The Impact of Relationship Recognition on Lesbian Women in Canada: Still Separate and Only Somewhat "Equivalent"

Kathleen A. Lahey
Faculty of Law, Queen's University

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Translation Quality Control: Serge Thériault

For more information contact:
Research Directorate
Status of Women Canada
123 Slater Street, 10th Floor
Ottawa, Ontario K1P 1H9
Telephone: (613) 995-7835
Facsimile: (613) 957-3359
TDD: (613) 996-1322
E-mail: research@swc-cfc.gc.ca

ABSTRACT

This study evaluates the impact of relationship recognition on lesbian women as a class. Two main conclusions are reached. First, all statutes that recognize lesbian and gay relationships continue to discriminate against them in many ways. Second, extending spousal treatment to lesbian and gay couples for federal income taxation, social assistance and retirement programs will result in disproportionately higher taxes and reduced social benefits for those lesbian and gay couples with the lowest incomes. Using microsimulation, those new costs are projected to be in the order of $130 million to $155 million in 2000, while new fiscal benefits of relationship recognition are only about $10 million to $15 million.

These costs fall most heavily on lesbian women and on low-income gay couples. As women, lesbian women are heavily disadvantaged by their gender, and this disadvantage is further compounded by the effects of sexuality, race, disability, age and family responsibility. Using low-income cutoffs, family income concepts, the tax on marriage and presumed economies of scale to limit low-income assistance turns relationship recognition into a way to increase the total tax load on low-income couples.

The solutions recommended in this study include eliminating all remaining forms of discrimination in federal law on the basis of sexuality and shifting from the use of the couple as the basic unit of tax/transfer policy to the use of the individual as the basic policy unit. These steps, when combined with the extension of employee family benefits and tax provisions relating to non-conjugal couples, and the repeal of tax/transfer benefits for the support of economically dependent able-bodied adults, will eliminate much of the regressivity of the tax/transfer system at lower income levels. Enhancing the progressivity of the total tax system will further assist in improving the incidence of government penalties on low-income couples and households.

Recommendations for enhanced data collection, protection of human rights and law reform are also made.

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PREFACE

Good public policy depends on good policy research. In recognition of this, Status of Women Canada instituted the Policy Research Fund in 1996. It supports independent policy research on issues linked to the public policy agenda and in need of gender-based analysis. Our objective is to enhance public debate on gender equality issues and to enable individuals, organizations, policy makers and policy analysts to participate more effectively in the development of policy.

The focus of the research may be on long-term, emerging policy issues or short-term, urgent policy issues that require an analysis of their gender implications. Funding is awarded through an open, competitive call for proposals. A non-governmental, external committee plays a key role in identifying policy research priorities, selecting research proposals for funding and evaluating the final reports.

This policy research paper was proposed and developed under a call for proposals in August 1998, entitled *The Intersection of Gender and Sexual Orientation: Implications of Policy Changes for Women in Lesbian Relationships*. The purpose of this call was to examine the implications, for women in lesbian relationships, of possible reforms which would bring government policy and programs into conformity with the recent court decisions requiring the inclusion of same-sex couples.

Status of Women Canada funded two research projects on this issue. The other project funded under this same call for proposals is entitled *Legal Recognition of Lesbian Couples: An Inalienable Right* by Irène Demczuk, Michèle Caron, Ruth Rose and Lyne Bouchard.

We thank all the researchers for their contribution to the public policy debate.

EXECUTIVE SUMMARY

This study evaluates the impact of relationship recognition on lesbian women as a class. Two main conclusions are reached. First, all statutes that recognize lesbian and gay relationships continue to discriminate against them in many ways. Second, extending spousal treatment to lesbian and gay couples for federal income taxation, social assistance and retirement programs will result in disproportionately higher taxes and reduced social benefits for those lesbian and gay couples with the lowest incomes. Using microsimulation, those new costs are projected to be in the order of $130 million to $155 million in 2000, while new fiscal benefits of relationship recognition are only about $10 million to $15 million.

These costs fall most heavily on lesbian women and on low-income gay couples. This is because, as women, lesbian women are heavily disadvantaged by their gender. The effects of sexuality, race, disability, age and family responsibility further compound this disadvantage. Using low-income cutoffs, family income concepts, the tax on marriage and presumed economies of scale to limit low-income assistance turns relationship recognition into a way to increase the total tax load on low-income couples.

The solutions recommended in this study include the following.

- Replace the “heterosexual presumption” in Canadian law with the presumption that all relationship provisions apply to all couples without regard to their sex, sexuality, gender identity or legal sex. This should be done through both judicial declaration and legislation.

- Repeal the marriage clause in federal Bill C-23 and the 1998 marriage motion.

- Extend the right to marry to all conjugal couples and offer all couples a meaningful choice between marriage and cohabitation.

- Extend all the rights and incidents of marriage to all couples who marry, without any distinctions as to the classification, form of union, registration, reporting or legal effects of the relationship.

- Extend all the rights and incidents of legally recognized cohabitation to all conjugal couples who satisfy the criteria without any distinctions as to sexuality, gender identity or legal sex.

- Replace the couple with the individual as the basic unit of tax and transfer policy. Provisions or penalties that disparately affect low-income individuals, couples or parents should be carefully restructured to eliminate these effects.

- Repeal all tax and direct subsidies for the support of economically dependent able-bodied adults.

- Replace couple-based income limits with individual income cutoffs.

- Eliminate all taxes on marriage.

- Extend single supplements to all adults in relevant legislation.

- Repeal benefit formulas that rely on economies of scale in calculating couple-based benefits.

- Avoid extension of couple-based provisions to non-conjugal relationships.

- However, extend employee benefits and tax exemptions for benefit plans to non-conjugal beneficiaries to equalize the distribution of benefits among single adults until an earned-income credit program can be implemented for two-earner households.

- Revise all conflict-of-interest criteria to make the existence of conflict a matter of factual non-arm's-length dealing instead of a matter of legal presumption.

Recommendations designed to improve the ability of the federal government to discharge its legislative obligations to lesbian, gay, bisexual, transgender, transsexual and two-spirited people and their families are also made.

- Collect data on all individuals, couples and families affected by sexuality or gender identity.

- Make these data available to researchers on an ongoing basis.

- Include couples affected by sexuality or gender identity in the scope of "marital status" discrimination in the federal *Human Rights Act*.

- Establish a commission to collect data, report to Parliament and make ongoing recommendations for reform in relation to sexuality and gender identity at the federal level for at least five years.

INTRODUCTION

The trend toward state recognition of lesbian and gay relationships has become well established in Canadian law. In the last two years, three jurisdictions have extended many spousal rights and responsibilities to lesbian and gay couples in omnibus legislation.[1] Several court challenges to the denial of marriage rights to lesbian and gay couples were filed in 2000.[2] The Dutch parliament is expected to permit lesbian and gay couples to marry in 2001,[3] and new relationship recognition legislation has begun to emerge elsewhere around the globe.[4] The net result is that increasing numbers of heterosexual and lesbian/gay couples are being treated as if they were spouses for purposes of state policy.

The omnibus extension of spousal treatment to unmarried couples has essentially been an exercise in formal equality. Unlike litigation, which has proceeded through challenges to selected discriminatory provisions and which has necessarily entailed substantive analysis of the merits of each individual case, omnibus legislation has taken a mechanical approach. In searching out terms, such as "spouse," in legislation and redefining them to include different- or same-sex cohabitants, omnibus reforms have placed greater emphasis on extending large numbers of provisions to cohabitants, and relatively little emphasis on the substantive merits of the provisions themselves. Indeed, in recent years, there has been no consideration at all of the continued use of the couple as the central unit of state social or legal policy.

This study assesses the impact of relationship recognition on lesbian women as a group. Lesbian women (and, where relevant, gay men) have been selected as the focus because of the unique status of lesbian women in Canadian society. Excluded from recognized family structures for much of Canada's history, yet long involved in waged labour as well as in forming relationships, raising children, and seeking social and economic security without the support of state family policies, lesbian women are markedly disadvantaged by their gender as well as by their sexuality. This study seeks to ascertain how legal reform that begins to treat lesbian women and gay men as full members of the human family affects them—both positively and negatively.

Early Policy Choices

The legal and political status of adult relationships is a fundamental element of Canadian social and economic policy. This has been evident for nearly a century. For example, when the first income tax act was introduced in Parliament in 1917, heated debate broke out immediately over whether the income tax system should treat all taxpayers equally, or whether special tax benefits should be given to married men.

This debate arose when the government decided that because households in Canadian society were so diverse, it was more appropriate to give all taxpayers generous individual exemptions instead of adopting structured dependency exemptions that would be available only to some taxpayers. As the Minister of Finance explained when introducing this feature of the *Income War Tax Act*:

> It would be unfair to base the distinction solely on the number of the members of a family, because there are many citizens who have not only children to take care of, but other dependents as well. [T]here are many citizens who have not only their own family to take care of, but also the family of a brother or a sister, or perhaps they have to look after an aged father or mother.[5]

This proposal was met with outrage. Members railed at the unfairness of placing single men and "spinsters with taxable income" in the same position as married men with children: "I think it is absolutely unfair to put the man with no children on the same footing as the father of a big family, with the children to feed and clothe and send to school, and so forth."[6]

Single men were described as "escaping too lightly"[7]; "spinsters" were assumed to have no dependants, and married women with no children were accused of being "free," of being able to choose to work for wages or "save a lot of disbursements" by working in the home.[8]

> We have some striking examples of unmarried men in this House. I am not in favour of encouraging a man to laxity in that regard, because I believe a man should get married, if possible, when he reaches a certain age. Of course, with some of them, it is not their fault.[9]

As the arguments piled up, the members became more and more incensed at the image of married men with all their dependants being treated the same as all these other groups. In the end, the government agreed to reduce the $3,000 individual exemption to $1,500 for taxpayers who were not married, and some consideration was given to raising the exemption to $4,000 for men with six or more children.[10]

Beginnings of Change

In the following decades, women—including lesbian women—became more visible in policy debates. The early women's movement drew attention to discrimination against women, and the involvement of women in war industries brought issues of women's economic autonomy and questions of lesbianism to the surface of public debate. In the postwar period, the renewed emphasis on women's domestic responsibilities placed pressure on politicians to enact various provisions designed to give government recognition and support to married couples.

Although growing attention was focussed on women's role as waged workers throughout this period, most legislative measures continued to be designed around women as wives and women as mothers. It is clear from the legislative record through the early 1950s that it was invariably assumed in both litigation and legislation that marriage was the fundamental unit of legal policy. Thus, married couples remained the primary focus of Canadian legal and social policy right up through the 1960s.

The late 1960s generated massive changes in the social policy landscape. The civil rights movement in the United States, the women's movement that erupted in the late 1960s and the Stonewall rebellion of 1969 in New York City all drew public attention to the legitimacy

of constructing legal and economic policy solely around single-income heterosexual married couples.

The year 1974 was key in this process in Canada. Early studies commissioned by the Advisory Council on the Status of Women (ACSW)—itself established on the recommendation of the Royal Commission on the Status of Women—brought the definition of "spouse" under close scrutiny at virtually the same moment that lesbian and gay activists began to demand that lesbian and gay relationships be recognized. In two studies by Henri Major (1974, 1975), the Advisory Council drew attention to the general lack of coherence in the law relating to non-married "common-law" spouses. These studies recommended that the criteria applied to women who claimed to be common-law spouses be simplified and that spousal benefits be extended to common-law wives in major government benefit schemes (They had been limited to veterans' pension benefits for war wives.)

At about the same time that the ACSW began to lobby for inclusion of common-law couples in the definition of "spouse," news that lesbian and gay couples had begun to apply for marriage licences surfaced in the media. The federal government quickly seized on the opening created by the ACSW recommendations as an opportunity to begin inserting "opposite-sex" definitions of "spouse" into statutes dealing with common-law relationships.[11]

By opening up the definition of "spouse" in this way in 1974 and 1975, the federal government made the first substantial move away from restricting federal benefits to married couples alone. This was a liberalizing move for heterosexual couples. However, it was simultaneously a regressive move from the perspective of lesbian and gay couples. Statutory definitions of marriage that had made no reference to gender or sexuality for most of the century had suddenly been turned into heterosexual-only provisions when they were amended to include cohabiting couples in the definition of "spouse" if they were "of the opposite sex."

At the same time that the federal government in Canada began to inject opposite-sex clauses into its legislation, courts in Canada and the United States began to close the door on lesbian and gay couples who sought to marry.[12] Thus, by the end of the 1970s, it appeared that there was no scope in Canadian law to recognize either lesbian or gay relationships. But at least the issue had been raised expressly for the first time in Canadian law.

Impact of the *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms* created new opportunities in the 1980s for lesbian and gay couples to seek legal recognition of their relationships. Although this struggle took over 15 years, it resulted in dramatic changes in the law.

The Charter equality provisions opened up the discourse surrounding the status of lesbian and gay couples in some unexpected ways. On the legislative level, the decision to eliminate sex-based distinctions from statutes and regulations resulted in replacing terms, such as "wife" or "husband," with gender-neutral terms, such as "spouse." Thus, "common-law wife" was replaced with formulations, such as "persons who cohabit." Keenly aware that such gender-

neutral terms no longer expressly excluded lesbian and gay couples, governments limited cohabitation definitions of "spouse" to couples "of the opposite sex." For example, in 1985, after being pressured to bring provincial statutes into line with the equality guarantees of section 15 of the Charter, Ontario added "sexual orientation" to its human rights code. However, it simultaneously amended the definition of "spouse" in the human rights code to include cohabitants but to exclude cohabitants "of the opposite sex."

The "opposite-sex" definition of recognized cohabitation was obviously designed to prevent lesbian and gay couples from using the new human rights "sexual orientation" clause to gain access to relationship recognition.[13] Opponents of the new "sexual orientation" clause had insisted that it would augur the destruction of the traditional family. Speaking for the government, Ian Scott, then Attorney General, reassured the legislature that these amendments were intended to protect only the personal or individual rights of lesbian women and gay men. He stated that "the government has no plans to redefine the family in Ontario legislation to include unmarried couples of the same sex."[14]

Section 15 of the Charter also provided a constitutional basis from which lesbian women and gay men could bring court challenges to denial of rights. Section 15 enabled lesbian women and gay men to challenge specific statutory provisions dealing with individual rights. This led to important decisions that interpreted human rights statutes as including sexual orientation clauses. Eventually, it resulted in court decisions that recognized lesbian and gay relationships in a variety of contexts.

Three key Supreme Court of Canada decisions supported this trend. In the 1995 decision in *Egan and Nesbit* v. *Canada*,[15] the Court concluded that the "opposite-sex" definition of "spouse" in old age security legislation violated the equality guarantees of section 15(1). Although the Court went on to refuse to invalidate the provision on the basis that excluding gay couples from this benefit scheme was "demonstrably justified" under section 1 of the Charter, the first part of the ruling sparked numerous other favourable rulings across the country. In 1998, the Court ruled in *Vriend* v. *Alberta*[16] that excluding "sexual orientation" from human rights provisions violates section 15 of the Charter and, in 1999, the Court ruled in *M.* v. *H.*[17] that the opposite-sex definition of "spouse" in Ontario's cohabitant support provisions unjustifiably violated section 15.

Legislative Responses to Charter Rulings

Between 1985 and 1997, few legislatures dealt with sexuality issues. Those that did merely added "sexual orientation" clauses to their human rights statutes. Only British Columbia and Ontario went beyond that by making changes to substantive statutory provisions. Ontario quietly extended consent to treatment and substituted consent legislation to lesbian and gay couples.[18] British Columbia amended several family law provisions to make them applicable to lesbian and gay couples.[19]

On the whole, these initial legislative changes were friendly in intention and form. However, they radically departed in form and content from the way in which courts had amended discriminatory legislation. Courts had removed opposite-sex clauses from expanded

definitions of "spouse," from statutes, whenever they could, resulting in the inclusion of lesbian and gay relationships in the general category of "spouse" as previously expanded to include "opposite-sex" cohabitants. In contrast, both Ontario and British Columbia created new statutory categories to which they assigned lesbian and gay couples. Ontario added the category of "partners of the same sex" to its consent legislation. While British Columbia added couples of "the same gender" to its expanded definitions of cohabitants deemed to be spouses, it did so by first recognizing the separate category of "same-gender" cohabitants, and then adding these couples to the general category of "spouse," instead of removing sexuality-specific language from these definitions altogether.

In retrospect, the creation of new categories for lesbian and gay couples does not appear to have been an accident. Some insight into the political pressures that resulted in the establishment of separate categories can be gleaned from the progress of Bill 167 through the Ontario legislature in the early 1990s. Originally drafted to add lesbian and gay couples to the definition of "spouse," Bill 167 was amended at the last minute after it came under heavy political attack to segregate lesbian and gay couples in a separate category of couples with less than full marital rights and responsibilities.

At the time Bill 167 was so radically altered, the government announced that it was going to adopt the European-style registered domestic partnership (RDP) model. This was a revealing announcement, for it is well known that RDPs do not extend full equality to lesbian and gay couples. In particular, they invariably prohibit the formation of families with children by denying adoption, custody or guardianship rights to lesbian and gay couples, and often deny other rights and responsibilities as well.

Even as altered, Bill 167 was nonetheless defeated. But it was an important moment in the gradual recognition of lesbian and gay relationships, because it foreshadowed the impact the growing political backlash would eventually have on the ultimate legal status of lesbian and gay relationships.

When the Supreme Court of Canada, in *M.* v. *H*, ordered Ontario to amend its definition of "spouse" in the cohabitant provisions of the *Family Law Act* to include lesbian and gay couples, the impact of this backlash on the growing judicial recognition of lesbian and gay couples became apparent. In March 2000, Ontario Bill 5 came into effect. This omnibus statute extended most of the provincial rights and responsibilities of married couples to lesbian and gay couples. However, it did so by creating a new segregated category of "same-sex partner" completely separate from the existing definition of "spouse" for married and cohabiting heterosexual couples. Thus, lesbian and gay couples have been given rights and responsibilities equivalent to those of married and cohabiting opposite-sex couples, but they gain access to them via the segregated legal category of "same-sex partner." This was done for the express purpose of continuing to reserve the traditional category of spouse for heterosexual couples, whether married or unmarried.

In June 2000, a similar pattern was followed when the B.C. government introduced another in a series of omnibus bills to recognize lesbian and gay relationships in most of the statutes

that had not yet been amended by earlier omnibus statutes. In all these statutes, the B.C. government has used separate terminology for lesbian and gay couples. And in June 2000, the federal government enacted Bill C-23, an omnibus bill that extends spousal rights and responsibilities to lesbian and gay couples by assigning them to the non-spousal category of "cohabitant."

Issues and Implications

This study assesses the implications of relationship recognition on lesbian women as a class (and on gay men). Two main implications are considered: the material impact of relationship recognition and the impact of the form of recognition.

The incomes and demographics of each lesbian family affect the material impact of relationship recognition. Where lesbian couples are recognized, they now qualify for the same benefits as heterosexual couples and are subject to the same responsibilities. In practice, however, only some lesbian couples are able to take advantage of spousal benefits, while others are actually penalized in ways they never had to face before. Material impact itself is affected by the incomes and opportunities available to lesbian women.

The form relationship recognition takes is important because the degree of integration or segregation from the population as a whole has administrative, social and emotional effects. When lesbian couples are included in the category "spouse," they are not segregated or separated out administratively or in legal theory. When they are considered to belong to separate legal categories such as "same-sex partners," they can be administratively cordoned off in governmental and non-governmental records, and their rights may not be protected to the same extent by human rights legislation as the rights of heterosexual couples. That is, not being "spouses" under some new statutory regimes, they cannot appeal to human rights commissions in the same way as heterosexual couples when they experience discrimination on the basis of marital or family status.

At this point in time, it is difficult to assess either type of impact with complete precision. Despite their growing recognition in law, lesbian women, gay men and their families are still not identified in government survey and census instruments. Thus, most of the tools of social and economic analysis that are routinely used in investigations, such as this, cannot be applied, except speculatively, to lesbian women. And on the legal issues, it is too early to predict how the courts will respond to the creation of segregated legal categories for lesbian and gay couples.

Plan of This Study

This report is constructed around a series of questions. Chapter 1 identifies the demographic characteristics of lesbian couples in Canada today. Using data from Canadian and U.S. sources, as well as a microsimulation database,[20] the incomes and other characteristics of lesbian and gay couples, as compared with each other and, to the extent possible, as compared with married and cohabiting heterosexual couples, are analyzed.

Beginning with demographic information is important. The material impact of relationship recognition on lesbian women is the product of the complex interaction of several factors:

- the distribution of incomes among women versus men;
- the impact of race on incomes;
- the distribution of incomes within lesbian couples;
- the degree of economic autonomy or dependency associated with lesbian couples;
- the specific rights and responsibilities arising from a given relationship recognition model;
- the mix of benefit/penalty provisions contained in the model; and
- the degree to which the model reflects differences in income levels in the delivery of benefits and penalties.

Women's incomes are much lower than men's incomes. Sexuality further affects women's incomes. Women who are racially identified and/or living with disabilities are additionally disadvantaged. Because lesbian women do not have access to the male economy in their conjugal relationships, they are disadvantaged by their sex *and* sexuality in income-earning potential. This demographic information forms the backdrop against which the impact of various models of relationship recognition on lesbian women is evaluated.

Chapter 2 surveys these relationship recognition models. At present, the models range from complete access to marriage (Netherlands) to the Vermont civil union model, quasi-marital models (New South Wales) and segregated models, such as Bill C-23, European RDPs and the French Civil Solidarity Pacts (PaCS). Although the specific mix of rights and responsibilities associated with each model is completely unique, they do have commonalities that make it possible to assess their overall structural impact on lesbian women. It is also possible to comment on the degree to which each type of model promotes the genuine equality of lesbian women when evaluated in light of constitutional equality criteria and with the status quo, in which lesbian women are treated as individuals, no matter how "coupled" they really are.

Chapter 3 takes a close look at the distributional impact of relationship recognition. This entails an examination of how incomes and other characteristics associated with sex, sexuality, race, relationship status and ability affect eligibility for relationship-based benefits. Because legal recognition of relationships does not invariably generate benefits, but sometimes results in the imposition of responsibilities or even penalties (such as the tax on marriage), these distributional effects are considered. Chapter 3 also looks at the probable revenue implications of recognizing lesbian relationships.

The policy recommendations in Chapter 4 bring together the two main considerations that have shaped the preceding analysis:

- the importance of promoting the genuine equality of all women in Canada, including lesbian women and women in lesbian relationships; and

- the importance of ensuring that relationship recognition laws do not differentially burden or benefit any class of people, whether by forcing them to be “outed,” by setting up pressures to conform to dominant norms or by reinforcing hierarchies of privilege.

The main conclusion reached in Chapter 4 is that segregated forms of relationship recognition and relationship benefits and penalties that differentially disadvantage groups characterized by gender, sexuality, race and/or disability violate constitutional equality guarantees.

These solutions are threefold: eliminate segregated forms of relationship laws, open all forms of relationship recognition, including marriage, to all couples and shift away from relationships toward the individual as the basic focus of both benefit and penalty provisions. Chapter 4 concludes with detailed recommendations on how these three structural solutions should be implemented.

1. LESBIAN WOMEN IN CANADA: DEMOGRAPHICS AND DISADVANTAGE

The decision to recognize lesbian and gay relationships in federal law is truly momentous. Federal law as amended by Bill C-23 affects all lesbian and gay couples across the country, as well as provincial legal policy where, for example, the provisions of the *Income Tax Act* are incorporated by reference into provincial income tax legislation.

Perhaps surprisingly, however, the impact of this major policy shift on lesbian women or gay men cannot be assessed with any precision, because the government has consistently refused to collect census or survey data on this sector of the population.[21] This chapter is devoted to developing a demographic profile of lesbian women, gay men and lesbian/gay couples that can be used to analyze the impact of alternative forms of relationship recognition on lesbian women.

As the material in this chapter demonstrates, many factors affect the status of lesbian women. Unlike gay men, lesbian women are significantly affected by sex discrimination. Thus, that forms the starting point for this analysis. Already disadvantaged by their sex, lesbian women are also affected by their sexuality, and by their lack of access to the "male" economy. Lesbian women may also be disadvantaged because of their race, ethnic origin, cultural identity and/or their physical/mental condition.

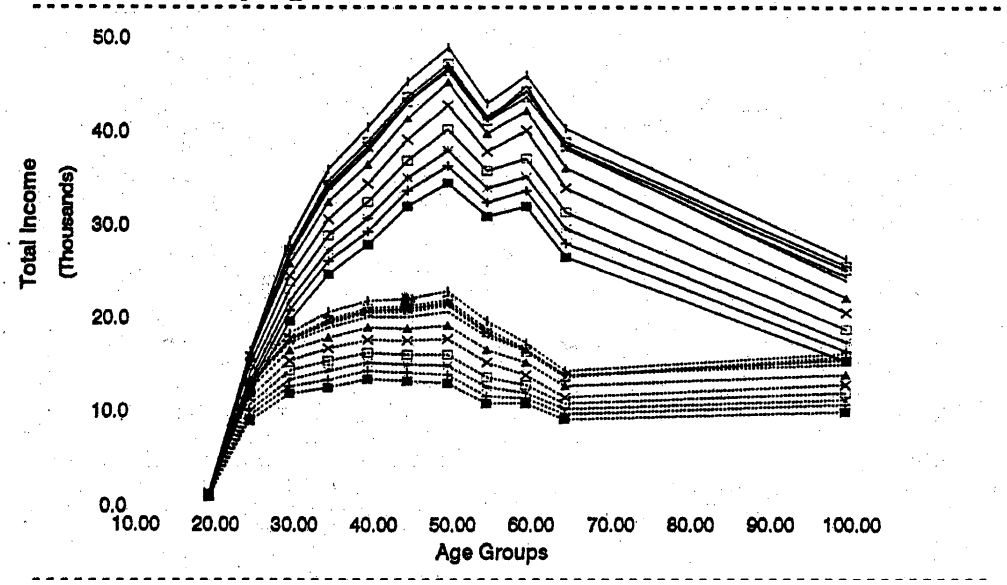
This chapter draws on material that illuminates the role each characteristic plays in constructing the disadvantage of lesbian women as a class. Building on Canadian data on women's and men's incomes, this chapter draws on Australian census data, U.S. survey and census data, extrapolations based on Canadian survey data and Canadian microsimulation studies to identify the main characteristics of lesbian women and gay men as classes. This material is presented at the outset to ensure that this study of the impact of relationship recognition on lesbian women takes the realities of lesbian existence into account as fully as possible, and explores the commonalities and differences between lesbian women and gay men as well.

Incomes and Gender

Some researchers consider lesbian women and gay men to be completely interchangeable from a policy perspective. However, there is some reason to believe that, at least from an economic perspective, lesbian women are perhaps more powerfully defined by their gender than by their sexuality, whereas gay men are more substantially affected by their sexuality.

Information about the income gap between women and men in Canada suggests it is an intractable problem and women's incomes remain markedly lower from men's. As Figure 1 indicates, from 1984 to 1995, women's average incomes tended to be in the $10,001 to $20,000 range, while men's average incomes were between $30,001 and $50,000 in equivalent years.

Figure 1 Total Income by Age, Sex, and Gender, 1984-1995



Source:
Social Policy Simulation Model and Database (SPSD/M) version 5.2, adjusted to years 1984-1995.

Whether the focus is on average incomes or on incomes by age, the gap between women and men's incomes remains so dramatic that it almost appears they inhabit two completely different economies.

This dual income pattern has several important implications for lesbian women. First, it suggests that lesbian women and gay men will have very different income levels, and that legal policy will not necessarily affect lesbian and gay couples in precisely the same ways. Second, it suggests that because lesbian couples will have two women's incomes and gay couples will have two men's incomes, lesbian and gay couples may also have different income patterns. Third, it suggests that because lesbian couples are the only couples that do not have access to male incomes, they may be uniquely disadvantaged in income terms when compared with all other couples.

Incomes and Sexuality

The collection of data on lesbian women and gay men poses special methodological problems. Even in jurisdictions that prohibit discrimination on the basis of sexuality, lesbian women and gay men are reluctant to reveal their sexual identities. This reluctance reflects the habits of self-protection associated with growing up and living in homophobic communities.

While younger lesbian women and gay men are less fearful of self-disclosure, they continue to display some of this lack of openness. Thus, research projects designed to measure the size of lesbian and gay populations have reported figures that range as low as one percent and as high as 20 percent. Factors affecting the degree of disclosure to researchers include the definition of sexuality used in the research project, the time frame covered by the questions and the research methodology.[22]

The difficulties of measuring lesbian and gay populations mean there is little valid data on the incomes and other characteristics of lesbian women and gay men. Because of the way census data are collected, there are more useful data on lesbian and gay couples than on lesbian or gay individuals. This is probably because sexuality can be inferred from the sex of non-married cohabitants in the context of some census questions, whereas no census instrument has yet included questions on the sexuality of unattached individuals.

As discussed below, Australia actually included a question on de facto couples in its 1996 census forms. This has facilitated identification of two-woman or two-man households where the adults are involved in a conjugal relationship. Similar data have been developed in the United States using census data that report the sex of cohabitants. While similar data were collected in the 1996 Canadian census, officials have refused to release these data, necessitating the creation of other research methodologies. However, general trends observable in Australian and U.S. data help frame research hypotheses to be used in the Canadian context.

Australian Census Data

The Australian Bureau of Statistics included questions relating to lesbian and gay couples under the category of "de facto couples" in the 1996 census. Over 10,000 couples were identified in this way. Around 11 percent of those couples did not provide complete income information, but the incomes reported by the remaining 88 percent bear out the hypothesis that lesbian couples generally have lower incomes than gay couples.[23]

Some 42 percent of all the de facto couples of the same sex, who identified themselves in the 1996 census, were lesbian. If the distribution of incomes between lesbian couples and gay couples was not affected by sex, one would expect that 42 percent of all same-sex couples in each income bracket would be lesbian. This is not borne out by the data.

As Table 1 demonstrates, lesbian couples are markedly overrepresented at the lower income levels. None of the couples in the lowest income bracket comprised gay men; 100 percent were lesbian women. In the second bracket, the balance shifted, with 40 percent of the couples in that bracket being gay men and 60 percent being lesbian women. Compared with the representation in the overall population of couples surveyed, this means that lesbian women were overrepresented in the lower income brackets by some 18 percentage points, and that gay men were underrepresented.

In the middle brackets, lesbian women were sometimes proportionately represented and sometimes slightly overrepresented, but over two thirds of the couples in the highest income categories were underrepresented at the higher income levels. This pattern is consistent with women's access to moderate-low incomes in split wage economies, such as Canada's, and suggests that most of the couples in those middle brackets probably had two income earners. But because women cannot achieve the income levels associated with men, their representation in the highest income brackets falls off sharply because, even doubled, women's incomes will not, on average, match either the highest men's incomes or doubled men's incomes. Some 14 percent of all couples fell into this highest income bracket.

Table 1. Family Incomes of Lesbian and Gay Couples, Australia, 1996

Income (weekly) $	Number of Couples in Income Bracket	Lesbian Couples as % of All Couples in Income Bracket	Gay Couples as % of All Couples in Income Bracket
1-119	9	100	0
120-159	15	60	40
160-299	245	43	57
300-499	745	50	50
500-799	1,409	47	53
800-1,199	2,340	42	58
1,200-1,499	1,454	42	58
1,500-1,999	1,517	43	57
2,000 and over	1,278	31	69
Total	9,069	42	58

Source:
Australian Bureau of Statistics, (1997, Table 1, at 18).

United States Data

Research in the United States suggests that sexuality generally has a negative effect on individual and couple incomes of both lesbian women and gay men. An early study demonstrated that three factors—sex, sexuality and marital status—interact to produce income hierarchies in which married women have the lowest incomes and married men have the highest. While women's average incomes are all markedly lower than average incomes of men, cohabiting heterosexual and lesbian women did have higher incomes than married women, while gay men had the lowest individual male incomes (Blumstein and Schwartz 1983: 598, Table 9).

More recent research has confirmed this pattern. In a multivariate regression analysis of survey data, Lee Badgett used the General Social Survey conducted by the National Opinion Research Center to carry out a multivariate regression analysis of the effect of sexual activity on incomes.[24] As summarized in Table 2, she found that heterosexual men had the highest incomes, followed by gay/bisexual men, heterosexual women and lesbian/bisexual women, in that order.

