What is Marriage-Like Like? The Irrelevance of Conjugality

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WHAT IS MARRIAGE-LIKE LIKE? THE IRRELEVANCE OF CONJUGALITY

Brenda Cossman* & Bruce Ryder**

While the notion of conjugal or marriage-like has become legally ubiquitous in the regulation of non-marital cohabitation in Canada, its meaning remains elusive. A review of the case law and of spousal definitions in income security schemes reveals that the presence or absence of a sexual component to a relationship has become immaterial to, or of declining relevance in, the determination of conjugality. As a result, legal decision-makers have had to grapple with the increasing instability of the distinction between conjugal and non-conjugal relationships.

The question of whether a relationship has a sexual component bears no relation to legitimate state objectives. As a result, the distinction between conjugal and non-conjugal relationships is collapsing as a coherent basis for legal policy. It thus becomes necessary to develop better ways of determining when and how adult personal relationships ought to be recognized in the law. Rather than continuing on the elusive quest for marriage equivalence, it is necessary to reformulate relational definitions to focus more precisely on the kinds of emotional and economic interdependence relevant to the objectives of particular laws.

I. INTRODUCTION

Definitions of common law spouses or partners in Canadian statutes tend to require cohabitation in a "conjugal" or

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“marriage-like” relationship. As a result, a number of legal consequences turn on the distinction between conjugal and non-conjugal relationships. These include benefits or rights, such as the right to claim family employment benefits, the right to claim the spousal or common law partner tax deduction, the right to death benefits or survivors’ pensions, the right to inherit property when a loved one dies intestate, the right to bring a claim for losses consequent upon the wrongful death or injury of a loved one, and the right to sponsor a common law partner for immigration purposes. Financial penalties may also flow from recognition as a common law spouse or partner. A low-income person deemed to be living in a conjugal relationship may find his or her entitlement to benefits reduced or eliminated pursuant to a variety of federal and provincial/territorial income security schemes. Likewise, whether a person has certain obligations, like spousal support obligations or a duty to provide the necessaries of life to a cohabitant, depends on the distinction between conjugal and non-conjugal relationships.

Given the heavy legal freight the notion of conjugality has been asked to bear, one would think it would have been thoroughly investigated and its meaning clearly understood. Yet, while debates have raged over the question of who the law should consider to be a spouse, the definition of conjugality remains elusive. Until recently, it has received little critical attention. The academic literature increasingly emphasizes the diversity of family forms beyond the conjugal relationship. In sociological terms, family is increasingly defined by functions and practices — what people do in their personal relationships —

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rather than by the formal status of relationships.\(^2\) Despite the emphasis on the diversity of familial practices, the definition of the conjugal relationship itself is rarely interrogated.\(^3\)

\(^2\) See B. Cossman \& J. Fudge, “Introduction to Privatization, Law and the Challenge to Feminism”, in B. Cossman \& J. Fudge, eds., \textit{Privatization, Law and the Challenge to Feminism} (Toronto: University of Toronto Press, forthcoming 2002); “Profiling Canada’s Families II” (May 2000) at v, online: Vanier Institute of the Family Homepage <http://www.vifamily.ca/pubs> (last modified 31 July 2000) (defining family as people bound by ties of mutual consent, birth, adoption or placement who assume responsibilities for variant combinations of care; procreation; socialization of children; social control of members; production, consumption and distribution of goods and services; and affective nurturance).

In this paper, we pursue a series of questions about conjugality that have become more important as the notion has spread across our statute books. What are conjugal or marriage-like relationships like? What distinguishes them from other adult personal relationships, and why should the distinction matter? Should conjugality remain a marker for the allocation of rights and responsibilities? Is the distinction normatively and legally viable?

We argue that the more the notion of conjugalcy is interrogated, the more it becomes apparent that it is an irrational basis for the allocation of legal benefits and burdens. We begin by reviewing the recent legislative developments in response to the constitutional rulings requiring equal treatment of conjugal relationships. At the federal level and in each provincial/territorial jurisdiction, an array of legal rights and obligations are now imposed on persons who cohabit in conjugal or marriage-like relationships. Constitutional challenges and the ensuing legislative reforms have been animated by a drive towards formal equality. Persons in relationships deemed equivalent to marriage have increasingly been accorded the same rights and responsibilities as married couples. The extension of rights and responsibilities to unmarried cohabitants — both same-sex and opposite-sex alike — has used conjugality as the appropriate marker for legal inclusion through ascribed spousal status.

We then turn to a review of judicial approaches to the definition of conjugality, culminating in a discussion of the Supreme Court of Canada's comments on the issue in M. v. H. We critique the current uses and understandings of conjugality, arguing that in the aftermath of M. v. H., the distinction

between conjugal and non-conjugal relationships has become even more elusive. Sex, once the hallmark of a conjugal relationship, has become legally less important, to the point that the Supreme Court has suggested that a relationship may be conjugal even if the individuals do not have a sexual relationship.

We argue that sex is, or ought to be, totally irrelevant. Taking sex into account at all is wrong-headed and offensive. It is wrong-headed because whether a relationship has a sexual component or not bears no relation to the achievement of legitimate state objectives. It is offensive because it requires cohabitants to disclose the details of the most intimate aspects of their lives to administrators or in public proceedings.

We go on to review the expansive definitions of spouse employed in the context of social assistance legislation, and show how the distinction between conjugal and non-conjugal relationships has been eroded and that erosion contested. In addition to the uncertainties about whether co-residents are caught within definitions of conjugal relationships, we will show how the administration of the spousal regime to unmarried couples entails significant negative consequences for their privacy, autonomy and financial security.

We argue that these problems could be attenuated if governments were to consider three general directions for law reform. First, there is a need to reconsider legislative objectives and the relevance of relationships to them. For example, social welfare is an area where the objective of delivering benefits to persons most in need could be accomplished more effectively if the existence of a conjugal or any other relationship was not used as a proxy for reduced need.

Second, legislatures should expand opportunities for persons to voluntarily take on legal rights and responsibilities by legalizing same-sex marriage and by enacting domestic
partnership regimes that are not restricted to conjugal cohabitants. The need to rely on the involuntary imposition of spousal status would then be reduced, although not entirely eliminated.

Third, definitions of ascribed spouses or common law partners need to be reformulated. Conjugality should no longer be the marker or proxy for the legal regulation of adult personal relationships. The distinction is no longer normatively or legally viable. The search for marriage-equivalence is a relic of an era when the law sought to bolster and regulate marriage as the only socially acceptable intimate relationship between adults. Ironically, at the same time as lawmakers have abandoned the view that marriage should be the only state-sanctioned adult intimate relationship, they have extended the use of marriage or marriage-like relationships to accomplish a range of state policies.

Conjugality or marriage-equivalence is a poor proxy for the relational attributes relevant to legislative objectives. We argue that the law should more carefully tailor its definitions of adult personal relationships to the underlying objectives of state regulation. The law should avoid presumptions based on relational status and focus more on the actual existence of the kinds of economic and/or emotional interdependence relevant to particular legislative objectives.

II. THE CENTRAL PLACE OF CONJUGALITY IN STATUTORY DEFINITIONS OF COMMON LAW SPOUSES OR PARTNERS

Canadian legislatures have gone much further than their counterparts in many other jurisdictions in imposing legal rights and responsibilities on unmarried couples. They have done so by deeming cohabitants to be spouses or "common law partners" if they have lived together in conjugal relationships for a defined period of time. For decades, federal pension laws
and provincial/territorial laws dealing with spousal support and social assistance have included common law spouses. These laws both promoted and responded to the economic vulnerability of women who formed relationships with men outside of marriage. In many legal contexts, however, marriage remained the only legally recognized adult personal relationship into the 1980s and 1990s.

In the past decade, court rulings holding that discrimination on the basis of marital status and sexual orientation are prohibited by the Constitution accelerated the pace of change. Two Supreme Court of Canada rulings played a pivotal role. In *Miron v. Trudel* (1995),\(^4\) the Court held that imposing legal disadvantages on unmarried opposite-sex cohabitants relative to their married counterparts violates the constitutional prohibition on marital status discrimination. In *M. v. H.* (1999),\(^5\) the Court ruled that imposing legal disadvantages on same-sex conjugal cohabitants relative to their unmarried opposite-sex counterparts violates the constitutional prohibition on discrimination on the basis of sexual orientation.

Together, the *Miron v. Trudel* and *M. v. H.* rulings constitutionalize a principle of conjugal relational equality, calling into question the validity of all differences in the legal status of married and unmarried (either same-sex or opposite-sex) cohabitants.\(^6\) While there is still a large gap between

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\(^6\) The Court will consider these issues again shortly when it hears the appeal of *Walsh v. Bona* (2000), 186 D.L.R. (4th) 50, 185 N.S.R. (2d) 190 (N.S.C.A.), leave to appeal granted February 15, 2001, S.C.C. Bulletin, 2001 at 284. The Nova Scotia Court of Appeal held that the exclusion of unmarried couples from statutory rights to division of
constitutional requirements and legislative realities, in the last few years the federal government and eight provincial governments have passed laws that, to varying degrees, bring their statutes closer to recognizing the principle of conjugal relational equality.

At both the federal and provincial/territorial levels, the definition of common law spouses or partners applicable to unmarried cohabitants typically require co-residence for a certain period of time in a conjugal or marriage-like relationship. While these laws differ in many important details that are not the concern of the present discussion — for example, the required duration of co-residence or whether or not they embrace same-sex couples — conjugality is a common prerequisite (with rare exceptions). What follows is a brief review of the current legislative definitions, many of them revised and extended by legislatures in the aftermath of the 1999 ruling in *M. v. H.*

### A. Federal Laws

Until recently, federal legislation recognized unmarried cohabitants only in the context of pension and taxation laws.\(^7\) The passage of the *Modernization of Benefits and Obligations Act*\(^8\) in 2000 has radically altered the legislative landscape. With the exception of a few Acts on which reforms are

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pending,\textsuperscript{9} unmarried cohabitants now have the same rights as married spouses in all federal legislation. According to the Act, a person cohabiting with another in a "conjugal relationship" for at least a year is now referred to as a "common law partner". The new definition has been added alongside "spouses" (now a term reserved to husbands and wives) throughout the federal statute book. The new definition contains no reference to gender, thereby extending ascribed "common law partner" status to same-sex couples. The federal government took a "one size fits all" approach to implementing the principle of conjugal relational equality: the same definition of common law partner appears uniformly in legislation dealing with a variety of subjects within federal jurisdiction, such as taxation, employment pensions, old age security, veterans' pensions, diplomatic immunity, financial institutions, and criminal law.

