160} Id. at 136 n.58.