Badgett concluded that the income penalty for gay or bisexual men could be as much as 24.4 percent, and increased to as much as 26.7 percent when occupation variables were included. However, she also concluded that because lesbian women were so disadvantaged in income terms because of their sex, discrimination on the basis of sexuality had far less effect. Nonetheless, lesbian women's earnings were lower when expressed as a percentage of gay/bisexual men's earnings (57 percent), while heterosexual women's earnings were higher when expressed as a percentage of heterosexual men's earnings (64.8 percent). This suggests that the earnings of lesbian women are negatively affected by both sex and sexuality.

Table 2: Incomes by Sexual Behaviour, United States, 1989-1991

	Lesbian/Bisexual	Heterosexual Women	Gay/Bisexual	Heterosexual Men
Annual earnings	$15,056	$18,341	$26,321	$28,312
$0-$9,999	29.4%	21.2%	10.6%	8.8%
$10,000-$19,999	35.3%	36.2%	29.8%	22.5%
$20,000-$29,999	29.4%	25.8%	21.3%	26.2%
$30,000-$39,999	5.9%	12.0%	17.0%	19.4%
$40,000-$49,000	0.0%	4.7%	21.3%	23.1%

Source:
Badgett (1995: 726, 734).

Although the U.S. census does not collect information on sexuality, data on the sex of "unmarried partners" has made it possible for researchers to analyze incomes of lesbian and gay couples who reported their relationships in this manner. Marieka M. Klawitter and Victor Flatt (1995) used the 1990 census data to analyze the income levels and race/gender composition of same-sex couples. Summarized in Table 3, their findings are similar to Badgett's, with married and gay couples receiving the highest household incomes, followed by unmarried heterosexual couples and then by lesbian couples.

Table 3. Predicted Earnings Differences by Couple Type, United States, 1990

	Lesbian Couple $	Gay Couple $	Cohabiting Heterosexual $	Married Heterosexual $
Household income	37,754	45,777	41,530	46,721
Individual men's incomes	--	18,462	18,213	24,450
Individual women's incomes	15,823	--	10,611	9,866

Source:
Calculated from data in Klawitter and Flatt (1995, tables 2 and 4, using "private employment" lines).

It is worth emphasizing that only the Blumstein-Schwartz study was deliberately designed to produce valid data on incomes by sex, sexuality and type of relationship. The findings in the other two studies were based on partial data sets. While providing insight into the possible income effects of sex, sexuality and type of relationship, the results remain partial because none of the governmental instruments used to collect the data was deliberately fashioned to produce valid and representative data on these points.[25]

These data are not comparable with each other, cannot always be used to make comparisons with heterosexual couples and leave identification of probable individual incomes somewhat speculative. However, all these studies do support the hypothesis that the interaction of sex, sexuality and type of relationship generates income hierarchies in which married couples

consistently receive the highest incomes and lesbian couples the lowest. While lesbian women's incomes are slightly higher than the incomes of married and heterosexual cohabiting couples, they still remain markedly lower than all men's incomes, which explains why lesbian couples' incomes remain the lowest of all couple incomes.

Canadian Data

There are no direct Canadian data on lesbian women and gay men. Existing survey data are univariate, and no representative national samples have been developed. Statistics Canada has consistently refused to include questions on sexuality in the census forms, although it has been included in the 2001 census. Unlike Australia and the United States, which have published data on lesbian and gay couples identifying themselves in the cohabiting categories, Canada has refused to publish its test data or the admittedly incomplete responses of some lesbian and gay couples who did identify themselves as "other" in the 1996 census. In any event, these data would relate only to couples, not to individuals.[26] Until Statistics Canada does collect national data on sexuality, data on lesbian and gay couples can be collected only indirectly and on a very speculative basis. One method involves identifying two-adult, non-family, same-sex pairs in census or survey data who may be lesbian or gay. The other method involves using microsimulation to construct potential populations of lesbian and gay couples for analytic purposes. Neither method deals directly with known lesbian and gay couples, because there is nothing in either type of database to suggest which two-adult, non-family pairs of the same sex are actually lesbian or gay, or intimately involved with each other. However, studies using this methodology can identify rough trends and issues and, in the case of microsimulation studies, make it possible to analyze the impact of complex factors on the distribution of government benefits and penalties.

Three studies have produced income data on the class of same-sex pairs. One was carried out by the Department of Finance for use by the Department of Justice when representing the government in litigation. This study used data on same-sex pairs in the 1990 Statistics Canada Survey of Consumer Finances to project data on probable lesbian and gay couples. For purposes of this research project, this methodology was repeated at Queen's University using the Survey of Consumer Finances, adjusted to 1996. The third study used the Statistics Canada Social Policy Simulation Model and Database, adjusted to 2000, to identify two-adult, non-family pairs. The results of these studies are summarized below.

Department of Finance study

In this study, all two-adult households containing unrelated adults of the same sex in a sample of 39,000 households were identified. (Full-time students were excluded.) The resulting figures were then used to project that there were approximately 134,700 same-sex couples in Canada in 1994 (about 1.6 percent of all households with more than one person). These data were used to model detailed characteristics of these households to project the probable distributional and revenue implications of recognizing lesbian and gay couples for income taxation purposes.[27]

Table 4. Adult Pairs of Same Sex by Number of Earners, Household Income, 1994

Total Household Income $	Single Income	Two Incomes	Total	% in Bracket
Under 10,000	1,100	--	1,100	1
10,001-20,000	2,800	2,400	5,200	4
20,001-30,000	1,700	11,500	13,200	10
30,001-40,000	1,700	15,100	16,800	12
40,001-50,000	700	18,500	19,200	14
50,001-75,000	1,200	43,000	44,100	33
Over 75,000	--	35,000	34,900	26
Total households	9,200	125,500	134,700	
Average household Income	27,850	63,070	60,670	
Percentage of all couples	6.8	93.2	100	100

Source:
Affidavit of Albert Wakkary, filed in *Rosenberg* v. *The Queen* (Ont. Gen. Div., Court File No. 79885/94) (sworn June 2, 1994), Exhibit B, Table 2.

These data have limited utility. They are highly speculative. The same-sex adult pairs identified in this study are not necessarily lesbian or gay. They may be friends, roommates, distant relatives or people who have decided to live together for a variety of reasons. There is nothing in the survey data that makes it possible to identify the sexuality of the pairs.

These data are not easily comparable, because comparable data for heterosexual couple earnings were not developed. Nor do they break pairs down by sex. They do separate out the single-income pairs from the two-income pairs and present the findings by income brackets. However, the data cannot be used to project the impact of sex and sexuality together on income distributions.

These data are useful because they give some insight into the relative number of pairs that have one income versus two. However, the suggestion that average household incomes are around $60,000 is somewhat high.

Queen's analysis of survey data

To fill in some of the missing comparisons and breakdowns, the Department of Finance study was replicated with data from the 1996 Survey of Consumer Finances. The households selected for this Queen's University study consisted of all households with two adults of the same sex who were not related by blood, marriage or adoption.[28] Pairs of students were removed from the file, as were pairs in which extreme age differences or occupation codes suggested that it was quite unlikely that the pairs were potential lesbian or gay couples.

A total of 843 household records were selected for use in constructing the database used in the Queen's analysis. These 843 households represent 363,196 individuals, or 2.8 percent of

the entire adult population. All selected households were classified as to sex: 63 percent were male, 37 percent were female.

These pairs were selected not because they are lesbian and gay couples, but because it is safe to assume that most lesbian and gay cohabitants fall within this overall population. Actual lesbian and gay couples cannot be separated out from non-lesbian or gay pairs in any way. Nor are they necessarily evenly distributed among the income classes used in this study. However, this is the most realistic way of getting some sense of how incomes of this part of the population may also be affected by sex.

Table 5 summarizes the distribution of income among these households by income bracket and by sex. The overall distribution of income among this population is substantially lower than that found in the Department of Finance study. In the Queen's analysis of 1996 Survey of Consumer Finance data, 29.4 percent of all incomes by household fell below $30,000. In the Department of Finance 1994 Survey of Consumer Finance study, only 15 percent fell below $30,000. In the middle-income brackets, the distribution was consistently higher in the Department of Finance study, and there was another substantial divergence in incomes over $50,000. The Queen's study found only 49 percent of the class above that level, whereas the Finance study found 59 percent representation at that level. This divergence is evenly spread through the brackets above $50,000.

Table 5. Same-Sex Pair Income by Sex, Survey of Consumer Finances, 1996

Total Household Income $	Male Households %	Female Households %	Total %
0-10,000	2.2	0.5	2.7
10,001-20,000	3.5	5.5	9.1
20,001-30,000	10.4	7.1	17.6
30,001-40,000	5.2	5.3	0.5
40,001-50,000	9.1	4.2	13.3
50,001-60,000	11.4	4.3	15.8
60,001-70,000	5.0	2.5	7.5
70,001-80,000	5.0	3.9	8.9
80,001-90,000	5.4	0.9	6.2
90,001-100,000	2.0	0.5	2.4
Over 100,000	4.5	1.5	6.0
Total	63.7	36.3	100

Source:
Compiled using the combined database composed of the individual, census family and key files from Statistics Canada (1997b).

The Queen's findings are more consistent with the Australian and U.S. data summarized earlier in this section.

The Queen's study categorized these same-sex pairs by sex as well as by incomes. While the two-male and two-female households identified in this way have similar income profiles, female pairs are substantially overrepresented in lower-income brackets. Approximately 36 percent of all female pairs have less than $30,000 in total household income, and about 62 percent have less than $50,000. Only some 25 percent of male pair incomes falls below $30,000, and around 47 percent falls below $50,000.

Further analysis of this database revealed that this sex-based pattern is borne out whether there are children in the household or not. Average household income for female households is less than that for males with and without children present. The database containing same-sex adult pairs that was constructed using the Statistics Canada Social Policy Simulation Model and Database (SPSD/M) also suggests that the incomes of potential lesbian couples are lower than those of potential gay couples.[29]

Incomes and Race

Race is another factor that has a marked influence on income levels at both the individual and the couple level. It was not possible to code race into the data set used in this study. However, the information in Table 6 suggests that lesbian women or gay men who are racially identified will experience more income disadvantage than non-identified individuals. The effects of racism on income levels would be predicted to affect couple-based incomes as well.

The growing literature on the relationship between income tax policy and race in the United States has demonstrated that there are numerous income tax provisions that disparately affect people of colour. This disparity is primarily due to the impact of race on incomes of both individuals and couples.

The income tax provisions that have a disparate impact include the imposition of the "marriage penalty" generated by the different tax rates applied to single and married people, the large number of tax benefits given to those who own various forms of property, and joint filing, which is not available to couples who cannot afford to live on a single income.[30] Family-based, low-income cutoffs for various forms of social assistance will also tend to discriminate against two-income couples and, over time, place pressure on low-income mothers or custodial parents to live alone in order to qualify for maximum state-funded benefits.

Those who are both sexually and racially identified would probably be affected even more severely by such provisions.

Table 6. Average Incomes by Race and Gender, 1990-1995

Race/Ethnic Identity	Men $	Women $
Southeast Asian	24,233	16,794
Filipino	24,771	20,145
Arab/West Asian	26,401	16,964
Latin American	21,254	14,461
Japanese	41,254	20,202
Korean	24,548	16,976
Chinese	27,815	20,046
South Asian	29,435	18,952
Black	25,410	20,345
All the above combined	27,933	19,204
First Nations/on reserve	14,711	13,447
First Nations/off reserve	22,144	15,559

Source:
Statistics Canada (1996).

Incomes and Disability

The continued omission of sexuality from census and survey data means there are no data in Canada that would illuminate the combined impact of disability and sexuality on incomes. However, the impact of disability on incomes is well documented and, certainly, women who are classified as disabled have markedly lower incomes than men who are disabled. Those who are disadvantaged by disability as well as by sexuality are likely to have lower-than-average incomes when compared with other individuals of their sex. Thus, lesbian couples who are disabled would be likely to have incomes lower than average lesbian couples.

Table 7. Average Incomes by Disability and Gender, 1996

Ability Status	Men $	Women $
Able-bodied	30,000	18,008
Disabled	22,129	13,425

Source:
Ministers Responsible for Social Services (1998-99).

People with low incomes are unlikely to engage in the types of behaviours that attract the largest tax benefits. For example, women with a disability, with average incomes of $13,425, are unlikely to be able to support both themselves and another woman. Thus, they would not be able to take advantage of the married tax credit that can be claimed by taxpayers supporting an economically dependent spouse. For this reason, it is likely that income tax and transfer programs will have a disparate negative impact on people characterized by disability and sexuality.

Conclusions

It is commonly accepted that governmental regulatory and fiscal structures should be neutral and fair in their impact on behaviour. When demographic characteristics, such as sex, sexuality, race and/or disability, are known to produce differential incomes, responsible policy formation requires that the impact of major changes in social and economic policy on those groups be considered carefully.

When the goal of new relationship recognition legislation is to ameliorate conditions of disadvantage flowing from patterns of historical discrimination, it is particularly important to note how such changes affect various members of that population. As this review of the available data has demonstrated, the incomes of people characterized by their sexuality are also affected by their sex, relationship status, perceived race, responsibility for children, and physical or mental ability.

Gender, Race and Ability

Women's incomes are markedly lower than men's, whether they are examined over the life cycle, by level of education, by occupation group, or on regional or national averages. Race correlates with lower lifetime and average incomes across variables of education or occupation. Physical or mental disability also predicts greater poverty.

Sexuality and Relationship Status

Married couples have the highest household incomes of all couples. Gay men have lower incomes than heterosexual men, but when their incomes are doubled, they have household incomes comparable to those of heterosexual couples. Non-married cohabiting women have higher incomes than married women, but cohabiting men have lower incomes than married men. Lesbian women's incomes tend to cluster at about the same or somewhat higher level as cohabiting women's, but lesbian households have the lowest incomes of all categories of households.

Race and Relationship Status

The average incomes of racially identified persons are generally lower than those who are not racially identified (predominantly people of European origins). Not only are there wide divergences in average incomes by ethnic origin/race, but there are wide divergences by gender as well. Generally, the gap between women and men's average incomes is smaller and, for some groups, women's incomes are relatively less depressed than men's when compared with national averages. Thus racially identified married couples' household incomes are, on average, much lower than those of married couples who are not racially identified. To state this finding in another way, the benefit of having access to male incomes is much smaller in this category.

Disability and Relationship Status

Similar patterns are to be expected in relation to individuals with a disability. All adults with disabilities receive lower incomes than those without a disability. Women with a disability are far more disadvantaged than men with a disability, in terms of incomes. In this class of

couples, then, the advantages of having access to male incomes are blunted by the effects of disability.

The realities of lesbian and gay existences are not neutral because of the non-neutral effects of sexuality and, in the case of lesbian women, gender on their incomes, needs, resources and responsibilities. These realities become even less neutral when lesbian women or gay men are also racially identified or have a disability, or both.

It is important to keep the income effects of sexuality, gender, race and disability in mind when assessing alternative forms of relationship recognition on lesbian women and gay men. Tax/transfer policy is not neutral in its impact on low-income couples. The trend toward imposing the full fiscal burdens of relationship recognition on lesbian and gay couples, while continuing to withhold many of the benefits of couple status, can be expected to intensify the overall disadvantage of lesbian and gay couples.

Patterns of benefits and burdens imposed in new forms of relationship recognition that have emerged over the last decade are canvassed in the next chapter.

2. EMERGING FORMS OF RELATIONSHIP RECOGNITION: SEPARATE BUT SOMEWHAT "EQUIVALENT"

Until legal policy began to address the status of lesbian and gay couples, only two types of relationships between adults were recognized in Canadian law: marriage and cohabitation. Most of the thinking, to date, about how lesbian and gay relationships should be recognized has centred on two issues: whether lesbian and gay couples should be given access to either married or cohabitant status, and how parent–child relationships are recognized within lesbian and gay families. This study is concerned with the impact of alternative forms of relationship recognition on lesbian women, but the parent–child relationship is also important, for lesbian and gay couples often form families and are members of families themselves.

The first part of this chapter outlines the basic legal differences between single status, marriage and cohabitation in Canadian law. Next, the extent to which judicial and statutory methods of recognizing lesbian and gay relationships can be considered to be "equal' is examined. The methodological advantages of judicial recognition over statutory recognition are outlined, as are the various forms of discrimination inevitably built into statutory provisions.

The third part takes a closer look at new federal Bill C-23, which has assigned lesbian and gay couples to a new category in federal law labelled "common-law partners." The impact of the mix of rights, responsibilities, benefits and burdens that flow from Bill C-23, on lesbian women particularly and on queer couples more generally, is considered from the perspective of constitutional equality doctrine and from the perspective of how the legislation differentially affects lesbian women as a class. The interface between federal and provincial law is included in this analysis, because changes in federal law have implications for provincial tax and family property law.

The main conclusion emerging from this analysis is that, while lesbian and gay couples are now expected to bear the same burdens and responsibilities as other couples in Canada, they continue to experience unique and significant forms of discrimination in federal law. This is primarily due to the fact that the role of the state in recognizing adult relationships is still very much the product of 19th- and 20th-century values that treat male-headed, single-income, heterosexual marriage as the basic unit of social organization to be supported and promoted in federal law.

Like all non-voluntary laws that extend spousal treatment to lesbian and gay relationships, Bill C-23 requires lesbian and gay cohabitants to pay the same price for relationship recognition as all other couples, but federal and provincial laws continue to deny them the full benefits of recognition. Indeed, as explored in this chapter and as documented in statistical form in Chapter 3, the way federal relationship benefit/burden policy operates ensures that, because of lower average incomes, the burdens of relationship recognition fall more heavily on lesbian and gay couples than on married or cohabiting heterosexual couples, and most heavily on queer couples affected by race, female sex, disability and/or parental responsibilities.

Because Bill C-23 continues to deny lesbian and gay couples equal rights, it can best be described as creating a class of couples who are separate but somewhat equivalent to unmarried heterosexual cohabitants.

Individuals, Married Couples and Cohabitants

Although it seems to be taken for granted in North American legal discourse that married people ought to have special rights and responsibilities, this has not always been the case, nor is it true everywhere. In egalitarian societies, property ownership tended to be collective, devolution of property reflected the primacy of collective interests, and the smallest observable unit of social and economic organization often focussed on the mother–child unit. Over time, egalitarian social organization has been displaced, to a great extent, by patrifocal organization. Thus, by the late Roman Empire when the outlines of contemporary property law first emerged, property ownership became vested in individual men of the citizen class. The political and legal prerogatives that gave shape to the emerging state were also concentrated exclusively in the hands of male citizens, making it possible for ruling classes to maintain political and economic control over a growing geographic area and diverse population.

Individuals

Individuals emerged in European legal discourse in contradistinction to kin-based collectivities. As reflected in Roman civil law, one of the earliest legal systems to define and organize rights and prerogatives at the level of the individual, the legal rights and status of the individual were shaped around the political and legal prerogatives of male citizens in Roman law.

Although the right to own property, enter into contracts, hold public office, consent to marriage, have custody of children, utilize the courts, establish a domicile and be considered a citizen were initially available only to male citizens, in North American legal discourse, all individuals possess these fundamental civil and political rights. Indeed, the language of section 15(1) of the *Canadian Charter of Rights and Freedoms* clearly confirms that it is the individual who holds rights in Canadian society, and that the principle of equality extends to all individuals, notwithstanding previously incapacitating characteristics such as sex, race or disability.[31]

This point is made to emphasize that while all people are considered individuals and, therefore, legal persons in Canada today, this concept originally was not neutral, but was designed to create and maintain hierarchies of privilege and power.

The individual is now considered the basic unit of society. While the term “individual” is often counterpoised against more collective terms, it is useful to remember that expectations around the legal status of individuals themselves have been shaped by the political and legal status of males in Euro-Canadian society generally.

Marriage

The rights and responsibilities associated with marriage likewise can be traced to hierarchical Roman law. Marriage has not always had legal significance. Forms of marriage have often

existed without any legal status whatsoever. Inheritance and tax laws that focussed directly on married couples were designed to promote heterosexual marriage over male–male relationships. Thus, the Julian laws of the Roman Empire penalized men who did not give or bequeath their property to their children, and penalized women who did not marry and have at least three children.[32] Sometimes, seen as essentially moralistic in purpose, such laws maintained the wealth and political power of the citizen class by regulating marital and property transactions.

From a fiscal perspective, these laws are not unlike many of those of the modern state. Such provisions subsidize heterosexual marriage, women's reproduction and family bequests by penalizing those who choose to behave as individuals. Indeed, when viewed from this perspective, it can be seen that the purpose of special property rights and tax benefits for married couples is to shift economic power from those who act as individuals to those who act as heterosexual married couples.

Similar objectives have produced a legal structure in which, in Canada, certain rights and responsibilities are reserved for married couples only. Many of these rights and responsibilities have been extended to conjugal cohabitants as well, but until the 1990s, all relationship rights and responsibilities continued to be denied to lesbian and gay couples. To the present day, lesbian and gay couples have no access to any of the rights reserved strictly for married couples. At best, lesbian and gay couples have only partial access to cohabitant rights.[33]

The special rights reserved almost exclusively for married people in Canadian law are generally as follows:

- presumptive 50 percent interest in the matrimonial home;
- prohibition on encumbering or alienating the matrimonial home without the written consent of the other spouse;
- presumptive 50 percent interest in the remainder of the matrimonial estate;
- rights to possession of the matrimonial home without regard to which spouse holds actual legal title to the property;
- rights to share of accumulated pension credits;
- surviving spouse's right to a forced share of assets owned by deceased spouse no matter what the decedent's will provides;
- a surviving spouse's right to elect whether to take the family law share of net family estate, gifts under will or forced share on intestacy on the death of the other spouse;
- a surviving spouse's right to act as the personal representative of the deceased spouse;
- a surviving spouse's right to apply for dependant's relief against the estate of the deceased spouse;
- income tax provisions that extend tax-exempt status to the above types of transactions;

- many other types of taxes that create exemptions only for married couples (e.g., exemptions from land transfer taxes, tax deductions for contributions to Ontario registered home ownership savings plans, eligibility for the Ontario guaranteed annual income);
- presumptions of parentage that flow, in many jurisdictions, from the fact of marriage notwithstanding actual biological connections to children; and
- orders for exclusive possession of the matrimonial home.

These particular rights and responsibilities are almost universally reserved for married couples in Canada. Three law reform commissions have recommended that some of these property rights be extended to heterosexual cohabitants[34] but, so far, only one court and three legislatures have taken that step.[35]

Beyond these core incidents of marriage, the remainder of the rights and responsibilities assigned to married people varies a great deal from jurisdiction to jurisdiction. Appendix tables A-1 through A-5 illustrate the wide range of additional marital rights and responsibilities found in federal, Ontario, Quebec and British Columbia statutes. The biggest difference is between federal legislation and provincial/territorial legislation. This is due to the fact that federal legislative authority is quite distinct from provincial/territorial legislative authority. Generally, these additional marital rights and responsibilities relate to the public law areas of public pensions, benefits, taxation, conflict of interest and social assistance.

Heterosexual Cohabitation

In a sense, heterosexual cohabitation lies along a continuum between individual versus married status. This is true of every jurisdiction in Canada, for every jurisdiction now recognizes heterosexual cohabitation for at least some purposes.

The legal incidents that lie along this continuum between single and married status are not unique to cohabitation. No legal rights or responsibilities have been crafted to meet the special needs of cohabitants. Instead, cohabitant status is a mixture of the legal incidents of single and married status. For example, in Ontario, opposite-sex cohabitants are treated as if they were individuals for purposes of domestic property law and inheritance, but they are treated as if they were married—indeed, are deemed to be spouses—for purposes of child support, presumptions of parentage and human rights complaints.

From a policy perspective, the hundreds of rights and responsibilities associated with heterosexual marriage in each jurisdiction continue to set the standard of relationship recognition. As non-marital relationships have come to be recognized, policy formation has tended to proceed by deciding which of those hundreds of incidents will be extended to other types of relationships. This is an all-or-nothing choice, because there are only two possible choices that can be made in relation to each specific marital provision: extend it to some or all non-married couples, or do not extend it.

This all-or-nothing method of creating new policy arises from the fact that in legal discourse, people are seen either as spouses—actually married or deemed to be married—or as single

individuals whose adult relationships have no legal significance. Unlike policy relating to adult–child relationships (which, in some contexts, looks at factual matters, such as whether the adult lives with the child, the extent to which the child has functionally moved into adulthood and whether the adult wholly or partially supports the child alone or with another adult), legal policy in relation to adult relationships offers only two choices: either the relationship is sufficiently like marriage in relation to some particular element of legal doctrine to be treated the same as marriage, or it is not.

Lesbian and Gay Couples

Until just 12 years ago, lesbian and gay relationships were not recognized in Canadian law at all. No matter how long-term, exclusive, committed, supportive or inter-dependent a queer relationship might be, the partners in that relationship were treated as if they were unrelated individuals—strangers in law.

Transgender, lesbian and gay partners first attempted to break out of that enforced individual status by marrying. Gay couples who sued to obtain marriage licences failed,[36] and marriages involving transgender partners who had not legally changed their sex were, when challenged, treated as legal nullities by the judiciary.[37] Thus, the judiciary closed the route to relationship recognition via formal marriage. New challenges, begun in 2000, may eventually change this, but for the moment, it remains closed.

Legal recognition of lesbian and gay relationships has, however been achieved to some extent by challenging the exclusion of lesbian and gay individuals from opposite-sex cohabitant provisions. Thus, lesbian and gay couples now fall along the continuum between individual and married status in some jurisdictions. However, they generally have far less legal recognition than opposite-sex cohabitants, and no jurisdiction has extended the full rights of heterosexual cohabitants to lesbian and gay couples. Appendix tables A-1 through A-5 illustrate the differences that still exist between heterosexual and lesbian/gay cohabitants under Ontario, Quebec, British Columbia and federal law, and reform proposals. These jurisdictions were selected for this analysis because they are the only jurisdictions in Canada that have amended many or even most of their statutes to extend some form of legal recognition to lesbian and gay relationships. Similar steps have not yet been taken in any other jurisdictions in Canada.[38]

When the rights and responsibilities of lesbian and gay cohabitants are mapped against those of married people, it can be seen that queer couples in Canada are still largely treated as if they were individuals.

Table 8. Selected Legal Rights and Responsibilities of Lesbian and Gay Couples, 2000

Jurisdiction	Human Rights Protection, Individual	Human Rights Protection Relationship	Right to Marry	Share Family Home (*)	Share Family Property (*)	Inheritance Rights	Dependant's Relief	Parent–Child Relationship Recognized	Adopt as Couple	Employment Benefits for Spouse	Pension Survivor Benefits
Federal	X							Some de facto		X	X
Ontario	X	X						X	Step-parent	Provincial employment	Some
Quebec	X								X	X	Some
British Columbia	X	X						Step-parent	X	X	
New Brunswick	X										
Nova Scotia	X										
Newfoundland and Labrador	X										
Manitoba	X	X								Provincial employment	Provincial employment
Saskatchewan	X									Some	
Alberta	X								Step-parent		
Yukon	X										
Northwest Territories											
Nunvavut											

Note:

As at June 24, 2000, equitable remedies may be available.

As will be outlined in the next section of this chapter, there is considerable variation in the degree to which lesbian and gay relationships are legally recognized in each jurisdiction. However, in no jurisdiction have any of the core features of marriage been extended to lesbian and gay couples. Nor has any jurisdiction extended *all* the legal incidents of heterosexual cohabitation to lesbian and gay couples.

Judicial vs. Legislative Recognition of Queer Relationships

The fundamental constitutional issue presented by current patterns of relationship recognition becomes whether lesbian and gay couples are entitled to voluntary access to the two existing categories of relationship recognition—marriage and cohabitation. Or, will they be assigned to third and fourth classes that are different from, and segregated from, the first two? This is essentially a choice between full and genuine equality with all other couples in Canadian law versus third- or fourth-class legal status.

While issues of relationship recognition remained almost exclusively in the hands of the judiciary, it appeared that lesbian and gay couples would gradually move out of the category of individuals by gaining increasing access to the incidents and benefits of cohabitation without any distinction on the basis of sexuality. In North America, where constitution-based litigation relating to queer couples first developed, the trend in judicial remedies for discrimination on the basis of sexuality has been to remove statutory classifications based on sexuality.[39]

In contrast, legislation that recognizes lesbian and gay relationships has invariably fallen far short in two different ways. First, legislation tends to create new statutory classifications for queer couples. Second, it tends to extend only selected incidents of heterosexual cohabitation to queer couples. Not only have all legislatures continued to deny lesbian and gay couples access to formal marriage; but not even the legislatures that have purported to enact omnibus legislation have as yet extended the full rights and responsibilities of heterosexual cohabitants to queer couples.

Judicial Recognition

When discrimination against lesbian and gay couples has been challenged successfully under the Charter, courts have ordered remedies designed to eradicate that discrimination. The nature of these remedies has tended to reflect the way in which discriminatory effects were created in the first place—by judicial interpretation or by express statutory provision.

In some cases, courts have found language that makes no reference to sexuality to violate section 15(1) of the Charter because it has been assumed to exclude lesbian and gay couples. Judicial orders in these "heterosexual presumption" cases resemble the order in the famous Privy Council decision in the 1929 Persons case, in which the court read the Canadian constitution as if the word "male" included women. Beginning with the Federal Court of Appeal decision in *Veysey*,[40] courts that have found that sexuality-neutral language violates the Charter have invariably formulated orders that have read those sexuality-neutral provisions as if they include lesbian and gay couples. Such orders are clearly within the common-law competence of courts, not the least because it was the courts themselves that

originally created the heterosexual presumption to exclude lesbian and gay couples from sexuality-neutral provisions.

When statutory provisions have been expressly limited to heterosexual couples, the courts have issued declarations that have achieved this "as if" effect by removing those expressly discriminatory terms and then reading the resulting language as if it included lesbian and gay couples. Thus, for example, when statutory provisions have defined "spouse" as including only cohabitants of the opposite sex, courts have used the power to remove terms such as "opposite sex." (This is called "reading down.") They have then been able to read the remaining sexuality-neutral language as if it included lesbian and gay couples. When sex-specific terms such as "husband and wife" have been "read down," sex-neutral phrases such as "two persons" have been read in, in their place.[41]

Only when the grammatical construction of the provision in question has made it impossible to eliminate discriminatory language, by reading down, reading in or reading as if, have the courts inserted new sexuality-specific classifications into statutes that have been challenged under the Charter. For example, in *Rosenberg* v. *The Queen*, the court had to add the phrase "or of the same sex" to the definition of "spouse" in order to extend it to include lesbian and gay couples. Because of the way in which the extended definition of spouse had been formulated in the *Income Tax Act*, merely removing the phrase "of the opposite sex" would have affected not only the definition of cohabitant, but also the definition of formal marriage.[42] Since that Charter challenge focussed only on the cohabitant aspect of the definition of "spouse," the court did not want to frame an order that would include lesbian and gay couples in the definition of married spouses.

In all other situations, however, the courts have demonstrated a clear preference for neutral language that eliminates all sexual classifications. This is consistent with the mandate of section 15 of the Charter, which directs that all individuals receive the equal benefit and protection of law without discrimination on the basis of personal characteristics.[43]

On a practical level, the judicial approach has several advantages. First, by refusing to eliminate discrimination by setting up separate parallel provisions for lesbian and gay couples, the courts have made it clear that constitutional equality guarantees cannot be satisfied by granting equivalent rights to queer couples. Second, sexuality-neutral provisions counter any tendency on the part of the government or private institutions to continue thinking of lesbian and gay couples as somehow separate from other couples.

Third, because Charter challenges to discriminatory legislation are brought by the people who are disadvantaged by them, and not by the government, litigants have been able to address some of the most serious problems facing lesbian and gay couples, while leaving room for challenges to other provisions in the future.

The fact that it has been lesbian and gay couples who have defined the legal barriers that most need to be challenged has ensured that change has been carried out in direct response to the perceived needs of the lesbian and gay couples themselves. At the same time, lesbian and gay couples have not been forced to face all at once, and after a lifetime of discrimination, the

often significant costs of relationship recognition (discussed in Chapter 3). When striking down provisions that deny relationship benefits to lesbian and gay couples, the courts have left penalty provisions to be dealt with in the future.[44]

Legislative Recognition

Legislative recognition of lesbian and gay couples has emerged from two distinct political dynamics. European legislation, which dates back to the late 1980s, arose not in response to court challenges, but as the result of political lobbying by, and on behalf of, lesbian and gay couples. In contrast, North American legislation has all been enacted in response to litigation, and all of it can be described as backlash legislation.