B. Provincial/Territorial Laws

Among the provinces, British Columbia, Quebec, Ontario and Saskatchewan have taken the largest steps towards respecting conjugal relational equality. Legislation enacted beginning in the late 1990s in these jurisdictions has extended the rights and obligations possessed by unmarried opposite-sex cohabitants to same-sex couples. Like the federal Parliament, the Saskatchewan legislature took the additional step of according rights to unmarried cohabitants previously reserved to married couples.

In British Columbia, the law defines common law spouses as two persons who have lived together in a "marriage-

\textsuperscript{9} For example, the \textit{Canada Evidence Act}, R.S.C. 1985, c. C-5.
like relationship". In Ontario, the government distinguished itself by opting for terminological segregation on the basis of sexual orientation in 1999 omnibus legislation: if they live together in a “conjugal relationship”, unmarried opposite-sex couples are “spouses” and same-sex couples are “same-sex partners”. In Quebec, 1999 legislation extended rights and obligations to two persons “qui vivent maritalement” (“who live together in a de facto union”, in the English version). The Saskatchewan government, in legislation passed in 2001, opted for a distinctly unhelpful definition: a common law spouse is defined tautologically as either of two persons who cohabit “as spouses”.

The remaining six provinces – Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland – and the three territories recognize common law cohabitants for more limited purposes. When they do, they typically define “spouse” or “common law partner” by employing the same “marriage-like” or “conjugal” relationship language that appears in the B.C. and Ontario statutes. One


11 An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H., S.O. 1999, c. 6.


14 In Alberta, spousal support obligations extend to two persons of the opposite sex who have lived together in a “marriage-like” relationship: Domestic Relations Act, R.S.A. 1980, c. D-37, s. 1(2), as am. by S.A. 1999, c. 20, s. 2. In Manitoba, the government added a definition of “common law partner”, defined as a person cohabiting
exception to the conjugal focus can be found in New
Brunswick, where spousal support obligations are imposed on
two persons who have lived together "in a family relationship
in which one person has been substantially dependent upon the
other for support." This definition extends to conjugal
couples as well as others living together, such as two siblings,
in relationships characterized by economic dependency.

Nova Scotia is the only province that has not relied
exclusively on ascribing common law spousal or partner status
to cohabitants as the means of responding to the constitutional
requirement of conjugal relational equality. Two persons who
wish to subscribe to a package of rights and obligations
previously reserved to marital couples may now register as
"domestic partners". Even here, however, the conjugal fixation
of recent reforms is not displaced. Domestic partnership

with another in a conjugal relationship, to statutes dealing with
spousal support, pensions, and death benefits: An Act to Comply with
In Newfoundland, the law dealing with spousal support applies to
"partners", defined as two persons who have cohabited in a conjugal
relationship: Family Law Act, R.S.N. 1990, c. F-2, s. 35(c), as
amended by S.N. 2000, c. 29. In the Northwest Territories and
Nunavut, spouses are defined for the purposes of support and
property rights as two persons of the opposite sex who have cohabited
in a conjugal relationship: Family Law Act, S.N.W.T. 1997, c. 18, as
duplicated for Nunavut by s. 29 of the Nunavut Act, S.C. 1993, c. 28.
In Nova Scotia, "common law partners", defined as two persons who
have lived in a conjugal relationship, are now included in laws
dealing with spousal support, taxation and pensions: Law Reform
Yukon, spousal support obligations extend to two persons of the
opposite sex who have cohabited in a conjugal relationship: Family
Law Act, R.S.P.E.I., c. F-2.1, s. 1(1) and s. 29; Family Property and
Support Act, R.S.Y. 1986, c. 63, s. 1 and s. 35.

Family Services Act, S.N.B. 1983, c. 16, s. 112(3), as am. by S.N.B.
2000, c. 59.
declarations are open only to “two individuals who are cohabiting or intend to cohabit in a conjugal relationship.”

While the notion of conjugality or marriage-like has become legally ubiquitous in the regulation of non-marital cohabitation in Canada, one searches in vain for legislative guidance on its meaning. It is not defined in any Canadian statute. The task of giving meaning to this crucial relational characteristic has been left to administrators, tribunals and courts. What is marriage-like like? Is there such a thing as a typical or standard marriage? Among the multitude and diversity of relationships between married men and women, can we identify common characteristics of their shared lives apart from the experience of having exchanged vows and signed forms in a religious or civil proceeding? Or, should we abandon the attempt to assign a fixed set of functional characteristics to the state of being married, and acknowledge that it is increasingly unintelligible to speak of a relationship as being “marriage-like”? The absence of a legislative definition suggests that the meaning of conjugality is either self-evident or difficult to pin down. The record of judicial attempts to grapple with the notion supports the latter conclusion.

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16 Law Reform (2000) Act, S.N.S. 2000, c. 29, s. 45, adding a new “Part II: Domestic Partners” to the Vital Statistics Act, R.S.N.S. 1989, c. 494. The Quebec government is considering enacting legislation permitting the registration of “civil unions” between two unmarried persons of the same sex who are not closely related to each other and do not have a common law partner. See the draft bill, Loi instituant l’union civile des personnes de même sexe et modifiant le Code civil et d’autres dispositions législatives, online: Assemblée Nationale du Québec <http://www.assnat.qc.ca/fra/publications/Av-projets/01-fap01.htm> (last modified: 22 February 2002).
III. JUDICIAL INTERPRETATIONS OF CONJUGALITY

Just as the legal content and social understandings of marriage have changed over time, so too have judicial interpretations of conjugal or marriage-like relationships.\(^{17}\) Emphasis that can be found in the older cases on the performance of traditional gender roles – the woman “rendering housewifely duties” and the man supporting her “as a husband should”\(^ {18}\) – have faded as the explicitly gendered and patriarchal content of matrimonial regulation has been replaced by the notion that marriage is a partnership between equals not tied to the assumption of any particular social roles.\(^ {19}\)

Similarly, recent case law by and large does not support the notion, more evident in some earlier cases,\(^ {20}\) that financial dependence of one co-resident on another is an essential feature of a conjugal relationship. As we have argued elsewhere, an approach based on economic dependency reflects

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\(^{17}\) As Wilson J. noted in *Macmillan-Dekker v. Dekker* (2000), 10 R.F.L. (5th) 352 (Sup. Ct. J.), online: QL (OJ) at para. 46: “The case law, viewed historically with respect to what constitutes a marriage relationship, is a mirror of social values which have fluctuated over time.”

\(^{18}\) *Thomas v. Thomas*, [1948] 2 K.B. 294 at 297, per Lord Goddard C.J.


the stereotype of marriage as a relationship of inequality and dependency.\textsuperscript{21} Defining the spousal relationship in terms of the economic dependency of women is at odds with the partnership model of spousal relationships that increasingly informs family law. The emphasis should be placed on interdependency and equality, rather than dependency.\textsuperscript{22} Just as the discourse of spousal support more generally has shifted from an emphasis on dependency to interdependency,\textsuperscript{23} we would expect to see a similar shift in the definition of unmarried conjugal relationships.

A shift from a dependency to an interdependency model is indeed evident in many judicial rulings. A good example is \textit{Fitton v. Hewton Estate} (1997),\textsuperscript{24} a case involving a claim pursuant to dependant’s relief legislation by the deceased’s long-term lover. Even though the statutory definition of common law spouse in the legislation included a requirement that the applicant be “dependant upon the deceased for maintenance and support”,\textsuperscript{25} the court held that an

\begin{footnotesize}
\begin{enumerate}
\item Cossman & Ryder, \textit{supra} note 3 at 80.
\item \textit{Ibid.}
\item Since \textit{Moge v. Moge}, [1992] 3 S.C.R. 813, (1992), 99 D.L.R. (4th) 456 (S.C.C.), the emphasis in spousal support law has been on compensating for the economic advantages and disadvantages of an interdependent relationship. Even in \textit{Bracklow v. Bracklow}, [1999] 1 S.C.R. 420, (1999), 169 D.L.R. (4th) 577 (S.C.C.), where the Supreme Court of Canada endorsed a non-compensatory approach to spousal support, the Court can be seen to be emphasizing the idea of marriage as involving mutual obligations. In explaining the theory of marriage that she sees as informing this non-compensatory approach, McLachlin J. wrote (at para. 30) that “[t]he mutual obligation theory of marriage and divorce...posits marriage as a union that creates interdependencies that cannot be easily unravelled” (emphasis added).
\item (1997), 38 B.C.L.R. (3d) 78, online: QL (YJ) (C.A.).
\item \textit{Dependants Relief Act}, R.S.Y. 1986, c. 44, s. 1(f).
\end{enumerate}
\end{footnotesize}
interdependent relationship between financially independent persons meets this test: "It is enough if the couple cooperate in assisting each other so they are dependant one upon the other in the improvement of the enjoyment of their life." Justice Braidwood wrote that the definition of common law spouse should be interpreted so as to give effect to the realities of our current society. These include the desirability of not only the male but also the female partner in a common-law relationship, as indeed in a marriage, to be financially and economically independent and to have the ability to enjoy a fulfilling life in the market place as well as to rear children, if so desired. It should be interpreted in the context of equality between the spouses.

If the performance of traditional gender roles and economic dependency are no longer considered necessary components of marriage-like relationships, what are the defining attributes of those relationships? Two approaches now prevail in the case law. The first approach locates marriage equivalence in the voluntary assumption of long-term commitments to mutual economic support. The inquiry focuses on the subjective intentions of the parties to a non-marital relationship. On this approach, the only essential, defining feature of a marital relationship is the voluntary assumption of mutual support obligations "until death do us part". We will call this the "subjective equivalence" test. The second approach finds marital equivalence in a bundle of factors that together indicate the existence of an emotionally and economically interdependent relationship. The focus of the inquiry is on the

26 Fitton, supra note 24 at para. 39.
27 Ibid. at para. 38.
objectively observable features of the relationship. We will call this the "functional equivalence" test.

A. Subjective Equivalence

The leading case advancing the subjective equivalence approach is the decision of the British Columbia Court of Appeal in Gostlin v. Kergin. In determining the degree to which cohabitants are subjected to spousal rights and obligations, Justice Lambert was concerned that "independence should be a choice" and that the law "should not force them into mutual commitments that they do not want." Therefore, in his view, the touchstone for determining whether an unmarried couple is living in a marriage-like relationship is whether "they have voluntarily embraced the permanent support obligations" in the legislation. If the nature of their subjective intentions proves elusive, then objective factors may be relied upon to illuminate whether they have pledged to each other permanent mutual support. Justice Lambert listed a number of objective factors that should be examined if a mutual commitment to support is not clear from the parties' account of their own understandings:

Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share property? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial

28 Supra note 19.
29 Ibid.; 3 B.C.L.R. (2d) at 267.
30 Ibid.
independence and become economically dependent on the other, in accordance with a mutual agreement?\textsuperscript{31}

This approach examines a range of functional dimensions of the relationship, but solely for the purpose of ascertaining whether the couple intended to embrace a long-term commitment to mutual support.

The \textit{Gostlin} ruling is still a leading authority in British Columbia\textsuperscript{32} and the Yukon,\textsuperscript{33} although it has received little support in other jurisdictions in recent years. Searching for subjective intention is often fruitless, since cohabitants may have different views regarding the nature of their commitments, and other cohabitants may have given the matter little thought as their relationships evolved.\textsuperscript{34} Even if shared intentions regarding mutual support obligations can be ascertained, the autonomy concerns that ground the subjective equivalence approach have given way to a concern with protecting cohabitants from economic disadvantages produced over the course of an interdependent relationship. If there truly

\textsuperscript{31} \textit{Ibid.} at 268.


\textsuperscript{33} In \textit{Fitton v. Hewton Estate}, \textit{supra} note 24, the Yukon Court of Appeal applied \textit{Gostlin}.

\textsuperscript{34} As Blumberg has noted, “reported cases, sociological studies and gender-related social and economic conditions” belie the notion that cohabiting couples “operate with one heart and one mind despite their conflicting interests”: G.G. Blumberg, “Cohabitation Without Marriage: A Different Perspective” (1981) 28 U.C.L.A. L. Rev. 1125 at 1168. See also W. Holland, “Cohabitation and Marriage – A Meeting at the Crossroads?” (1990) 7 C.F.L.Q. 31 at 47 (“[m]any couples drift into long-term relationships without any clear idea of what is happening”).
is a mutual desire to live outside of spousal support rights and obligations, cohabitants can enter into a domestic contract to this effect.\textsuperscript{35} In a recent dissenting opinion where she called into question the \textit{Gostlin} approach, Justice Huddart wrote that over the course of cohabitation finances become intertwined and financial dependency may emerge by the way the parties structure their relationship so that at its termination, one party is in need of support even in circumstances where neither party intended a lifetime commitment. As in so many areas of life, conduct speaks louder than words.\textsuperscript{36}

In sum, the subjective equivalence approach appears to be falling out of judicial favour. Notably, the Supreme Court of Canada did not mention the parties’ intentions regarding mutual support when it addressed the meaning of conjugality in \textit{M. v. H.}, to be discussed further below. The second approach, one based on a search for functional equivalence through an

\textsuperscript{35} See Holland, \textit{supra} note 3 at 158; Cossman & Ryder, \textit{supra} note 3 at 58-66. As L’Heureux-Dubé J. wrote in her concurring opinion in \textit{Miron, supra} note 4 at para. 101: “it must be recalled that the imposition of marriage-like mutual rights and obligations upon couples in a relationship analogous to marriage need not deprive them of the autonomy required to make personal choices if these persons also have the possibility of resorting to domestic contract to exclude the effects of the legislation. Rather than placing the onus on unmarried couples to contract into any such mutual rights and obligations, inclusion within the legislation merely shifts the onus to those who wish to preserve individual autonomy to contract out.”

\textsuperscript{36} \textit{Takacs, supra} note 32 at para. 40. Another careful dissection and rejection of the \textit{Gostlin} approach can be found in Wilson J.’s judgment in \textit{Macmillan-Dekker, supra} note 17 at paras. 50-67 (para. 67: \textit{Gostlin} is “clearly at odds with the practical realities of social policy upon which support obligations are imposed”).
examination of objective features of a relationship, is now dominant in the jurisprudence.

B. Functional Equivalence

Pursuant to this approach, legal decision-makers seek to identify the basic dimensions and functions of a marital relationship, and then determine whether the relationship in question has a sufficient number of these features to qualify as a conjugal or marriage-like relationship.37 This approach differs from the subjective equivalence approach in that it examines a broader range of relational attributes, and in that the objectively observable features of the relationship are the focus of the inquiry rather than the stated subjective understandings of the parties. The leading case in the common law provinces (apart from British Columbia) is Molodowich v. Penttinen (1980),38 which consolidated the relevant functional attributes under seven headings: 1) shelter; 2) sexual and personal behaviour; 3) services; 4) social; 5) societal perceptions of the couple; 6) economic support; and 7) children.39 Under each heading,

37 "Courts have, by and large, adopted a particular view of marriage by asserting that the marriage relationship has certain characteristics and that these ought to form the basis for a comparison with the relationship in question. If a significant (but unspecified) number of correspondences are found, the relationship under scrutiny will be held to be a 'conjugal' relationship.": Macmillan-Dekker, ibid. at para. 44.

38 Supra note 19.

39 In New South Wales, where ascribed status has been the preferred means of implementing conjugal relational equality, the Supreme Court formulated a similar list of factors to determine whether cohabitants are in a "de facto relationship". See D. v. McA (1986), 11 Fam. L.R. 214 at 227 (N.S.W.S.C.). This list is now incorporated in s. 4(2) of the New South Wales Property (Relationships) Act 1984, online: Australian Legal Information Institute website <http://www.austlii.edu.au/au/legis/nsw/consol_act/pa1984298/s4.html>.
Judge Kurisko set out a detailed and oft-quoted set of inquiries. A review of these inquiries brings home the striking degree to which the administration of the functional equivalence approach requires investigations into the intimate details of cohabitants' lives. For example, under the heading "sexual and personal behaviour," Judge Kurisko suggested that the following questions should be posed:

Did the parties have sexual relations? If not, why not? Did they maintain an attitude of fidelity to each other? What were their feelings toward each other? Did they communicate on a personal level? Did they eat their meals together? What, if anything, did they do to assist each other with problems or during illness? Did they buy gifts for each other on special occasions?  

The functional equivalence approach has been criticized for the extent to which it measures cohabitants' relationships against a norm of an idealized marital relationship. As we have argued previously, there is a danger that "the idealized functional approach sets up a monolithic and mythical image of the marital relationship, against which all relationships are evaluated". Indeed, it is tempting to speculate how many marriages would fail to qualify as "marriage-like" if they were subjected to similar scrutiny. In her thoughtful dissent in Mossop, Justice L'Heureux-Dubé cautioned that functional definitions of family should not be used to establish one model of family as the norm. Her

40 Supra note 19 at 381.
42 Cossman & Ryder, supra note 3 at 78.
comments are equally relevant to thinking about functional definitions of common law spouses or partners:

The use of a functional approach would be problematic if it were used to establish one model of family as the norm, and to then require families to prove that they are similar to that norm. It is obvious that the application of certain variables could work to the detriment of certain types of families. By way of example, the requirement that a couple hold themselves out to the public as a couple may not, perhaps, be appropriate to same-sex couples, who still often find that public acknowledgement of their sexual orientation results in discriminatory treatment. It is also possible that a functional model may be used to subject non-traditional families to a higher level of scrutiny than families who appear to conform more to the traditional norm.\footnote{Mossop v. Canada (Attorney General), [1993] 1 S.C.R. 554, (1993), 100 D.L.R. (4th) 658 [hereinafter Mossop cited to S.C.R.] at 638.}

Along the same lines, Justice Cory in \textit{Egan} noted that same-sex relationships need not conform to an idealized norm to qualify as conjugal.\footnote{Egan v. Canada, [1995] 2 S.C.R. 513, (1995), 124 D.L.R. (4th) 609 at para. 169.} Lower courts too have been sensitive to this concern, while defending the ability of the \textit{Molodowich} test to assess the essential attributes of conjugal relationships in a flexible and contextual manner without relying on a single marital ideal.\footnote{See, \textit{e.g.}, \textit{Diebert v. Calder} (2001), 14 R.F.L. (5th) 21 (Q.B.), online: QL (AJ) at paras. 68-69.}
As a result, on the functional equivalence approach, marriage-like is not like any particular marriage. Rather, marriage-like is like marriages tend to be, or perhaps more accurately, how judges imagine marriages ought to be. The inquiry is guided by a flexible and evolving ideal, but it is still an ideal. Notwithstanding the sensitivity to diversity evident in recent judicial rulings, the functional equivalence approach is necessarily tied to the pursuit of an imagined marital ideal. Because the relevance of marriages, in all their diversity, to the attainment of many legislative objectives is no longer apparent, so too has it become difficult to understand the point of the search for the elusive ideal of marriage equivalence.