Every North American statute has given lesbian and gay couples fewer rights than they had asked for in litigation, and all these statutes deliver those rights in predominantly segregated form. Even the most seemingly sympathetic North American legislation seems to have been designed primarily to give lesbian and gay couples enough legal recognition to block future litigation. However, because these statutes are all segregated in one way or another, each one creates third- or fourth-class status for lesbian and gay couples.

When the rights and responsibilities recognized in European, U.S. and Canadian statutes are compared, there are some important structural differences. On a general level, European registered domestic partnership (RDP) statutes extend many of the core incidents of marriage to lesbian and gay couples, but maintain many important distinctions between heterosexual and queer couples, largely in the area of family relationships. The two U.S. statutes can both be roughly classified as RDPs, but each has unique features that place them in their own categories. The Vermont statute creates a civil union that completely parallels marriage, but remains segregated from marriage in name, process and documentation. The Hawaii statute creates a limited RDP for all pairs who wish to register. Lesbian and gay couples, heterosexual couples, friends, relatives, even business partners can register under this legislation.

None of the Canadian models has extended any of the core incidents of marriage to lesbian and gay couples. All the Canadian models merely extend some selection of cohabitant rights and responsibilities to lesbian and gay couples. With the exception of the Nova Scotia domestic partnership election, new in 2001, none of the Canadian models is elective. They all segregate lesbian and gay couples in some manner, either by establishing segregated legal classifications or by deeming them to be cohabitants with fewer rights. The New South Wales model is similar to Canadian cohabitation models, but it is also unique in that it extends some of the core incidents of marriage to all cohabiting couples on a non-elective basis.[45]

The apparently universal principle of statutory discrimination against lesbian and gay couples can be seen in the Netherlands marriage bill slated for enactment in 2001. Even though this bill purports to eliminate all discrimination within marriage on the basis of sexuality by opening civil marriage to queer couples, it will not extend to lesbian and gay couples the presumption of parentage that already applies to heterosexual cohabitants. Lesbian and gay couples who have children together will still be forced to resort to step-parent adoptions to legalize their relationships with their own children.

Ontario Bill 5

Ontario has been the site of many successful Charter challenges to legislation that discriminates against lesbian and gay couples. An early marriage challenge was dropped while cohabitation litigation proceeded, but was initiated again by the City of Toronto on June 14, 2000. An early attempt to adopt an integrated quasi-marital model failed in the early 1990s, and even when this proposal was amended to conform to the discriminatory European RDP model in order to save it, it was defeated.

The Supreme Court of Canada decision in *M.* v. *H.* was pivotal in prompting the Conservative Government in Ontario to initiate new legislation that became effective in March 2000.[46] Although the Court agreed that it would not make any order as to remedy so the province could formulate its own amendments to the cohabitant rules in the *Family Law Act*, Ontario decided to address those narrow issues (which related only to support and cohabitation agreements), as well as some 400 other specific provisions of Ontario law in 60 statutes that related to heterosexual cohabitants. It drafted this legislation in secrecy, passed it in less than 48 hours with no debate and virtually no comment by the government, and attempted to convince constituents that the Court forced it to legislate on nearly the whole of Ontario law.[47]

Bill 5 creates new forms of discrimination on the basis of sexuality in numerous complex ways. First, while Bill 5 extended most of the legal rights and responsibilities that affect heterosexual cohabitants in Ontario to lesbian and gay couples, it has done so by removing queer couples from expanded definitions of "spouse" to which the courts had given them access and by placing them in the new category of "same-sex partner." The definition of "same-sex partner" is exactly the same as the definition of "spouse" to which they had previously been admitted by the courts. [48] The only change that Bill 5 makes to that definition is to remove lesbian and gay couples from it and to reassign them to the new category of same-sex partner.

The government made its discriminatory intent very clear. Although the Attorney General made only very limited comments on Bill 5 in the press and in the legislature, he repeatedly cited "protection of marriage" as the reason for moving lesbian and gay couples out of the category of spouse that they had occupied for nearly a decade.

> The only reason we are introducing this Bill is because of the Supreme Court of Canada decision. Our proposed legislation complies with the decision while preserving the traditional values of the family by protecting the definition of spouse in Ontario law (Ontario, Ministry of the Attorney General 1999).
>
> I stress that the bill reserves the definition of "spouse" and "marital status" for a man and a woman, the traditional definition of "family" in Ontario. The bill introduces into the law the new term called "same-sex partner," while at the same time protecting the traditional definitions of "spouse" and "marital status". ... The decision of the Supreme Court of Canada and this bill are not about redefining the traditional understanding of family. This bill responds to the Supreme Court ruling while preserving the traditional values of family in Ontario....[49]

Second, the government took the position that the essence of the Supreme Court of Canada ruling in *M.* v. *H.* was that lesbian and gay couples were entitled to rights and responsibilities equivalent to those of heterosexual cohabitants, but not to the status of cohabitant or spouse, even when the legislation included cohabitants in an expanded definition of spouse.

Third, the government claimed it was actually extending a large number of new rights to lesbian and gay couples, when, in fact, the most important rights in provincial law had already been won through litigation.[50] Those extended by Bill 5 are either of relatively limited importance and would be extended if challenged in the courts anyway,[51] or consist of numerous penalty provisions.[52] Thus, the net result of Bill 5 on a substantive level has been to re-enact existing spousal rights as rights of same-sex partners while adding a few new rights to the list to make it look as if the bill improves the legal status of lesbian and gay couples.

In fact, the government has continued to deny lesbian and gay couples all access to a much larger class of relationship rights and responsibilities than those newly extended. The core incidents of marriage remain denied to queer couples because they cannot choose to marry,[53] and many other provisions relating to relationships continue to exclude queer couples as well.[54] This is the fourth way in which Bill 5 discriminates against lesbian and gay couples.

Fifth, Bill 5 now prohibits lesbian and gay couples from continuing to bring complaints arising out of sexual orientation discrimination under the heading of "marital status" to the Ontario Human Rights Commission. Opposite-sex cohabitants and married couples are still considered to have marital status, but Bill 5 has reclassified lesbian and gay couples as having only same-sex partnership status. Because this term is not defined, it enables the government to administer human rights legislation as if same-sex partners are entitled to a very different level of protection.

Sixth, Bill 5 appears to roll back important step-parent adoption rights that had been won through litigation.[55] Bill 5 did not amend the definition of "spouse" in section 136 of the *Child and Family Services Act*. Although the application of this opposite-sex definition of "spouse" to step-parent adoption had been judicially corrected to include lesbian and gay parents, Ontario courts had taken the position that these rulings did not automatically apply across the province and had to be sought in each new court. The government and those entitled to notice in adoption applications may now argue that the omission of section 136 from Bill 5 has effectively overruled these cases, and step-parent adoption is no longer available to lesbian and gay parents.

Seventh, Bill 5 has revised the stranger adoption provisions of the *Child and Family Services Act* in a way that clearly excludes lesbian and gay couples from the category of couples who are entitled to adopt jointly. Under prior law and under Bill 5, heterosexual cohabitants and married couples can jointly adopt a stranger in a one-step process. At best, lesbian and gay couples will be able to engage in stranger adoption in a two-step process, and that depends on whether step-parent adoption continues to be available to them. If it is, then one lesbian or gay partner can complete a stranger adoption as a single individual, and then the other partner

can apply for step-parent adoption. (Some practitioners report that this is being allowed at present, and that courts are permitting both applications to be made jointly for efficiency.) If step-parent adoption is no longer permitted, then the new language in section 146(4) of the *Child and Family Services Act* will restrict stranger adoption to single individuals, and individuals are subject to closer scrutiny and greater judicial discretion "having regard to the best interests of the child" than are heterosexual couples.[56]

Eighth, the government appears to be committed to giving as much effect as possible to this new segregated category of same-sex partner. When the Family Law Rules Committee attempted to revise family court forms to include lesbian and gay couples in the general category spouse, the Attorney General intervened directly. These forms now all provide a separate box marked "same-sex partner" for lesbian and gay couples, while all heterosexual couples—married and cohabiting—are permitted to tick the box marked "spouse" (Buist 2000).

Perhaps most important, before Bill 5 was enacted, the judiciary in Ontario had been extending definitions of cohabitants to lesbian and gay couples whenever they found a provision to be discriminatory. Thus, lesbian and gay couples had become increasingly included in the basic two-category set of relationship rights and responsibilities that previously characterized Ontario law. They continued to be denied the core incidents of marriage,[57] but they were increasingly treated as cohabitants, and where Ontario law deemed cohabitants to be spouses, they were deemed to be spouses as well.

Bill 5 has now replaced this two-tiered definition of "spouse" with a three-tiered system. Opposite-sex cohabitants are now defined separately, but continue to be deemed to be spouses. Married couples continue to share the category "spouse" with cohabitants in many contexts. But now lesbian and gay couples are excluded from both categories and, if they are given particular rights and responsibilities at all, they enjoy them only in their new segregated status as same-sex partner. As a result, a third class of relationships has been created:

- married couples;
- opposite-sex cohabitants, who continue to be deemed to be spouses in over 70 statutes; and
- same-sex partners, who appear in some 65 statutes.

Segregated by legal classification and having fewer rights overall, the net result of Bill 5 is to reinstate discrimination on the basis of sexuality in a way that the government hopes will withstand challenge under the Charter.[58]

British Columbia

As in Ontario, the courts in British Columbia have been leaders in the judicial recognition of lesbian and gay couples. One of the first cases to do so was the B.C. decision in *Knodel* v. *British Columbia (Medical Services Commission)*,[59] in which the court concluded that the partner of a gay man should be considered to be "a man or woman who, not being married to each other, lived as husband and wife" for purposes of provincial health services legislation.

On the legislative level, British Columbia was the first province to extend adoption rights to lesbian and gay couples, and in the last few years has systematically extended the legal rights and obligations of opposite-sex cohabitants to same-gender cohabitants in many other areas of law.[60] These changes have resulted in extensive recognition of lesbian and gay couples in family law (support, child custody, child support, cohabitation agreements, adoption and reciprocal enforcement of judicial orders) and public law (e.g., elections, public service pensions and provisions for crime victims). (See Table A-3, for details.)

The terminology used to extend that recognition is largely inclusive and non-segregating, at least so far as it relates to adult relationships.[61] However, segregating language has been introduced in the law of parentage, which continues to reserve the category of "parents" for the birth mother and her husband or male cohabitant. Instead of extending parental presumptions to lesbian and gay cohabitants, they are classified as "step-parents" even if they were parents from the time conception was imagined, planned or achieved.[62] A term previously reserved for an adult who assumes the role of parent sometime after the birth of a child, this use of "step-parent" is unique to lesbian and gay parents. Lesbian and gay cohabitants thus remain excluded from the category of "natural parent" even when, for example, the male cohabitant of a woman who conceives by alternative insemination would be deemed by the law of parentage to be the "natural father" or "natural parent" of the child by virtue of the fact of cohabitation.

Because lesbian and gay parents are still third-class parents, if they are not biological progenitors, and because lesbian and gay couples are still denied many of the legal rights and responsibilities extended to heterosexual couples in B.C. law—including the right to marry and the incidents of marriage—they are just as much third-class couples in British Columbia as they are in Ontario. While it is true that Ontario couples are classified separately while B.C. couples are integrated into the umbrella definition of "spouse" via the cohabitation rules, they do not have fully equal access to the incidents of either heterosexual cohabitation or marriage.

Excluded from marriage and thereby from the matrimonial property provisions of British Columbia legislation, lesbian and gay couples cannot apply for equal division of the net matrimonial estate; they cannot take advantage of pension division provisions on divorce; and they are denied the status of spouse for purposes of inheritance and succession, including the right to a forced share of the estate, preference over creditors and dependant's relief. The government has enacted legislation that will extend dependant's allowances to lesbian and gay survivors, but continues to postpone proclamation. Although the Attorney General promised in the spring of 2000 to consider issuing a marriage licence to a lesbian couple that had applied, no action has yet been taken.[63]

Quebec Bill 32

The status of lesbian and gay couples in Quebec law is governed by the unique Quebec position on non-married cohabitation: Following French law, Quebec treats non-married cohabitation as a "free union" in the sense that the relationship is free of law or has no legal significance. This principle is fully reflected in the *Quebec Civil Code*, which regulates status and relationship issues in much the same manner as the *Code civil des Français*. Thus, there

are no references to non-married cohabitants in the *Quebec Civil Code*, and most of the provisions of the code relating to adult relationships are expressly focussed on marriage only.

Nonetheless, a few provisions of the Civil Code are framed in terms that enable cohabitants to fall within them (provisions relating to joint adoption, joint annuities and insurable interests), and because those provisions are expressed in sex- and sexuality-neutral language, lesbian and gay couples are technically included within them. (See Table A-1.)

The Civil Code regulates private relations such as marriage, filiation and succession. The general statutes of Quebec regulate all other aspects of life in the province. In the revised statutes of Quebec, the status of both opposite-sex couples and lesbian and gay couples is completely different than found under the Civil Code. Most of the general statutory provisions that make mention of marriage also apply to non-married cohabitants. These types of statutes generally relate to government action, programs or benefits, such as health services, the Quebec Pension Plan, workplace standards and automobile insurance standards.

This bifurcated model—recognition of cohabitants in public law versus exclusion in the Civil Code—sets up a dual regime in which only the state of heterosexual marriage gives rise to what are ordinarily understood as marital rights or responsibilities between the spouses. In contrast, either formal marriage or long-term cohabitation can give rise to rights or responsibilities between the couple and the government. Nonetheless, lesbian and gay couples have historically been excluded from public law provisions as well as from the Civil Code.

The *Charter of Human Rights and Freedoms* of Quebec, which was the first human rights code in Canada to prohibit discrimination on the basis of sexual orientation in 1977, has helped ensure that lesbian and gay couples have been included in some aspects of public law. For example, in 1994, a human rights tribunal ruled that a campground that described itself as a "family" service could not exclude a lesbian couple.[64] However, the Quebec Charter has not had much impact on the general status of lesbian and gay couples in that province.

This is the context in which Bill 32 was enacted in June 1999. Bill 32 amended the general statute law to extend the category of cohabitation to lesbian and gay couples. However, it did not make any changes to the Civil Code. Thus, lesbian and gay couples have approximately the same status as opposite-sex cohabitants. They have none of the many rights and responsibilities that attach to the married status, but they have many of the rights and responsibilities that apply to cohabitants. These changes were made by deleting sexuality-specific terms (such as "husband" or "wife") from cohabitation provisions and replacing them with sexuality-neutral provisions (such as "two persons who live together..."), or by adding "of the same sex" to opposite-sex definitions.

Despite the pervasive impact of Bill 32, Quebec continues to recognize three tiers of adult relationships. Cohabitants do not have access to marriage and the Civil Code incidents of marriage, and lesbian and gay couples do not have all the rights and responsibilities of opposite-sex cohabitants—including the right to decide whether they want to marry.[65]

In addition to the matrimonial provisions of the Civil Code, only married couples can obtain reciprocal enforcement of maintenance orders. Only married couples are declared by the *Charter of Human Rights and Freedoms* of Quebec to be subject to the principle of equality in the marriage of rights and obligations; and only married couples are subject to some conflict-of-interest provisions.

Despite Bill 32, many Quebec statues continue expressly to exclude lesbian and gay couples. In addition to some conflict-of-interest provisions, hunting and fishing rights in James Bay are extended only to "legitimate spouses." Other general statutes use sexuality-neutral language that does not clearly guarantee that it will apply to lesbian and gay couples. (The chief one is the use of the term "conjoint" without defining it.) Because of the continuing uncertainty surrounding the *Vaillencourt* decision, which relates to queer survivor options under pension plans, it is not clear whether these usages will apply to lesbian and gay couples, or whether the government will oppose attempts to extend them to queer couples. These provisions include the right to receive information on the death of a spouse, the allocation of Aboriginal land rights to spouses, electoral enumeration definitions of "spouse," substituted services in some proceedings and burdening provisions, such as conflict-of-interest clauses, disclosure of conflict requirements and anti-avoidance provisions.

The current status of lesbian and gay couples in Quebec as the result of Bill 32, the Civil Code, and pre-existing general statutory law is outlined in Table A-2. This table should be read with caution. In addition to the uncertain impact of Bill 32 on the many provisions it has not amended (some 28 in all), it is, as in other jurisdictions, not clear how *Miron* v. *Trudel* and *M.* v. *H.* might affect the application of these provisions.

European RDPs

Unlike Canadian statutes recognizing lesbian and gay relationships, European legislation has extended at least some of the core incidents of marriage to lesbian and gay couples. Whether the legislation is designed to offer a "marriage substitute" to lesbian and gay couples, or whether it is designed to create a separate cohabitant status for queer couples, these registered domestic partnerships are elective, voluntary and formally registered relationship forms.

Though European RDPs do extend at least some of the incidents of marriage to queer couples, as a type of statute and individually, they are discriminatory. Most important, they are completely segregated statutory structures, and the rights they create are expressed, administered and registered on a segregated basis. In addition, whether they are styled "marriage" or "cohabitation" alternatives, none of the RDPs extend the full legal rights and responsibilities of either marriage or cohabitation to queer couples. Thus, like Canadian legislation, they place lesbian and gay couples in a third-class status when compared with married and cohabiting heterosexuals. The Netherlands has drafted a marriage bill that would eliminate all discrimination on the marriage side of relationship recognition. That legislation is expected to become effective in 2001.

Four distinct types of RDPs can be found in Europe. Denmark has created a formal "marriage alternative" with its RDP. The Swedish model is designed to offer a form of recognized cohabitation to queer couples. The French Civil Solidarity Pacts (PaCS) creates an entirely new category of cohabitation for both heterosexual and queer couples, all of whom have been excluded from the Civil Code because of the non-recognized status of "free unions." And Belgium has created something referred to as a "statutory cohabitation contract" that has no legal rights or obligations attached to it. Despite this diversity, what all these forms do have in common is the fact that they are all segregated structures, and none of them extend the full incidents of either marriage or heterosexual cohabitation (where that relationship form is legally recognized) to lesbian and gay couples.

The Danish RDP legislation is constructed around the marriage model, and is designed to offer lesbian and gay partners status similar to that of marriage.[66] Registration is performed civilly after the issuance of a "partnership certificate" and, as with marriage, the partners do not have to prove they will live together or that they have a sexual relationship. Most incidents of marriage apply automatically to registered partners or have been interpreted as applying to them. (This includes support, community property rules, insurance rules, separation, divorce, maintenance and inheritance regimes, death duties, the right to the home, social security benefits and pensions.)[67]

Registered partners are nonetheless denied full equality. Lesbian and gay couples continue to be denied actual marriage rights, and RDPs are not considered a "marriage." Lesbian and gay couples are not permitted to have religious marriages, because RDPs are purely civil unions. This is significant in Denmark because formal marriage is a religious process. Since they are not religiously married, lesbian and gay couples are denied access to clergy mediation. RDPs are limited to Danish citizens or citizens of treaty countries.

RDPs are seen as conferring "spousal" status, but partners have been prevented from forming families together in almost every way. Lesbian and gay partners are prohibited from adopting children jointly, are not permitted access to assisted reproduction, and are not considered to be parents of their partner's children. On relationship breakdown, partners cannot apply for access, joint custody or child support in relation to each other or their children (Nielsen 1992-93: 314; Pedersen 1991-92: 290-291). The only exception is the recent extension of step-parent adoption rules to registered partners. This will open the door to applications for custody, access and support, but it does not affect any of the other barriers to family formation.

Swedish RDP legislation is constructed around the cohabitation model. This legislation is primarily focussed on property rights rather than on the incidents of the relationship itself. The "joint homes" of cohabitants are subject to rules similar to the matrimonial home rules of Canadian legislation. Cohabitants cannot encumber or alienate their home without the written consent of both, and surviving partners are entitled to a statutory forced share in the home, proceeds of sale of the home and its contents. Unlike married couples in Canada, however, partners can opt out of these provisions by written contract in the same way that married couples can opt out of community property by contract. Swedish law also denies lesbian and gay partners the right to adopt jointly, and has not provided for parentage, child custody, access or child support.[68]

The French PaCS gives civil status outside the Civil Code to both lesbian/gay and heterosexual cohabitants. Because free unions exist outside the Civil Code, registrants have none of the matrimonial rights of married couples. Thus, it reinforces the rigid segregation of formal marriage and marital property regimes versus the limited rights/responsibilities ascribed to lesbian and gay couples. The PaCS gives couples the same rights and obligations as married couples in income taxation, inheritance, housing, immigration, health benefits, job transfers, synchronized vacation time, responsibility for debts and social welfare. However, it does not grant parental, adoption or procreation rights.

Registration, administration and execution of the PaCS are rigidly segregated. Because of the furore over the PaCS, the offices in which registrations are to be filed are physically different from those where marriages are performed. (Marriage is entirely a matter of civil law and not of religious practice in French law.) Nonetheless, it is very popular. Some 14,000 couples have registered their relationship since the law came into effect in October 1999, with about half of them being gay couples.

In contrast, the Belgian statutory cohabitation contract has no legal impact and is designed to be largely symbolic. Not surprisingly, it is very unpopular, with only eight couples in Brussels taking advantage of it and very few in other locations. The Belgian parliament has yet to consider legislation that would have any actual legal effect on issues such as social security or taxation.

Although it is true that northern European legislatures have been generally sympathetic in their enactment of RDPs, and RDPs generally pre-date Canadian legislation, all these laws are just as partial and discriminatory—perhaps even more so in some regards—as Canadian statutes. The same issues keep surfacing as bills are presented in new jurisdictions, and change has been difficult to achieve. While RDPs do present more formalized ways to recognize cohabitation, they fall far short of giving lesbian and gay couples either full marriage rights or the full rights of cohabitants in countries that recognize cohabitation.

North American RDPs

Only two registration systems have been adopted in North America. Both can fairly be classified as backlash legislation in that they were adopted to prevent the courts from ordering states to issue marriage licences to lesbian and gay couples. This motivation is clearly expressed in the legislative record of each of these two statutes (Hawaii and Vermont). Ontario and British Columbia have both received proposals for registration systems; the Ontario proposal was also clearly the result of political backlash. The B.C. proposal arises out of sympathy for the lack of a formal recognition of lesbian and gay couples including the refusal to extend marriage to queer couples.

After the Hawaii courts issued the historic decisions in *Baehr* v. *Lewin* and *Baehr* v. *Miike*, both of which found that, constitutionally, the Hawaii government could not refuse marriage licences to lesbian and gay couples, the Hawaii government filed an appeal to the state supreme court and simultaneously sought immediate passage of a “reasonable alternative” to marriage in order to block eventual marriage rights. Adoption of a “marriage alternative” was

designed to convince the appellate court that the appeal was moot or should be decided in favour of the state because new developments have given the court a "compelling justification" to deny lesbian and gay couples full marriage rights.

A state commission on sexual orientation recommended the adoption of registered domestic partnership legislation in 1995, (Coleman 1995: 541) because RDPs were thought to be the non-marriage alternative that would most closely resemble marriage and would, therefore, convince the court that it was justified in denying marriage rights.

When this recommendation was not adopted and time grew short, the government pursued two other strategies. In 1998, a successful referendum required the state to amend the constitution to give the legislature power to reserve marriage to opposite-sex couples. It then adopted reciprocal beneficiary legislation. This statute gives reciprocal beneficiaries some 50 of the hundreds of rights and responsibilities given to married couples. These include joint medical insurance coverage for state employees for a two-year trial period; hospital visitation rights, mental health commitment approvals and notifications, family and funeral leave; joint property rights; inheritance and other survivorship rights; and legal standing for wrongful death, victims' rights and domestic violence family status.

Although the reciprocal beneficiary statute was originally intended to apply only to lesbian and gay couples, religious and moral objections to using the term "same-sex" in state legislation resulted in removal of this language. Thus, the statute permitted any two adults to register as reciprocal beneficiaries. They do not have to be involved in a conjugal relationship or be related to each other in any way.

The final development in Hawaii occurred in 1999 when the reciprocal beneficiary statute was replaced with domestic partnership legislation. This statute maintains a rigid distinction between domestic partners and married couples, and contains provisions that confirm that only couples of the opposite sex can marry. Like the reciprocal beneficiaries legislation, the domestic partnership option is available to any two adults. It extends all the legal incidents of marriage to domestic partners, but the form and the process of registration are entirely separate from that related to marriage.[69]

The Vermont civil union and reciprocal beneficiary provisions also arose as the result of political backlash. Early in 2000, the Vermont Supreme Court ruled in *Baker* v. *State* that denial of civil marriage to lesbian and gay couples violated the common benefits clause of the state constitution. However, instead of formulating a remedial order, the court turned the remedy over to the state legislature, much as the Supreme Court of Canada had in *M.* v. *H.* The legislature made findings that civil marriage is "a union between a man and a woman" and, therefore, created a new form of relationship termed a "civil union" specifically for persons of the same sex.[70]

The civil union statute is unique in that it extends all statutory, regulatory, common-law, equitable and policy features of civil marriage to parties to a civil union. This is done by ensuring that parties to civil unions are included in any definition or use of terms such as "spouse," "family" or similar terms throughout Vermont law.[71] With such expansive statutory

language, it will be difficult to deny parental status, access to reproductive assistance or recourse to family court. Vermont has permitted lesbian and gay couple adoption for nearly 25 years, and the civil union statute will assure that couples who form a civil union will be permitted to adopt.

Nonetheless, the Vermont civil union statute remains discriminatory. The civil union statute is clearly premised on the continuing exclusion of lesbian and gay couples from formal marriage, and it also repeatedly affirms in the preamble and in various provisions that civil union is not a form of marriage. This segregation is built into the administration and registration of civil unions. Parties to a civil union apply not for a marriage licence, but for a civil union licence. While religious celebrants can perform civil unions, the entire system of recording and registering civil unions is rigidly segregated in civil union registries and tabulated in returns of civil union statistics. Small towns are permitted to intermix marriage records with civil union records, but each certificate must be carefully executed to reflect its status, and elsewhere, civil unions are to be filed in separate registry books.[72] In addition, discrimination against queer couples who form a civil union will not be considered discrimination on the basis of marital status, but discrimination on the basis of civil union.

The *Civil Union Act* also established reciprocal beneficiaries as an additional separate status. Like the Hawaii reciprocal beneficiary provisions, this permits non-conjugal pairs to form a reciprocal beneficiaries relationship in order to be treated as spouses for selected legal purposes. Unlike the Hawaii statute, the Vermont statute applies only to two people who are related by blood or adoption. And unlike the Hawaii statute, the Vermont statute focusses on health insurance and health matters: hospital visitation, medical decision making, decision making in relation to organ donations, funerals and disposition of remains, power of attorney for health care, patient care and nursing homes, and abuse prevention. A spouse will have priority over a reciprocal beneficiary, but other family members have lower priority.

The Vermont civil union gives lesbian and gay couples by far the most complete relationship rights of any statute, without, of course, the right to marry. In contrast, the Vermont reciprocal beneficiary status is very narrow. It does not affect property, support or inheritance—not even property management. The separate Civil Union Review Commission has been established to supervise the implementation of both civil unions and reciprocal beneficiaries legislation for two years, and the commission has been charged with considering whether the legal incidents of reciprocal beneficiaries relationships should be expanded in the future.

Only one limited RDP has been enacted in Canada. When comprehensive relationship recognition legislation was teetering on the verge of defeat in Ontario in the early 1990s (Bill 167), the Ontario government offered to replace this proposal with an RDP structure. Bill 167 would have extended several core incidents of marriage to queer couples along with many marital/ cohabitant rights and responsibilities. The government was prepared to recast these rights and responsibilities as separate RDP legislation and, consistent with European RDP legislation, announced that it was removing joint adoption rights from the bill. The bill failed nonetheless.

More recently, the B.C. Law Institute (BCLI) has proposed to augment its marriage and cohabitation regimes with four new relationship categories: registered domestic partnerships, unregistered domestic partnerships, long-term cohabitation and short-term cohabitation. The apparent purpose behind offering two different categories of partnership and of cohabitation is to give queer couples a choice between formal recognition and a less formal status similar to the choice that heterosexual couples have between formal marriage and less formal recognized cohabitation. Unlike marriage and cohabitation, however, both forms of domestic partnership would be open to any two people who wanted to register. They would not be required to be involved in a conjugal relationship or be connected by blood or adoption.

The main elements of the BCLI proposals are outlined in Table A-5. If adopted, B.C. law would then recognize four categories of relationships: marriage, registered domestic partnership, long-term unregistered cohabitation (after 10 years) and short-term unregistered cohabitation (after two years). Cohabitation for less than two years would remain unrecognized. Parties to any of the four recognized forms of relationships would be included in the proposed new definition of "spouse."[73]

Although the BCLI proposals effectively create four different paths to the status of spouse, not all choices would be available to all couples. All lesbian and gay couples would continue to be barred from formal marriage, and non-conjugal couples would be barred from the two categories of recognized cohabitation. At the end of the day, however, lesbian and gay couples would always have fewer choices than opposite-sex couples.

Under the BCLI proposals, the following choices would be established.

- Heterosexual conjugal couples would have four choices: marriage, registered domestic partnership, and long- and short-term unregistered cohabitation. (Unrecognized cohabitation is no longer a choice after cohabiting for two years.)

- Lesbian and gay conjugal couples would have three of those four choices: registered partnership, long-term cohabitation and short-term cohabitation (compulsory after two years).

- Non-conjugal, opposite-sex pairs would also have three choices: marriage, registered partnership or unrecognized cohabitation.

- Non-conjugal same-sex pairs have only two choices: registered partnership and unrecognized cohabitation.

The choices this structure would give lesbian and gay couples do not really parallel the choices available to heterosexual couples. The fact that non-conjugal couples, such as friends or relatives, would be able to form registered partnerships demonstrates that this structure is not really a genuine alternative to marriage.[74] Second, lesbian and gay couples would still be denied the right to marry.

Lesbian and gay couples could acquire many of the rights and responsibilities associated with marriage in two different ways. One route would be to register their partnership.[75] The other way would be to cohabit long enough to pass from unrecognized cohabitation (under two years) to short-term partnership (over two years), to long-term partnership (over 10 years). After 10 years, they would be deemed to be registered domestic partners.

Regardless of which route lesbian and gay couples take, they will still not be able to achieve all the rights and responsibilities of actual marriage. First, they will still be denied the right to marry that all opposite-sex pairs have. Second, during the 10 years before deemed registration status would be attained through length of cohabitation, lesbian and gay couples would be denied the matrimonial home, family property, inheritance and pension division rights of married couples. Third, even after actual or deemed registration, lesbian and gay couples would still not be considered to be "natural parents" via parentage presumptions that apply to heterosexual cohabitants and married couples. Instead, they would be considered to be "step-parents," even if they were actually involved in their children's lives from the moment they planned to have children.

Overall, these proposals would create a three-tier hierarchy of relationships:

- marriage (available to opposite-sex couples only);
- registered domestic partnerships (available to any pair of adults of any kind whatsoever);
- marriage-like relationships (recognized cohabitation) (available to both opposite- and same-sex conjugal couples).

Only lesbian and gay couples would be prohibited from exercising all three choices.

Australian legislation

Australian amendments to inheritance and intestacy provisions have set up the categories "domestic partner" and "eligible partner" to deal with the rights of non-married cohabitants. Domestic partner is defined expansively as including "a person other than the person's legal spouse who—whether or not of the same gender as the deceased—lived with the deceased at any time as a member of a couple on a genuine domestic basis."[76] As in other countries, married couples remain separate from this new category. However, in some circumstances, a same-sex partner can actually be preferred over the formally married spouse of the same person in matters of intestacy.[77]

New South Wales has also created a new category for cohabitants that is separate from married couples. Opposite-sex and same-sex cohabitants are both considered to be in de facto relationships. The rights and responsibilities of de facto and married couples overlap to a certain extent, for some of the property rights usually reserved for married couples in Canadian law are now available to those in de facto relationships.[78]

Methodological Heterosexism

As can be seen from this short overview, new forms of relationship recognition fall on a continuum ranging at one extreme from the Vermont civil union, which is nearly equivalent to marriage, to the Quebec extension of conjoint status to all cohabitants in public law only. As the rights and responsibilities attached to these new categories increasingly overlap with, or resemble, some of the property rights associated with marriage, statutes tend to call for some method of registration (Vermont, Hawaii, European statutes). At the other end of the continuum, couples have to make various kinds of declarations to qualify for public and private law rights such as pensions, employment benefits or tax benefits.