In *Macmillan-Dekker*, Justice Wilson summed up current understandings of the functional equivalence approach nicely:

I conclude that there is no single, static model of a conjugal relationship, nor of marriage. Rather, there are a cluster of factors which reflect the diversity of conjugal and marriage relationships that exist in modern Canadian society. Each case must be examined in light of its own unique, objective facts... the seven factors [listed in *Molodowich*] are meant to provide the Court with a flexible yet objective tool for examining the nature of relationships on a case-by-case basis. The emphasis should not be on the parties' subjective intention as provided in their viva voce evidence, but upon the objective facts that are indicia of both a conjugal/spousal relationship and the parties' objective intentions.46

46 *Supra* note 17 at para.68.
The Molodowich functional equivalence approach is now dominant in the jurisprudence. With the exception of British Columbia and the Yukon, where the Gostlin subjective equivalence approach is followed, courts across the country have adopted the functional equivalence approach to conjugality.\(^{47}\) In M. v. H. (1999),\(^{48}\) the Supreme Court of Canada endorsed Molodowich, likely securing its status as the leading case for some years to come. Given the importance of the Supreme Court's ruling in M. v. H. – where a majority engaged for the first time with the meaning of "conjugal" in the context of non-marital cohabitation – a consideration of the Court's comments follows.

C. M. v. H.: The Supreme Court of Canada and Conjugality

In M. v. H., the Supreme Court, by an 8-1 majority, held that s. 29 of the Ontario Family Law Act\(^{49}\) discriminated on the basis of sexual orientation by excluding lesbians and gay men from the right to seek spousal support from a same-sex partner with whom they have cohabited. In their joint judgment on behalf of six members of the Court, Justices Cory and Iacobucci\(^{50}\) found that s.

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\(^{48}\) Supra note 5.

\(^{49}\) R.S.O. 1990, c. F.3.

\(^{50}\) Cory J. wrote the s. 15 portion of the analysis, and Iacobucci J. dealt with the s. 1 and remedial issues. Lamer C.J. and L'Heureux-Dubé,
29 of the Act violated the human dignity of lesbian and gay couples. In the words of Justice Cory, the exclusion of these couples promotes the view that they are "less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples." Moreover, "it perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence." The majority held that the exclusion was not rationally related to the objectives underlying the spousal support provisions in Part III of the Family Law Act, which they characterized as dealing equitably with the economic needs of persons in interdependent relationships and the alleviation of claims on the public purse by privatizing the costs of family breakdown.

The ruling in M. v. H. was groundbreaking. For the first time, the Supreme Court recognized the "conjugal" nature of same-sex relationships. After twice postponing a resolution of the issue in the 1990s, the Court recognized that persons in same-sex relationships are entitled to the same rights and responsibilities as unmarried persons in opposite-sex relationships. However, the question of the meaning of conjugality did not receive a detailed consideration. One of the crucial questions that challenges to spousal definitions brought by same-sex couples have raised over the years is not only who is a spouse, but also what makes a spouse a spouse. Earlier Supreme Court opinions have included a more comprehensive

McLachlin and Binnie JJ. concurred with their joint judgment. Major J. and Bastarache J. wrote separate concurring judgments. Gonthier J. dissented.

51 Supra note 5 at para. 73.
52 Ibid.
53 Ibid. at para. 93.
54 Mossop, supra note 43; Egan, supra note 44.
discussion of the scope and content of spousal and familial status – notably, Justice L’Heureux-Dubé’s dissenting opinion in Mossop (1993) in favour of recognizing same-sex couples as family, and, on the other side of the debate, Justice La Forest’s opinion in Egan (1995) affirming the exclusion of same-sex couples from spousal definitions. These two opinions canvass the various policy arguments in support of and against the recognition of same-sex couples as family or spouses. And in so doing, they canvass a range of opinion on the nature of the spousal relationship.

The ruling in M. v. H. shares the spirit of Justice L’Heureux-Dubé’s opinion in Mossop, given their common conclusions that the exclusion of same-sex couples from definitions of spouse or family is discriminatory. However, the majority ruling in M. v. H. did not refer to Justice L’Heureux-Dubé’s lengthy discussion and endorsement of functional understandings of family forms. In fact, the ruling in M. v. H. steered away from an extensive policy discussion of the meaning of spouse.

Instead, Justice Cory focused on the narrow question of whether a same-sex couple could meet the definition of conjugal within the meaning of s. 29 of the Ontario Family Law Act. He began by stating that

same-sex couples will often form long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner on the other. Though it might be argued that same-sex couples do not live together in ‘conjugal’ relationships in the sense

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55 Ibid.
56 Supra note 44.
that they cannot 'hold themselves out' as husband and wife, on this issue I am in agreement with the reasoning and conclusions of the majority of the Court of Appeal.\textsuperscript{57}

He then endorsed, with little elaboration, the functional equivalence approach to conjugality. Justice Cory cited \textit{Molodowich} as setting out "the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple".\textsuperscript{58} He appeared to be taking into account some of the criticisms of this functional approach to the family, noting that these dimensions of family life will be present in varying degrees, and that it will not be necessary for a couple to satisfy all of these dimensions for their relationship to be conjugal:

In order to come within the definition, neither opposite-sex couples nor same-sex couples are

\textsuperscript{57} Supra note 5 at para 58. At the Ontario Court of Appeal, (1996), 31 O.R. (3d) 417 at 442-3, Charron J.A. stated that same-sex couples may have conjugal relationships even though they may not be "out" to their communities: "The existing case-law on this point has developed in the context of heterosexual relationships only. Even so, the existing jurisprudence makes it clear that couples do not have to fit a singular traditional model in order to demonstrate that their relationship is conjugal within the meaning of the law. The extent to which these different elements of a conjugal heterosexual relationship will be taken into account will vary with the circumstances of each case. In the same way, some factors may take on a greater or lesser significance than others in the case of same-sex couples. For example, some same-sex cohabitees may not have openly and publicly presented themselves as a couple for fear of reprisal or prejudice, a concern which may not be present to the same degree, if at all, in the case of unmarried heterosexual cohabitees."

\textsuperscript{58} Supra note 5 at para. 59 (citing \textit{Molodowich}, supra note 19).
required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".\textsuperscript{59}

He continued by emphasizing that sexual relations were not a necessary feature of conjugality and that the \textit{Molodowich} list of factors must be considered flexibly in every case:

Certainly an opposite-sex couple may, after many years together, be considered to be in a conjugal relationship although they have neither children nor sexual relations. Obviously the weight to be accorded the various elements or factors to be considered in determining whether an opposite-sex couple is in a conjugal relationship will vary widely and almost infinitely. The same must hold true of same-sex couples. Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely. In these circumstances, the Court of Appeal correctly concluded that there is nothing to suggest that same-sex couples do not meet the legal definition of "conjugal".\textsuperscript{60}

\textsuperscript{59} \textit{Ibid.}

\textsuperscript{60} \textit{Ibid.} at para. 60. See also \textit{Richardson v. Richardson}, supra note 19 at para. 13 ("The parties may, for a number of reasons, such as age, illness or indifference, choose not to have sexual relations but still live together and hold themselves out to be husband and wife in other respects. For that reason, it is my view that the trial judge was wrong to have made sexual relations between the parties a requisite for a conjugal relationship.").
Justice Cory said nothing further about the meaning of conjugality. Without actually engaging with the critiques of the functional approach to conjugality, he appeared to recognize some of the dangers of this approach, in noting that neither opposite-sex nor same-sex couples are required to fit precisely within the traditional marital model. Like many lower court judges, he pulled back from a rigid functional approach, emphasizing instead that the factors to be taken into account in determining whether a couple is conjugal “will vary widely and almost infinitely”, since “the relationships of all couples will vary widely.”

D. Conjugality After M. v. H.

There are a number of criticisms that may continue to be directed to the current definitions for ascribed spousal status. The prevailing definition of cohabitation and conjugality remains less than clear. Following M. v. H., the test for conjugality involves a consideration of the various factors in Molodowich, which according to the Court, “may vary widely and almost infinitely”. In so doing, the Court has repeated its increasingly characteristic emphasis on judicial discretion in family law. Family law is often cast as a fact-driven area, best left to trial judges who can balance the various factors and circumstances on a case-by-case basis. In M v. H., the Supreme Court has once again simply set out a wide-ranging list of factors that will have to be balanced by trial courts. The Court has given very little guidance on the question of what, if anything, makes a spousal relationship unique. Many of the seven Molodowich factors will be met to varying degrees by

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61 Supra note 5 at para 60.
62 Ibid.
What is Marriage-Like Like?

most adult domestic relationships. If none is essential, what makes a spouse a spouse? What distinguishes spouses from other interdependent domestic relationships between adults? How many of the factors must co-residents meet before they are considered spouses? Are any of the seven Molodowich factors more important than others? The Court gives little guidance, other than to emphasize discretion, flexibility and diversity.

The uncertainties associated with this approach to conjugality are compounded by the Court’s observations that a conjugal relationship may exist, even in the absence of a sexual relationship, which is often assumed in ordinary parlance to be a central if not defining feature of a “conjugal” relationship. Again, there are many advantages to the Court’s understanding of conjugality. The presence or absence of a sexual relationship is a poor indicator of whether cohabitants should be entitled to legal rights and responsibilities. It is both over- and under-inclusive. Many persons who have a sexual relationship do not have a close economic relationship. And conversely, many persons who do not have a sexual relationship may have an economically and emotionally interdependent relationship. It is not clear how the details of cohabitants’ sexual lives are relevant in any way to the attainment of legitimate state objectives. Such an inquiry constitutes an undue intrusion into personal privacy.64 In our view, policy-makers ought to give

64 As we have already indicated, the functional equivalence approach to conjugality requires legal decision-makers “to engage in inquiries into the intimate details of relationships, intruding on personal privacy” (O.L.R.C., supra note 41 at 62). This problem is an inevitable feature of any legal regime that seeks to draw legal distinctions between categories of co-residents depending on the nature of their relationships. If the law must treat roommates or co-tenants differently than common law spouses or partners, then significant invasions of privacy will surely follow. However, accepting the inevitability of the problem should not deter us from seeking to minimize it. In particular, the details of cohabitants’ sexual
serious consideration to whether the hearts and bedrooms of the nation need to be so fully exposed to public dissection, as the Molodowich test requires. A sexual relationship should simply not be a relevant criterion. However, if we are right that the existence of a sexual relationship ought not to be a decisive factor that determines the scope of application of many laws, then the exclusion of many non-conjugal relationships from many legislative policies becomes more and more difficult to sustain.

Indeed, in light of the observation made by the Supreme Court (and by lower courts in other cases) that conjugal relationships need not have a sexual component, the jurisprudence is undermining the very distinction between conjugal and non-conjugal relationships on which legislative definitions of spouse and common law partner rest. In most contexts, legislatures have not contemplated that definitions of spouse include enduring non-sexual relationships between adult co-residents – such as siblings, adult children and their parents, or non-relatives sharing accommodation. But what is the basis for excluding persons in these relationships from legislative policies? Their relationships may be characterized by joint residence, emotional intimacy, and economic interdependency. They may provide domestic care and support to each other. One person may be entirely economically dependent on the other. While they would not hold themselves out to their communities as spouses, their relationships may be characterized by many of the dimensions of family life that give rise to legal rights and responsibilities on the functional equivalence approach.

Conjugality has long been the dividing line between those opposite-sex relationships that are included in the definition of spouse, and those that are not. And as our review
of recent legislative changes above illustrates, conjugality is rapidly becoming the dividing line between all cohabiting relationships – same-sex and opposite-sex alike. Yet, in the aftermath of *M. v. H.*, the meaning of conjugality remains elusive, and the distinction between conjugal and non-conjugal couples has begun to unravel. The approach adopted by the Supreme Court and a number of lower courts in the recent decisions canvassed above is undoubtedly an improvement over a functional approach that holds fast to a single idealized norm of marriage. However, in sacrificing clarity and predictability for flexibility and diversity, the judicial understanding of conjugality now comes close to a “I know it when I see it” approach.\(^6\) Conjugality remains the key in deciding whether a relationship is spousal or not, yet it is becoming less clear how and why a conjugal relationship is to be distinguished from a non-conjugal one.

The instability of conjugality as a legal concept is evident from our examination of the recent case law and the Supreme Court’s first authoritative comments on the issue in Cory J.’s opinion in *M. v. H.* We will turn our attention now to

\(^6\) For this reason, perhaps it is not a coincidence that several recent rulings have fallen back on variations of the “duck” test to determine whether co-residents are spouses: *Sanford v. Canada* (2001), D.T.C. 12 (T.C.C.), online: QL (TCJ) at para. 17 (“If a two-legged creature with feathers waddles like a duck, quacks like a duck, and looks like a duck, it must be a duck.”); *R. v. Jantunen*, [1994] O.J. No. 889 (Gen. Div.), online: QL (OJ) at para. 52 (“if a bird walks like a duck, quacks like a duck, and flies like a duck, it can be concluded that it is a duck.”). Reg Graycar and Jenni Millbank make a similar observation about the definition of *de facto* relationships in Australia. While it has “no settled legal meaning”, “most Australians would ‘know it when they see it’, yet if asked what the legal criteria were, would respond with a wide variety of answers”: R. 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 239.
social welfare laws, a context in which this instability has long been evident as part of a regime of spousal regulation that has had pernicious consequences for low-income persons.

IV. ASCRIBING SPOUSAL STATUS IN SOCIAL WELFARE LAWS

The meaning of spouse has followed a rather different trajectory in the social welfare context. It has been the subject of greater statutory attention, as well as the site of considerable contestation. Nonetheless, the meaning of conjugality for the purposes of ascribing spousal status in social welfare laws shares a number of general characteristics with the approach to conjugality in other legal contexts. As elsewhere, conjugality in the social welfare context is determined by a functional equivalence approach, although one that is more strictly delineated by statute and regulation.

We will begin by describing some of the definitions of spouse that have been employed in provincial social welfare laws. Some of these definitions expressly include non-conjugal relationships between co-residents within the definition of spouse or common law partner. In Ontario, for example, sex is not only unnecessary to conjugality (as the Supreme Court held in *M. v. H.*), it is not even a factor that can be considered. A sexual relationship has been deemed to be immaterial to the existence of a spousal relationship since 1987. We then consider several court rulings that have reined in expansive definitions of spouse to restrict the negative consequences that “spouse in the house” rules have for the personal and financial autonomy of recipients of social assistance. The social welfare context provides poignant examples of the problems that result from the application of the functional equivalence approach affirmed in *M. v. H.*, namely, serious invasions of privacy and uncertainty arising from the instability of the distinction between conjugal and non-conjugal couples.
As Shelley Gavigan has noted, the definition of spouse in social assistance legislation “has always been broad in reach and mean in its application”. Persons seeking income assistance risk having their benefits reduced or eliminated if they share accommodation and expenses with other adults who may be considered to be spouses or partners. Fiscal and social conservatism have produced remarkably expansive definitions of spouses in a number of provinces, definitions that focus on economic interdependence and thus expressly abandon the distinction between conjugal and non-conjugal relationships that guides the law in other areas.

For example, in New Brunswick welfare regulations, spouse is defined as including “a person who resides with the unit head, who shares the responsibilities of the unit and who benefits economically from the sharing of food, shelter, or facilities.” This definition includes any group of persons living together in an economically interdependent relationship. In Quebec, welfare legislation defines spouses as including persons who “vivent maritalement” (live together in a de facto union, in the English version). While this definition appears to be restricted to conjugal relationships, welfare authorities have interpreted it in an expansive manner. The following three criteria are applied to determine whether “une vie maritale” exists:

1. Cohabitation: le fait de vivre sous un même toit; 2. Secours mutuel: l'entraide, le réconfort et le support que l'on retrouve chez un couple marié; 3. Commune renommée: le fait d'être

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66 S. Gavigan, “What is a Spouse?”, supra note 3 at 143.
67 N.B. Reg. 95-61, s. 2 (General Regulation under the Family Income Security Act, R.S.N.B., c. F-2.01).
A sexual component is notably absent from this definition. Since mutual support and cohabitation are the only required elements, many persons living together in interdependent relationships are at risk of having their entitlements to social assistance diminished by a finding that they are living "la vie maritale".

Ontario welfare regulations put in place a similar test. A co-resident will be considered a spouse or same-sex partner "if the social and familial aspects of the relationship between the person and the applicant or recipient amount to cohabitation" and they provide "financial support" to each other. The regulations also provide that "sexual factors shall not be investigated or considered in determining whether or not a person is a spouse or same-sex partner." This latter provision was added to the regulations in 1987 to limit the

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70 O. Reg. 134/98, s. 1(1).

71 Ibid., s. 1(2).
invasions of privacy and over-zealous enforcement of celibacy that had characterized the administration of the scheme.

The Ontario regulations are notable in that they use the term “cohabitation” to define a disqualifying relationship, whether or not sexual intimacy is a feature of the relationship. According to the policy directives issued by the Ministry, “three key areas are to be considered to determine cohabitation: residence in the same dwelling place or shared residency; financial interdependence; and social and familial circumstances. All three areas must be present for cohabitation purposes.” Unlike the definition of spouse for the purposes of support obligations in Ontario, which require cohabitation for three years (or in a relationship of some permanence if there is a child of the relationship), no minimum period of cohabitation is required by the welfare regulations. A spousal relationship exists as soon as the functional criteria are met.

The expansive definitions of spouse and the hazards they pose for low-income persons sharing accommodation have been contested in the courts in a number of jurisdictions. The events that gave rise to these cases provide further evidence of the instability in practice of the distinction between conjugal and non-conjugal relationships. Courts have sought to restrict the definition of conjugality to limit the negative impact of these rules on the personal and financial autonomy of social assistance recipients.

72 DIR 14.0-7, June 1, 1998.
73 See the definitions of spouse and same-sex partner in s. 1(1) of the current regulations, supra note 70. In 1987, the definition of spouse was amended to introduce a three-year cohabitation requirement. Family Benefits Act Regulations, R.R.O. 1990, Regulation 318, s.1(1)(d)(iv), as am. by O. Reg. 589/87, s.1(1). In 1995, this three-year grace period for “trial” relationships was repealed: O. Reg. 410/95.
The case of Brunette c. Québec (1999)\textsuperscript{74} involved a 64-year-old permanently disabled woman who needed assistance with many aspects of daily living. She invited Émard, a 54-year-old mentally disabled man, to share her accommodation with her. Brunette and Émard lived together, shared expenses and provided care and support to each other. They were not physically attracted to each other. They never had a sexual relationship. Nevertheless, their relationship was characterized by a high degree of interdependence. As a psychiatrist’s report put it, “[i]ls ont tout simplement décidé d’unir leurs forces, chacun pouvant faire pour l’autre ce que l’autre lui-même est incapable de faire.”\textsuperscript{75} The welfare authorities concluded that Brunette was no longer entitled to benefits because her relationship with Émard was marriage-like. The Quebec administrative tribunal agreed:

Les faits en la présente instance amènent le Tribunal à conclure à l'existence entre les requérants d'une vie affective, sans qu'il y ait nécessairement de rapports sexuels.

Il existe entre les requérants une relation privilégiée de confiance qui ne se retrouve que dans une relation réciproque stable dont les personnes dépendent l'un de l'autre dans leur cheminement de vie.

Le Tribunal constate que la relation existante entre les requérants ne correspond pas du tout à celle d'un chambreur avec sa logeuse et qu'il

\textsuperscript{74} Brunette c. Québec (Ministre de la Solidarité sociale), [2000] R.J.Q. 2664 (C.S.), online: QL (JQ).

\textsuperscript{75} Ibid. at para. 31. Translation: “They simply decided to unite their forces, each capable of doing for the other that which the other was incapable of doing.”
This decision was reversed on appeal to the Superior Court. Justice Julien argued that the finding of a marriage-like relationship confronted Brunette with an impossible choice that violated her human dignity. She could cease cohabiting with Émard, in which case her benefits would be restored, but she would have great difficulty residing in her own apartment and could be forced to live in an institutional setting and thus sacrifice some of her personal autonomy. Or, if she continued to live with Émard in her home, she would lose her benefits and thus her financial autonomy. The judge concluded that it was possible to exclude from the definition of spouse a non-sexual relationship founded on the respective needs of two disabled co-residents: "Il n'y a pas de vie maritale au sens habituel du terme". In the result, the judge reasserted the more traditional distinction between conjugal and non-conjugal relationships, one that places great reliance on the existence of a sexual relationship, an understanding that had been eroded by the original denial of benefits to Brunette.