Because of the diversity of these new forms, it is not really possible to draw any generalizations about them**.** However, it is true that nowhere are lesbian and gay couples given complete equality with either married couples or cohabitants. There are always some differences, most often in relation to family formation, parent–child relationships, access to the core incidents of marriage and access to marriage itself.

For analytic purposes then, it is only possible to draw extremely wide generalizations about the types of legislation that have been devised to recognize lesbian and gay relationships. On a purely structural level, the following categories have emerged.

- **Quasi-marital models** extend nearly all or at least some of the core incidents of marriage to lesbian and gay couples:
  - civil union (Vermont);
  - registered domestic partnerships (Europe, BCLI);
  - declared domestic partnerships (Hawaii); and
  - cohabitants deemed to be spouses (Australia).

- **Cohabitation models** do not extend any of the core incidents of marriage to lesbian and gay couples:
  - cohabitants included in “spouse” (B.C.);
  - cohabitants separate from spouses (Quebec, Canada); and
  - lesbian and gay couples separate from heterosexual cohabitants and married couples (Ontario).

- **Personal rights models** do not depend on cohabitation, registration as partners or marriage, but are mutual elections that have some legal impact:
  - reciprocal beneficiaries (Vermont, formerly Hawaii); and
  - statutory cohabitation agreements (Belgium).

There is wide variation within each category. Despite some superficial structural similarities, the actual statutes that fall within each model vary along three dimensions.

- What kinds of couples can qualify for the form?

- What kinds of rights and responsibilities flow from the form?

- To what degree does the statute integrate or segregate lesbian and gay couples with respect to heterosexual couples?

The impossibility of generalizing on these statutes can be seen when they are grouped according to the types of couples to whom they apply. RDPs can be limited to lesbian and gay couples only (Denmark), to both queer and heterosexual cohabitants (Sweden, France) or to any two persons, related or unrelated (BCLI RDP proposal). The same is true of the statutes based on the cohabitant model. Ontario limits Bill 5 to lesbian and gay couples. France permits either queer or heterosexual couples to use the PaCS. Personal rights statutes can be limited to non-conjugal relatives (Vermont reciprocal beneficiaries) or to any two people without regard to relationship, cohabitation or intimacy (Hawaii).

The groupings change considerably when the focus is on the kinds of rights and responsibilities that flow from a form. Some forms extend all the incidents of marriage to lesbian and gay couples (Vermont). RDPs tend to extend most of the property incidents of marriage to queer couples, but not the parentage rules (Denmark, Sweden, BCLI RDP proposal, French PaCS), while either cohabitation statutes or reciprocal beneficiaries elections can confer some marital property rights. The most consistency is found among the Canadian cohabitation statutes, which tend to extend many cohabitant rights, no marital rights and some parent–child types of provisions.

It is important to note how diverse these alternative forms of relationship recognition are in practice, because, whether evaluating the qualitative impact they have on lesbian women as a class or their distributional/revenue implications, each statute will have its own unique impact. While many generalizations can be drawn, and while specific problems of application arising under a particular model can be isolated, looking at alternative models is not, by itself, particularly illuminating.

However, one generalization can be drawn quite safely on the basis of looking at these alternative models. The Canadian judiciary has quite easily managed to simultaneously remove sex- and sexuality-based classifications from relationship provisions and apply the resulting neutralized language to lesbian and gay couples. The same cannot be said of statutory structures. While some of them do refer to same-sex or same-gender couples merely to confirm that they are to be applied inclusively, none has managed to reverse the long-standing presumption that sex- or sexuality-neutral language refers to heterosexual couples only.

As a result, the continued use of sexuality-based classifications in legislation against the backdrop of such a heterosexual presumption reinforces the tendency to parcel out rights and responsibilities, status and eligibility, to lesbian and gay couples on a right-by-right and responsibility-by-responsibility basis. Substantively, legislation uses heterosexual marriage as the standard of “equality.” Nonetheless, the continued vitality of the heterosexual presumption ensures that methodologically, legislation will inevitably perpetuate discrimination on the basis of sexuality.

Thus, it should not be surprising that the same dynamic has produced, in federal Bill C-23, the same discriminatory outcomes.

Bill C-23 "Common-Law Partners"

The jurisdiction of the federal government is very different from that of the provinces. The provinces have jurisdiction over matters relating to property and civil rights, including pensions, for example, and the solemnization of marriage. The federal government has jurisdiction over such areas as taxation, immigration, banking, capacity to marry and employment matters relating to employees of the federal government or its agencies. Lack of clarity as to the division between federal and provincial jurisdiction often complicates the allocation of authority.

In autonomous areas of federal law, the federal government writes its own definitions of terms such as "spouse" and "child." In areas intertwined with provincial law, the federal government has tended to develop definitions of "spouse" and "child" that begin with some basic principles but incorporate, to some degree, provincial definitions.

One area of jurisdiction that is particularly overlapping and even confused is jurisdiction over marriage. Although jurisdiction over capacity to marry is considered a federal matter, the federal government has legislated only in relation to degrees of consanguinity, and has exercised federal power over solemnization in some contexts. In contrast, some provinces have legislated in relation to aspects of capacity, such as prior marriage, mental capacity and age of consent. Such legislation has been upheld to the extent that it can be connected to the province's jurisdiction over the solemnization of marriage.

Over the last 25 years, the federal government has gradually expanded "spouse" to include opposite-sex cohabitants in a variety of circumstances. Beginning with amendments to the *Veterans Act* in 1974, the federal government reduced the number of years of cohabitation required to establish de facto or common-law marriage from seven to just one or two. Also beginning in 1974, Parliament systematically inserted the requirement that cohabitants be of the "opposite sex." Until Bill C-23 came into effect, most federal statutes used some expanded form of "spouse" that was expressly limited to couples of the opposite sex.

The federal government has been extremely slow to recognize both the individual and relationship rights of queers. The federal human rights code had to be amended judicially.[79] Revenue Canada (now known as the Canada Customs and Revenue Agency) had to be ordered to stop administering the *Income Tax Act* as if its sexuality-neutral provisions excluded lesbian and gay couples.[80] The federal government has promised new immigration regulations for years, but still admits lesbian and gay partners only on discretionary compassionate grounds, and then only when virtually threatened with federal court action. At the moment, even after passing Bill C-23, it is still refusing to confirm in its new immigration legislation that lesbian and gay couples will be given spousal status, and has left "common-law partner" completely undefined in that statute. It amended sentencing laws to treat homophobic hatred as an exacerbating factor, but then declared itself legally unable to address hate speech recently imported from the United States.

This governmental resistance was supported by the 1995 Supreme Court of Canada decision in *Egan and Nesbit*, in which a bare majority of the Court concluded that exclusion of lesbian and gay couples from the extended opposite-sex definition of "spouse" in federal social assistance legislation was constitutionally permissible. However, Supreme Court decisions in *Vriend*[81] and *M.* v. *H.* have subsequently changed the litigation climate considerably.

In particular, the combined effect of *M.* v. *H.*, *Rosenberg*,[82] and *Moore and Akerstrom* brought the federal government to the realization that it would be only a matter of time before it would be ordered to include lesbian and gay couples in extended definitions of "spouse" throughout federal legislation. Each decision arose out of challenges to the "opposite-sex" definition of "spouse" that has been so extensively incorporated into federal and Ontario legislation. Although *M.* v. *H.* challenged provincial legislation and *Moore and Akerstrom* was a human rights complaint, all these cases delivered the same message: Excluding lesbian and gay couples from extended opposite-sex definitions of "spouse" is discriminatory, and it is not saved by giving them equivalent rights in segregated categories.[83]

Since *Egan and Nesbit* was decided in 1995, the federal government had displayed a decided preference for extending rights to queer couples—when it had to—on a segregated basis. Thus, it was not surprising that when the government's long-promised omnibus bill to recognize queer couples was introduced in 2000, it did so by removing lesbian and gay couples from the legal category of "spouse."

Bill C-23 accomplished this by repealing 25 years' worth of extended opposite-sex definitions of spouse (which treated opposite-sex cohabitants and married couples as equivalent in the majority of federal enactments) and creating two new categories: "spouses," now reserved for married couples only, and "common-law partners," to which both opposite-sex and same-sex couples who meet statutory criteria have been moved. (The test of common-law partnership is living conjugally for one year or having a child together. Having a child together encompasses de facto parentage through actual care and control of a child.)

On a substantive level, it is clear that the overriding legislative purpose of the abandonment of the extended opposite-sex definition of "spouse" is to remove queer couples from statutory association with married couples and to segregate them—along with heterosexual cohabitants—in the new (old) category of "common-law partner." This can be seen from the changes made to the *Income Tax Act*: Bill C-23 has repealed the existing definition of "spouse"[84] and has re-enacted it word for word as the definition of "common-law partner."[85] The substantive tests of relationship have not been changed at all. Only the name of the category has been changed.

The net result of these changes is twofold. First, Bill C-23 now leaves the term "spouse" undefined except to the extent that it requires marriage. All opposite-sex definitions of "spouse" have been repealed, because they arose only when "spouse" was deemed to include opposite-sex cohabitants. Second, all cohabitants—both opposite-sex and lesbian/gay—are classified as "common-law partners." In effect then, all cohabitants have been segregated from married couples.

This change is intended to make it look as if the federal government perceives marriage to be a unique institution, that heterosexual and queer cohabitants are different from married couples, and that all cohabitants are being treated equally by classifying them together as common-law partners. Superficially, it may appear that the government has replaced the three-tier set of categories that discriminated against lesbian and gay couples with a new "equal" two-tier system.

In reality, however, Bill C-23 has merely replaced one three-tiered system with another three-tiered system. The three new categories are:

- "spouse," reserved for married couples only;
- "common-law partners" of the opposite sex; and
- "common-law partners" who are not of the opposite sex.

Table A-4 outlines the overall impact of Bill C-23 on the status of lesbian and gay couples. There is now greater equivalence among the three classes of relationships listed above. However, the new status of lesbian and gay couples continues to discriminate in several key areas.

- Lesbian and gay couples continue to be denied the right to marry. Giving the appearance that cohabitation outside of marriage is a meaningful basis for legal classifications is belied by the fact that one group of cohabitants cannot marry if they so choose. The denial of the right to marry is made even more offensive by the addition of the marriage clause to Bill C-23.

- The government appears to have backtracked on the constitutionally mandated equality of both lesbian/gay and heterosexual cohabitants[86] in order to carve out a new non-marital status that it obviously hopes will help insulate the third-class status of lesbian and gay couples from Charter challenge.

- Bill C-23 has not eliminated even the most important areas of continuing discrimination in federal law. Two of the most important areas of litigation since section 15 came into effect have been the unequal age of consent rules for sexual activity in criminal law and the refusal to permit lesbian and gay Canadians to sponsor their partners for immigration purposes. Neither form of discrimination affects opposite-sex cohabitants. Neither form of discrimination has been redressed in Bill C-23. When releasing Bill C-23, the federal government stated that it would deal with those issues as part of overall reforms relating to criminal law and immigration law. However, current proposals on both points make it clear that existing discrimination will not be eliminated as either of those sets of amendments go forward. Other miscellaneous provisions relating to married couples continue to discriminate on the basis of sexuality as well.

- The failure to include common-law partnership in federal human rights legislation makes it entirely possible for the government to argue that lesbians and gays can now only file human rights complaints on the basis of individual rights and not on the basis of

> relationship rights. As early as 1993, the Supreme Court of Canada ruled that lesbian women and gay men do not have "family status."[87] This ruling appeared to have been surpassed by *Egan and Nesbit*, in which the Court concluded that the expanded "opposite-sex" definition of "spouse" violates the equality guarantees of the Charter not on the basis of "marital status" discrimination, but on the basis of sexual orientation discrimination. But with the repeal of all the expanded opposite-sex definitions of "spouse" in federal legislation, powerful precedents, such as *Egan and Nesbit*, *Rosenberg*, *M*. v. *H* are no longer as legally relevant as they were. Yet, lesbian and gay couples are left without any marital status within the meaning of human rights legislation because of *Mossop*. Further Charter litigation will be needed to test the continued application of the Charter to lesbian and gay couples under federal law.

Instead of simply amending the *Interpretation Act* to insert lesbian and gay couples into various formulations of "spouse," "married couple" and other terms, this piecemeal approach to reform has perpetuated the very form of discrimination that Bill C-23 purports to redress.

Penalty Provisions

One of the most problematic effects of Bill C-23 arises from the massive impact the federal taxation and transfer system has come to have on individuals, couples and families. The tax/transfer system operates through a complex set of direct and indirect tax and expenditure benefits and penalties. The problem with the impact of the tax/transfer system on lesbian women specifically and on queer couples more generally arises from the fact that this entire system has been constructed over the decades around the ideal of the single-income family where the male is the head of the household.

This is not a new problem. The women's movement has already revealed many of the anachronistic assumptions on which it has been based. Tax benefits to those with economically dependent spouses, reduced social security payments to dependent spouses and disqualification from employment insurance benefits to employee spouses—all these tax/transfer provisions are designed around the assumption that the state should subsidize single-income couples, that women's work has no value and that any claims women might make to have worked for their husband are designed to create a basis for false employment insurance or pension claims.

Instead of seriously addressing the rationale behind such provisions, as these assumptions came under scrutiny over the last 25 years, sex-specific terms were merely replaced with gender-neutral language, and marriage-specific terms were replaced with language, such as "opposite-sex cohabitants," to include non-married couples.

With the extension of relationship concepts to include lesbian and gay couples, the irrationality of designing the entire tax/transfer system around the ideal of the single-income couple, headed by the male, has become even more apparent. This is because the less a couple resembles the ideal of the single-income couple headed by the male, the fewer advantages that couple will receive from the tax/transfer system, and the more this system will tend to disadvantage non-conforming couples. The flaw is simply this: The entire tax/transfer system places invisible

penalties on couples to the extent that they deviate from this implicit ideal around which it has been constructed.

This is the penalty effect of Bill C-23. From the tax on marriage to the dependency credits and employment insurance benefit criteria, single-income couples and families will reap more benefits and incur fewer of the fiscal burdens of relationship recognition than other types of couples. The reason for the differential impact of the tax/transfer system is the differential allocation of incomes by gender, race, ability, marital status and sexuality.

While Bill C-23 was being formulated and debated, attempts to raise this problem were consistently met with the contention that "with the benefits of equality come the burdens." But especially for lesbian women and for many gay men, this contention misses the real point.

Like other relationship recognition statutes, Bill C-23 does not extend genuine equality to lesbian and gay couples. It does not even extend full "equivalence" to lesbian and gay couples.

To the extent that it gives lesbian and gay couples fewer benefits and imposes greater penalties on them than when they were treated as individuals under the tax/transfer system, Bill C-23 has imposed the full price of equality on this class of couples, without giving them that equality.

Because lesbian women, gay men and lesbian/gay couples have markedly lower incomes than average women, men and heterosexual couples, lesbian and gay couples will receive considerably fewer benefits from this partial equivalence at the same time that they are exposed to considerably higher penalties.

Thus, lesbian and gay couples are actually paying a proportionately higher price for fewer state benefits than are any heterosexual couples.

Since the tax/transfer system was initially designed, attitudes toward people in relationships have undergone tremendous change. Women were once encouraged to devote most of their productive energies to non-waged domestic work and were often awarded long-term alimony payments in recognition of the fact that this career choice usually rendered them unable to support themselves after divorce. Canadian legal policy now reflects the opposite expectation: All adults should be encouraged to seek self-dependence.

The structural flaw in much of Bill C-23, then, is that applying the existing structure of the tax/transfer system to a class of couples who, more than most other classes of couples, already exhibit a high level of self-dependence and economic autonomy actually results in fewer benefits and greater fiscal penalties than would be received by other classes of couples. This means federal policy will place pressure on lesbian and gay couples to modify their relationship styles in order to maximize their overall financial position.

This is not a criticism of relationship recognition. It is a criticism of the distributional impact of the existing tax/transfer system. This criticism can also be levelled from the perspective of women as a class, adults with a disability as a class, and racially identified individuals and couples. Because of the impact of multiple layers of discrimination on lesbian women and the

severe effects of discrimination on the basis of sexuality on gay men, it is a particularly important issue for lesbian women and gay men.

Ironically, at the same moment that lesbian and gay couples have become recognized in Canadian law, it has become important to shift away from couple-based tax/transfer provisions to using the individual as the basic unit of legal policy. If this criticism of Bill C-23 were to be taken seriously, Canada would not be the first country to move toward the individual as the basic policy unit at the same time that it begins to define legally recognized adult relationships more widely. Most Scandinavian countries that have adopted RDPs have already moved dramatically away from joint tax/transfer provisions.[88]

The impact of specific tax and transfer provisions varies on the basis of a large number of variables, as demonstrated in Chapter 3. It can be seen that although there are winners and losers among lesbian and gay couples as a result of Bill C-23, on the aggregate level, lesbian and gay couples, as a class, will generally lose much more than they will gain.

"Separate but Somewhat Equivalent"

Stepping back from the details of statutory and judicial methods of recognizing lesbian and gay relationships, the overall picture that emerges consists of these elements.

- Lesbian and gay couples are still segregated by statutory classifications and by substantive legal provisions from married and heterosexual couples. The degree of segregation varies from statute to statute, but all statutes are more alike than they are different in this important regard.

- Lesbian and gay couples have fewer rights and responsibilities even in those jurisdictions that claim to have granted them full equivalence with other couples, primarily non-married heterosexual cohabitants. Equivalence is not equality, and it is accurate to say that lesbian and gay couples remain, at best, only partially equivalent in all jurisdictions.

- The only place where lesbian and gay couples approach anything resembling full equivalence is in tax/transfer provisions. They are meticulously included in all this legislation at the federal level. Here, however, the overall impact of these provisions is to impose, on the aggregate, more tax/expenditure penalties on queer couples than new benefits. The quantum of this overall penalty is exacerbated by the pre-existing income disadvantages faced by lesbian women, gay men and queer couples, and is further intensified when one or both partners are racially identified, have a disability or are responsible for children.

In terms of overall legal status, then, it is fair to say that far from having become "equal" in Canadian law, lesbian and gay couples have attained only the lowest rung on the towering ladder they must climb to reach genuine equality. They remain segregated in law and, at best, have obtained legal rights that are only somewhat equivalent to those of cohabiting couples in some jurisdictions in Canada.

3. DISTRIBUTIONAL IMPACT OF EQUIVALENCE: BENEFITS AND BURDENS

Demographically, lesbian and gay couples are disadvantaged in terms of incomes. Three provinces and the federal government have now adopted legislation that treats lesbian and gay couples as being nearly equivalent to married couples for purposes of benefit and penalty provisions. None of these jurisdictions has extended all spousal provisions to lesbian and gay couples. In most of these jurisdictions, however, almost all the "penalty" types of provisions that apply to heterosexual couples have been fully extended to lesbian and gay couples.

This chapter explores the distribution of benefits and penalties that flow from this pattern of law reform. This analysis has been carried out by microsimulation for the taxation year 2000, augmented by textual analysis and other sources of data where useful.

The first part reports on the overall costs, to lesbian and gay couples, of relationship recognition. The main finding is that the benefits lost because of relationship recognition greatly outweigh the benefits gained. The largest losers are lesbian women. Where there are gains, they appear to be divided equally between lesbian and gay couples.

The next parts analyze the distribution of the benefits gained and focus on why the costs of relationship recognition are so much larger than the benefits. The fourth section looks at how the loss of federal tax/transfer benefits at the federal level flows through to the provincial income tax level to produce an additional layer of fiscal penalties flowing from relationship recognition.

The overall conclusion drawn from this analysis is that extending relationship provisions to new classes of largely low-income couples will result in the loss of substantial benefits to them. This, in turn, produces substantial revenue savings to both the federal and provincial governments. This conclusion is relevant to the question of how relationship recognition, as currently structured, affects lesbian women as a class, and to two additional issues: whether the individual or the couple should be the basic tax/benefit unit, and whether relationship-based provisions should be extended to adults in non-conjugal relationships. These issues are discussed in the final sections.

Aggregate Impact of Relationship Recognition

Until Statistics Canada produces valid data on lesbian and gay couples, it will be impossible to measure the impact of any tax or transfer provisions on them. However, it is safe to say that existing lesbian and gay couples are among those currently reported as "unrelated" adults in survey and census instruments. Thus, the methodology used for this microsimulation study has identified all "unrelated" adult pairs of the same sex living together in a household, with and without children. It is unlikely that all or even most of these pairs are actually lesbian or gay couples. These pairs include roommates, companions and others who for some reason share living space. However, by removing those related by kinship or marriage, the most obvious non-lesbian or gay pairs have been eliminated.

Two sets of data were produced for this study. In one, a tight screen was used to select possible queer couples. The tight screen eliminated all students and pairs in which the age difference was so large that a care-giving relationship could be possible. In the other, a loose screen was used to collect data on all same-sex pairs on the assumption that some students are lesbian or gay, and some couples have large age differences.[89]

There is no way of knowing what proportion of either set could be considered lesbian or gay couples. Nor is there any way of knowing whether the lesbian or gay couples among these pairs are distributed evenly across the genders and income classes into which they have been divided. They could be clustered, or they could be distributed evenly.

Although these questions cannot be answered until actual census and survey data are available, the results of this microsimulation study are, nonetheless, useful. Being based on actual household records, all the details of household finance, including details of incomes, tax liability and transfer incomes of those household members are built into the model. The results represent the dynamic interaction of the whole of the federal–provincial tax/transfer system on actual incomes associated with each record, and represent more realistic results than static single-variable analysis could produce. It would be important, however, to test the results of this study against the actual data collected on queer couples in the 2001 census.

Aggregate Data

Table B-1 reports on the aggregate impact of treating the identified same-sex pairs as if they were "spouses" for purposes of all tax and transfer items, adjusted to the year 2000. Using the loose screen, the total gains resulting from spousal treatment would be $14.8 million ($14.0 million for the tight screen). In contrast, the total losses resulting from being treated as spouses would be $124.2 million ($102.6 million for the tight screen).

Those couples that benefited had an average gain of $768 (or $772), while those that lost ground were, on average, down by $967 (or $954). This translated into a loss in consumable income of $570 ($550) across the entire sample. The average consumable income for the pairs in this group, when treated as spouses, fell from $37,498 to $36,948 for both adults combined.[90]

Overall, these results are produced when the tax/transfer penalties arising from application of spousal rules outweigh the financial benefits. They represent the combined effect of a myriad of items that have tax or transfer significance recalculated on the basis that the pairs are treated as spouses for all legal purposes.

Aggregate Data by Income Classes

As Table B-11 demonstrates, the distribution of gainers and losers on the aggregate level is consistent with the distribution of households among the various income classes. This suggests that, on average, the total distribution of gains and losses resulting from being treated as spouses is not significantly affected by the amount of income received by the pair.

There are a few exceptional results, however. Almost 36 percent of all gainers are located in the $20,001 to $30,000 income class. This suggests there are tax benefits or transfer items payable to those pairs that they could not receive before. Because only about 15 percent of all households fall into that income class, that is a significant concentration of benefits in that class. From a tax policy perspective, increasing the gains in that income class would be considered progressive, because the overall distribution of after-tax incomes in Canada is seriously regressive at the lower income levels, and this change would help counter that pattern.

The same effect can be seen in the $40,001 to $50,000 income range. With roughly 12 percent of the households, this group realizes about 23 percent of the gains. Representing the incomes of two adults, this income level is not particularly high. Thus, this effect could also be considered progressive.

Losses are less clustered. Instead, they are spread out somewhat more evenly among the $30,001 to $60,000 income classes. Given that these are pair incomes, this result is regressive. It is also regressive that fewer of the losses are concentrated in the top income classes. However, it could be considered progressive that the two lowest income classes have less than their pro rata share of losses from relationship recognition.

When the average size of gains and losses is examined, the impact of relationship recognition appears to be a little less benign. On the loose screen, the average negative impact for losers in the bottom three income classes is around $1,100 for each class and actually shrinks as income increases. The average gain for those who benefited is smaller, ranging from $952 to $557. It is only at the over $100,000 income level that a larger gain is realized ($1,438).

Aggregate Data by Gender

Table B-3 reveals that within these averages and income classes, gender is a significant factor. The distribution of gainers and losers between male and female pairs is not significantly out of line, but the average gains and losses are. The average loss for male couples is only $689, but the average loss for female couples is $1,301. With average female couple incomes of nearly $2,000 less than male couples, this is a significant difference.

The average gains are more evenly allocated between male and female couples: $717 for male and $845 for female.

Due to the size of the sample constructed for this study, it has not been possible to look at income brackets by gender of the couple. However, data on selected tax/transfer items analyzed below do yield some insight into the source of the larger losses going to female pairs.

Distribution of Gains

The federal system of transfer payments confers a large number of personal benefits on adults. The Guaranteed Income Supplement, the Canada Pension Plan and *Old Age Security Act* are social welfare programs that extend social assistance payments and retirement incomes to adults. The income tax system provides additional personal benefits in the form of

tax reductions of various kinds. These include income tax credits for adult dependants, single parents, low-income couples with children, the Goods and Services Tax (GST) credit for those with low incomes, income tax exemptions for various employee family benefits and retirement contributions, and income tax deductions for child care expenses.

Depending on how eligibility for these benefits is structured, they fall into four basic classifications:

- benefits for supporting an economically dependent conjugal partner;
- family wage types of benefits that are available to anyone with a partner or child(ren) without regard to dependency or income levels;
- benefits that recognize or promote sharing of income or property with a partner or child(ren); and
- benefits that are primarily restricted to low-income taxpayers.

Dependency benefits include such items as the income tax credit for supporting an economically dependent spouse, the *Old Age Security Act* spousal pension allowance and transferable income tax credits of various kinds (disability, age, education, medical, etc.).[91] Family wage benefits include income tax exemptions for employee compensation that takes the form of employee benefits extended to a spouse or child (insurance coverage, interest-free loans for housing for spouse or child). Benefits that recognize or promote sharing of income or property with a partner or child are numerous and range from survivor options or benefits under various pension plans (registered pension plans or retirement savings plans) that permit property of the decedent to be transferred to another member of the family, to tax-deferring rollovers of property to a spouse or child.

Until the enactment of Bill C-23, lesbian and gay couples were treated as if they were individuals for purposes of all four categories of federal legislation. Court decisions had given them access to a few of these benefits.[92] A few others were available because of the wide language used in the legislation,[93] and court challenges to most of the others would probably have been successful. But, the result was that dependency benefits, many family wage type benefits and income/property-sharing benefits were not available to lesbian or gay couples.

All these benefits are constructed around a tax and transfer system in which the basic unit of eligibility is the individual. However, individual eligibility is modified in the case of the first three categories of benefits above, because only individuals with a legally recognized conjugal partner can obtain these benefits. The fourth category is somewhat different, because it contains a group of benefits that are actually reduced for couples in recognized relationships but increased for individuals who may have a relationship that is not recognized.

Thus, benefits that are primarily restricted to low-income taxpayers are not as beneficial consistently for couples as non-targeted benefits. This is because benefits targeted at low-income individuals and couples impose penalties on couples who claim them. This is the infamous spouse in the house rule in effect. Because family income concepts used to test

eligibility for many benefits use flat income cutoffs, they are more easily exceeded when there are two income earners in the house instead of one. The items that fall into this category are, for example, the GST credit or the Guaranteed Income Supplement. Both benefits are designed to deliver larger payments to individuals than they do to couples. Whether structured as a tax on marriage or built around presumed economies of scale, presumptions of non-arm's-length dealing or low-income cutoffs, income tax and transfer items targeted for low-income individuals actually impose penalties or losses on adults whose relationships are legally recognized.

Benefit provisions that have this penalty effect are discussed below. The point being made here is that because lesbian and gay couples generally fall into low-income classes, relationship recognition will affect them asymmetrically. Generally, their incomes are not high enough to take much advantage of tax and transfer items in the first three categories, but they are often high enough to disqualify them from receiving tax or transfer benefits that use the same flat income cutoff point for individuals or for couples. While other couples with low incomes may experience the same effect, it is particularly burdensome for lesbian and gay couples, because they have not yet achieved full civil equality with heterosexual couples, and lack the right to marry, for example, which would give them access to other legal rights and responsibilities that would be worth the price of the increased tax burden. In addition, it is likely, based on the projections in Chapter 1, that lesbian couples, in particular, are overrepresented in the class of couples that have virtually no access to these types of benefits, yet will disproportionately lose valuable tax and direct benefits. Like couples affected by racism, the lack of access to middle and high incomes severely constrains access to many types of tax benefits, while low-income couples are exposed to most of the tax penalty items.

Dependency Credits

Total new benefits gained as the result of relationship recognition are projected to be in the range of $14 million to $15 million for 2000. The bulk of these new benefits must be due to new eligibility for the married tax credit. According to Table B-13, treating same-sex pairs as if they were eligible for this credit will produce new tax benefits of $9.4 million to $14.1 million for 2000.

Because myriads of tax and transfer items go to make up the final distribution of after-tax incomes, the distribution of net gains to those who benefit in this simulation will not be identical to the distribution of new claims for the married tax credit.

Analyzing the impact of new eligibility for the dependent spouse credit is complicated because two things are going on in this calculation. On the one hand, extending spousal treatment to same-sex pairs immediately deprives any single parents among those pairs of the equivalent-to-married credit, which is very similar in amount to the dependency credit but which can be claimed only by an adult maintaining a self-contained domestic establishment in which he or she supports a related dependant who is under 18, the taxpayer's parent or grandparent, or infirm.[94] On the other hand, pairs in which one person receives income of less than $572 will qualify for the full dependent spouse credit.

Depending on the relative incomes received by each member of the pair, the dependent spouse credit may completely replace the lost equivalent-to-married credit, may not replace it at all (e.g., if both partners have incomes over the limit) or may replace it only partially. The interaction of these two credits is analyzed in detail below. For purposes of looking at the distribution of new claims for the dependent spouse credit, the net gain over prior claims will be treated as the new eligibility. This is because no single person can claim this credit unless it is for a single parent claiming in relation to a child, and no couple can claim anything but the spousal version of the credit.

The distribution of new claims for the dependent spouse credit is consistent with low couple incomes. Couples with incomes under $20,000 claim some 25 to 39 percent of new dependent spouse credits. These percentages increase to 28 to 32 percent for all couples with incomes under $30,000. This suggests there are large numbers of same-sex pairs with these quite low couple incomes, and that the distribution of income between members of the pair is imbalanced enough to make them eligible to claim the credit.

By the time couple income reaches $50,000, new claims for this credit are almost non-existent. This suggests both that income distribution within the couple is less imbalanced and that there is a low level of economic dependency among couples who could, in fact, exist on one income. When examined from the perspective of impact on same-sex pairs by income class, this distribution of new dependent spouse credits appears to be sharply progressive.

When viewed from the perspective of impact on female versus male pairs, the distribution of the dependency credit appears to be quite fair. New claims for the dependent spouse credit almost exactly mirror the ratio of female-to-male pairs in the sample, with 59 to 60 percent of the credits going to male pairs and the balance going to female pairs.

As discussed below, when the distribution of new claims for the dependent spouse credit is examined in light of the distribution of lost claims for the equivalent-to-married credit formerly claimable by single parents, there is a serious gender skew in the resulting distribution. Female pairs do not make up lost equivalent credits by being able to make new claims for the spousal credit, while male pairs are almost purely winners on this item.[95]

In addition, extending tax credits to taxpayers for supporting an economically dependent adult partner must be questioned seriously for its long-term impact on adult economic self-dependence. It is well recognized in the tax policy literature that joint taxation instruments form hidden tax barriers to, or implicit tax penalties on, the labour force participation rate of lower-income spouses. Although lower-income spouses are overwhelmingly female, the distribution of incomes among lesbian and gay couples suggests that gay couples may also be particularly vulnerable to this effect.[96]

Any group that has disparately low levels of income as compared with members of other groups is thereby less securely attached to the organized and well-paid waged labour force. Such marginalized workers will be more likely to agree to substitute non-waged domestic work for waged work. Allocation of large tax credits, such as the dependent spouse credit, to

potential supporting taxpayers is capable of tipping the balance in favour of non-waged work and, thereby, becomes a subsidy for the support of a middle- or high-income taxpayer as well as a hidden tax barrier to equal wage force participation.[97]

Lesbian women and gay men are both vulnerable to these effects. Gay men have access to the male economy. Thus, the high-low and single-income patterns[98] that attract the maximum dependent spouse credit are within the reach of gay couples, and low- or no-income gay couples are, accordingly, susceptible to the subsidy effect described above. Extension of this tax credit to gay couples would tend, over time, to result in greater discrepancies, perhaps by age, disability, educational attainment or income, in overall wealth.

Lesbian women do not have access to the male economy, but at the margins, the same effect would be expected. As discussed below, lesbian women would be even more vulnerable to this pressure especially when they receive valuable transfer benefits as single parents. As lesbian women lose direct benefits through being deemed partners, they are literally forced to become the dependants they are legally presumed to be. This, in turn, intensifies actual dependency and their partner's eligibility to claim the dependent spouse credit.

While there are many situations in which actual dependency is not an option but a given (e.g., situations of physical disability), extension of the dependent spouse credit to all couples, disabled and non-disabled alike, creates a subsidy for the non-waged work of partners without a disability that is not necessarily justifiable.

Other Tax Benefits

Because the SPSD/M does not model tax items that are too small to measure on the aggregate level, it was impossible to determine the impact of the smaller transfer items that must have played a role in producing the modest tax/transfer gains projected for the newly recognized same-sex pairs found to be gainers in this analysis.

However, changes in the average of all transfer items and total taxes sheds some light on the magnitude of those probable gains. Table B-12 demonstrates that when total pair market income is held constant, the difference between being treated as individuals and as spouses for tax purposes produces additional tax benefits in the order of $200 per couple. The amount of increased benefits varies with income. Couples with the lowest incomes (under $20,000) received an additional $154 in tax benefits; this rises to $300 to $464 for couples in the $20,001 through $50,000 range. The increases almost disappear or become negative at the higher income levels.

Again, this distribution of overall tax benefits is progressive and improves the fairness of the tax system when it is viewed in isolation. The exception to this statement is the relatively small increase in tax benefits realized by the poorest couples. The small size of the increase at this income level is consistent with the regressive incidence of the total tax system at the lowest income levels.

These changes in total average taxes are the result of the overall interaction of the hundreds of specific provisions in the tax system as well as the application of the graduated rate

structure to taxable income. Most of these tax provisions will be of greater value to middle- and high-income couples than they will to those with low incomes. Some of the credits that can be transferred from one partner to another will be of greatest value to low-income pairs. For example, the only limit on claiming the disability and age credits that cannot be used by a partner is that the other partner's income tax liability must be large enough to make use of them. However, other transferable credits can be claimed only so far as the couple has enough money to pay for the items that will then give rise to tax credits. For example, if a couple cannot afford drug or medical treatment not covered by provincial health care plans or private extended insurance, then they will not qualify for transferable medical credits. The same limit will operate in relation to educational expenses, for example.

Beyond the transferable credits, tax benefits arising from Registered Retirement Savings Plan (RRSP) contributions to spousal plans, transfer of RRSPs on a tax-deferred (rollover) basis to a surviving spouse, a tax-deferred transfer of income-producing property to a partner or other tax benefits available to those with investment income or property gains will tend not to be available to low-income pairs precisely because they tend not to have sufficient disposable income to engage in the types of transactions that will qualify them for such tax benefits.

As can be seen from Table B-12, same-sex pairs with incomes under $20,000 have average market income as a couple of only $7,171, and receive more than that in average transfer income—$7,820. With total tax liability of $2,498 when treated as spouses, their average disposable income as a couple is only $14,083. At this after-tax income level, there is virtually no room for discretionary spending, tax-benefited investment behaviour or income splitting that would attract further tax reductions. And at this income level, even if one member of the relationship were able to afford to make tax-benefited contributions to, for example, a spousal RRSP, taxable income is already so low that there would be no actual tax benefit for doing so. Thus, such investment behaviour is not encouraged by the tax system with respect to low-income couples.

At higher income levels, spending for items that qualify as transferable credits, tax-deferred investments, income splitting and other types of behaviour become both rational and possible. This is reflected in the fact that average tax benefits increase substantially in the $20,001 to $50,000 income range, for there is room for spousal sharing and behaviour that will attract tax benefits. At the highest income levels, this capacity for sharing becomes non-rational as both partners inferentially become more able to plan their income, expenditure and tax activities as individuals not dependent on tax benefits to optimize their after-income disposable incomes.

The tax-planning behaviour of both middle- and high-income couples will also be affected by their expectations for their relationships. Those who expect to remain in long-term relationships tend to be interested in benefits such as employment-related benefits, the dependent spouse credit in the *Income Tax Act*, rollover treatment for transfers of property between partners, pension survivor options and RRSP benefits. Those who do not, tend to plan as if they were, in fact, not coupled.

Non-Quantifiable Relationship Benefits

Quite apart from the tax implications of relationship recognition, couples at all income levels may derive other benefits. Having a legal framework within which to identify and define relationship responsibilities and rights, being able to receive employment benefits, knowing that one's partner will be treated as next of kin for purposes of medical consent in emergencies—all these legal rights are of more or less equal value regardless of economic power. Indeed, some of these features grow more valuable as cash incomes drop and conflict or crisis of any kind makes proportionately bigger demands on scarce energy and resources.

Different types of benefits will be more or less attractive at different income levels and for each member of a relationship. A person who expects to be able to make a claim for personal or child support on relationship breakdown will value being in a recognized relationship. A person who expects to have to make such payments will consider that a good reason to avoid relationship recognition. Low-income individuals in stable relationships may welcome the opportunity to seek support if the relationship were to terminate, in order to receive life insurance payouts, guardianship of children or medical care, whereas middle- and high-income individuals may not.

Financial autonomy is another feature of relationship recognition that is little understood at this time. There is some suggestion in the research literature that lesbian and gay couples tend to share the tasks of living on a more egalitarian basis than heterosexual couples, and income differences between partners do not correlate as strongly with power in the relationship or assignment of non-waged or unpalatable tasks.

Those who do not place value on long-term relationships may fear that entering a legally recognized relationship will fetter their financial autonomy by forcing them to share property, their homes or their incomes. Or if members of a couple have actually arranged their financial affairs as separate individuals, relationship recognition may cost them the chance to claim double principal residence exemptions, whereas low-income people are more worried about just being able to afford a joint home.

Distribution of Losses from Relationship Recognition

The net loss to potential lesbian and gay couples from relationship recognition is substantial. As modelled for the year 2000, relationship recognition would reduce the consumable incomes of lesbian and gay couples by $100 million to $124 million.

The net impact on consumable income does not reflect the full impact of relationship recognition, for these net figures are themselves moderated by the gains discussed above. For 2000, the six largest tax and transfer items affected by relationship status will produce projected losses for the potential lesbian and gay couples in this sample in the range of $131 million to $155 million. As with benefits, other smaller items will add to that figure, but cannot be calibrated by this model.

Relationship recognition is costly to all couples because of the mechanisms that have been devised to place limits on adults who receive income tax and transfer payments. Because

individuals and couples who receive various types of tax and transfer benefits are subject to many of the same low-income cutoffs or to other benefit-limiting formulas, low- and middle-income adults are actually better off financially if they are considered to be individuals.

These losses are the result of the application of the following types of relationship penalties to the potential lesbian and gay couples in this sample:

- the tax on marriage, which withdraws some or all financial support from low-income adults when they form relationships;
- low-income cutoffs that trigger benefit reduction formulas;
- economy of scale formulas that reduce couple benefits to reflect assumptions about household consumption patterns;
- deemed non-arm's-length provisions that disqualify some classes of adults from receiving some types of benefits; and
- conflict of interest provisions that disqualify some people from receiving some forms of benefits.

When couples are economically disadvantaged because of the long-term income effects of discrimination or prior exclusion from benefit systems, as are lesbian and gay couples, these effects will be particularly severe. Lesbian women are especially disadvantaged because they do not have any access to the male economy, yet have substantial responsibilities for raising children. Gay men are especially disadvantaged by employment discrimination and frequently have responsibility for children as well, often without the kind of child custody that would entitle them to receive social assistance payments in relation to those children and, often, with child support obligations.

Global Losses

Table B-12 demonstrates that on a global level, when compared with the size of gains realized through new access to income tax benefits, potential lesbian and gay couples in every income class experience significant losses of transfer income. The average loss is $755 per couple. When this average loss is offset by average gains in net income tax benefits, the global loss averages out to $550 per couple.

These losses in transfer incomes are regressive in incidence. Pairs with total incomes under $20,000 have average total incomes of around $14,500. Over half of that income is, on average, made up of transfer incomes; less than half is market income. For this extremely disadvantaged class of couples, the loss of an average of $563 in transfer incomes for 2000 is significant. Offset by a mere $154 in additional tax benefits per couple, this means the net cost to these potential couples of relationship recognition is $409.

The highest costs of relationship recognition are clustered in the lowest income classes. Couples with incomes in the $20,001 to $30,000 range—which means individual incomes on average of $10,001 to $15,000—lose an average of $1,089 in transfer incomes. Those with

incomes of $20,001 to $30,000 lose $1,062. Although gains in tax benefits offset these amounts somewhat, the combination of the two effects produces a regressive scale of effects.

When the net losses to potential couples are expressed as a percentage of average disposable income before relationship recognition, the net price of being treated as spouses ranges from 2.3 percent for those with couple incomes under $20,000 to 0.1 percent for those with incomes over $100,000. The pattern is considered regressive because it imposes the heaviest costs of relationship recognition on those couples with the lowest incomes.

These global losses are distributed regressively by gender as well as by incomes. As reported in Table B-3, the average net loss for female couples in this sample is $1,301, which is 188 percent of male couples' average net loss of $689.

Tax on Marriage

The hallmark of a so-called tax on marriage is that the mere fact of relationship recognition triggers loss of a benefit or the inferential increase in income tax liability that flows from it. Many tax and transfer items function as a tax on marriage, some in combination with economy of scale formulas that reduce couple benefits to reflect assumptions about household consumption patterns.

The equivalent-to-married credit given to single parents who support a dependent child in a separate domestic establishment is an example of a tax on marriage that operates alone. It does not depend on income levels, assumptions about economies of scale or any other targeting devices. A single parent of any income level will receive it, and a parent who is treated as a spouse will not.

The refundable GST credit is more complex in design. Although it is a refundable credit, which means that low- and no-income people can receive it even if they have no income tax liability, it is calculated in two segments: all qualifying people receive the basic individual amount, and single people receive an additional single supplement. Thus, it combines a low-income cutoff (LICO) and an economy of scale formula with the basic tax on marriage mechanism.

Other examples of the tax on marriage are found in the direct transfer system. The Old Age Security spousal pension allowance and the Guaranteed Income Supplement all have a tax on marriage effect to the extent that the size of benefits is linked directly to marital status. Because this scaling of benefits is premised on the assumed economies of consumption available to conjugal couples, they are discussed separately below.

Equivalent-to-married credit

The interaction between the dependent spouse and the equivalent-to-married income tax credits illuminates how relationship recognition intensifies both income regressivity and gender discrimination in the overall operation of the tax and transfer systems.

As discussed above, new tax benefits will flow to newly recognized couples who can claim the dependent spouse credit. This credit has a financial value of $972 in 2000 for those

couples who can take full advantage of it. The distribution of those credits is fairly equitable on both the gender and income dimensions.

However, the price of claiming the dependent spouse credit for any taxpayers with dependent children is the loss of the equivalent-to-married credit. This credit has a financial value of $972 in 2000 for those taxpayers who can claim it. Basically, anyone with an income of more than $7,000 can take partial advantage of the equivalent-to-married credit, and it can be fully utilized by those with taxable incomes of around $13,000 or more.[99] But only single individuals can claim the equivalent credit. Those taxpayers whose relationships are legally recognized cannot claim it.

Not surprisingly, given gender patterns in Canadian society, the bulk of the tax benefits flowing from the equivalent-to-married credit go to women. A growing but still small share goes to men. As seen in Table B-4, one of the most clear-cut effects of extending spousal treatment to lesbian and gay couples is the complete loss of the equivalent-to-married credit. This credit functions as a tax on marriage to the extent that only unmarried individuals can claim any part of it. By extending marital treatment to lesbian and gay couples with children, they are denied the equivalent-to-married credit. The resulting loss for gay men is $1.4 million for 2000; for lesbian women, $8.4 million.

Eligibility for the equivalent-to-married credit is not limited to low-income individuals. All single taxpayers can claim it. At the lowest income levels, loss of this credit may be difficult to make up, especially if the couple has sufficient combined income to lose eligibility for other credits such as the child benefit. At middle- and high-income levels, loss of this credit is offset by increased economic power.

When dealing with potential lesbian and gay couples, loss of the equivalent-to-married credit is not necessarily offset by other tax or transfer items. In looking at the relationship between the dependent spouse credit, for which married couples do qualify, and the equivalent-to-married credit, which is lost when individuals move into the category of recognized couples, it can be seen that while higher-income gay men can expect to more than make up for the loss of the equivalent credit by gaining access to the married credit, the opposite is true for lesbian women.

Thus, the male pairs in Table B-4 lose equivalent-to-married credits of $1.4 million as the result of being treated as if they are married, but they gain new dependent spouse credits of $11.3 million, for a net gain of $9.9 million as the result of spousal treatment. In contrast, the female pairs in Table B-4 lose equivalent-to-married credits of $8.4 million—women traditionally have more responsibility for children than men—but gain only $7.9 million in new dependent spouse credits.

The resulting loss for female pairs is $0.5 million. This is not a surprising result. It is consistent with women's lower incomes, which make it less feasible for any woman to support a female pair. It is also consistent with women's greater responsibility for children.

Taking the allocation of equivalent credits between the female and male pairs in Table B-4 as an indication of the allocation of children between female-pair and male-pair households, it can be seen that even though the female pairs have far more children and much smaller average incomes, they realize a net loss of tax credits as a result of relationship recognition. The male pairs in Table B-4, however, have far fewer children and much larger average incomes, yet they realize a net gain of tax credits larger than the net received by female pairs in the form of the equivalent credit before relationship recognition.

This is symptomatic of the low-income plus children pattern of lesbian couples versus the higher-income without children pattern of gay couples. The result is that gay couples can be predicted to have greater access to a single-income life, subsidized by the married credit, while loss of the equivalent credit and lack of eligibility for the married credit reinforces the tendency of lesbian couples to have to rely on two incomes instead of just one.

The result of this pattern is that lesbian couples—even those with children—will have less access to the inferential tax benefits of the non-waged domestic work of a dependent spouse in the house. Gay males, however, will not only receive the tax benefits of the married credit, which subsidizes single-income couples, but will also then have access to the substantial financial and tax benefits of tax-exempt, non-waged domestic work provided by the non-income-earning partner.

Table B-13 demonstrates the relationship between income levels and claims for the equivalent-to-married credit versus the dependent spouse credit. All the credits in the column under “Married Tax Credit Claimed - Status Quo” are lost because of spousal treatment, and the credits under the heading “Married Tax Credit Claimed - Same Sex Couples” are new. The net figure, “Change in Married Tax Credit Claimed” represents the net of new married credits over lost equivalent credits. All but $1.4 million of the losses were incurred by female pairs, while the majority of the gains were received by male pairs. While pairs who have couple incomes under $20,000 receive nearly a quarter of the new married credits, female pairs did not make up the loss with new married credits. This is due to women’s generally lower incomes than men.

GST credit

The equivalent-to-married credit is one of the largest tax credits delivered via the *Income Tax Act*. But it is by no means the most significant. The GST income tax credit involves a much larger loss of tax credits to individuals who are treated as spouses.

The GST replaced the federal manufacturer-level sales tax in the early 1990s. When the GST was enacted, the sales tax credit was replaced by the GST credit in light of the expected incidence of this tax. The result is the refundable tax credit system in section 122.5 of the *Income Tax Act*. Both the sales tax credit and the GST credit that replaced it were intended to ameliorate the admittedly regressive incidence of those flat-rated consumption taxes, such as the sales tax or the GST.

The GST income tax credit is subject to two limitations. Married couples automatically lose the single supplement built into this tax credit, even if their combined incomes are extremely

low. An individual or an adult couple will lose the right to claim this credit once total income rises above a low-income cutoff point. The first limitation—the loss of the single supplement when couples are treated as spouses—operates as a tax on marriage that ensures that even though couple incomes remain below the low-income cutoff, the couple will receive a smaller total credit than if they claimed it as two separate individuals.

The GST tax on marriage reflects the assumption that even if two adults have low incomes, two adults in a conjugal relationship can live more cheaply than one. Most tax and transfer formulas that are built around presumed economies of consumption or economies of scale assume that two individuals can maintain their individual standard of living even if their individual incomes are reduced by 30 percent.

The GST credit tax on marriage is steeper, reducing the rate for each member of a couple to 65 percent of the individual rate. This is accomplished by removing the single supplement from both individuals who form a legally recognized couple. For 1993, the full adult GST credit was $199. Single adults received a single adult supplement of $105.

The GST tax on marriage affects the adult credit as well as the credit extended in relation to dependent children. In this regard, the GST credit functions like the equivalent-to-married credit. A single parent can claim, in addition to the $199 adult credit and the $105 supplement, the adult credit of $199 for one dependent child plus a supplement of $105 for each additional child. In contrast, couples can claim only $199 per adult, for $398 per couple, but receive neither the $105 single adult supplement for either of them nor the $199 adult credit for any dependent child.

Because of the adult and child components of the GST tax reduction features, the amount of the tax on marriage for any particular family will depend on the specific make-up of the family. When two adults are deemed to be spouses for purposes of the GST credit, they lose $210 each year between them. When one child is involved, the amount of reduction is $304 per year; if there are two children, the family loses a total of $397 in credit per year.

Tables B-6 and B-15 set out the impact of this tax on marriage by gender and by income classes. The overall impact is the loss of something between $37.3 million and $42.7 million for 2000 for all the potential lesbian and gay couples in this study. This is the single largest lost benefit at the federal level, second only to the total losses of benefits arising at the provincial level across the country (discussed below).

Substantial losses on the part of female pairs are indicative of the concentration of women in low-income classes. Representing 40.5 percent of pairs receiving the GST credit, female pairs received 45 percent of the tax credit when treated as individuals. When treated as spouses, which would result in the loss of single supplements and single-parent supplements, female pairs incurred 46 percent of the losses. The loss to these female pairs came to $17.3 million ($19.4 million on the loose screen).

The male pairs in Table B-6 also lost substantial amounts of GST credit. Their loss was not proportional to their representation in this sample. Although 60 percent of recipients of the GST credit are male pairs, they lost only 54 percent of the lost credit.

Because the GST credit is means-tested (discussed below), it is not surprising that the majority of lost credits are concentrated in the lower income ranges. In Table B-15, the lost GST credits for pairs with incomes under $20,000 and between $20,001 and $30,000 is quite small (only 0.3 and 8.9 percent of the total amount lost, respectively) when compared with their representation in the sample (12.5 and 15.3 percent). However, in the $30,001 to $40,000 and $40,001 to $50,000 income ranges, which imply individual incomes of roughly $15,000 to $25,000 for each partner, the share of the GST credit lost is substantially higher than the percentage representation in those classes. This suggests that the tax on marriage affects high-low and low-middle income classes quite harshly.

On the other hand, the data on individual GST credits for high-income classes suggest that substantial GST claims in high-low income pairs are being lost completely.

On the aggregate level, any tax on marriage—whether it is disqualification from claiming the equivalent-to-married credit for single parents or the GST single supplements—will tend to promote the economic dependency of low-income adults. This will disparately affect women to the extent that they have substantially lower incomes than men. But it will also affect men who earn disparately low income. This class of men will include gay men, men with a disability and racially identified men. The fact that women are disparately burdened by provisions such as this does not mean they cannot also burden selected groups of men. The GST effect on marriage is a clear example of a provision that does just that.

The impact of such a tax on marriage is similar to the extension of dependency credits to no-income spouses. The loss of tax benefits to low-income and marginally employed adults sets them up for choosing economic dependency as an alternative strategy for survival. The amounts lost through the GST tax on marriage are, in the aggregate, quite large. They represent a major item in the total tax/transfer package aimed at delivering income supports to low-income individuals and couples. Withdrawal of this support, as part of the process of recognizing an already-disadvantaged sector of the adult population, is not calculated to encourage revelation of relationship status at the administrative level nor confidence that the total tax/transfer system is fair or equitable.

Low-income cutoffs

Low-income cutoff clauses (LICOs) are designed to restrict eligibility for some spousal benefits to those people who need them the most. Need here is measured not merely by whether a recipient is in a recognized relationship, but by the aggregate amount of income received by the couple.

LICOs are found both in direct government expenditure schemes and in indirect expenditure programs delivered through income tax legislation. They are used to target distribution of

direct social assistance, old age spousal pension allowances, child benefits, the equivalent-to-married tax credit, some transferable tax credits, child-care expense deductions, employment insurance, worker compensation and medicaid provisions.

When LICOs are calculated and administered by reference to both individual income and the incomes of other family members via family-income concepts, many people who would qualify for benefits as individuals are denied benefits (or have their benefits "ground down" to some extent) when their spouse or cohabitant's income is large enough to take the couple or the family over the group-based LICO.

Child-care expense deduction

Some LICO formulas operate indirectly. For example, the LICO in the child-care expense deduction provisions does not place an absolute income ceiling on eligibility, nor does it grind the amount of the benefit down as income increases. Instead, it assigns the deduction to the spouse with the lower income, treating that spouse as having the marginal income to which the deduction relates. Single individuals can claim their own child care expense deductions, no matter their own income level, although the caps on deductible amounts do place absolute limits on the top value of the deduction.

In a sense, the child-care expense deduction has a floating low-income cutoff for couples. This keeps the amount of the deduction that can be claimed below the amount of income earned yet above a subsistence level as measured by the net other credits that can be claimed. The deduction can shift from one partner to another, which means that it will also be scaled to the marginal income tax rate payable by the lower-income partner.

Because the deduction can shift between partners, lesbian or gay parents considered to be common-law partners as the result of Bill C-23 will not be able to continue deducting their own child-care expenses unless two conditions are met: the parent's income is large enough to take advantage of the full deduction, and his or her individual income is lower than the partner's income. When the partner's income is lower, then the partner is required to claim the deduction, or if their partner has no income. If the partner has no income, then even if there is no economic relationship between them or the partner is not involved at all in child care, no deduction can be claimed at all.[100]

Unlike tax credits, the child-care expense deduction is just that—a deduction that can be claimed in calculating taxable income. It is not a tax credit. Thus, it exhibits the "upside down" of tax benefits that deliver larger benefits to taxpayers with larger incomes and smaller benefits to those with smaller incomes.

Child tax benefit

The child tax benefit is a federal transfer item that is delivered through the *Income Tax Act*. The amount of the full benefit is for 1999 was $1,104 (it has increased somewhat for 2001), and is structured as a refundable tax credit. Recipients are deemed to have overpaid their federal income taxes by the amount of the credit for which they qualify. That deemed

overpayment is delivered directly to them by the government, not as part of the income tax return filing process, but in separate transactions entirely outside the annual tax return.

The child benefit is subject to an annual individual or couple low-income cutoff of $25,921 (1999). An individual parent can earn up to that LICO without losing any of the full benefit. If the parent is treated as a spouse, then the incomes of the two adults are combined, and the same LICO is applied to determine eligibility. The cutoff is not scaled for economies of consumption or in any other way adjusted to reflect the higher costs of supporting two adults on the same income.

Not surprisingly, the vast majority of those receiving the federal child benefit are women. Table B-7 indicates that for 2000, over 90 percent of all recipients are women. On an individual level, all the claims are clustered in the two bottom income ranges—below $20,000 and between $20,001 and $30,000. This is a highly targeted benefit. Because the LICO is $25,921 and because there are relatively few single male parents, only a tiny proportion of the benefit is claimed by men.

Table B-7 suggests that recognizing lesbian and gay couples will result in the loss of over half the benefits currently paid to this class. When treated as individuals, the same-sex pairs in this sample received $23.6 million in child benefits. When treated as spouses, those pairs receive only $11.6 million in benefits. This is a substantial portion of the overall cost of relationship recognition to lesbian and gay couples.

Because over 90 percent of the recipients of this benefit are, as indicated in Table B-7, women, it can safely be concluded that nearly all these lost benefits will be relinquished by lesbian women instead of by gay men. Women would have received some 88 percent of the lost benefits. Because even lesbian women have much lower average incomes than any classes of men—except men who are racially identified or have a disability—it is not likely that these women will have partners whose incomes are much higher than their own.

The policy objective behind the use of family- or couple-based LICOs in this context is to ensure that family members turn first to each other for economic support, and then to the state only if they cannot meet their own minimal needs. Both family law and criminal law ensure that this duty to support can be enforced.[101] Unfortunately, this places lesbian women in a particularly difficult situation. Most jurisdictions still do not recognize lesbian or gay couples, let alone their relationships to each other's children. Without an obligation to support each other's children, the loss of valuable federal child benefits on the irrebuttable presumption that there is support burdens lesbian women as compared with heterosexual women and parents with access to some form of the male economy. Charter litigation in this area has produced mixed results, but this may well be an area the courts will have to address.[102]

GST credit "grind-down" formula

The GST tax credit contains both a low-income cutoff, which functions to limit claims to individuals whose family income does not exceed $25,291 and an income grind-down formula. The GST credit is ground down by five percent of the extent to which family income exceeds the relevant LICO. Thus, aggregation of family incomes can grind down the already-reduced

GST credit faster for couples than would occur on the individual level. This, of course, will depend on the specific make-up of family incomes.

This mechanism, like the others of its ilk, tends to promote economic dependency, withdrawal from labour force participation to realize the financial benefits of non-waged domestic labour when there is another supporting individual in the household, and greater dependence on government subsidies.

Economy of Scale Formulas

Numerous elements of the tax and transfer system are built around the assumption that two can live more cheaply than one because of economies of consumption. The GST single supplement is designed to remove the extra support needed for individual people from the benefit when people who are married or treated as married apply for it. Other examples of benefits that are scaled down for married couples are the Old Age Security spousal pension allowance and the Guaranteed Income Supplement.

Treating lesbian and gay couples as spouses will reduce the benefit levels they receive under the GIS substantially. This impact will be felt most severely by lesbian couples and by the lowest income couples.

Table B-5 demonstrates that 91 percent of the GIS benefit losses that result from relationship recognition will be borne by female pairs (loose screen). Male pairs are barely affected. This is due to the greater poverty of women generally. The GIS is an income support program for the very poorest people in Canada. The LICOs used in this program are much lower than for any other tax or transfer program, and they are sharply scaled to reflect presumed economies of consumption. Individuals can earn up to $11,735 and still receive the GIS; couples can earn only $15,312, which is only 65 percent of the combined LICO for two individuals.

Benefits under the GIS are also scaled in the same proportion. Both single recipients and recipients married to non-pensioners can receive benefits of up to $6,048.50 per year (as of March 1, 2000) while recipients married to pensioners receive only $3,939.73 per year. The economy of scale built into these figures presumed that two individuals living together can maintain their standard of living on only 65 percent of what it takes for two individuals living separately (i.e., they can “save” 35 percent overall by living together in a conjugal relationship).

The combined effect of married penalties for eligibility plus married penalties built into the benefit structure means that when adult pairs who have been treated as individuals are given the same treatment as spouses, they lose substantial benefits. This is borne out by the data in Table B-5. Same-sex adult pairs would lose 34 percent of their GIS benefits from being given spousal treatment.

Table B-14 shows how spousal treatment affects recipients by income class. When treated as individuals, pair incomes can range all the way from the lowest to the over-$100,000 level. This is because an individual whose income falls below the LICO of $11,735 can live with someone whose income is $90,000 or more without losing the GIS. Sharing living space

alone does not disqualify individuals from receiving the GIS, so long as the relationship between the parties is not considered a conjugal relationship.

However, the number of instances in which this high-low pattern is present is obviously very small. As the loose screen results in Table B-14 indicate, less than $0.5 million in GIS individual benefits goes to people in such situations. The bulk of the payments under the status quo are concentrated in the two bottom income classes—$0 to $20,000 and $20,001 to $30,000. The very bottom income class is scarcely affected by spousal treatment. In fact, those claims go up by a tiny fraction. However, claims by pairs whose combined incomes fall into the $20,001 to $30,000 income range fall by 28 percent, and claims by those with combined incomes in the $30,001 to $50,000 range fall by 82 percent.

These figures suggests that around 76 percent of the current GIS recipients live with another adult whose income exceeds $3,577 by some degree. The distribution of lost benefits in Table B-14 indicates that these "excess" incomes are concentrated in the $5,001 to $15,000 range.

The principle of equality is thought to be symmetrical: along with new rights should come new responsibilities. But the principle of distributional justice, or equity, looks not only to the strict symmetry associated with formal equality but also to the substance of what is achieved in the name of equality. When looking at the distribution of lost benefits flowing from spousal treatment under the GIS, what becomes clear is that many same-sex pairs live together because they are so extremely poor. If equal treatment produces inequitable treatment, then the structure of the tax/transfer system must be called into question.

Deemed Non-Arm's-Length Provisions

Conflict of interest provisions can be cast in many different forms. One of the tightest barriers to conflict is a type of provision known as deemed non-arm's-length (NAL) provisions. If individuals fall into a category of people deemed to deal not at arm's length, then no matter how much evidence there may be that they are, in fact, dealing completely at arm's length, as if they were total strangers with adverse economic interests, they are not permitted to enter into certain legally recognized transactions.

The concept of non-arm's-length dealing was originally developed for purposes of enabling the Minister of National Revenue to disregard transactions and arrangements involving members of the same family. The presumption on which these provisions are based is that members of a family will always and only ever be motivated by tax avoidance or tax evasion, and they cannot be permitted to deal together.

The definition of "non-arm's-length dealing" in the *Income Tax Act* has remained unchanged and unchallenged for decades. Section 251 stipulates that married couples or others treated as spouses for income tax purposes are deemed to deal not at arm's length. The Minister has the discretionary authority to find that other unrelated people are factually not dealing at arm's length. The key point here is that spouses and other relatives are irrebuttably deemed to not deal at arm's length with each other.

The application of the NAL rules to spouses has a long and difficult history that has persisted into the present. Until 1980, a wife who worked in a family business either as an employee or as a partner was not considered to earn any income of her own, even if she did actually receive a salary or a share of the profits. This was because for taxation purposes, a salary that was actually paid to a wife was deemed to be the husband's income, if the wife was the husband's employee.[103] Family corporations could be used to get around these rules, but the NAL rules empowered the Minister of National Revenue to ignore such salaries if it appeared that they were not "reasonable in the circumstances."[104]

In essence, the prevailing test used to assess the reasonableness of spousal salaries under section 67 remains the test established in *Murdoch* v. *Murdoch*[105] in which the Supreme Court of Canada concluded that a farm wife was not entitled to a share of farm property held in her husband's name on the basis of her labour contributions because she was just doing what "any good farm wife" was expected to do.[106]

This statutory erasure of wives' salaries was not beneficial. Although it had the appearance of relieving wives from liability for income taxation, it was actually designed to prevent spouses from gaining tax advantages that were thought not to be appropriate for the spousal relationship. Those benefits were the overall tax reduction resulting from splitting the profits of family businesses between spouses and the ability of the wife to treat her salary as insurable earnings for unemployment insurance purposes or as pensionable earnings for purposes of the Canada Pension Plan. Thus, the non-deductibility of wives' salaries was one of the ways women were prevented from developing their own social security entitlements and forcing them to rely on their husband for ongoing support during marriage and retirement.

Pressure from the women's movement eventually resulted in the repeal of the non-deductibility provision, but the deemed NAL rules in the *Income Tax Act* were not repealed.[107] After the non-deductibility provisions were repealed, unemployment insurance and CPP rules were modified to incorporate the deemed NAL provisions of the *Income Tax Act* relating to spouses into the *Unemployment Insurance Act* and the *Canada Pension Plan Act*, thereby continuing the exclusion of women from these two benefit schemes, even when they possessed their own independent incomes. Indeed, the NAL rules reached even further than the non-deductibility rules had ever reached, because these provisions could be used to ignore the interposition of a corporate entity.