The denial of welfare assistance to Brunette because of her relationship with Émard was insidious. But it is easy to see how a functional equivalence approach, like the Molodowich

76 Ibid. at para. 32. Translation: “The facts of this case lead the Tribunal to find affective ties between the applicants, even though there were not sexual relations. The applicants had a special relationship of trust that one finds only in a stable reciprocal relationship where persons depend on each other in leading their lives. The Tribunal affirms that the relationship existing between the applicants is not at all the same as the relationship between a tenant and boarder and that it amounts to a marriage-like relationship as understood by the law.”

77 Ibid. at para. 66.

78 Ibid. at para. 64. Translation: “There is not a marriage-like relationship as normally understood.”
approach affirmed by the Supreme Court in *M. v. H.*, can produce such results. Since conjugal relationships can "vary widely and almost infinitely", and need not have a sexual component, on what basis can a highly interdependent relationship like that between Brunette and Émard be excluded? And what if Brunette and Émard did have a sexual relationship? Then, presumably, the finding that they lived in a marriage-like relationship would have been more difficult for the court to avoid. Brunette probably would have lost her benefits. Similarly, the termination of benefits would have followed with no debate if she and Émard had decided to marry. Yet, the negative consequences for Brunette's financial and personal autonomy — the denial of her human dignity, as the judge put it — would have been no less severe if she and Émard were in a marital or marriage-like relationship. The reasoning in *Brunette* recuperates sex as the crucial distinction between conjugal and non-conjugal relationships. The result, however, is a legal regime that appears to tolerate legal rules that deny human dignity so long as it is only persons in conjugal relationships that suffer.

In *Falkiner v. Ontario*, the applicants sought an order declaring that the definition of spouse in Ontario's welfare regulations is unconstitutional. The applicants were four women who had been deemed to be living with "spouses" and had thus been disentitled to social assistance. Each of the applicants had been living with a man for less than a year. None of the men were the fathers of the applicants' children, and none of them had any legal obligation to support the applicants or their children. A majority of the Ontario Divisional Court concluded that the "spouse in the house" rule constituted an unjustifiable violation of the equality rights of

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sole support parents on social assistance, the vast majority of whom are women.

Like Justice Julien in Brunette, Justices Land and Haley were troubled by the impact the "spouse in the house" rule has on women's personal and financial autonomy. The effect of the rule, they noted, is to force women to give up either their relationships or their financial independence. 80 "It is hard to think of a more intrusive scheme", they said, "than to force two persons sharing accommodation into an unwanted economic relationship." 81

Justices Land and Haley rejected the government's arguments that the regulation was a legitimate attempt to promote the formal equality of married couples and unmarried conjugal couples. The problem with the regulation, in their view, is that it "does not just treat common law couples the same as married couples, but it catches a large number of relationships which do not resemble marriage, where there is no 'couple' and no 'family unit' involved." 82 The fact that roommates who share nothing but accommodation could become "spouses" within the meaning of the regulation, in the majority's words, "makes nonsense of the claim that the pressing concern on the part of the government is to ensure equality between common law and married couples." 83 As they elaborated:

The Regulation captures as part of a "couple" individuals who have not formed relationships of such relative permanence as to be comparable to marriage, whether formal or

80 Ibid. at 80 and 92.
81 Ibid. at 104.
82 Ibid. at 100.
83 Ibid. at 101.
common law. It makes couples, or family units, out of individuals like the Respondents who have made no commitment to each other, with accompanying voluntary assumption of economic interdependence. There is all the difference in the world between a person, with her own money, sharing accommodation in the hope that an inchoate relationship may flourish, versus a person whose financial support is largely in the hands of her cohabitant who has no legal obligations towards her and her children. As a functional definition of a marriage-like relationship, the Regulation is deeply flawed because it assumes equivalency between a cohabitant who has support obligations to the applicant or recipient and one who does not. 84

The majority thus struck down the definition of spouse on the grounds that it was too broad. They sought to reassert a stable distinction between conjugal and non-conjugal cohabitants by narrowing the definition of spouse so that it did not threaten to absorb roommates and tentative new relationships between lovers. The fatal flaw with the current definition of spouse, in their analysis, is that it lacks a durational requirement. It does not distinguish between "trial" relationships and more enduring partnerships. By implication, their ruling suggests that if the "spouse in the house" rule did not take effect until after three years of cohabitation — that is, if the definition of spouse mirrored the definition used for the purposes of imposing spousal support obligations — then the constitutional defect would be rectified. The majority judgment thus does not condemn the use of conjugality to deny entitlement to social assistance. Rather, it simply insists that the

84 Ibid. at 80.
length of required conjugal cohabitation be the same as that required in the definition of spouse used to impose support obligations in family law. In other words, women can be forced to be economically dependent on men, so long as the law offers them the possibility of relief from that dependency if the relationship breaks down.

The rulings in Brunette and Falkiner addressed the injustices in the cases before them, but adopted solutions that are too narrow. They seek to curb the expansion of spousal definitions at their uncertain margins but leave the core of the problem intact. The real problem is that the existence of a domestic relationship, conjugal or otherwise, no matter how it is defined, is not a reliable marker of reduced financial needs. The effect of using conjugality in any form as a proxy for reduced need is to deny low-income persons the choice of forming economically independent relationships. As Justice

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85 The problems evident in Brunette and Falkiner are a recurring feature of the administration of income security programs at the federal level as well. For example, low-income taxpayers are at risk of being denied the Canadian Child Tax Benefit and the Goods and Services Tax Credit if they live in a conjugal relationship for a year or longer. The income of a spouse or partner is considered in determining an applicant's entitlement to these tax benefits, even if the parties have agreed to remain economically independent: see the decisions of the Tax Court of Canada denying benefits to women who had chosen to remain financially independent from their partners in Sanford, supra note 65; Lavoie, supra note 47; Poulter v. Canada (1995), 13 R.F.L. (4th) 288 (T.C.C.), online: QL (TCJ); and Bolduc v. Canada, [1994] T.C.J. No. 495 at para. 11 ("spouses living in a conjugal relationship are treated in the same way as married spouses, and there is nothing in the Income Tax Act permitting them to have agreements between them that would prevent the Minister from applying the said sections"). For a discussion, see K.A. Lahey, The Benefit/Penalty Unit in Income Tax Policy: Diversity and Reform (Law Commission of Canada, 2000) at 11-15, 107-111, online: Law Commission of Canada website <http://www.lcc.gc.ca/en/themes/pr/cpra/lahey/index.>
Glube said in a Nova Scotia case, the assumption that conjugal living results in an improved financial state "is truly outmoded as it presumes that a man who marries or lives with a woman will provide for her financially. It further presumes dependency of the woman on the man . . . [T]o assume one spouse will 'take care' of the other." Since financial independence should be a choice that is not only tolerated but encouraged, since the formation of interdependent family units should also be encouraged, and since coerced dependence is wrong, the existence of a conjugal relationship should not, in itself, make any difference to welfare entitlements. The flaw of "spouse in the house" rules is not only that they rely on overly broad definitions of conjugality as Brunette and Falkiner suggest, but that they treat the mere existence of a co-residential relationship as a proxy for actual income sharing.

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87 This was the conclusion reached by Kelly J. in R. v. Rehberg (1994), 111 D.L.R. (4th) 336, 127 N.S.R. (2d) 331 (S.C.). In dismissing a charge of welfare fraud against the accused based on her failure to disclose that she was a cohabiting with a man, Kelly J. found that the "spouse in the house" rule violated her constitutional equality rights. The definition of spouse at issue, like the Ontario definition at issue in Falkiner, required cohabitation in a conjugal relationship ("as husband and wife") for an unspecified duration. Kelly J. condemned the rule as "a disincentive to the formation of new families" and for "encouraging a highly discretionary invasion of privacy" (at para. 48) and suggested that welfare entitlement should not be based on relational presumptions. Unfortunately, it appears that Kelly J.'s well-considered analysis has had no impact on the administration of "spouse in the house" rules in Nova Scotia: see Burroughsford v.
Both Brunette and Falkiner, like M. v. H., raise questions about the stability of the distinction between conjugal and non-conjugal relationships. In M. v. H., the Supreme Court said that the presence or absence of a sexual relationship should not determine the issue of conjugality for the purposes of spousal support obligations. In the social welfare context in some jurisdictions, sexual criteria had already been removed by statute or regulation. As sex has become immaterial to, or of declining relevance in, the determination of spousal status, legal decision-makers are troubled by the increasing instability of the distinction between conjugal and non-conjugal relationships. The courts in Brunette and Falkiner acknowledged this problem, insofar as they both expressed concern that current understandings of spouse could capture individuals living in non-conjugal relationships. They sought to reassert a more stable distinction by removing from the category of spouse persons who have not lived together in enduring sexual or romantic relationships.

V. MOVING BEYOND RELIANCE ON ASCRIBED SPOUSAL STATUS

Our discussion has revealed that the current legal understandings and uses of conjugality are deeply flawed. Their administration involves serious invasions of privacy, including examinations into the details of cohabitants' sexual lives. The distinction between conjugal and non-conjugal relationships is uncertain and unstable. Judicial efforts to shore up the distinction through the functional equivalence approach appear to plant the seeds of its demise. The reasons for devoting so much effort to maintaining a collapsing distinction are difficult to discern. We conclude that to ask whether a conjugal or marriage-like relationship exists is quite simply to

ask the wrong question. The existence of a marriage or marriage-like relationship is rarely relevant to the attainment of legislative objectives.

To correct Canadian laws' over-reliance on ascribed conjugal status, we propose a number of directions for future reform. First is the need to reconsider whether relationships are even relevant to particular legislative objectives. For example, as we have suggested above, relationships should not be treated as automatically relevant to the objective of adjusting benefits according to need that animates income security schemes. Relationship status is simply a poor proxy for actual financial needs. Since relationships may involve financial independence, and since this is a choice that ought not to be denied by state policy, relational presumptions should not be used to determine entitlement.

There are, however, other contexts in which relationships will continue to be relevant to legislative objectives. For example, family laws providing rights to the division of family property, possession of the family home, and spousal support aim to provide an orderly and equitable resolution of financial affairs on the breakdown of interdependent relationships. Rather than relying solely on the involuntary ascription of spousal or common law partner status to extend these rights beyond marriage, legislatures should expand opportunities for individuals to voluntarily assume them. Removing legal barriers to same-sex marriage, as we have argued elsewhere, is required by the prohibition on discrimination against gays and lesbians.\(^8\) To restrict same-sex couples living in committed relationships to ascribed spousal or partner status, with all of the resulting uncertainties, delays and

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invasions of privacy, is to treat their relationships as less worthy of respect.

Legislatures should also give consideration to enacting domestic partnership schemes that would allow registrants to voluntarily assume a range of legal rights and obligations. Domestic partnerships or civil unions should not be considered as a means of avoiding same-sex marriage, as has been the case in the Nordic European countries, Vermont and Hawaii. For many, the symbolic meanings and public affirmation that accompanies marriage cannot be replaced. To offer same-sex couples domestic partnership instead of marriage, then, even if the legal consequences were the same, would not fully remove discrimination. In our view, domestic partnerships should be considered as a supplement to equal marriage, offering to persons who cannot or do not want to marry — including non-conjugal couples — the ability to formalize their relationships through a public commitment and to voluntarily assume a package of legal rights and obligations.8

If these first two directions of reform are followed — the reliance on relationships eliminated where they are not relevant to legislative objectives, and opportunities to voluntarily assume rights and obligations expanded — the need to rely on ascribed relational definitions will be diminished, although not eliminated altogether. For example, it will still be necessary to confer rights to property, support, death benefits and pension survivors’ benefits to prevent economic exploitation in the lives of persons who have not formalized their relationships. People who are economically vulnerable as a result of their contributions to enduring domestic

8 For a discussion of domestic partnership regimes and the advantages they offer relative to ascribed spousal status, see ibid. at 129-43; Beyond Conjugality, supra note 3 at 117-122; N. LaViolette, Registered Partnerships: A Model for Relationship Recognition (Ottawa: Law Commission of Canada, 2001).
relationships will not necessarily have taken steps to formalize their relationships through either marriage or domestic partnership. However, by removing notions of conjugality from these definitions, legislators can save legal decision-makers from having to embark on the elusive quest for marriage equivalence. We believe that relational definitions should be more carefully tailored to expressly incorporate the precise functional attributes that are relevant to the particular legislative objectives at issue. As Graycar and Millbank put it, in summarizing the similar purposive approach that animated law reform in New South Wales, "the kinds of relationships that laws should regulate ought to depend upon the purpose of the law in question. As these purposes vary, so should the type of recognition and obligation."

At least some degree of precision is to be preferred, in our view, to open-ended definitions of the relevant relationships. An example of the latter can be found in British Columbia Law Institute, Report on Recognition of Spousal and Family Status (Vancouver: BCLI, 1998), online: British Columbia Law Institute website <http://www.bcli.org/pages/projects/rrsfs/contents.html>. The Report recommended that non-conjugal relationships be recognized if they involved a close association that is the equivalent of "a family relationship" (at 32). The Report made clear that the goal of this definition was to include enduring relationships involving emotional and economical interdependence, and to exclude roommates, boarders and live-in employees (ibid.). However, the Report refrained from specifying the distinguishing features of a family-like relationship on the grounds that "discretion must play a large role" (at 24). While we agree that flexibility and discretion must play large roles, there is much to be said for structuring that discretion by focusing decision-makers' attention on the relevant functional attributes. The exercise of discretion needs to be anchored to considerations relevant to particular legislative objectives. An open-ended functional equivalence approach to "family" would give rise to the same quest for an elusive ideal, and the drift from rationality, that has characterized the Molodowich approach to conjugality.

Graycar & Millbank, supra note 65 at 260.
In our view, the relationships that are relevant to state policies will involve varying combinations of four criteria: co-residence, duration, emotional interdependence, and economic interdependence. Depending on the nature of the legislative objective at issue, sometimes all four should be present in the definition of included relationships. On other occasions emotional or economic interdependence alone should suffice. Consider, for example, section 61 of the Ontario Family Law Act, a modernized wrongful death provision that enables listed family members to bring a tort action to recover their relational losses consequent upon the negligently caused death or injury to a loved one. Damages may be awarded for their pecuniary loss, including the loss of future emotional support ("guidance, care and companionship"). Since the objective of this provision is to compensate for harm to an economically or emotionally interdependent relationship, it follows that any person who had a relationship characterized by economic and/or emotional interdependence with the deceased or injured person may have suffered a relevant loss and therefore should be entitled to bring an action. Since all that is at stake is the right to bring a civil action, where a loss of economic or emotional support must be established by evidence on the balance of probabilities, a broad relational definition — if one is necessary at all — is appropriate. There is no need to include conjugal, co-residential or durational requirements in the definition of the relevant relationships. The current exclusion of non-conjugal relationships (unless persons are related by ties of blood or adoption) is inconsistent with the provision's objective.

However, in the context of rights to family property and support on the breakdown of relationships, there is good reason to retain a durational requirement. These provisions respond to economic disadvantages and expectations that form over the

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92 R.S.O. 1990, c. F.3, s. 61.
course of enduring interdependent domestic relationships. We have argued that the combination of emotional and economic interdependence should be salient factors, replacing the current references to conjugality:

It is the combination of emotional intimacy and economic partnership that creates the unique vulnerability of spouses to harsh consequences arising on the breakdown of a lasting relationship. Emotional intimacy is founded on the kinds of trust that tend to prevent people from taking seriously the possibility of economic deprivation if the relationship falters. And a high degree of economic interdependence potentially creates a high degree of economic vulnerability.93

Therefore, in our study on the spousal definitions in Ontario family law, we suggested that the definition of “spouse” for the purposes of family property rights should include “either of two persons who have lived together in a relationship of primary importance in each other’s lives.” We further recommended that “live together” be defined as “living together in an economic partnership whether within or outside of marriage”.94 While the language of this proposal could no doubt be improved upon, we remain convinced that the underlying focus on the combination of emotional and economic interdependence is sound. Similar reforms, extending property and support rights to persons in emotionally and economically interdependent non-conjugal relationships, have been adopted in the Australian Capital Territory (1994) and in New South Wales (1999). In NSW, “domestic relationships” include “a close personal relationship between two adult

93 Cossman & Ryder, supra note 1 at 82.
94 Ibid. at 83.
persons, whether or not related by family, who are living together, one or each of whom provides the other with domestic support and personal care.” The one important difference in the ACT definition, which otherwise uses similar terminology, is that co-residence is not a requirement. In the ACT and NSW reforms, rights were also extended to same-sex couples. These jurisdictions have thus taken important steps towards conjugal relational equality without ignoring the interests of persons living in non-conjugal relationships.


96 Australian Capital Territory, Domestic Relationships Act 1994, s. 3(1), online: Australian Legal Information Institute website <http://www.austlii.edu.au/au/legis/act/consol_act/dra1994253/s3.html> (“domestic relationship” means “a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other, and includes a de facto marriage”). The Nova Scotia Law Reform Commission favoured this language, supplemented by durational and co-residential requirements, in its report on family property: see Law Reform Commission of Nova Scotia, Reform of the Law dealing with Matrimonial Property in Nova Scotia: Final Report (Halifax: The Commission, 1997), (recommending that family property rights apply to married persons and “two adults in a personal relationship where one provides personal or financial commitment and support of a domestic nature for the benefit of the other, where the parties have cohabited for a period of at least one year.”). The Nova Scotia legislature opted instead to extend support rights to conjugal cohabitants and property rights to conjugal couples that choose to register as domestic partners: see Law Reform (2000) Act, supra note 14.
Extending family property and support rights to persons in interdependent non-conjugal relationships could disrupt expectations based on the current exclusion of those relationships from legal rights and obligations. It would also produce a new set of uncertainties regarding which relationships would fall within the purview of the law. In Canada, the disputes that now occur at the conjugal/non-conjugal dividing line would not go away, they would just be shifted to new terrain. Mindful of these difficulties, the Ontario Law Reform Commission in 1993 recommended against extending family rights and obligations to non-conjugal relationships. If the law focused on the combination of emotional intimacy and economic partnership, the Commission commented, it would potentially apply “to many relationships that are not currently within the purview of the Family Law Act. It could conceivably apply, for example, to business partnerships, as well as to relationships between parents and their children, or between friends.”

In our view, the concerns raised by the Commission can be addressed without excluding non-conjugal relationships entirely from the law. For example, a carefully drafted definition could exclude business partnerships, either expressly or by including language like the phrase “close personal relationship” used in the NSW legislation. Relationships between parents and their minor children could also be expressly excluded. However, it is true, as the OLRC suggested, that a new legal definition that focuses on emotional intimacy and economic interdependency could well bring a broad range of currently excluded adult personal relationships within the law’s purview. It could include, for example, relationships between siblings, or parents and adult children, or non-relatives who have lived together in interdependent, non-sexual relationships for many years. These relationships likely fall outside of the scope of the current definitions of spouse and

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97 O.L.R.C., supra note 41 at 62.
partner in most Canadian family law legislation. However, if they have lived together in long-term relationships that involve emotional and economic interdependence, then the objectives of the legislation will be called into play when the relationships break down. The current exclusion of persons in non-conjugal relationships from statutory rights to property division, possession of the family home, or support, is not consistent with the legislative objectives.