Eventually, the NAL rules in the CPP legislation were dropped, enabling wives—and by that time, opposite-sex cohabitants—to establish their own CPP eligibility on the basis of earnings from a family business. However, the NAL rules have remained substantially in effect in unemployment/employment insurance legislation, which makes it very difficult for spouses to establish that they are engaged in insurable employment when working for one another. EI benefits cannot be claimed unless the employee can convince the Minister that he or she would have been able to enter into a "substantially similar contract" if dealing with an arm's length party.[108] In practice, this means that if the employment arrangement is constructed around a wife's child-care activities, for example, or reflects other flexibility that spouses

would extend to each other as a matter of family convenience, the Minister will be less likely to treat the employment relationship as bona fide for purposes of EI coverage.

With the extension of the *Income Tax Act* NAL rules to lesbian and gay couples as the result of Bill C-23, lesbian and gay partners are deemed by the new *Employment Insurance Act* to have non-insurable earnings from employment when they work for their partner, for a partnership of which their partner is a member, or for a corporation controlled in whole or together with other unrelated persons by their partner.[109]

Thus, some portion of EI benefits claimable before the enactment of Bill C-23 will become non-claimable as the result of the deemed NAL rules in that legislation. Although there is a reverse onus exception to this deemed NAL rule that enables employees to attempt to establish that the terms of their employment were similar to actual arm's-length relationships, the courts have placed a very heavy burden on those who seek exception from the NAL rule.[110]

The same system of rules will now apply to lesbian and gay partners who seek to establish that they have pensionable earnings for purposes of maintaining or establishing their own CPP entitlement.[111] Partners will acquire an affirmative obligation to convince revenue officers that salary payments are reasonable in the circumstances in order to establish that those payments can continue to be treated as pensionable earnings for purposes of CPP contributions.

Thus, if lesbian couples and partners who work in a family business cannot establish, to the satisfaction of revenue officials, that they have arm's-length contracts, they will not be able to meet the reverse or affirmative test in both statutes. They will cease to have their own EI and CPP accounts. Both of these effects bring lesbian and gay couples into closer conformity with the presumed spousal dependency model out of which these rules grew.

New eligibility for CPP survivor benefits, as well as confirmation of survivor options under employee-registered pension plans and rollovers for undistributed RRSP contributions will enhance the retirement security of lesbian and gay couples. But the offsetting loss for those who are no longer able to maintain independent EI and CPP eligibility will detract significantly from those new benefits.

Conflict of Interest Provisions

Some spouse-based legislative provisions are designed to prevent spouses from collaborating to optimize benefits of various kinds. This includes conflict-of-interest provisions, disclosure of family interest legislation and numerous taxation provisions intended to force family members to deal at arms' length with each other, or that otherwise block tax planning schemes in which family members can be presumed to have collaborated to reduce their overall tax liability.

Conflict-of-interest provisions do not all work in the same way. In addition to the deemed non-arm's-length rules discussed above, other mechanisms are used. For example, the principal residence provisions in the *Income Tax Act* flatly prohibit spouses (including, since 1993, opposite-sex cohabitants) from designating more than one building per year as a principal residence of any of them.[112] Other conflict-of-interest or anti-avoidance rules not

only look to the legal relationship between members of couples, but are buttressed by factual tests of "relatedness" or "connection." Thus, many of these "burden" provisions will have applied to lesbian and gay couples long before new conflict-of-interest provisions extended to them in Bill C-23 come into application.

Federal–Provincial Problems

Substantive federal law exists more or less independently of provincial/territorial law. However, there are two areas where the two levels of authority and legislation overlap in ways that create continuing problems for lesbian and gay couples notwithstanding the provisions of Bill C-23:

- the federal bar to lesbian and gay marriage; and
- the flow-through of federal penalties caused by relationship recognition to the calculation of provincial income tax liability.

Not all these effects can be quantified. The impact of the continuing denial of marriage rights to lesbian and gay couples is both inherently non-quantifiable and has concrete financial implications that cannot be measured. Regardless of whether the federal government continues to deny lesbian and gay couples the right to marry, the incorporation of federal income tax law into provincial income tax law, in circumstances in which provincial law does not recognize lesbian and gay couples, magnifies the costs of relationship recognition without extending any offsetting benefits at the provincial level.

Federal Marriage Bar

Jurisdiction over marriage in Canada is divided between the federal and provincial/territorial governments. The federal government has jurisdiction over capacity to marry, and the provincial/territorial governments have jurisdiction over solemnization.

While the distinction between capacity and solemnization is murky and the case law sketchy and of little authority, it seems to be taken more or less for granted that lesbian and gay couples do not have the right to marry. Opponents to lesbian and gay marriage hope the parliamentary resolution on marriage passed in 1998 or the marriage clause in Bill C-23 will block any effort on the part of the courts to extend marriage rights to lesbian and gay couples. Supporters of equal marriage rights for all couples point to the fact that any marriage bar violates the equality guarantees of the *Canadian Charter of Rights and Freedoms*. To date, two governments have taken the position that the only legal obstacle to equal marriage rights is the federal common law, and have initiated court proceedings to seek a declaration that they can legitimately issue marriage licences to lesbian and gay couples.

The significance of the marriage bar to this study is that the right to marry is one of the many "benefits" that have been withheld from lesbian and gay couples in Bill C-23. If the justification for extending all the most costly burdens and penalties in both tax and transfer programs to lesbian and gay couples is that "equality" carries with it both rights and responsibilities, then continued denial of marriage rights makes it appear extremely unfair to impose those full burdens and penalties on queer couples while they continue to await full equality.

On a practical level, continued federal denial of marriage rights has a cascade effect. It blocks provincial/territorial governments from extending equality in this area even when they believe it to be constitutionally mandated. Lesbian and gay couples cannot take full advantage of the extension, to them, of spousal treatment in the *Income Tax Act*, because even if they were to engage in property or other transactions, to which rollover treatment applies for married couples, they cannot gain access to the status of "married" that qualifies these transactions for tax-exempt or tax-deferred status. Last, many of the tax benefits now lost to lesbian and gay couples carry a provincial increment where, as in most provinces, provincial income tax liability is calculated as a fraction of federal income tax liability. This results in further magnification of the costs of equality at the same time that the full benefits of equality continue to be withheld.

Tax/Transfer Penalties Compounded

Bill C-23 has a flow-through effect on provincial income tax law that increases the costs and penalties of relationship recognition to queer couples. This is a very significant effect. The provincial costs to lesbian and gay couples of relationship recognition are nearly as large as the increased costs and burdens that can be predicted at the federal level.

For example, New Brunswick provincial law does not recognize lesbian and gay couples. Whether the issue is continuation of residential tenancy rights after relationship breakdown or the right to make an application for support, exemption from vehicle transfer taxes, or the right to combine or take each other's last names, lesbian and gay couples are treated as if they were complete strangers to each other for legal purposes.

However, a lesbian or gay couple living in New Brunswick will be treated as if they were spouses for purposes of calculating federal income tax liability. Their provincial income tax liability would be based on the federal amount payable. Continuing the example, if one of the partners was a single parent deemed to be a common-law partner by virtue of cohabitation for 12 months under Bill C-23, then that partner would lose the federal equivalent-to-spouse credit of $972. The partner would incur a further tax penalty in the form of additional provincial tax payable. The provincial penalty would be calculated by looking at how much additional provincial tax would have to be paid because of the loss of the federal income tax benefit.

Provincial taxes in New Brunswick are calculated at the rate of 58.5 percent of federal taxes payable for 2000. If federal tax liability increases by $972 due to the loss of a federal tax benefit, then the provincial tax on that lost benefit would be $972 x 0.585 = $569. Thus, the total cost of relationship recognition to such an individual would be $1,541 on a combined federal and provincial level.

It is well known that the tax-on-tax nature of provincial income tax liability magnifies the value of federal tax benefits. What is less obvious is that every time an income tax benefit is lost at the federal level, provincial income taxation magnifies the amount that is lost.

Provincial income tax provisions do not all operate in this way. As Table B-9 indicates, some lesbian and gay couples will actually receive slightly larger non-refundable provincial tax

credits as the result of relationship recognition. These increases are in the order of $0.5 million for all couples in all provinces.

However, these slight increases are massively offset by reductions in refundable provincial tax credits. Table B-8 indicates that these losses are in the order of $56 million to $72 million for 2000. As tabulated in Table B-10, additional losses from lost provincial tax reductions in the order of $0.4 million to $0.5 million can be expected as well. They will affect male and female pairs roughly equally. However, as indicated in Table B-16, these lost provincial tax credits will strike the lowest-income couples most heavily, and will have negligible effect—if any—on higher-income couples.

In sum, continuing to incorporate federal income tax law into provincial income tax law when provincial general law does not recognize lesbian and gay couples at all has two burdensome effects: it magnifies the costs of relationship recognition at the federal and provincial levels, and continues to withhold even bare legal equality from lesbian and gay couples.

To use the language of the Charter of Rights, it does not appear to be "demonstrably justifiable" to extend the full burdens and responsibilities of relationship recognition to a long-despised class of couples without, at the same time, extending the full benefits that go with relationship recognition to that class of couples. It is possible that as the federal–provincial/territorial tax collection agreement is restructured to give provinces more control over the definition of the tax base and the criteria surrounding tax benefits and rates, the provinces may cease to flow all federal-level credits and penalties through in this fashion. However, the one province that has remained independent of the federal tax collection process—Quebec—has never completely eliminated similar types of credits and penalties, and it would be surprising if other provinces did either. It is more likely that provinces that do not want to recognize lesbian and gay relationships any more than they have to would define credit provisions independently so they could deny them to lesbian and gay taxpayers.

Conclusions

Bill C-23 recognizes lesbian and gay relationships by including them in a new class known as "common-law partners" along with heterosexual conjugal cohabitants. It then extends spousal treatment to those couples in this new class. This results in the creation of some new rights and benefits that have quantifiable value, and others that have either intangible or non-quantifiable value.

However, Bill C-23 does not extend full spousal treatment to these common-law partners. Nor does it fully equalize the status of heterosexual, lesbian or gay common-law partners. Most important, heterosexual cohabitants can marry if they choose, giving them access to all remaining rights and responsibilities of married couples. Lesbian and gay couples cannot.

Although lesbian and gay couples are denied full equality with either heterosexual cohabitants or married couples, they bear all the same responsibilities and costs assigned to those couples throughout federal law. These costs and penalties are of much greater value than the small

benefits that flow from federal relationship recognition. In the aggregate, they are on the level of some $89 million to $140 million for 2000, depending on what assumptions are made.

The distribution of these costs and penalties flowing from relationship recognition is not neutral. Lesbian women, couples with children (which tend overwhelmingly to be lesbian couples rather than gay) and low-income couples bear the largest penalties and incur the highest costs flowing from relationship recognition. This is the direct result of the long-standing practice in federal fiscal policy of tightly limiting the cost of income support and child-focussed benefits by using low-income cutoffs, single-parent rules and other devices.

These penalties and costs have been shown to have a disparate negative impact on women as a class quite apart from issues relating to sexuality. What Bill C-23 has accomplished is to extend this disparate negative impact to lesbian and gay couples, who are also, as the result of sexuality discrimination or gender plus sexuality discrimination, concentrated in low-income classes. It can be predicted that this negative disparate impact will extend to all couples affected by discrimination on the basis of race, age, disability, and/or gender and sexuality.

These aggregate effects call into question both the manner in which relationship recognition is being carried out at the federal level and the motivations of those who have participated in this process. In contrast with the long-term process during which heterosexual cohabitants came to be recognized in federal law, in which some of the benefits of relationship recognition were extended long before most of the costs and penalties flowing from recognition were extended, lesbian and gay couples face a different situation. They must continue to struggle politically, and in their personal life, for the bare necessities of juridical existence at the federal level—the right to sponsor their partners for immigration purposes, the right to equal age of consent laws—and for all forms of relationship recognition in the majority of provinces/territories. Yet, they have already been required to start paying, since January 2001, the same price for partial equality that heterosexual couples pay for full and complete equality.

This asymmetrical pattern of relationship recognition is itself discriminatory.

4. POLICY RECOMMENDATIONS

This study has undertaken an investigation into the impact of relationship recognition on lesbian women. Because important court decisions, federal and provincial proposals, and new legislation were all released in quick succession while this study was being carried out, they and similar developments in other countries have formed the focus for the analysis. In particular, the speedy enactment of federal Bill C-23 in 2000 has made it urgent to assess its impact—along with judicial decisions and other new statutes—on lesbian women and gay men.

The issues that have framed this study have been closely linked to the here and now. Due largely to the strong ruling on discrimination on the basis of sexuality in the Supreme Court of Canada decision in *M.* v. *H.*, it is becoming more acceptable and more urgent to talk about how existing legal rights and responsibilities should be extended to lesbian and gay couples. While many lesbian, gay, bisexual, transgendered, transsexual and two-spirited people continue to be firmly of the view that relationships do not have to have legal status or bear legal rights or responsibilities to have value or to function effectively, the option of non-recognition has not been considered in this study. Nor have the policy issues posed by adult relationships involving three or more persons. That is another issue that needs to be considered carefully.

Instead, this study has taken, as its parameters, the options for relationship recognition that have been on the table in one way or another, either in litigation or in policy recommendations. It has attempted to identify those features that are of benefit or concern to lesbian women. While these options cover quite a range of approaches, theoretical options such as adult communalism, abolition of marriage or withdrawal of the state from the regulation of adult relationships have not been considered. The reason for this is simply that with so much discrimination built into existing political initiatives, it seems unlikely that more visionary approaches to the nexus between law and lesbian relationships will result in more equitable outcomes than do existing initiatives.

This study has not considered the impact of new forms of relationship recognition on lesbian women alone. Lesbian women and gay men share many common experiences of discrimination, erasure and marginalization. As the data generated for this study have demonstrated, lesbian women and gay men share a common experience of economic disadvantage, and now face the sudden onslaught of the substantial financial costs of relationship recognition. Where there are differences in the impact of relationship provisions on lesbian women as distinguished from gay men, those are discussed, but their commonalities are identified as well.

Four main conclusions have been reached in this study. They shape the recommendations made in this chapter.

- There is a serious problem with obtaining data relevant to the lives of lesbian women and gay men, both as individuals and as members of couples and families.

- Lesbian women, gay men, lesbian and gay couples are disproportionately disadvantaged by relatively low incomes. This disadvantage is exacerbated for lesbian couples

particularly, and for any couples additionally affected by race, age, disability and/or family responsibilities.

- Relationship recognition statutes invariably withhold some benefits and provisions from lesbian and gay couples. This is discriminatory.

- Relationship recognition statutes tend to extend all the most costly burdens and responsibilities to lesbian and gay couples. This is also discriminatory.

In addition to the specific policy recommendations that flow from these findings, four general policy conclusions help form a basis for formulating less discriminatory policy in the area of relationship recognition.

- The high costs of relationship recognition to low-income couples can be moderated by moving away from the use of the couple as the basic unit of tax and expenditure policy and toward the use of the individual.

- As adult relationships become more diverse, government subsidies for adult economic dependence should be replaced with tax or direct benefits that promote equal access to fair wages.

- Existing inequities arising from some types of relationship-based provisions can best be eliminated by expanding eligibility for benefits to those in non-conjugal relationships.

- Depending on the type of policy issue in question, it is not necessary for all relationship-based provisions to apply to all classes of relationships.

Policy options relevant to these general findings and policy conclusions are discussed in more detail below, together with concrete proposals for further reform.

Development of Statistical Data

One core problem in a study of this kind or in attempting to formulate responsible and appropriate policy relating to lesbian women and gay men is that after having been invisible in law and policy until the last few years, there is no data on this sector of the population. While including lesbian and gay couples in the 2001 census is a step in the right direction, this will solve only part of the problem. Continuing to exclude issues relating to sexuality or sexual identity from statistical instruments will make it impossible to assess the full range of implications of relationship recognition on sexual minorities.

Lesbian women and gay men who cohabit are not the only queers whose needs and role in Canadian society are important. Until the data routinely collected in relation to gender, age, income, race, ethnic origin, disability, family and household composition, education and other demographic indicators are available to inform policy decisions relating to people who identify as lesbian, gay, bisexual, transsexual, transgender or two-spirited, governments cannot exercise responsible authority in this area of life.

Recommendation 1
All federal statistical survey and census instruments, as well as all other data-collecting officials or agencies, should collect and report full demographic data on lesbian, gay, bisexual, transsexual, transgender and two-spirited relationships, couples, households and their families.

Recommendation 2
As federal data on lesbian, gay, bisexual, transsexual, transgender and two-spirited individuals, and family relationships are tested and developed, interim results should be made available to non-governmental researchers through the federal government's Data Liberation Initiative, making it available without cost through depository libraries.

Eradicating the Heterosexual Presumption

Canadian legal history has revealed that the only way to reverse deeply ingrained presumptions that form the foundation of legal policy is for the courts to issue declarations eradicating those presumptions. Legislation remains a poor and partial method of solving problems of fundamental jurisprudence.

This is demonstrated by the way in which the common-law presumption that married women lacked full adult legal capacity was eventually abolished in Canada. The Privy Council declared in the Persons case that the gender-neutral term "person" had to be read as if it included women. This reversed the long-standing masculinist presumption that gender-neutral words like "person" have to be read to exclude women, and replaced it with a gender-neutral presumption in which the starting point for reading legislation is that it presumptively includes women.

All existing legislation relating to lesbian and gay couples reflects a similar heterosexual presumption. Legislative classifications and judicial decisions have proceeded for so long on the assumption that references to couples in legislation or common law include only heterosexual couples that Canadian law exhibits a fundamental heterosexual presumption.

Only the courts can eradicate the heterosexual presumption. This was achieved at a substantive level in *M.* v. *H.* when the Supreme Court of Canada concluded that the extended "opposite-sex" definition of spouse violates section 15(1) of the Charter. However, when the Supreme Court was persuaded that the Ontario government should be given the freedom to structure its own non-discriminatory support provisions, it left the door open for that government and all other governments to continue to legislate against the backdrop of the continuing heterosexual presumption.

Methodologically, Bill C-23—along with all other relationship recognition legislation—continues to vitalize the heterosexual presumption by creating new and further legislative classifications to which lesbian and gay couples are assigned and which entitle them to only those benefits and rights selected by the government of the day. In addition, history has now demonstrated that left to the pressures of prejudice and intolerance, legislatures cannot be

counted on to enact non-discriminatory remedies for the discrimination they created in the first place.

The only way to eradicate fully the heterosexual presumption is for the courts to abolish it through the declaratory powers of the court.

Even if interpretation legislation were to be adopted to achieve the same result, that would not affect the common law nor the interpretation of fundamental constitutional provisions. Nor would it place repeal of such legislation beyond the reach of the government of the day.

Recommendation 3
The federal government should bring a reference to the Supreme Court of Canada seeking a declaration that, for purposes of all law and policy within federal jurisdiction, lesbian, gay, bisexual, transgendered, transsexual and two-spirited individuals and relationships, and their children, are included in all references to individuals, relationships, children and other relevant terms. The federal government should seek to join as many provinces in this reference as are willing.

Recommendation 4
This principle should be reflected in amendments to the *Interpretation Act* that declare that all references to terms connoting individuals, relationships or children should be read as including lesbian, gay, bisexual, transgendered, transsexual and two-spirited individuals and relationships, and their children unless expressly stated to the contrary.

Recommendation 5
The federal government should repeal the marriage clause in Bill C-23 and rescind the 1998 marriage motion immediately.

Non-Discriminatory Relationship Recognition Legislation

Simply including couples of the same sex in some federal statutes has not eliminated discrimination in federal relationship legislation. Non-married heterosexual couples continue to be denied some of the rights and benefits assigned by virtue of marriage to married couples. Lesbian and gay couples continue to be denied both the right to marry and some of the rights and benefits assigned to married couples and some available to heterosexual cohabitants.

Non-discriminatory relationship legislation would contain two elements: it would extend full access to marriage to all couples without regard to sexual identity, gender identity or legal sex, and it would simultaneously extend the full benefits associated with long-term cohabitation to all couples without any form of discrimination.

In particular, all legislative classifications that differentiate on any basis, other than cohabitation markers or marriage, should be repealed to eliminate the tendency in this area to create separate, but only somewhat equivalent, classifications from federal law.

Recommendation 6
All couples should be given access to marriage in federal marriage legislation.

Recommendation 7
All couples should be given the choice between formal marriage or legally recognized cohabitation.

Recommendation 8
All the rights and incidents applying to married couples should be extended to all couples who marry without any distinctions as to classification, form of union, registration, reporting or legal effects.

Recommendation 9
All the rights and incidents applying to legally recognized cohabitants should be extended to all couples who satisfy the criteria without any distinctions as to sexuality or sexual identity.

Eliminate Relationship Penalties

The federal government has developed its relationship policies almost by rote instead of by careful consideration of the needs of married and unmarried couples. The limited recommendations made in the *Report of the Royal Commission on the Status of Women in Canada* (1970) in relation to the exclusion of common-law wives from some federal benefit programs have led to gradual and largely unquestioning extensions of spousal status to non-married cohabitants.

In the first extension, opposite-sex cohabitants were deemed “spouses” for purposes of federal law in increasing numbers of statutes, regulations and policies. At the end of this period, which ended in 1993 with the full extension of income tax benefits and penalties to heterosexual cohabitants, large numbers of single mothers and low-income couples unexpectedly lost access to important low-income and child-related federal benefits.

In the second extension, lesbian and gay couples have been deemed in Bill C-23 to be “common-law partners” and given spousal treatment for less than all benefit provisions but for all penalty provisions. Large numbers of lesbian and gay couples now face the unexpected loss of access to important low-income and child-related federal benefits, in addition to provincial benefits that are calculated on the federal income tax base.

The asymmetrical extension of relationship penalties to lesbian and gay couples is a form of structural discrimination in federal law. Relationship penalties that were initially constructed around the ideal of the single-income couple headed by the male have now been extended to all couples in Canada. This allocation of relationship penalties disparately affects women (who as a class have far lower incomes than men), lesbian and gay couples (who are disadvantaged in terms of incomes) and couples in which one or both partners are disadvantaged by virtue of race, ethnic origin, a disability and/or gender.

Law reform patterns in other countries that have recognized increasingly diverse relationships and families demonstrate that the continued imposition of couple-based income criteria, the tax on marriage, deemed non-arm's-length provisions and other income-targeting mechanisms are inconsistent with the elimination of poverty and the allocation of income tax liability and government benefits on a progressive or even a neutral basis.

The solution adopted in tax and benefit policy has been to move away from joint instruments of taxation and to adopt the individual as the tax and benefit unit. This has the combined effects of minimizing the regressive impact of joint taxation at the lowest income levels and of eliminating non-neutralities between recognized and non-recognized couples. It is also consistent with the recognition of women as fully self-dependent and autonomous adults.

Recommendation 10
Joint taxation and benefit provisions should be replaced with tax and benefit provisions that treat the individual as the basic unit of legal policy. Provisions or penalties that disparately affect low-income individuals, couples or parents should be carefully restructured to eliminate these effects.

Recommendation 11
Government benefits that are available only to those who support dependent, able-bodied adults should be repealed.

Recommendation 12
All conflict-of-interest criteria should be revised to make the existence of conflict a matter of factual non-arm's-length dealing instead of a matter of legal presumption, even if such presumptions are rebuttable.

Recognition of Non-Conjugal Relationships

Non-conjugal relationships are becoming increasingly recognized in legal policy. Indeed, in Canada, dozens of income tax provisions recognize a wide range of non-conjugal familial relationships in various benefit provisions, as do growing numbers of private employment benefit plans.

As this study has suggested, extension of legal recognition to new classes of relationships by rote and without carefully fitting the scope of application of a provision to the class to be affected can have two undesirable effects. First, it can expand the number of provisions that tend to create government subsidies for adult economic dependency. This runs counter to overall legal policy at this time in Canada. Second, it can expand the number and types of relationships that actually fall within the application of penalties and burdens.

Expansion of the category of relationships to which federal legislation applies must be undertaken with great care. For example, extension of the equivalent-to-married credit to parents of a taxpayer has already increased the risk to low-income women and men, by making that credit available to their children, of becoming economically and functionally dependent. Structuring that benefit as a direct subsidy to parents who are on the economic

margins rather than as a type of caregiver credit, largely for women, would reduce the pressure to substitute non-waged domestic work on the part of the parent in exchange for being supported by a child.

Automatic extension of spousal treatment in benefit provisions to siblings, parent–child pairs, companions or other types of couples would also subject such pairs to the tax/transfer penalties of low-income cutoffs, benefit disqualifications, couple-based benefits and the tax on marriage. As the data on same-sex unrelated adult pairs in the microsimulations used in this study indicate, this sector of the adult population is characterized by low incomes and heavy reliance on the tax/transfer system for transfer and benefit incomes that make subsistence existence possible.

Automatic extension of spousal treatment to non-conjugal relationships could also open the door to unintended tax avoidance. For example, if tax-deferral rollovers are made available to a wider class of non-familial relationships, such transactions could be used as a way to avoid recognition of capital gains or income in transactions that would otherwise be considered ordinary market transactions.

On the other hand, employment benefits (e.g., health-related, survivor and other benefits), especially as enhanced by the exemption of such benefits from income taxation, are subsidized by single workers and taxpayers. Extension of such benefits and tax exemptions to non-conjugal relationships would represent a second-best solution to the current disparity in this area. In the alternative, extending a small refundable income tax credit to single taxpayers would equalize this disparity.

Recommendation 13
Tax and direct subsidies for the support of economically dependent, able-bodied adults should not be extended to non-conjugal relationships.

Recommendation 14
Tax and direct subsidies relating to sharing or redistributing income within family groupings should not be extended to non-familial and non-conjugal relationships.

Recommendation 15
Tax and benefit provisions that inferentially impose penalties on low-income couples should not be extended to non-conjugal or non-familial relationships.

Recommendation 16
Extension of employee benefits and income tax exemptions for employee benefits to non-conjugal and/or non-familial relationships would equalize discrimination on the basis of single status in employment standards and income taxation.

Asymmetry in Relationship Provisions

Existing relationship recognition policy at the federal level is, in fact, not completely symmetrical. Federal members of Parliament may take a travelling companion with them on government business, while federal employees may make survivor elections under their employment pensions only in relation to their conjugal spouse. This asymmetry is essential to maintaining substantive connection and balance between formal equality demands and the delivery of substantive equality.

Such non-neutralities should be created consistent only with the principles of equity, substantive equality, inclusiveness and the progressive incidence of taxes and penalties as measured by genuine economic capacity to bear costs or lose benefits.

Recommendation 17
Differences in the substantive treatment of different types of relationships are appropriate when required by the subject matter or the impact of the benefit or penalty in question.

Recommendation 18
Such differences should be shaped consistent with the requirements of horizontal equity, substantive equality and progressivity in the impact of the total tax/transfer system on low-income and disadvantaged groups of people.

Ongoing Commission Supervision

In jurisdictions that have begun to move into the new and challenging area of legally recognizing lesbian, gay and other relationships on a spousal or quasi-spousal basis, governments have accepted responsibility for supervising the transition into this area of government regulation by establishing a commission or government department responsible for collecting data on, reporting on and recommending further law reform initiatives.

In addition, the creation of new classes of legally recognized relationships without extending express jurisdiction over discrimination relating to those relationships to the federal human rights commission creates the risk that the ongoing effects of prejudice and homophobia cannot be addressed once Bill C-23 has come fully into effect.

Recommendation 19
The federal government should create a commission on relationship recognition to stand for at least five years and charged with collecting data on, reporting on and making recommendations for further law reform to Parliament in relation to Bill C-23 and related legislation, litigation and policy.

Recommendation 20
The federal *Human Rights Act* should be amended to confirm that it has jurisdiction to accept under the heading of “marital status” complaints brought on the basis of discrimination against couples in which one or both members are lesbian, gay, bisexual, transgendered, transsexual, two-spirited or of the same legal sex.

APPENDIX A: RELATIONSHIP RIGHTS AND RESPONSIBILITIES IN SELECTED JURISDICTIONS

Table A-1. Rights and Obligations of Married Persons, Opposite-Sex Cohabitants, and Lesbian and Gay Couples, Ontario, Before and After Bill 5

	Married Couples	**Opposite-Sex Cohabitants**	**Lesbian/Gay Cohabitants**	**Bill 167 (spouse)**	**Bill 5 (same-sex partner)**
Family Law					
Capacity to marry	X	X			
Emergency consent	X	medical	medical		
Matrimonial home	X				
Share of family property	X				
Marr/cohab agreements	X	X		X	X
Alimony	X	X	*M.* v. *H.*	X	X
Equitable remedies for division of property	not needed	equity	equity		
Child support	X	X	X	X	X
Filiation	X	X	parent	not natural parent	
Custody/access	X	X	X		X
Joint adoption	X	X	X		
Support obligations	X	X			X
Joint annuities	X	X			
Insurable interest	X	X	case law		X
Debtor protection	X	X			X
Human Rights					
Sexual orientation - individual rights			X		
Included in protection for marital status	X	X	limited		
Relationship status protected in some other way				X	same-sex partner status
Pension rights protected	X	X	*Dwyer*		X
Social benefits protected	X				

Table A-1 (Cont'd)

	Married Couples	**Opposite-Sex Cohabitants**	**Lesbian/Gay Cohabitants**	**Bill 167 (spouse)**	**Bill 5 (same-sex partner)**
Public Law					
Health services	X	X	X	X	X
Access to artific. insemin.	X	X	X		
Worker protections	X	?			X
Legal aid/courts	X	X			
Taxation	X	X		prov only	
Vehicle trans. tax exemption	X	X	X		
Banking, investing	X				X
Auto insurance	X	X	X		X
Public employee benefits	X	X	some		X
Public employee pension	X	X	some		X
Publicly funded pensions	X	X	X		X
Low income supports	X	X			X
Family benefits	X	X			X
Student assistance	X	X			X
Miscellaneous					
Maint. Order enforce	X				X
Info. Re spouse's death	X	X			X
Electoral enumeration	X	X			X
Conflict of interest	X	X			X
Disclosure of conflict	X	X			X
Anti-avoidance rules	X	X			X

Table A-2. Rights and Obligations of Married Persons, Opposite-Sex Cohabitants, and Lesbian and Gay Couples, Quebec, Civil Code and Bill 32

	Married Couples	Opposite-Sex Cohabitants	Lesbian and Gay Cohabitants
Civil Code			
Capacity to marry	X	X	
Marital obligations	X		
Emergency consent	X	medical	medical
Matrimonial home	X		
Share of family prop.	X		
Elect prop. regime	X		
Right to change regime	X		
Default regime	X		
Alimony	X		
Equitable remedies for division of property	not needed		
Child support	X	X	
Filiation	X	X	
Joint adoption	X	X	X
Succession rights	X		
Annuity reversions	X		
Joint annuities	X	X	
Debtor protection	X		
Irrev. benefic. des.	X		
Jurisdiction	X		
Charter of Human Rights			
Sexual orientation - individual rights			X
Included in protection for marital status	X		
Relat. status protected in some other way	X	X	
Pension rights protected	X	X	
Social benefits protected	X	X	
Added by Bill 32			
Health services	X	X	X
Workplace standards	X	X	X
Legal aid/courts	X	X	X
Taxation	X	X	X
Banking, investing	X	X	X
Auto insurance	X	X	X
Public employee benefits	X	X	X
Public employee pension	X	X	X
Quebec Pension Plan	X	X	X
Low-income supports	X	X	X
Family benefits	X	X	X
Student assistance	X	X	X
Immigration	X	X	X

Table A-2 (cont'd)

Excluded from Bill 32			
Maintenance order enforcement	X		
James Bay Aboriginal rights	X	X	?
Aboriginal land rights	X	X	?
Electoral enumeration	X	X	?
Info. re sps. death	X	X	?
Substituted service	X	X	?
Conflict of interest	X	some	?
Disclosure of conflct	X	some	?
Anti-avoidance rules	X	X	?