We do not mean to suggest that non-conjugal relationships can be easily or simply assimilated into existing family laws that currently apply only to conjugal couples. A presumption in favour of equal division of family property may be inappropriate in the case of non-conjugal relationships. Similarly, a needs-based conception of permanent support obligations, like the conception of spousal support put forward by the Supreme Court of Canada in *Bracklow,* is premised on the view that marriage entails the voluntary assumption of support obligations “until death do us part”. This conception of spousal support arguably reflects a dated view of marriage. Its application to non-conjugal cohabitants — and to unmarried conjugal cohabitants for that matter — would be even more questionable. However, a legislative property and support regime founded on the objective of preventing exploitation by compensating for the economic disadvantages attributable to roles taken on during interdependent relationships can be justly applied to both conjugal and non-conjugal cohabitants. For example, the *New South Wales Property (Relationships) Act 1984* empowers courts to make orders adjusting the property rights of persons in domestic relationships where it is “just and equitable” to do so in light of their respective contributions to the value of their property or each other’s welfare.* Similarly, courts can order maintenance where a party to a domestic

98 *Supra* note 23.

99 *Supra* note 95, s. 20.
relationship is unable to support himself or herself adequately because child-care responsibilities or other circumstances of the relationship have adversely affected his or her earning capacity.¹⁰⁰ There are no automatic entitlements to property or support. The legislation puts in place a flexible approach that can respond to injustices arising on the termination of any domestic relationship.

In a recent paper, Nicholas Bala and Rebecca Jaremko Bromwich have defended the current blanket exclusion of non-conjugal relationships from family property and support laws.¹⁰¹ They do agree with the need to reconsider the law’s focus on conjugality in many legal and policy contexts. However, in the area of private rights and obligations imposed by family law, they argue that conjugality is a clear and important concept that should remain determinative. Conjugal relationships, they suggest, are distinct because of the commitments and expectations of permanence that accompany them, and their role in providing stable family environments for raising children. With respect, though, their argument confuses conjugality with the relevant functional attributes that often (but not always) accompany conjugal relationships. Committed relationships that involve the raising of children or the assumption of other caregiving or domestic roles may give rise to expectations of continued support to which the law should respond. But conjugal relationships do not always embody these or other relevant qualitative attributes; nor are they always absent from non-conjugal relationships.

¹⁰⁰ Ibid., s. 27.

As Justice McLachlin (as she then was) pointed out in *Miron v. Trudel*, governments should frame legislation not by reference to marital status, conjugality or marriage-equivalence, but by reference to the functional attributes of relationships that are relevant to the legislative objectives at issue. In *Miron*, in devising legislation dealing with who should be entitled to claim accident benefits pursuant to automobile insurance policies, Justice McLachlin suggested that the Ontario legislature had “misconstrued the issue as one of marriage equivalence” when it ought to have identified “which family units were so financially interdependent and stable as to warrant provision of the benefits in question.” As she concluded,

If the issue had been viewed as a matter of defining who should receive benefits on a basis that is relevant to the goal or functional values underlying the legislation, rather than marriage equivalence, alternatives substantially less invasive of *Charter* rights might have been found.  

Bala and Jaremko Bromwich’s analysis also misconstrues the issue as one of conjugality or marriage-equivalence. For example, they seem to suggest that it would always be unfair and socially undesirable to impose support obligations on an adult child living with an elderly parent. While this may be true most of the time, it would not be true if the circumstances of the relationship gave rise to a reasonable expectation of continued support and one party’s earning capacity was adversely affected by responsibilities undertaken over the course of the relationship. The relevant functional

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102 *Supra* note 4 at para. 169.


104 Bala & Jaremko Bromwich, *supra* note 101.
consequences that often accompany conjugal relationships, and sometimes accompany non-conjugal relationships, ought to be the focus of legal definitions, not conjugality itself.

The above discussion is only a brief illustration of how a purposive approach to relationship recognition would lead to the consideration of innovative definitions that more precisely articulated the functional attributes of relationships relevant to particular legislative goals. While the definitions would differ in the details depending on the legislative objectives at stake, they would share some common features: conjugality would be displaced and an inquiry into sexual relations would be irrelevant. Instead, legislative definitions of relationships should focus on the combination of co-residence, duration, emotional intimacy and economic interdependence that is relevant to the achievement of the legislative objectives at issue. We should emphasize that we do not believe that these revised definitions will resolve all of the problems that arise whenever the law imposes relational consequences on people that they have not voluntarily assumed. Like any presumptive or ascribed relational definitions, their administration would involve uncertainties and invasions of privacy. The definitions would continue to involve considerable discretion on the part of legal decision-makers. These problems of the Molodowich marriage-equivalence approach would not be left behind by the purposive functional approach we have defended here. The advantage of a purposive functional approach is that legislative definitions would better focus discretion and provide a more principled basis for considering whether particular adult personal relationships should be included within particular legislative schemes. Our point is that legal decision-makers would at least be asking the right questions, rather than embarking on the elusive quest for marriage-equivalence.

105 For a discussion of similar issues in the context of federal legislation, see Beyond Conjugality, supra note 3, Chapter Three, “Reconsidering the Relevance of Relationships”.
VI. CONCLUSION

When the federal bill extending rights and obligations to conjugal partners\textsuperscript{106} was being debated in Parliament, members of the Reform Party, the right wing opposition party, argued at some length that the existence of a sexual relationship was an inappropriate basis for the allocation of rights and responsibilities. This argument was a thinly veiled effort to oppose the extension of rights and responsibilities to same-sex couples, particularly given the Reform Party's support for limiting the definition of marriage to opposite-sex couples.\textsuperscript{107}

Nevertheless, the argument regarding the irrelevance of sex does raise a serious question about the viability of the distinction between conjugal and non-conjugal couples. Eric Lowther, a Reform Party Member of Parliament, after speaking at length about the importance of the traditional definition of marriage and of promoting the institution of marriage, stated:

There are many types of gender relationships: siblings, friends, roommates, partners, etcetera. However, the only relationship the government wants to include is when two people of the same gender are involved in private sexual activity, or what is more commonly known as

\textsuperscript{106} Modernization of Benefits and Obligations Act, supra note 8.

\textsuperscript{107} Svend Robinson, MP makes this point in his comments on Second Reading, "I would note as well that each and every one of those members of parliament who is now speaking out against this bill is saying that they should oppose this bill because it does not go far enough, it does not recognize other dependent relationships like two sisters living together or two elderly gentlemen sharing a home. Without exception each and every one of those members has spoken against basic equality for gay and lesbian people. That is their agenda. They do not believe in it." House of Commons Debates (15 February 2000) at 1245 (S. Robinson).
homosexuality. No sex and no benefits is the government’s approach to this bill. Even if everything else is the same, even if there is a long time cohabitation and dependency, if there is no sex there are no benefits. Bill C-23 is a benefits for sex bill. It is crazy.\textsuperscript{108}

The Honourable Member misstated the scope of the Bill (which extended benefits and obligations, to same-sex and opposite-sex common law couples) and misrepresented the current test for conjugality\textsuperscript{109} (within which a sexual relationship is but one relevant factor). However, his comments do capture the extent to which in the public imagination, conjugality continues to be associated with a sexual relationship, as well as the extent to which the mere existence of a sexual relationship increasingly seems to be an inappropriate marker for the extension of rights and responsibilities.

Minister of Justice Anne McLellan defended the use of conjugality to confer rights and obligations by stating that “there is a qualitative difference between the relationships addressed in Bill C-23 and the types of relationships that may exist among relatives, siblings or friends living under the same roof and sharing household expenses”.\textsuperscript{110} The Minister then noted that adult Canadians who currently live in non-conjugal interdependent relationships may welcome the extension of benefits, but perhaps not the accompanying legal obligations, and that this raises a series of important questions about how these relationships of dependency ought to be recognized.

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\textsuperscript{108} Ibid. at 1135-1140.

\textsuperscript{109} See Molodowich, supra note 19.

\textsuperscript{110} House of Commons Debates (15 February 2000) at 1110 (A. McLellan).
While the extension of legal rights and responsibilities to non-conjugal cohabitants raises many difficult questions, our analysis takes issue with the Minister’s assertion that there is a “qualitative difference” between conjugal and non-conjugal relationships. Rather, we have argued that the distinction is elusive and increasingly difficult to maintain. Conjugal and non-conjugal relationships may both be characterized by the qualitative attributes of interdependence relevant to legislative objectives. In common understandings and in many legal decisions, the distinction ultimately rests on the presence of an affective relationship with a sexual or romantic component. But sex has declined in importance in legal understandings of conjugality. For some time, sex has been treated as immaterial to definitions of spouse in social welfare laws. As the Supreme Court’s ruling in *M. v. H.*, confirned, sex is no longer determinative of who is a spouse outside of the social welfare context either. The functional equivalence understanding of conjugality, which seeks to maintain the coherence of the distinction, actually contains the seeds of its own destruction. So long as the line between conjugal and non-conjugal relationships is maintained in the law, some courts will likely continue to reassert sex as a defining aspect of the distinction,

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111 The debates over Bill C-23 included a number of similar assertions. For example, Svend Robinson stated, “I do not know if the honourable member has brothers or sisters, but if he is suggesting that his relationships with his brother or his sister is qualitatively the same as his relationship with his wife, that is a ludicrous suggestion. We can look at other relationships of dependency, but the fact of the matter is that they are qualitatively different from the relationship that gay or lesbian people have with their partners”, *ibid.* at 1300. At the same time, however, Robinson emphasized in his remarks that a conjugal relationship is not simply defined by a sexual relationship, and cited the test for conjugality set out by the Supreme Court of Canada in *M v. H.*

112 *Supra* note 5.
especially where it is desirable, as in Brunette,\textsuperscript{113} to limit the insidious effects of laws that rely on unjust relational presumptions.

We have argued that the question of whether a relationship has a sexual component bears no connection to legitimate state objectives. Once this is recognized, and sex is removed from the scope of relational inquiries, the distinction between conjugal and non-conjugal relationships collapses. And we then need to develop better ways to determine when and how the existence of an adult personal relationship is relevant and should be recognized in law. The notion of conjugality that currently determines the scope of application of laws across the land requires legal decision-makers to focus on the wrong question: what is marriage-like like? We have suggested that this is an unanswerable question. Its pursuit leads to incoherence in the application of legislative policies. To redirect inquiries to the right questions, it is necessary to reformulate relational definitions to focus more precisely on the facts relevant to the objectives of particular legislative schemes.

\textsuperscript{113} Supra note 74.