Table A-3. Rights and Obligations of Married Persons, Opposite-Sex Cohabitants, and Lesbian and Gay Couples, British Columbia

	Married Couples	Opposite-Sex Cohabitants	Same-Sex Cohabitants
Family Law			
Capacity to marry	X	X	
Emergency consent	X	X	X
Matrimonial home	X		
Share of family prop.	X		
Marr/cohab agreements	X	X	X
Alimony	X	depends on facts	depends on facts
Equitable remedies for division of property	not needed	depends on facts	depends on facts
Child support	X	X	X
Filiation	X	X	Step-parent
Custody/access	X	X	X
Joint adoption	X	X	X
Support obligations	X	only to partner or children	only to partner or children
Succession rights	X		
Joint annuities	X	X	X
Insurable interest (life only)	X	X	X
Debtor protection	X		
Jurisdiction	X	X	X
Human Rights			
Sexual orientation-individual rights			X
Included in protection for marital status	X		
Relat. status protected in some other way	X	X	case law
Pension rights protected	X		
Public Law			
Health services	X	X	X
Access to artific. insemin.	X	X	X
Worker protections	X	X	X
Legal aid/courts	X	X	X
Taxation	X	X	X
Banking, investing	X	X	X
Auto insurance	X	case law	unclear
Public employee benefits	X	X	X
Public employee pension	X	X	X
Private pension plans	X	X	X
Low income supports	X	X	X
Family benefits	X	X	X
Student assistance	X	X	X

Table A-4. Rights and Obligations of Married Persons, Opposite-Sex Cohabitants, and Lesbian and Gay Couples, Canada, Before and After Bill C-23

	Married Couples	**Opposite-Sex Cohabitants**	**Lesbian/Gay Cohabitants**	**Bill C-23**
Family Law				
Capacity to marry	X	X		
Division of pension	X	X		X
Filiation	X	*de facto* parent	*de facto* parent	*de facto* parent
Debtor protection	X	X		X
Child support guidelines	X	X		X
Human Rights Law				
Sexual orientation - individual rights			X	
Included in protection for marital status	X	X	yes, according to some tribunal decisions	
Relationship status protection in some other way	not necessary	not necessary		
Pension rights protected	X	X		
Social benefits protected	X	X		
Public Law				
Unemployment insurance	X	X		X
Tax benefits	X	X	health, pension survivor options	X
Tax penalties	X	X		X
Banking, invsting	X	X		X
Public sector employee benefits	X	X	X	X
Public sector pension rights	X	X	X	X
Canada Pension Plan survivor benefits	X	X	mixed tribunal rulings	X
Low income supports	X	X		X
Immigration	X	X	discretionary	
Other				
Aboriginal legislation	X			
Evidence not compellable against spouse	X			
Electoral enumeration	X	X		X
Conflict of interest	X	some	if factual conflict, in some contexts	X
Disclosure of conflict	X	some	if factual conflict, in some contexts	X
Anti-avoidance measures	X	X	if factually not dealing at arm's length	X
Census enumeration	X	X	in 2001	

Table A-5. Rights and Obligations of Married Persons, Opposite-Sex Cohabitants, and Lesbian and Gay Couples under B.C. Law Institute Proposals

	Married couples	Opposite-Sex Cohabitants	Lesbian/Gay Cohabitants	Registered Domestic Partners	Unregistered Domestic Partners
Family Law					
Capacity to marry	X	X		opposite sex only	opposite sex only
Marital obligations	X			X	X
Emergency consent	X			X	X
Matrimonial home	X	X >10 yrs	X >10 yrs	X	X < 3rd parties
Share of family property	X	X >10 yrs	X >10 yrs	X	X < 3rd parties
Elect prop. regime	X	cohab agreement	cohab agreement	X	X < 3rd parties
Marr/cohab agreements	X	X	X	X	X
Default regime	X	X	X	X	X
Alimony	X	depends on facts	depends on facts	X	X
Equitable remedies for division of property	X	depends on facts	depends on facts	X	X
Child support	X	X	X	X	X
Filiation	X	X	step-parent	opposite sex: natural parent; same-sex step-parent	opposite sex: natural parent; same-sex step-parent
Custody/access					
Joint adoption	X	X	X	X	X
Support obligations	X	only to partner or children	only to partner or children	X	
Succession rights	X	depndnt relief	depndnt relief	X	?
Annuity reversions	X	?	?	X	X
Joint annuities	X	X	X	X	X
Insurable interest	X	X	X	X	X
Debtor protection	X			X	X < 3rd parties
Irrev. Benefic. Des.	?			?	X < 3rd parties
Jurisdiction	X	X	X	X	X
Human Rights					
Sexual orientation - individual rights			X	same sex only	
Included in protection for marital status	X			X	
Relationship status protected in some other way	X	X	X	X	
Pension rights protected	X	X	X	X	
Social benefits protected	X	X	X	X	

Table A-5 (cont'd)

Public Law					
Health services	X	X	X	X	
Access to artific. insemin.	X	X	X	X	X
Worker protections	X	X	X	X	X
Legal aid/courts	X	X	X	X	X
Taxation	X	X	X	X	X
Banking, investing	X	X	X	X	X
Auto insurance	X	X	X	X	X
Public employee benefits	X	X	X	X	X
Public employee pension	X	X	X	X	X
Low income supports	X	X	X	X	X
Family benefits	X	X	X	X	
Student assistance	X	X	X	X	X

APPENDIX B: DISTRIBUTIONAL IMPACT OF RECOGNIZING LESBIAN AND GAY RELATIONSHIPS UNDER BILL C-23 (fy2000)

Table B-1. Summary of Fiscal Data on Same-Sex Pairs, Tight versus Loose Screen

Selected Quantities for Households - Status Quo versus Same-Sex Couples and Change					
Year 2000 (in $ millions)					
	Tight Screen			**Loose Screen**	
	Status quo (base) $	As same-sex couples (variant) $	Change in amounts $	Status quo (base) $	As same-sex couples (variant)
Market income	7,834.6	7,834.7	0.1	8,500.2	8,500.3
All transfer income	871.6	749.6	(122.0)	1,169.9	1,023.9
Federal transfer income	354.0	288.1	65.8)	518.1	444.5
Provincial transfer income	517.6	461.4	(56.2)	651.8	579.4
All taxes	2,647.3	2,614.2	(33.1)	2,870.5	2,834.3
Federal taxes	1,705.5	1,688.6	(16.9)	1,850.7	1,832.0
Provincial taxes	941.6	925.6	(16.0)	1,019.7	1,002.3
Federal taxes less transfers	1,351.6	1,400.5	48.9	1,332.6	1,387.5
Provincial taxes less transfers	424.0	464.1	40.1	367.9	422.9
Federal transfer income	354.0	288.1	(65.8)	518.1	444.5
Total federal child benefits	23.6	11.6	(12.1)	24.5	12.0
OAS benefits	58.2	58.3	-	80.1	80.2
GIS benefits	33.2	18.2	(15.0)	50.8	33.9
Spouse’s allowance	-	-	-	-	-
Federal social assistance	-	-	-	-	-
Federal sales tax credit	60.3	23.1	(37.3)	73.0	30.3
Unemployment Insurance/ Employment Insurance benefits	10.9	10.9	-	15.8	15.8
CPP/QPP payable	114.5	114.5	-	145.7	145.8
Quebec tax abatement (refundable)	0.1	0.1	-	0.1	0.1

Table B-1 (cont'd)

	Tight Screen			Loose Screen	
	Status quo (base) $	As same-sex couples (variant) $	Change in amounts $	Status quo (base) $	As same-sex couples (variant)
Other taxable demogrants	-	-	-	-	-
Other SA or guarantees	-	-	-	-	-
Provincial family programs	1.1	1.7	0.5	1.4	1.7
Provincial social assistance	439.2	439.2	-	548.1	548.1
Refundable provincial tax credits	76.5	20.5	(56.0)	101.6	29.4
Federal taxes	1,705.5	1,688.6	(16.9)	1,850.7	1,832.0
Federal income tax payable	949.6	938.2	(11.4)	1,017.1	1,005.2
Basic federal tax	982.1	969.9	(12.2)	1,051.4	1,038.7
Federal tax reduction	-	-	-	-	-
Quebec tax abatement (applied)	31.3	30.5	(0.8)	32.9	32.1
Other federal tax credits applied (416)	3.7	3.7	-	3.7	3.7
Federal surtax	4.3	4.2	-	4.3	4.3
UIC contributions	149.4	149.5	0.1	161.8	161.9
CPP/QPP contributions	217.7	217.9	0.1	236.1	236.2
Social benefits repayments	0.1	0.1	-	0.1	0.1
Federal commodity taxes	388.3	382.9	(5.4)	435.2	428.5
Provincial taxes	941.6	925.6	(16.0)	1,019.7	1,002.3
Provincial income tax payable	568.2	557.7	(10.5)	603.1	592.5
Provincial commodity taxes	373.3	367.9	(5.4)	416.4	409.8
Disposable income	6,821.0	6,721.0	(100.0)	7,651.6	7,528.1
Consumable income	6,059.0	5,970.1	(88.8)	6,799.6	6,689.9

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-2. Same-Sex Pairs, by Gender and Income, Canada, 2000

	Gender of Couple				
Base Total Income ($)	**Male (000s)**	**Female (000s)**	**Both (000s)**	**Males (%)**	**Females (%)**
Tight Screen					
Min-20,000	14.5	5.6	20.1	15	9
20,001-30,000	13.2	11.6	24.8	14	18
30,001-40,000	12	10.4	22.3	12	16
40,001-50,000	14.6	5.9	20.5	15	9
50,001-60,000	5.8	9.2	15	6	14
60,001-75,000	14.8	9.1	23.9	15	14
75,001-100,000	11.7	8.4	20.1	12	13
100,001-Max	9.6	5.4	15	10	8
All	96.1	65.5	161.6	100	100
Loose Screen					
Min-20,000	23	10.3	33.3	20	14
20,001-30,000	15.8	12.3	28.1	14	16
30,001-40,000	14.8	12.5	27.3	13	16
40,001-50,000	16.2	6.6	22.8	14	9
50,001-60,000	8.5	10.9	19.4	7	14
60,001-75,000	15.5	9.7	25.1	13	13
75,001-100,000	12.8	8.4	21.2	11	11
100,001-Max	9.8	5.4	15.1	8	7
All	116.3	76	192.3	100	100

Source:
SPSD/M version 7.0, adjusted for 2000.

Table B-3. Gainers and Losers, by Gender

	Tight Screen			Loose Screen		
	Male	Female	Both	Male	Female	Both
Number of gainers	10,361	7,797	18,158	10,690	8,592	19,282
Number of losers	60,893	46,604	107,497	73,768	54,649	128,417
Total gains among gainers ($ millions)	7.4	6.6	14.0	7.6	7.2	14.8
Total losses among losers ($ millions)	(42.0)	(60.6)	(102.6)	(54.3)	(54.3)	(124.2)
Average gain for gainers	717	845	772	707	843	768
Average loss for losers	(689)	(1,301)	(954)	(736)	(1,278)	(967)
Average change in consumable income	(361)	(827)	(550)	(404)	(825)	(570)
Unit count	96.1	65.5	161.6	116.3	76	192.3
Distribution of households (%)	59.5	40.5	100	60.5	39.5	100
Distribution of gainers (%)	57.1	42.9	100	55.4	44.6	100
Distribution of losers (%)	56.6	43.4	100	57.4	42.6	100
Average total income – status quo ($)	54,842	52,475	53,882	50,714	49,601	50,275
Average disposable income – status quo ($)	42,656	41,565	42,214	39,845	39,681	39,780
Average consumable income – status quo ($)	38,068	36,661	37,498	35,560	35,030	35,351
Average consumable income – same-sex couples ($)	37,707	35,835	36,948	35,157	34,205	34,780

Table B-4. Married Credit, Individual versus Spousal Treatment, by Gender

Gender of Couple	Married Tax Credit Claimed - Status Quo ($ millions)	Married Tax Credit Claimed - Same-Sex Couples ($ millions)	Change in Married Tax Credit ($ millions)	Average Married Tax Credit Claimed - Status Quo ($)	Average Married Tax Credit Claimed - Same-Sex Couples ($)	Change in Average Married Tax Credit Claimed ($)	Unit Count	Distribution of Households (%)
Tight Screen								
Male	1.4	11.3	9.9	14	117	103	96.1	59.5
Female	8.4	7.9	(0.5)	129	121	(8)	65.5	40.5
Both	9.8	19.2	9.4	61	119	58	161.6	100.0
Loose Screen								
Male	1.4	14.4	13.0	12	124	112	116.3	60.5
Female	8.8	9.8	1.0	116	129	14	76	39.5
Both	10.1	24.2	14.1	53	126	73	192.3	100

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-5. GIS Benefits, Individual versus Spousal Treatment, by Gender

Gender of Couple	GIS Benefits - Status Quo ($millions)	Average GIS Benefits - Status Quo ($)	GIS Benefits - Same-Sex Couples ($ millions)	Average GIS Benefits - Same-Sex Couples ($)	Change in GIS Benefits ($ millions)	Number of GIS Recipients - Status Quo ($)	Number of GIS Recipients - Same-Sex Couples
Tight Screen							
Male	2.1	1,740	0.8	2,804	(1.3)	1,200	280
Female	31.1	3,235	17.4	2,092	(13.7)	9,630	8,340
Both	33.2	3,069	18.2	2,115	(15.0)	10,830	8,620
Loose Screen							
Male	3.0	1,546	0.8	2,804	(2.2)	1,942	280
Female	47.8	2,975	33.1	2,438	(14.8)	16,082	13,572
Both	50.8	2,821	33.9	2,445	(17.0)	18,024	13,852

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-6. GST Credit, Individual versus Spousal Treatment, by Gender

Gender of Couple	Federal Sales Tax Credit - Status Quo ($ millions)	Federal Sales Tax Credit - Same-Sex Couples ($ millions)	Change in Federal Sales Tax Credit ($)	Average Federal Sales Tax Credit - Status Quo ($)	Average Federal Sales Tax Credit - Same-Sex Couples ($)	Change in Average Federal Sales Tax Credit ($)	Unit Count (000s)	Distribution of Households (%)
Tight Screen								
Male	33.3	13.3	(20.0)	346	138	(208)	96.1	59.5
Female	27.1	9.8	(17.3)	413	150	(264)	65.5	40.5
Both	60.3	23.1	(37.3)	373	143	(231)	161.6	100.0
Loose Screen								
Male	41.3	18.0	(23.3)	355	155	(200)	116.3	60.5
Female	31.7	12.3	(19.4)	417	161	(256)	76.0	39.5
Both	73.0	30.3	(42.7)	380	158	(222)	192.3	100.0

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-7. Child Benefit, Individual versus Spousal Treatment, by Gender

Gender of Couple	Total Federal Child Benefits - Status Quo ($ millions)	Total Federal Child Benefits - Same-Sex Couples ($millions)	Change in Federal Child Benefits ($ millions)	Average Federal Child Benefits - Status Quo ($)	Average Federal Child Benefits - Same-Sex Couples ($)	Number of Recipients - Status Quo	Number of Recipients - Same-Sex Couples
Tight Screen							
Male	2.5	1.0	(1.5)	616	390	3,987	2,490
Female	21.2	10.6	(10.6)	782	457	27,104	23,151
Both	23.6	11.6	(12.1)	761	450	31,091	25,641
Loose Screen							
Male	2.5	1.0	(1.5)	616	390	3,987	2,490
Female	22.1	11.1	(11.0)	781	456	28,246	24,293
Both	24.5	12.0	(12.5)	761	450	32,233	26,783

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-8. Refundable Provincial Credits, Individual versus Spousal Treatment, by Gender

Gender of Couple	All Refundable Provincial Tax Credits - Status Quo ($ millions)	All Refundable Provincial Tax Credits - Same-Sex Couples ($ millions)	Change in All Refundable Provincial Tax Credits ($ millions)	Average Provincial Refundable Tax Credits - Status Quo ($)	Average Provincial Refundable Tax Credits - Same-Sex Couples ($)	Change in Average Provincial Refundable Tax Credits ($)
Tight Screen						
Male	42.2	10.4	(31.8)	439	108	(331)
Female	34.3	10.1	(24.2)	523	154	(369)
Both	76.5	20.5	(56.0)	473	127	(346)
Loose Screen						
Male	56.8	14.9	(41.8)	488	128	(359)
Female	44.8	14.4	(30.4)	589	190	(399)
Both	101.6	29.4	(72.2)	528	153	(375)

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-9. Non-Refundable Provincial Credits, Individual versus Spousal Treatment, by Gender

Gender of Couple	Non-Refundable Provincial Tax Credits - Status Quo ($ millions)	Non-Refundable Provincial Tax Credits - Same-Sex Couples ($ millions)	Change in Non-Refundable Provincial Tax Credits ($ millions)	Average Provincial Non-Refundable Tax Credits - Status Quo ($)	Average Provincial Non-Refundable Tax Credits - Same-Sex Couples ($)	Change in Average Provincial Non-Refundable Tax Credits
Tight Screen						
Male	2.7	3.3	0.5	29	34	6
Female	0.6	0.6	-	10	9	-
Both	3.4	3.9	0.5	21	24	3
Loose Screen						
Male	2.7	3.3	0.6	23	28	5
Female	0.5	0.5	-	6	6	-
Both	3.1	3.7	0.6	16	19	3

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-10. Provincial Tax Reduction, Individual versus Spousal Treatment, by Gender

Gender of Couple	Provincial Tax Reduction - Status Quo ($ millions)	Provincial Tax Reduction - Same-Sex Couples ($ millions)	Change in Provincial Tax Reduction ($ millions)	Average Amount - Status Quo	Average Amount - Same-Sex Couples	Change in Average Amounts
Tight Screen						
Male	2.5	1.3	(1.2)	26	13	(12)
Female	1.4	2.2	0.8	22	34	12
Both	3.9	3.5	(0.4)	24	21	(2)
Loose Screen						
Male	3.1	1.9	(1.3)	27	16	(11)
Female	2.0	2.7	0.7	26	36	10
Both	5.1	4.6	(0.5)	26	24	(3)

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-11. Gainers and Losers, by Income Group

Base Total Household Income ($)	Number of Gainers	Number of Losers	Total Gains among Gainers ($ millions)	Total Losses among Losers ($ millions)	Average Gain for Gainers ($)	Average Loss for Losers ($)	Average Change in Consumable Income ($)	Unit Count (000s)	Distribution of Households (%)	Distribution of Gainers (%)	Distribution of Losers (%)	Average Total Income - Status Quo	Average Disposable Income - Status Quo ($)	Average Consumable Income - Status Quo ($)	Average Consumable Income - as Same-Sex Couples ($)
Tight Screen															
Min-20,000	1,840	10,221	1.4	(9.5)	748	(931)	(408)	20.1	12.5	10.1	9.5	14,991	14,544	12,339	11,931
20,001-30,000	6,467	16,308	4.6	(20.1)	717	(1,235)	(625)	24.8	15.3	35.6	15.2	26,253	23,562	20,941	20,316
30,001-40,000	2,947	17,135	2.8	(19.4)	958	(1,131)	(744)	22.3	13.8	16.2	15.9	33,818	29,584	25,964	25,220
40,001-50,000	4,275	15,852	2.4	(13.1)	557	(826)	(524)	20.5	12.7	23.5	14.7	45,104	36,289	32,468	31,943
50,001-60,000	566	13,998	0.6	(13.4)	1,109	(960)	(853)	15	9.3	3.1	13	54,590	43,664	38,738	37,885
60,001-75,000	1,064	20,824	0.7	(14.1)	692	(676)	(562)	23.9	14.8	5.9	19.4	67,755	51,819	46,120	45,558
75,001-100,000	-	10,565	-	(10.0)	-	(943)	(502)	20.1	12.4	0	9.8	85,791	63,312	55,157	54,654
100,001-Max	999	2,594	1.4	(3.0)	1,438	(1,145)	(102)	15	9.3	5.5	2.4	128,227	92,184	84,152	84,049
All	18,158	107,497	14.0	(102.6)	772	(954)	(550)	161.6	100	100	100	53,882	42,214	37,498	36,948
Loose Screen															
Min-20,000	2,054	16,084	1.8	(17.7)	867	(1,097)	(480)	33.3	17.3	10.7	12.5	14,411	14,033	12,043	11,562
20,001-30,000	6,796	18,620	4.8	(21.7)	701	(1,165)	(602)	28.1	14.6	35.2	14.5	25,964	23,461	20,876	20,274
30,001-40,000	2,947	21,774	2.8	(25.0)	958	(1,149)	(816)	27.3	14.2	15.3	17	33,985	29,862	26,307	25,491
40,001-50,000	4,275	18,206	2.4	(17.1)	557	(940)	(646)	22.8	11.9	22.2	14.2	44,823	36,408	32,722	32,076
50,001-60,000	1,147	17,364	0.9	(14.8)	761	(850)	(712)	19.4	10.1	5.9	13.5	54,387	43,609	38,720	38,008
60,001-75,000	1,064	22,066	0.7	(14.5)	692	(657)	(551)	25.1	13.1	5.5	17.2	67,686	51,690	46,048	45,497
75,001-100,000	-	11,709	-	(10.5)	-	(894)	(499)	21.2	11	0	9.1	85,567	63,167	54,986	54,487
100,001-Max	999	2,594	1.4	(3.0)	1,438	(1,145)	(101)	15.1	7.9	5.2	2	128,218	92,205	84,151	84,049
All	19,282	128,417	14.8	(124.2)	768	(967)	(570)	192.3	100	100	100	50,275	39,780	35,351	34,780

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-12. Average Income and Transfer Amounts, Individual versus Spousal Treatment, by Income Groups

Base Total Income ($)	Average Total Income - Status Quo ($)	Average Total Income – Same-Sex Couples ($)	Average Market Income - Status Quo ($)	Average Market Income - Same-Sex Couples ($)	Average Transfer Income - Status Quo ($)	Average Transfer Income – Same-Sex Couples ($)	Average Taxable Income - Status Quo ($)	Average Taxable Income – Same-Sex Couples ($)	Average Total Taxes - Status Quo ($)	Average Total Taxes – Same-Sex Couples ($)	Average Disposable Income - Status Quo ($)	Average Disposable Income - Same-Sex Couples ($)	Average Consumable Income - Status Quo ($)
Tight Screen													
Min-20,000	14,991	14,428	7,171	7,171	7,820	7,257	6,697	6,698	2,652	2,498	14,544	14,083	12,339
20,001-30,000	26,253	25,165	17,485	17,486	8,768	7,679	18,513	18,514	5,312	4,848	23,562	22,858	20,941
30,001-40,000	33,818	32,756	23,781	23,782	10,036	8,974	24,709	24,710	7,854	7,536	29,584	28,728	25,964
40,001-50,000	45,104	44,155	41,413	41,414	3,690	2,742	38,587	38,588	12,636	12,212	36,289	35,708	32,468
50,001-60,000	54,590	53,681	51,329	51,330	3,260	2,351	47,922	47,922	15,851	15,796	43,664	42,697	38,738
60,001-75,000	67,755	67,104	64,966	64,967	2,788	2,137	59,063	59,064	21,634	21,546	51,819	51,199	46,120
75,001-100,000	85,791	85,401	82,764	82,764	3,027	2,637	77,067	77,067	30,634	30,746	63,312	62,752	55,157
100,001-Max	128,227	127,985	126,801	126,801	1,427	1,184	111,029	111,029	44,075	43,936	92,184	92,064	84,152
All	53,882	53,127	48,488	48,488	5,394	4,639	44,999	45,000	16,384	16,179	42,214	41,595	37,498
Loose Screen													
Min-20,000	14,411	13,800	7,360	7,361	7,050	6,439	7,140	7,141	2,368	2,238	14,033	13,484	12,043
20,001-30,000	25,964	24,938	16,811	16,812	9,153	8,126	17,995	17,996	5,089	4,664	23,461	22,784	20,876
30,001-40,000	33,985	32,899	23,361	23,362	10,624	9,537	24,840	24,841	7,679	7,409	29,862	28,932	26,307
40,001-50,000	44,823	43,783	38,647	38,647	6,176	5,136	38,535	38,536	12,101	11,707	36,408	35,698	32,722
50,001-60,000	54,387	53,592	50,549	50,550	3,837	3,042	47,174	47,175	15,667	15,584	43,609	42,801	38,720
60,001-75,000	67,686	67,048	64,503	64,504	3,182	2,544	58,995	58,996	21,637	21,551	51,690	51,082	46,048
75,001-100,000	85,567	85,170	82,181	82,181	3,385	2,989	76,921	76,921	30,580	30,683	63,167	62,610	54,986
100,001-Max	128,218	127,978	126,807	126,807	1,411	1,171	111,052	111,052	44,067	43,929	92,205	92,087	84,151
All	50,275	49,516	44,192	44,192	6,082	5,323	41,643	41,643	14,924	14,735	39,780	39,138	35,351

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-13. Married Credit, Individual versus Spousal Treatment, by Income Group

Base Total Income ($)	Married Tax Credit Claimed - Status Quo ($ millions)	Married Tax Credit Claimed - Same-Sex Couples ($ millions)	Change in Married Tax Credit Claimed ($ millions)	Average Married Tax Credit Claimed - Status Quo	Average Married Tax Credit Claimed - as Same-Sex Couples	Change in Average Married Tax Credit Claimed	Unit Count (000s)
Tight Screen							
Min-20,000	0.4	4.7	4.2	21	231	210	20.1
20,001-30,000	1.3	4.8	3.6	51	195	144	24.8
30,001-40,000	2.0	3.4	1.3	91	151	59	22.3
40,001-50,000	0.4	3.2	2.8	21	158	137	20.5
50,001-60,000	1.4	0.6	(0.8)	97	42	(55)	15
60,001-75,000	1.0	0.9	(0.1)	43	39	(5)	23.9
75,001-100,000	2.2	-	(2.1)	109	2	(106)	20.1
100,001-Max	1.0	1.5	0.5	65	99	35	15
All	9.8	19.2	9.4	61	119	58	161.6
Loose Screen							
Min-20,000	0.4	9.4	9.0	13	283	270	33.3
20,001-30,000	1.3	5.0	3.7	45	178	132	28.1
30,001-40,000	2.3	3.4	1.1	83	124	41	27.3
40,001-50,000	0.6	3.2	2.7	24	141	117	22.8
50,001-60,000	1.4	0.7	(0.7)	75	38	(37)	19.4
60,001-75,000	1.0	0.9	(0.1)	41	37	(4)	25.1
75,001-100,000	2.2	-	(2.1)	103	2	(101)	21.2
100,001-Max	1.0	1.5	0.5	64	98	34	15.1
All	10.1	24.2	14.1	53	126	73	192.3

Source:

SPSD/M version 7.0, adjusted to 2000.

Table B-14. GIS Benefits, Individual versus Spousal Treatment, by Income Group

Base Total Income Group	GIS Benefits - Status Quo ($ millions)	Average GIS Benefits - Status Quo ($)	GIS Benefits - Same-Sex Couples ($ millions)	Average GIS Benefits - Same-Sex couples ($)	Change in GIS Benefits ($ millions)	Status Quo Receivers of GIS	Receivers of GIS - Same-Sex Couples
Tight Screen							
Min-20,000	-	-	-	-	-	-	-
20,001-30,000	23.6	3,777	16.1	2,578	(7.5)	6,246	6,246
30,001-40,000	9.2	2,411	2.1	900	(7.1)	3,828	2,374
40,001-50,000	-	-	-	-	-	-	-
50,001-60,000	-	-	-	-	-	-	-
60,001-75,000	-	-	-	-	-	-	-
75,001-100,000	0.1	515	-	-	(0.1)	252	-
100,001-Max	0.3	572	-	-	(0.3)	504	-
All	33.2	3,069	18.2	2,115	(15.0)	10,830	8,620
Loose Screen							
Min-20,000	12.1	2,894	12.5	2,995	0.4	4,178	4,178
20,001-30,000	26.7	3,664	19.2	2,633	(7.5)	7,300	7,300
30,001-40,000	9.2	2,411	2.1	900	(7.1)	3,828	2,374
40,001-50,000	2.4	1,202	-	-	(2.4)	1,962	-
50,001-60,000	-	-	-	-	-	-	-
60,001-75,000	-	-	-	-	-	-	-
75,001-100,000	0.1	515	-	-	(0.1)	252	-
100,001-Max	0.3	572	-	-	(0.3)	504	-
All	50.8	2,821	33.9	2,445	(17.0)	18,024	13,852

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-15. GST Credit, Individual versus Spousal Treatment, by Income Group

Base Total Income ($)	Federal Sales Tax Credit - Status Quo ($ millions)	Federal Sales Tax Credit - Same-Sex Couples ($ millions)	Change in Federal Sales Tax Credit	Average Federal Sales Tax Credit - Status Quo	Average Federal Sales Tax Credit - Same-Sex Couples	Change in Average Federal Sales Tax Credit	Unit Count (000s)	Distribution of Households (%)
Tight Screen								
Min-20,000	8.2	8.1	(0.1)	407	400	(7)	20.1	12.5
20,001-30,000	12.9	9.7	(3.3)	523	391	(132)	24.8	15.3
30,001-40,000	12.3	4.8	(7.5)	552	216	(336)	22.3	13.8
40,001-50,000	8.9	0.4	(8.5)	436	20	(416)	20.5	12.7
50,001-60,000	7.2	-	(7.2)	481	1	(481)	15	9.3
60,001-75,000	6.6	0.1	(6.4)	274	4	(270)	23.9	14.8
75,001-100,000	3.1	-	(3.1)	156	-	(156)	20.1	12.4
100,001-Max	1.1	-	(1.1)	72	-	(72)	15	9.3
All	60.3	23.1	(37.3)	373	143	(231)	161.6	100
Loose Screen								
Min-20,000	13.6	13.3	(0.3)	410	399	(10)	33.3	17.3
20,001-30,000	14.7	11.0	(3.7)	522	392	(131)	28.1	14.6
30,001-40,000	14.9	5.5	(9.4)	547	201	(345)	27.3	14.2
40,001-50,000	10.3	0.4	(9.9)	450	18	(433)	22.8	11.9
50,001-60,000	8.2	-	(8.2)	422	-	(421)	19.4	10.1
60,001-75,000	6.8	0.1	(6.7)	270	4	(266)	25.1	13.1
75,001-100,000	3.5	-	(3.5)	164	-	(164)	21.2	11
100,001-Max	1.1	-	(1.1)	71	-	(71)	15.1	7.9
All	73.0	30.3	(42.7)	380	158	(222)	192.3	100

Source:
SPSD/M version 7.0, adjusted to 2000.

Table B-16. Refundable Provincial Credits, Individual versus Spousal Treatment, by Income Group

Base Total Income Group	All Refundable Provincial Tax Credits - Status Quo ($ millions)	All Refundable Provincial Tax Credits - Same-Sex Couples ($ millions)	Change in All Refundable Provincial Tax Credits	Average Provincial Refundable Tax Credits - Status Quo	Average Provincial Refundable Tax Credits - Same-Sex Couples	Change in Average Provincial Refundable Tax Credits
Tight Screen						
Min-20,000	21.1	10.0	(11.1)	1,047	494	(553)
20,001-30,000	24.4	8.3	(16.1)	987	337	(650)
30,001-40,000	8.8	1.6	(7.3)	396	70	(326)
40,001-50,000	10.1	0.2	(9.9)	494	10	(484)
50,001-60,000	2.5	-	(2.5)	168	-	(168)
60,001-75,000	6.3	0.3	(6.0)	262	11	(252)
75,001-100,000	3.1	0.1	(3.0)	154	6	(148)
100,001-Max	0.1	0.1	(0.1)	7	4	(3)
All	76.5	20.5	(56.0)	473	127	(346)
Loose Screen						
Min-20,000	37.9	17.3	(20.6)	1,139	520	(618)
20,001-30,000	26.8	9.2	(17.5)	953	329	(624)
30,001-40,000	13.2	2.0	(11.1)	483	75	(409)
40,001-50,000	10.4	0.3	(10.0)	454	14	(440)
50,001-60,000	3.4	-	(3.4)	174	1	(173)
60,001-75,000	6.5	0.3	(6.3)	259	10	(249)
75,001-100,000	3.3	0.1	(3.2)	156	5	(151)
100,001-Max	0.1	0.1	(0.1)	7	4	(3)
All	101.6	29.4	(72.2)	528	153	(375)

Source:
SPSD/M version 7.0, adjusted to 2000.

APPENDIX C: RELATIONSHIP-BASED INCOME TAX PROVISIONS (FEDERAL)

Table C-1. Income Tax Subsidies for Support of Economically Dependent Spouse

Provisions that are expressly conditioned on specific income levels:

118(1)(a)	Credit for support of spouse

Provisions that can be claimed by supporting spouse if lower income spouse cannot use them:

118.8	Transfer of unused tax credits to spouse, which include:
118.5	Tuition credit
118.6	Education credit
118(2)	Age credit
118(3)	Pension income credit
118.3(1)	Mental/physical impairment credit

Provisions that will apply when difference in incomes of spouses results in agreement or court order for payment of support:

56, 60	Shifts income tax liability for alimony payments to recipient

Source: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended for the 1999 taxation year.

Table C-2. Tax Provisions that Provide or Magnify "Family Wages" for Couples

Provisions that make it possible to split incomes or shift deductions between spouses:	
8	Deduction for cost of maintaining home for spouse (railway workers)
62, 64	Costs of moving spouse's personal property can be deducted as part of "household" moving expenses
104, 108	Income splitting by way of use of trust
118.2	Credits for payment of medical expenses of spouse
118.2(2)(q)	Credits for payment of premiums for medical insurance covering spouse
146	Taxpayer can receive tax deductions for contributions to spouse's RRSP
146	Joint and survivor benefits can be paid out of RRSP assets
Reg. 8501	Permits redirection of RPP benefits to separated or divorced spouse
Provisions that shelter benefits to spouses from taxation:	
6	Tax exemption for employee benefits that extend to spouse (dental, medical, counselling)
15	Tax exemption for employee shareholder loan taken out to provide housing for spouse
248(1)	Tax-exempt payment of up to $10,000 death benefit to spouse
Provisions that organize and/or subsidize survivor pensions:	
60(j.2)	Surviving spouse can roll deceased spouse's RPP or DPSP into own RRSP
146.3	Surviving spouse benefits can be paid out of retirement income funds (RIFs)
Reg. 8503, 8506	Surviving spouse benefits can be paid out of RPPs

Source: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

Table C-3. Income Tax Provisions Relating to Sharing Income or Property With Spouse, 1999

Provisions that make it possible to transfer assets between spouses without tax liability:

24	Tax-deferred rollover for transfer of eligible capital property to spouse
40	Tax-deferred rollover for transfer of farming property to spouse
40	Capital gain on home held in trust for spouse can be tax exempt under principal residence exemption
54	Capital gain on home owned by one spouse for use and occupation by other spouse exempt from taxation as principal residence
60(j.2)	Tax-deferred rollover for transfer of funds from registered pension plan or deferred profit sharing plan to spousal RRSP
70	Tax-deferred rollover for transfer of property to surviving spouse or spousal trust
70, 73	Tax-deferred rollover for transfer of farming property used by spouse
73	Tax-deferred rollover for transfer of capital assets to spouse or spousal trust during life
74.5	Tax-deferred rollover for transfer of capital assets to spouse living apart
96	Non-recognition of partnership income and gains when spouse takes over other spouse’s partnership interest
146	Tax-deferred transfer of RRSP assets to surviving spouse’s RRSP
147	Tax-deferred rollover of spouse’s deferred profit sharing plan (DPSP) to other spouse’s own registered plans
47.3	Tax-deferred rollovers from deceased or separated spouse’s registered pension plan (RPP) to other spouse's own RRSP or DPSP
148	Tax-exempt transfer of life insurance policies between spouses

Provisions that make it possible to transfer tax benefits from one spouse to another:

104	Flow-through of tax benefit items where property held in spousal trust, but income is paid to spouse personally
110.6	Flow-through of enhanced capital gain exemption where property rolled over to spouse

Source: *Income Tax Act*, R.S.C.1985, c. 1 (5th Supp.).

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ENDNOTES

[1] In 1999, Quebec Bill 32 became effective and British Columbia continued its program of gradually amending provincial statutes to include lesbian and gay couples. In 2000, Ontario enacted Bill 5 and the federal government enacted Bill C-23. All these bills recognize lesbian and gay couples as cohabitants. Elsewhere, Vermont enacted its civil union bill in April 2000, and in 1999, Hawaii enacted domestic partnership legislation. These bills are discussed in detail in Chapter 2.

[2] The Ontario challenge was filed on June 14, 2000 in Divisional Court and the B.C. challenge was announced in July. Both challenges are proceeding at the behest of the governments, which have taken the position that they are under an obligation to issue marriage licences but are prevented from doing so by federal law. The Quebec challenge, recommenced in 2000, does not have governmental support.

[3] Netherlands, Parliamentary paper 26672, Amendment of Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage) (introduced July 8, 1999 and effective as of April 1, 2001), trans. Kees Waaldjik (copy on file with author).

[4] The most up-to-date source is Wintemute (2001), which reports on such legislation around the globe.

[5] Canada, House of Commons, *Debates and Proceedings*, 7th Sess., 12th Parl., IV: 4102, 4103 (August 3, 1917), Thomas White.

[6] Ibid., IV: 4103, Mr. Verville.

[7] Ibid., IV: 4106, Mr. Middlebro.

[8] Ibid., IV: 4105, Mr. Knowles.

[9] Ibid., IV: 4104, Mr. Graham.

[10] Ibid., IV: 4109, Thomas White.

[11] Bill C-4, 1st Sess., 30th Parl., 23 Eliz. II, 1974, amending the *War Veterans Allowance Act*, R.S., c. W-5, c. 34 (2d Supp.) (Royal Assent given November 1974) reduced the period of cohabitation from seven to three years but required public holding out by a man that his partner was his wife; Bill C-16, *Statute Law (Status of Women) Amendment Act*, 1974, 1st Sess., 30th Parl., 23-24 Eliz. II, 1974-5 (Royal Assent given July 30, 1975) added the "opposite-sex" definition of deemed spouse to social programs such as the Canada Pension Plan and the *Old Age Security Act*.

[12] *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.), per Philp Co. Ct. J. (gay couple denied marriage licence); *Adams* v. *Howerton*, 486 F. Supp. 199, 673 F. 2d 1036 (C.C.A. 9, 1983), cert. den. 458 U.S. 1111, 102 S. Ct. 3494 (U.S.S.C., 1985) (marriage licence issued to gay couple and subsequent marriage not recognized for purposes of immigration sponsorship).

[13] *Equality Rights Statute Law Amendment Act*, 1986, S.O. 1986, c. 64.

[14] Legislative Assembly of Ontario, January 19, 1987, 4665-6; November 25, 1986, 3622.

[15] [1995] 2 S.C.R. 513.

[16] [1998] 1 S.C.R. 493.

[17] *M.* v. *H.*, [1999] 2 S.C.R. 3.

[18] *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, ss. 1(2), 17(1), giving a "partner" the rights extended to spouses under this statute.

[19] These are collected in Lahey, (1999, ch. 11).

[20] Statistics Canada, Social Policy Simulation Database/Model, version 7.0, made available for this study by the Data Liberation Initiative (Canada), with assistance from Brian Murphy, Statistics Canada Microsimulation Unit, and Andrew Mitchell, statistician.

[21] The justification sometimes given for this decision has been the assertion that lesbian and gay couples would not want to reveal themselves in the census. Lesbian and gay commentators have never found this justification to be convincing, especially when it has been coupled with concern that questions relating to sexuality would upset or alienate other groups of people and thereby endanger the entire census process. Note, however, that Census Canada did include a question about "living common-law" in the May 15, 2001 Census. Release of these data will certainly be a big improvement.

[22] Kinsey and his colleagues (1948: 357-361, 610-666; 1953: 474-475) concluded that 13 percent of United States males could be classified as homosexual and that the equivalent figure for women was roughly seven percent. For an analysis of the methodological factors that influence results in this area of research, see Bancroft (1997).

[23] Australian Bureau of Statistics (1997). The question that led to the collection of these data stated: "What is your relationship to householder #1?" The total population over the age of 15 in that census was found to be 13,914,897.

[24] Badgett (1995: 726, 734) analyzing data from Davis and Smith (1991).

[25] The Australian census was deliberately designed to collect data on lesbian and gay couples, but they were treated as a sub-set of de facto relationships, and after the census, there were widespread complaints that lesbian and gay couples could not figure out how to report their relationships.

[26] Statistics Canada (1992: 36; 1997a: 18-19) gave several reasons for excluding questions on sexuality from the 1996 census: it discounted the demand for inclusion as really being nothing more than a demand to legitimize the status of same-sex unions; it felt there was too much public resistance and concluded that many lesbian and gay couples found such questions to be potentially threatening. It expressed fear that controversy over the questions might lead people to boycott the census, endangering the utility of the responses, and there was just too much negative reaction to the suggestion. In the end, the 1996 census did not list same-sex couples as a response option, but Statistics Canada published a memorandum instructing lesbian and gay couples to write in "same-sex partner of Person 1" or "same-sex partner of Person _" with choices for up to six persons per household if they wished to select "Other-Specify" in answering Question 2 (relationships of members of the household). Statistics Canada memorandum, received by EGALE (Equality for Gays and Lesbians Everywhere) in 1996. Statistics Canada has refused to release this information, despite statements to the contrary, but now appears to be willing to include questions on sexuality in the 2001 census.

[27] These data were then presented by Albert Wakkary in an affidavit filed in *Rosenberg* v. *The Queen* (Ont. Gen. Div., Court File No. 79885/94) (sworn June 2, 1994), para. 8-9, at 7-8 and Exhibit B.

[28] This research was carried out as part of this Status of Women Canada project. The main researcher was Tara Doyle, assisted by Deirdre Harrington, Law '00. All research files are archived at the Faculty of Law, Queen's University, with the author.

[29] Statistics Canada, Social Policy Simulation Database and Model (SPSD/M) is a tool designed to analyze the financial interactions of governments and individuals in Canada. It allows the assessment of the cost implications or income redistributive effects of changes in the personal taxation and cash transfer system. See Table B-1 for detailed income levels by couple and gender.

[30] See generally Moran and Whitford (1996); Brown (1997).

[31] *Canada Act 1982*, 1982, c. 11 (U.K.) [Proclaimed in force April 17, 1982], SCHEDULE B, *Constitution Act, 1982*, PART I, *Canadian Charter of Rights and Freedoms* [Am. by Constitution Amendment Proclamation, 1983, SI/84-102; Constitution Amendment, 1993 (New Brunswick), SI/93-54, section 15(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[32] Men under the age of 60 and women under the age of 50 were required to be married, and bequests to unmarried men or married women with no children were void. See Lefkowitz and Fant (1982: 182). See also Coffield (1970: 25-26). Special inheritance taxes were imposed on bequests to unmarried men, childless married men and unmarried women with fewer than three children. Many of these laws were first enacted by Augustus between 30 B.C. and 14 A.D.

[33] As of June 2001, lesbian and gay couples in Nova Scotia can gain access to some of the rights by forming a registered domestic partnership. See Bill 75 (2000).

[34] See Ontario Law Reform Commission (1993) (recommending inclusion of opposite-sex cohabitants in definition of 'spouse' for purposes of matrimonial property law after cohabiting for three years or parents); Law Reform Commission of Nova Scotia (1997: 5) (recommending adoption of a new matrimonial regime for those in a "domestic relationship" of economic dependence or parents); British Columbia Law Institute (1999: s. 1(1)) .

[35] As at June 24, 2000, the Northwest Territories and Nunavut have extended family property and spousal intestacy provisions to non-married opposite-sex cohabitants. *See Family Law Act*, S.N.W.T. 1997, c. 18, s. 33 spouse; *Intestate Succession Act*, R.S.N.W.T. 1988, c. I-10, s. 1(1) spouse; *Family Law Act* (Nunavut) S.N.W.T. 1997, c. 18, as duplicated for Nunavut pursuant to the *Nunavut Act*, S.C. 1993, c. 28, s. 29; as am. S.C. 1998, c. 15, s. 4. The Nova Scotia Court of Appeal has ruled that exclusion of non-married heterosexual cohabitants from matrimonial property provisions unjustifiably violates section 15(1) of the Charter. See *Walsh* v. *Bona*, [2000] N.S.J. No. 117 (QL; file no. 159139, April 19, 2000), per Glube C.J.N.S., Roscoe and Flinn JJ.A., supplementary reasons for judgment released June 5, 2000 [[2000] N.S.J. No. 173; no appeal filed as at June 24, 2000.]

[36] *Re North and Matheson* (1974), 52 D.L.R. (3d) 280 (Man. Co. Ct.), per Philp Co. Ct. J.; *Layland* v. *Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 O.R. (3d) 658 (Ont. Div. Ct.), per Southey and Sirois JJ., Greer J. dissenting.

[37] See, for example, *B.* v. *A.* (1990), 1 O.R. (3d) 569 (Ont.), per Cork, Master; *Canada* v. *Owen*, [1993] F.C.J. No. 1263 (F.C.T.D.), per Rouleau. J; *L.C.* v. *C.C.* (1992), 10 O.R. (3d) 254 (Ont. Gen. Div.), per Jenkins J. In all these cases, "incomplete" male-to-female transsexual surgery was given as the reason for invalidating marriages that had already been carried out with a marriage licence, some as long as 21 years before the legal action in question. See also *Sherwood Atkinson (Sheri de Cartier)* (1972), 5 Imm. App. Cases 185 (Imm. App. Bd.).

[38] Nova Scotia Bill 75, unveiled by the government in the fall of 2000, opens up the possibility that other provinces may take similar steps.

[39] Not all constitutional challenges to discriminatory legislation have succeeded, of course. For a detailed account of the entire litigation record since 1974, see Lahey (1999), chapters two and three. By the late 1990s, most Charter challenges to discriminatory legislation had become successful, but not all.

[40] *Veysey* v. *Correctional Service of Canada* (1990), 109 N.R. 300 (F.C.A.), per Iacobucci C.J., Urie and Decary JJ., aff'g on different grounds (1989), 29 F.T.R. 74.

[41] Some of the cases that illustrate this approach are *Knodel* v. *British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 346 (S.C.); *Veysey* v. *Canada (Correctional Service),* (1990), 109 N.R. 300 (F.C.A.); *Dwyer* v. *Toronto (Metropolitan),* [1996] O.H.R.B.I.D. No. 33 (Ontario Board of Inquiry (Human Rights Code)); *Leshner* v. *Ontario* (1992), 16 C.H.R.R. d/184; 92 C.L.L.C 17, 035 (Ont. Bd. of Inquiry); *Kane* v. *Ontario (A.-G.)* (1997), 152 D.L.R. (4th) 738; *Ontario Public Service Employees Union Pension Plan Trust Fund (Trustees of)* v. *Ontario (Management Board of Cabinet),* [1998] O.J. No. 5075, 20 C.C.P.B. 38 (Ont. Gen. Div); *Re Canada (Treasury Board-Environment Canada) and Lorenzen* (1993), 38 L.A.C. (4th) 29; *Coles and O'Neill* v. *Ministry of Transportation and Jacobson*, File No. 92-018/09 (October, 1994) (Ont. Bd. Inq.); *Canada (Attorney-General)* v. *Moore,* [1998] 4 F.C. 585 (T.D.)*; M.* v. *H.* (1996), 31 O.R. (3d) 417, 142 D.L.R. (4th) 1 (Ont. C.A.), per Doherty and Charron J., Finlayson J. dissenting, aff'g (1996), 27 O.R. (3d) 593, 132 D.L.R. (4th) 538 (Ont. Gen. Div.), Epstein J., but varied as to remedy [1999] 2 S.C.R. 3.

[42] *Rosenberg* v. *Canada (A-G)* (1998), 38 O.R. (3d) 577; (1998), 158 D.L.R. (4th) 664 (Ont. C.A.). This has also been necessary in the Ontario step-parent adoption cases. See *Re K.* (1995), 23 O.R. (3d) 679, (1995), 125 D.L.R. (4th) 653 (Ont. Prov. Ct.); *Re C.E.G. (No. 1),* [1995], O.J. No. 4072 (Ont. Gen. Div.); *Re C.E.G. (No. 2) (Re),* [1995], O.J. No. 4073 (Ont. Gen. Div.).

[43] For a discussion of the unconstitutionality of "separate but equal" classifications, see *Canada (Attorney-General)* v. *Moore,* [1998] 4 F.C. 585 (T.D.).

[44] There are of course some drawbacks to litigation, even in a generally supportive jurisprudential climate. Litigation is expensive, time-consuming, ad hoc and individualistic. Unless litigation is brought forward as part of a coherent program, the cases that first reach courts are not necessarily the best cases. However, in Canada, the record demonstrates that litigation has achieved tremendous breakthroughs, while legislation has tended to perpetuate discriminatory classifications and the pattern of partial extension of rights.

[45] This discussion of Canadian legislation expands on, and updates, the discussion in Lahey (2001).

[46] *M.* v. *H.*, [1999] 2 S.C.R. 3, aff'g (1996), 27 O.R. (3d) 593, 132 D.L.R. (4th) 538 (Ont. Gen. Div.), Epstein J, aff'd (1996), 31 O.R. (3d) 417, 142 D.L.R. (4th) 1 (Ont. C.A.), per Doherty and Charron J., Finlayson J. dissenting.

[47] The government even went so far as to entitle the entire statute *An Act to amend certain statutes because of the Supreme Court of Canada decision in M.* v. *H.*, S.O. 1999 (October 28, 1999).

[48] Bill 5 defines "same-sex partner" as "either of two persons of the same sex who have cohabited (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

[49] Legislative Assembly, *Ontario Hansard* (27 October 1999) at 1830-1840.

[50] See Table A-1. With the exception of the items relating to emergency consent, where 1992 legislation extended the right to act for each other in medical emergencies, to receive medical information, and to visit in hospital as family, all the items under the heading "lesgay cohabs" in Table A-1 were extended to lesbian and gay couples as the result of litigation. These include public sector employee pension survivor rights; employment benefits for partners and children; tax exemptions for those benefits; the right to apply for cohabitant support; the right to take each other's last names; recognition of parental, custody and access rights; the right to co-adopt their own children to secure inheritance rights; insurance benefits; protection from discrimination as couples under the Human Rights Code; exemption from vehicle transfer taxes; and the right to apply for dependant's relief from a partner's estate.

[51] These include rights under the *Coroners Act* (making funeral arrangement, demanding an inquest), rights to compensation for victims of crime, proceeds of wrongful death suits, the right to take advantage of the support payment system run by the province, the right to share rooms in nursing homes and rest homes, the power to direct organ donations and clarified eligibility for dependant's relief. If Bill 5 had not been passed, these rights when claimed on the authority of *M.* v. *H.* would have been extended to lesbian and gay couples as "cohabitants deemed to be spouses," that is, on an integrated basis. Because of Bill 5, they are extended to lesbian and gay couples only as same-sex partners.

[52] These largely consist of dozens of conflict of interest provisions and compulsory exclusion provisions in statutes such as security legislation.

[53] These include matrimonial home provisions, sharing of family property, inheritance and forced shares on death, along with all the other rights and responsibilities listed in the first part of this chapter.

[54] The following statutes were omitted from Bill 5: *Family Law Act* marriage provisions; presumptions of parentage in the *Children's Law Reform Act*; all the tax credits and benefits delivered provincially and federally under the *Income Tax Act*; *Marriage Act*, even though it is sex- and sexuality-neutral; *Municipal Tax Sales Act*; *Budget Measures Act, 1994*; *Planning and Municipal Statute Law Amendment Act, 1994*; *Workers' Compensation and Occupational Health and Safety Amendment Act, 1994*; *Statute Law Amendment Act (Government Management and Services), 1994*; *Social Assistance Reform Act, 1997*; *Education Quality Improvement Act, 1997*; *Junior Farmer Establishment Act*; *McMichael Canadian Art Collection Act.*

[55] Step-parent adoption typically involves a child of one parent being adopted by that parent's spouse. Same-sex couples have been granted access to step-parent adoptions by decisions

like *Re K.* and *Re C.E.G.*, which have made it possible for both parents to be listed on the child's birth certificate. However, this method of securing parental status is itself a second-best solution to discrimination caused by other statutes, for *the Children's Law Reform Act* continues to define "natural parent" by presuming that either the husband or the "opposite-sex cohabitant" of a birth mother is deemed to be a natural parent. Lesbian and gay cohabitants have been excluded from that provision.

[56] *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 146(4); Assembly, *Ontario Hansard* (27 October 1999) at 1830.

[57] See, for example, *Obringer* v. *Kennedy Estate*, [1996] O.J. No. 3181 (Ont. Gen. Div.), per Sheard J.

[58] See the discussion of this issue below.

[59] [1991] B.C.J. No. 2588 (B.C.S.C.), per Rowles J.

[60] These statutes have included the *Health Care Consent Act*, the *Pension Benefits Standards Amendment Act*, Bill 100, 1999, the *Adoption Act*, the *Wills Variation Act*, the *Family Relations Act*, the *Representation Agreement Act*, and *the Family Maintenance Enforcement Act*. Table A-3 reflects the state of the law in force as at March 1, 2000. For full citations and references to specific provisions of this legislation, see Casswell (pending).

[61] For example, the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, section 1 spouse (effective February 28, 2000, B.C. Reg. 12/00) defines "spouse" as a married person or "a person who...is living with another person in a marriage-like relationship and...the marriage or marriage-like relationship may be between members of the same sex." The same effect is achieved by including "persons of the same gender" in the *Family Relations Act*, R.S.B.C. 1996, c. 128, section 1(c), as amended by Bill 31, section 1(c): "spouse" includes either a married person or "a person who...lived with another person in a marriage-like relationship for a period of at least 2 years...and...the marriage-like relationship may be between persons of the same gender."

[62] *Family Relations Act*, R.S.B.C. 1996, c. 128, sections 94 and 95, set out rules of parentage and presumptions of paternity in terms of "the male person" who is "the father" by virtue of either marriage or cohabitation. As amended by Bill 31, section 1(c) defines a person as the "stepparent of a child if the person and a parent of the child were married or lived together in a marriage-like relationship for a period of at least 2 years and...the marriage-like relationship may be between persons of the same gender."

[63] However, the B.C. government appears to have been planning for the day when lesbian and gay couples can marry. Eight statutes expressly state that "spouse" includes a person who is married to another person or is living with another person in a marriage-like relationship, "and for purposes of this definition, the marriage or marriage-like relationship can be between

members of the same sex." See *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 1 spouse; *Criminal Injuries Compensation Act*, R.S.B.C. 1996, c. 85, s. 1(1) immediate family member (a)(ii); *Family Maintenance Enforcement Act*, R.S.B.C. 1996, c. 127, s. 1(1) spouse; *Health Care (Consent) and Care Facilities (Admission) Act*, R.S.B.C. 1996, c. 181, s. 1 spouse (b); *Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 1(1) spouse; *Representation Agreement Act*, R.S.B.C. 1996, c. 405, s. 1 spouse (b); *Securities Act*, R.S.B.C. 1996, c. 418, s. 1(1) spouse; *Victims of Crime Act*, R.S.B.C. 1996, c. 478, s. 1 spouse.

[64] *Trudel et Commission des droits de la personne du Quebec* c. *Camping & Plage Gilles Fortier Inc.*, [1994] J.T.D.P.Q. no. 32 (Que. H.R. Trib.), per Brossard (December 13, 1994).

[65] As in Ontario and British Columbia; however, Quebec is facing a constitutional challenge to the denial of marriage rights to lesbian and gay couples.

[66] Act No. 372 of June 7, 1989, effective October 1, 1989, cited in Pedersen (1991-92: 289, note 2).

[67] For details, see Pedersen (1991-92: 290-91); Henson (1993: 286-87) community property, inheritance and intestacy provisions; Nielsen (1990).

[68] Henson (1993: 309, note 28). See also Griffin and Mullholland (1997); Waaldijk and Clapham (1993). Activism has coalesced around these issues, but progress has been slow.

[69] *An Act Relating to Domestic Partners*, House of Representatives, 20th Legisl., 1999, Hawaii, H.B. No. 884.

[70] *An Act Relating to Civil Unions*, H.847 (signed April 26, 2000), s. 3, amending 15 V.S.A., c. 23, s. 1202(2).

[71] Civil Unions, s. 3, amending 15 V.S.A., c. 23, s. 1204(a), (b).

[72] Civil Unions, s. 5, amending 18 V.S.A., c. 106, ss. 5001-5012, 5160-5169(e).

[73] Proposed Family Status Recognition Act, section 1(1) (Vancouver: British Columbia Law Institute, 1999).

[74] For example, registrants could be roommates, friends, siblings, parent and child, lesbians or tennis partners.

[75] Registration of the relationship would carry with it many of the incidents of marriage, including forced shares of a deceased partner's estate, the partnership home and the net partnership estate, as well as rights to support and the right to renounce the deceased partner's will. Registration would not have to be public. A secret registered partner would have the above rights and responsibilities, but third parties would not be affected by the registration.

[76] Family Provision (Amendment) Bill 1996, *An Act to amend the Family Provision Act* 1969, 1996, Legislative Assemb. Australian Cap. Terr., section 5, domestic partner, domestic relationship, eligible partner, legal spouse and spouse. See also the same definitions in Administration and Probate (Amendment) Bill 1996, *An Act to amend the Administration and Probate Act 1929*, 1996, Legislative Assemb. Australian Cap. Terr., section 8.

[77] Administration and Probate (Amendment) Bill 1996, section 10, amending section 45A in the legislation to provide that an eligible partner who lived with an intestate for more than the five years immediately preceding death would take the whole of the spousal share, even to the exclusion of a surviving spouse.

[78] *Property (Relationships) Legislation Amendment Act* 1999 (NSW).

[79] *Haig and Birch* v. *The Queen* (1991), 5 O.R. (3d) 245 (Ont. Gen. Div.), per McDonald J., aff'd (1992), 9 O.R. (3d) 495 (Ont. C.A.), per Lacourcière, Krever and McKinley JJ.A.

[80] *Moore and Akerstrom* v. *The Queen*, [1996] C.H.R.D. No. 8 (Can. Human Rts. Trib.), per Norton, Chair, Ellis, and Sinclair, Members, aff'd [1998] F.C.J. No. 1128 (QL: Court File Nos. T-1677-96, T-954-97, August 14, 1998) (F.C.T.D.), MacKay JJ.

[81] *Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.), per Cory and Iacobucci JJ.

[82] *Rosenberg* v. *A.-G. Canada* (1995), 127 D.L.R. (4th) 738, 25 O.R. (3d) 612 (Ont. Gen. Div.), per Charron J., rev'd [1998] O.J. No. 1627 (O.C.A.) (QL), per McKinley, Abella and Goudge JJ.A.

[83] In *M.* v. *H.*, the Supreme Court concluded that an Ontario extended opposite-sex definition of "spouse" violated the Charter equality guarantees. In *Rosenberg* v. *Canada*, the Ontario Court of Appeal ruled that notwithstanding a similar extended opposite-sex definition of "spouse" in the federal *Income Tax Act*, lesbian and gay employees were constitutionally entitled to select survivor options under their employer's registered pension plans. In *Moore and Akerstrom*, the Federal Court Trial Division concluded that the federal government's proposal to segregate lesbian and gay employees in separate employment benefit plans was constitutionally impermissible.

[84] *Income Tax Act*, section 252(4), enacted effective for the 1993 taxation year.

[85] To be found in section 248(1) of the *Income Tax Act* as amended by Bill C-23.

[86] See *Miron* v. *Trudel*, (1995), 13 R.F.L. (4th) 1 (S.C.C.), which established that common-law couples cannot be denied spousal rights, and *M.* v. *H.*, which established that lesbian and gay couples cannot be denied the rights of opposite-sex cohabitants.

[87] *Mossop*, Supreme Court of Canada, 1993. See also *Leshner*, Ont. Bd. of Inq., 1992, in which a tribunal held that discrimination on the basis of being in a lesbian or gay relationship is not discrimination on the basis of "marital status" under the *Ontario Human Rights Act*.

[88] At about the same time Sweden enacted RDP legislation, most of the provisions of the Swedish income tax system that were premised on adult relationships were repealed. The system now has almost no provisions based on adult relationships. See OECD (1993). See also Lund-Andersen (1990).

[89] Statistics Canada, SPSD/M version 7.0, custom databases prepared for this study. This database and model include all provisions of the *Income Tax Act*, all federal and provincial transfer programs, and most key demographic features of individuals, couples and families, as collected by the census and surveys of consumer finances. No significant tax or transfer programs are omitted from this tool.

[90] Consumable income is total income minus all taxes. It is distinguished from disposable income, which is total income minus federal and provincial income taxes.

[91] Tax credits for care of non-conjugal dependants are not included in this analysis. They are not credits that are extended on account of conjugality, and because these credits are restricted to relatives of dependent adults, lesbian or gay couples do not stand to lose them when they are deemed to be cohabitants under Bill C-23. The caregiver credit is worth $406 federally and can be claimed by dependants with income of $11,661 or less; the infirm dependant credit is also worth $406 federally, but is reduced once the dependent's income exceeds $4,845 (2000).

[92] *Rosenberg* had extended survivor options under retirement pension plans to lesbian and gay couples; *Hodder* and *Fisk* had extended survivor rights to lesbian and gay couples under the Canada Pension Plan.

[93] *Income Tax Act* s. 6(1)(a) does not impose any relationship criteria on the exemption of employer-financed family benefit plans from inclusion in the tax base; s. 62(3)(a)-(e) permits taxpayers to deduct moving expenses relating to anyone in their "household."

[94] *Income Tax Act*, s. 118(1)(b).

[95] See the discussion of the penalty effect of this provision below.

[96] See generally Lahey (2001b).

[97] The foundational work in this area is Apps (1981). See also Boskin and Sheshinski (1983); Leuthold (1985); Briggs (1985); Apps (1999, esp. 448-449).

[98] The high-low income pattern is one in which one partner has a high enough income to be able to afford to support the couple, and the other partner's income is low enough that it will not disqualify the high-income partner from taking full advantage of that credit. The single-income

pattern is one in which only one partner earns income, and that income is large enough to support both partners.

[99] These figures in this discussion treat this credit as if it exists only at the federal level. This is not accurate; it shows up in the calculation of provincial income tax liability as well. See "Federal–Provincial Problems" in this chapter for a discussion of the provincial layer of this credit.

[100] *Income Tax Act*, s. 63.

[101] *Criminal Code*, R.S.C. 1985, c. C-46, s. 215(1)-(4).

[102] See *Poulter* v. *M.N.R.*, [1995] T.C.J. No. 228 (T.C.C.) (Action No. 94-2119(IT)I, March 16, 1995), per Christie T.C.J. See also (Ont. Div. Ct., June 30, 2000, appeal pending); *Rehberg* (1994) N.S.S.C.; *Walsh* v. *Bona*.

[103] *Income Tax Act* ss. 18(1), 74(3), repealed. The same rule applied to salary paid to a wife by a partnership of which her husband was a member (s. 74(4)). In addition, the Minister of National Revenue had discretion to deem a wife-partner's share of partnership profits to the husband under s. 74(5).

[104] *Income Tax Act*, s. 67.

[105] (1973), 41 D.L.R. (3d) 367 (S.C.C.).

[106] See, for example, this evaluation of whether a farm wife actually worked for her husband for purposes of s. 67.

[107] *Income Tax Act*, s. 251.

[108] *Employment Insurance Act*, s. 5(2)(3)(b).

[109] This is because the *Employment Insurance Act*, ss. 5(2)(i) and 5(3) excludes salaries received by persons with whom an employer does not deal at arm's length from the definition of "insurable earnings." NAL dealing is to be determined in accordance with section 251(1)(a) of the *Income Tax Act*, which provides that "related persons shall be deemed not to deal with each other at arm's length," and section 251(2)(a) stipulates that "related persons include individuals connected by blood relationship, marriage or adoption." Section 251(2)(b) expands the circle of related persons to include corporations controlled by a related person or related group. Bill C-23 has amended these definitions of relationship to include lesbian and gay couples.

[110] See, for example, *Cook* v. *MNR*, [1999] T.C.J. No. 15 (QL; Court File No. 97-375(UI), January 8, 1999) (T.C.C.), per Cuddihy T.C.J.; *Garland* v. *MNR*, [1999] T.C.J. No. 73 (QL; Court File No. 97-477(UI), February 1, 1999) (T.C.C.), per Cuddihy T.C.J.

[111] See *Canada Pension Plan Act*, R.S.C. 1985, c.-8, s. 2(1) “excepted employment” and s. 6(2)(d), incorporating *Income Tax Act* NAL rules and tests of deductibility of salaries into the CPP Act by reference.

[112] *Income Tax Act*, s. 54 principle residence.